IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: LUBUVA, J.A., MROSO, J.A., And KAJI, JA.)

CRIMINAL APPEAL NO. 66 OF 2002

BETWEEN

1. MICHAEL S/O GODWN
2. NYAMBACHA JUMA ..... APPELLANTS

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the Resident Magistrate's Court of Mwanza at Mwanza)

(Lyamuya, PRM, Extended Jurisdiction)

dated the 12th day of June, 2000

in

RM Criminal Appeal No. 3 of 2000

JUDGMENT OF THE COURT

LUBUVA, J.A.

The appellants, Michael s/o Godwin and Nyambacha Juma, were charged with and convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code. They are appealing against the decision of the Principal Resident Magistrate (Lyamuya – PRM) exercising extended jurisdiction.

The evidence as established at the trial was that on the night of the incident, 22/2/1999, at about 1.30 a.m., the complainant, Daud Shigolo (PW1), and his wife, Magret Lugwisha (PW2) were sleeping in their house in Lamadi Trading Centre, Magu District. A gang of bandits forced open the door of the house armed with pangas, axe and a gun. A gun shot was heard when the bandits entered into their room. PW1 and PW2 took cover by climbing up the ceiling where they hid. In the room, there was light from a kerosene lamp which was lit.

From the vantage position in the ceiling, and with the aid of light from the kerosene lamp and torch light flushed by the bandits, PW1 and PW2 were able to identify the appellants and two others among the bandits who, it was alleged by PW1 and PW2, were about six in number. PW1 and PW2 knew the appellants before the incident. PW2, on her part, was able to identify only one person among the bandits, namely the sixth accused at the trial who is not a party in this appeal. Agnes Daud (PW3), then aged 12 years of age, a daughter of PW1 and PW2, was another witness. During the night

of the incident, she was also sleeping together with her younger sister in another room. When the bandits stormed into the house from the torch light flushed by the bandits, she identified the first appellant. She gave unsworn evidence after the trial magistrate had conducted *voir dire* examination. The trial magistrate was satisfied that she was possessed of sufficient intelligence and that she understood the meaning of telling the truth. DW1, Shaban Nyamanko, an employer of PW1 as a turn boy who was at the garage outside the house of PW1, also identified the appellants from the torch light of the bandits. The other witness, PW4 and PW5 came to the scene after the bandits had fled. PW1 mentioned the appellants having been among the bandits.

In the course of the raid, an assortment of items were stolen including cash money. Investigation was mounted by the police (PW6), which led to the arrest of the appellants and others. At the trial, the magistrate was satisfied that the identification of the appellants was proved, they were convicted as charged. On appeal, the Principal Resident Magistrate, in exercise of extended jurisdiction,

like the trial magistrate, was of the view that the appeal turned on the identification of the appellants. She was of the settled view that the identification of the appellants was proved beyond doubt. From the dismissal of their appeal, this second appeal has been instituted.

In this appeal, the appellants were unrepresented. The first appellant, Michael s/o Godwin had filed a seven-point memorandum of appeal. At the hearing of the appeal he also added two additional grounds. First, that the evidence of the 1st accused at the trial (DW1), was a frame up because in his statement to the police he (DW1) said he did not know him (1st appellant). The identification by DW1 was unreliable. Second that PW1 could not identify the 1st appellant from the hiding place in the ceiling.

Likewise the second appellant, Nyambacha Juma, filed nine additional grounds of appeal to the original five-point memorandum of appeal.

It is our view that for both the appellants these grounds boil down to one central issue. This is whether the bandits were properly identified during the time of the robbery incident. Mr. Mbago, learned Principal State Attorney for the respondent Republic prevaricated in his submissions. At one stage, he supported the conviction urging that the only crucial issue in this case, namely the identification of the appellants had been proved beyond reasonable doubt. He also conceded that what was described as kerosene lamp which it was claimed was lit when the bandits invaded PW1's house, was not described what kind of lamp and its intensity was also not shown. However, he maintained that the light from the lamp and the bandits' torch light enabled PW1 to identify the appellants who were known to him (PW1). Furthermore, Mr. Mbago submitted that the appellants were identified because PW1 mentioned them to Justin Makanyanga (PW5), the Village Executive Officer, who came to the scene in response to the alarm raised. The fact that PW3 identified the appellants at the identification parade was yet another factor showing that the appellants had been identified.

On the other hand, upon reflection Mr. Mbago declined to support the conviction. He said in view of the fact that it was not shown what kind of lamp it was that provided light in the room of PW1, and the fact that the bandits were flushing torch light towards PW1 and PW2, the identification of the appellants was open to doubt which should be resolved in favour of the appellants.

This Court has on a number of occasions reiterated the cardinal principle pertaining to evidence of visual identification. The principle is that evidence of visual identification is the weakest and most unreliable and that courts should only act on it when satisfied that possibilities of mistaken identity are eliminated. This principle was underscored by this Court in **Waziri Amani v. Republic** (1980) TLR 250. The Court's predecessor, the Court of Appeal for East Africa had also restated the principle in **R v. Eria Sebwato** (1960) EA 179, and **Mugo v. R.** (1966) EA 124 among others.

In the light of this principle, the question whether the evidence in this case passes the test has seriously engaged our minds. A quick

glance through the evidence would enable us to resolve the issue. First, is the question whether PW1 and PW2 were able to identify the bandits properly at the time of the invasion. PW1 said he was able to identify the appellants from the light of the kerosene lamp and the torch light flushed by the bandits. As observed earlier, it was not shown from the evidence on record what kind of lamp it was and its intensity. It is therefore not clear whether the light was such as to enable PW1 and PW2 unmistakably to identify the appellants to the elimination of any possibility of mistaken identity. Second what is more, it is inconceivable that PW1 or PW2 were able to identify the bandits when the bandits were flushing the torch light at them (PW1 and PW2). It is common knowledge that it is easier for the one holding or flushing the torch to identify the person against whom the torch is flushed. In this case, it seems to us that with the torch light flushed at them, (PW1 and PW2), they were more likely dazzled by the light. They could therefore not identify the bandits properly. In that case, as Mr. Mbago, correctly conceded, the possibility of mistaken identity could not be ruled out.

Furthermore, the fact that PW1 knew the appellants before the incident does not assist the prosecution case any further unless there was cogent evidence that at the time the appellants were alleged to be in the room of PW1, they were properly identified, generalized assertion that PW1 knew the appellants is not enough. On the contrary, this is all the more reason for doubting that the appellants were identified later. Similarly, the evidence of PW3 is not reliable. She merely said in her evidence that she identified the appellants, she does not show how she was able to identify them. For similar reason, her evidence that she identified the appellant at the identification parade does not in any way assist in establishing conclusive identification of the appellants.

In the circumstances, having regard to the circumstances of the case as a whole, we are satisfied that the conditions at the time of the incident were not favourable for the proper identification of the appellants. As conceded by Mr. Mbago, we think the condition was such that possibilities of mistaken identity could not be ruled out. The evidence on the identification of the appellants cannot be said to

be watertight. It being doubtful that the appellants were identified properly, the benefit of doubt must be resolved in favour of the appellants.

In the event, we allow the appeal, quash the conviction and set aside the sentence. The appellants are to be set free forthwith unless otherwise lawfully held.

DATED at MWANZA this 3rd day of July, 2004.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. M. RUMANYIKA
DEPUTY REGISTRAR