IN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO. 115 OF 2005

(Original Nachingwea D/Court Cr. Case No. 126/2004)

BETROD YOHANA.....APPELLANT
Versus
THE REPUBLIC.....RESPONDENT

27/5/2008 & 9/6/2008

JUDGMENT

RWEYEMAMU, J.

In Nachingwea District Court (DC) Cr. Case 126/2004, two people **Betrod Yohana** and **Richard Benard** (1st and 2nd accused respectively) were charged of Robbery with violence c/s 285 & 286 of Penal Code. Both were released on bail. Trial commenced, and after the 2nd accused (hereinafter **Richard**) had given his testimony in defense, he prayed and was given time to get his witness. **Richard** never did, instead he jumped bail. A warrant of arrest was issued and on 1/8/2005 his surety was ordered to forfeit bond by payment of Shs. 150.000/ in the alternative to suffer 6 months imprisonment.

Subsequent to that, the DC convicted both accused and sentenced them to 15 years imprisonment for the 1st accused now appellant and 18 years for **Richard** who had escaped. Each accused was ordered to pay Shs. 50.000/= to the victim as compensation for injuries sustained by him in the cause of the robbery. This is the 1st accused (hereinafter the appellant)'s appeal against the DC decision.

Briefly the prosecution evidence at trial was that; about 8.40 at night, the complainant **Pw[1]** was on his bicycle going home. When he reached Darajani vicinity, a brick was thrown at him and it hit his bicycle, he then saw three people, tried to run but fell down. Those people came and hit him, he raised an alarm but no one came in response, the bandits then took off with his bicycle.

Pw[1] then went home, informed his relatives of the mishap and with them, made a follow up, rechecking the scene of crime and trailing the bicycle marks which led them to the home of **Richard**. They hid near that house then saw one person bringing a bicycle there. They kept vigil until the following morning but **Pw[1]** left for a short while, reported the matter to the police with whom he returned; a search of the house made and his bicycle discovered therein. **Pw[1]**testified that he identified the appellant; that he was someone familiar and he identified him at the scene because there was moonlight and the appellant was the one who chased him after **Richard** took the bicycle.

Pw[2] testified that he was **Richard's** grandfather; that he witnessed the search of his grandson's house and recovery of the stolen bicycle; and that he knew that his grandson did not own a bicycle. The search of **Richard's** house on 5/10/2003 was also witnessed by the Ward Executive Officer (WEO) **Pw[3]**. He testified that the search was made in the absence of the 2nd accused but presence of his grandfather **Pw[2]**.

The police investigator **Pw[4]** –testified that he was assigned the complaint file in respect of this event, suspects were not mentioned therein.

In the course of investigations, the complainant told him that he knew the suspects (although that identification was not followed by their arrest). The witness instead went on to say that he later prepared a search certificate; informed the village leadership including **Pw**[3] and proceeded to conduct the search of **Richard**'s house, where the stolen bicycle was recovered.

In his memorandum of appeal, the appellant basically challenges sufficiency of evidence of identification submitting that conditions of identification were not ideal, to quote his exact words; "*the learned magistrate erred in law and in fact to believe that the appellant is the one who chased the complainant PW1 while it is made clear in the evidence that the complainant was assailed in odd hours beaten and horrified with his assailants at the scene of crime so it is quite impossible for horrified and injured persons like the complainant to identify properly the robber who chased him.*" He also submits that the evidence on record implicated **Richard** and not him; and further that the search which led to discovery of the stolen bicycle in **Richard**'s house was not conducted according to law.

The Republic concedes the appellant's conclusion. Declining to support conviction, Ms Shio state attorney who appeared for the republic assigns two reasons for their stance: First, they concede that conviction was based on insufficient evidence of identification. The incident occurred at night yet **Pw**[1] claimed to have identified the accused and done so while he was running – being chased by the bandits. She urges this court to find that the conditions described were not conducive for watertight identification. She also submits that the evidence on record implicated **Richard** than the appellant.

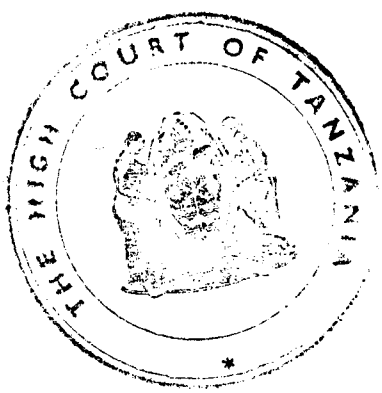
The issue for decision is whether the appellant was properly identified as one of the bandits who attacked and robed **Pw[1]**.

I have considered both parties' arguments in light of the evidence on record, according to which the only evidence against the appellant was that of visual identification by the victim **Pw[1]**. I am aware of the long established rule that such evidence has to be considered with caution, particularly where conditions of identification are unfavourable eg., lighting conditions are not ideal; the same is done under horrifying conditions (as properly noted by the appellant); the identifying witness had insufficient time and opportunity. In this case, the attack was sudden, done at night and done when the witness/victim was terrified and being chased. Such facts put me to caution.

The credibility of such evidence is shaken where the identification is not coupled with adequate specificity/necessary details e.g. describing attire worn or any other particular aspect,(See **Raymond Francis v.R** (1994) TLR 100); and the said identification is not followed by immediate naming/naming at the earliest opportunity of the suspect by the witness. As observed by the CA in **Swale Kahonga in Cr. App 46/2002 MZA registry (unreported) citing Marwa Wangiti Mwita , Boniface Matiku Mgendi v. R,** Cr App. No.6 /1995, MZA Registry (unreported) *"The ability of witness to name a suspect at the earliest opportunity is an all – important assurance of his reliability, in the same way as un-explained delay or complete failure to do so should put a prudent court to inquiry"* In the present case, the victim went home after the attack, became composed and started the search, if he had indeed identified the appellant, he would have told the search part so, or the police when he reported the incident but did not. That is why nobody

went looking for the appellant, instead, following bicycle marks-the probably the only lead, they recovered it at **Richard** as already described.

In view of all the above considerations, I find the appeal merited, quash the appellant's conviction, set aside his sentence and order his immediate release unless he is otherwise lawfully held. It is so ordered.



R.M. RWEYEMAMU
JUDGE
9/6/2008