

TANZANIA / JUDGMENT

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i ~ ~ : .. I . , .. IN THE COURT OF APPEAL OF TANZANIA ATMWANZA (CORAM: MSOFFE, J.A., MBAROUK, J.A. And BWANA, J.A.) CRIMINAL APPEAL NO. 117 OF 2005 !: :~~~~~/
~~~~~E} ..... APPELLANTS VERSUS THE REPUBLIC .....  
..... RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Mwanza) (Masanche, J.) dated the 15th day of December, 2004 in HC Criminal Appeal Nos. 9 and 10 of 2004 JUDGMENT OF THE COURT 28 April & 4 May, 2010 BWANA, J.A.: This is a second appeal by both appellants listed above. They were among three people charged with Armed Robbery contrary to sections 285 and 286 of the Penal Code. The trial court, the District Court - acquitted one of the accused persons and convicted the present appellants of the offence and sentenced each one of them to serve the mandatory minimum sentence of thirty (30) years imprisonment. In addition, each one of them was to suffer 12 strokes of the cane. Aggrieved by that decision of the trial court, they appealed to the High Court of Tanzania at Mwanza. Their appeals were unsuccessful, hence this second appeal. The facts of the case, as established by the trial court and accepted by the first appellate court may be culled from the record as follows. The victim of the armed robbery - one Mohamed Shirali, PW1

- is a businessman at Itumbili area of Magu District. On 7 January 2002, at about 8.30 p.m. he arrived at his home from Mwanza with some cargo in his motor vehicle. Among the people present was his watchman - one James Mapalala, PW2 - and his wife - Sakina Sherali, PW6. PW1 ordered the goods to be off-loaded from the vehicle. people invaded the premises. One of the intruders rushed to the kitchen where PW6 was and ordered her to surrender some money. Before PW1 could take further steps, he was pushed back by another man who was brandishing a machete. That attacker demanded money but upon being told by PW1 that he did not have any money, the said intruder attacked him, cutting him on the head. A second intruder, who had an axe, cut PW1 on the arms and leg. PW1 became unconscious. However before that, he managed to identify his attackers. Meanwhile, PW6 was forced to go to their shop and surrender shs. 2,000,000/= to the bandits. PW2 who had been at the scene of the robbery was shot at, injuring him. He had to be operated upon at Bugando hospital and as per PF3, a bullet was removed from his body. In their respective defences, both appellants denied any responsibility. They described how and when they were arrested - some days after the incident. None of them touched on the crucial issue: where were they on the material day and time. Both the trial court and the first appellate court upheld the

prosecution case that the identification of the two assailants was watertight. Before us, Mr. Bernard Kabonde, learned Counsel for the appellants, challenged that finding by the two courts. He stoutly argued that the two appellants' identification was not watertight so as to match with the requirements laid down in the case of *Waziri Amani vs Republic* (1980) TLR 252 (CAT). Mr. Edwin Kakolaki, learned Senior State Attorney appeared for the Respondent Republic. His address before us was short but focused. He did support Mr. Kabonde's submission. He did not support the convictions on the premise that indeed the identification of the appellants did not meet the standards as enunciated in the *Waziri Amani* case. We will revisit this issue shortly. In disposing of this appeal we find it apposite to note the following. First is the well settled principle of law in respect of the role of an appellate court when it comes to considering factual issues raised during trial and or before the first appellate court. The well settled principle of law on the subject is that an appellate court would interfere with factual issues only in extreme of cases such as (but not restricted to) glaring errors on the face of the record, mix up part of the evidence leading to injustice being occasioned, *ejudem generis* (see for example the cases of *OPP vs Jaffari - Mfaume--Kawawa* -

- (1981) TLR 149; *Z Maratu v Republic* (Criminal Appeal No. 86 of 2005 - (unreported)). 4 .. In *Edwin Mhando v Republic* (1993) TLR, 170; 174, this Court stated thus: "... on a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of fact are based on a correct appreciation of the evidence. It; as in this case/ both courts completely misapprehended the substance/ nature and quality of the evidence/ resulting in an unfair conviction this Court must in the interest of justice/ intervene. // We subscribe to the foregoing observation by this Court. Second, we turn to the issue of identification, particularly, visual identification. The crime with which the appellants were convicted of took place at around 8.30 p.m., thus it was dark already. It therefore required the removal of all possibilities of mistaken identity 1: .. \_ - ... ' . . ....: . ~ . (see *Anthony Kigodi vs Republic* - Criminal Appeal No. 94 of 2005 -
- unreported). This cardinal principle of law is reflected in other recent decisions of this Court.. In fact there is a long, unbroken chain of authorities on this point (see for example: *Raymond Francis vs Republic* - Criminal Appeal No. 207 of 2006, unreported; *Paschal 5 Christopher and Others vs Republic* - Criminal Appeal No. 106 of 2006, unreported). In this appeal, a decision to be made in respect of visual identification should be in compliance with what was stated by this Court in the *Raymond Francis* case (supra), namely, .... it is elementary that in a criminal case where determination depends essentially on identification evidence on conditions favouring correct identification is of utmost importance .. In other words, the identification must be watertight. In our respected opinion, such watertight evidence may be said to exist when it leads to the exclusion of all other possibilities of mistaken identity. The court must consider the following factors. First - how long did the witness see the accused under his/her observation, . Second - what was the estimated distance between the two. Third - if it were at night (as was the case herein) which kind of light did exist. Fourth - had the witness seen the accused before the day and

time of crime. If so, when and how often. Fifth - the whole evidence before the court 6 " considered, are there material impediments or discrepancies affecting the correct identification of the accused by the witness. Sixth - in the course of observation of the accused by the witness, was there any obstruction experienced by the witness, obstruction which may have interrupted the latter's concentration. In this case, the factual evidence on record suggests that the attack by the bandits was sudden and threatening. PW1 lost consciousness. We are left wondering if in such a situation, PW1 could still correctly identify his assailants. Our concern is further cemented by evidence on record that during the fracas some lights got broken (hence they went off). Could the appellants still be properly identified? Both PW2 and PW6 did not identify the appellants at the scene. They claimed to have done so during an identification parade arranged by the police. Our reasoning on this issue is that if the witnesses could do the same at a police identification parade, arranged some days later. All the above considered we are left with no doubt that the identification of the appellants was not watertight. As such we have 7 warned ourselves of the danger of convicting someone relying solely on identification which in turn, does not exclude all possibilities of mistaken identity .. We therefore allow the appeal, quash their convictions and set aside the sentences of 30 years imprisonment and the twelve strokes of the cane in respect of each appellant. We further order that unless the said appellants ( or either one of them) are lawfully held, they should be set free forthwith. DATED at MWANZA this 30th day of April, 2010. J. H. MSOFFE JUSTICE OF APPEAL M.S. MBAROUK JUSTICE OF APPEAL I certify that this is a true copy of the original. ~ , & , ~ ~ ...: , - . . , .. ! ~ ~ '•-. \_ \_\_, , , , , \_ \_ . (J. ~ s ~ ~ if - ~ ~ \f DEPUTY REGISTRAR 8 ~ ' .., , \_ . : : ~ ~ . = ~ ~ \_ if; . ..... "flif. ; , , , , , flt .. -

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