

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: MSOFFE, J.A., KILEO, J.A. And ORIYO, J.A.)

CRIMINAL APPEAL NO. 286 OF 2007

DEO AMOS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the Principal Resident Magistrate’s Court
at Moshi)**

(Mgaya, PRM. Ext. Jur.)

**dated the 4th day of April, 2007
in
Criminal Appeal No. 22 of 2007**

JUDGMENT OF THE COURT

16 & 19 August, 2010

MSOFFE, J.A.:

Mrs. Fredrica Mgaya (PRM Ext. J. as she then was) sitting at the Moshi Resident Magistrate’s Court (Extended Jurisdiction) affirmed the sentence of fifteen years imprisonment meted on the appellant upon conviction by the District Court of Moshi (Mrs. A. C. Nyerere, PRM as she then was) of the offence of robbery with violence contrary to sections 7

and 286 of the Penal Code. The appellant is still aggrieved, hence this second appeal.

The courts below believed the evidence of PW1, Prim Vincent Komu and PW2 Rose Jackson, a husband and wife respectively, that on 1/2/2005 at around midnight they were ambushed by armed robbers who included the appellant. The robbers stole shs. 86,000/= and two mobile phones. In the respective testimonies of PW1 and PW2 both stated that they identified the appellant as being among the robbers. They identified him because they knew him before the date of incident; like the other robbers he did not cover or mask his face; and finally that there was electricity light illuminating their bedroom at the material time.

So, on the basis of the above evidence the said courts opined and held that there was positive evidence of visual identification. In their respective and concurrent findings of fact, the above courts were indeed satisfied that PW1 and PW2 were truthful and credible witnesses. The crucial issue in this second appeal is whether or not there is anything to fault the above courts in their findings of fact.

At the hearing of the appeal the appellant appeared in person, unrepresented. He basically reiterated the grounds of appeal canvassed in his six point memorandum of appeal in which the basic complaint centres on the crucial issue of identification. In his view, his conviction was based on insufficient evidence of identification.

On the other hand, Mrs. Neema Joseph Ringo, learned Principal State Attorney appeared on behalf of the respondent Republic. She argued in support of the appeal. In her view, no evidence was forthcoming from the prosecution to specify the intensity of the electricity light. In the absence of such evidence it could not be safely said and concluded that PW1 and PW2 properly identified the appellant on the material night, she urged. She went on to say that it is in evidence that neighbours responded in answer to the alarm raised by PW1 and PW2. Yet, it is surprising that these two witnesses did not mention the name of the appellant to those neighbours at that early opportunity.

Mrs. Ringo also cited to us a number of cases by this Court on the evidence of visual identification in a case such as this one. We are grateful to her for the effort.

As already stated, this is a second appeal. In a second appeal we derive our jurisdiction from **Section 6(7) (a)** of the **Appellate Jurisdiction Act No. 15 of 1979** (CAP 141 R.E. 2002). Under **para (a)** (*supra*) an aggrieved party may appeal to this Court on a matter of law (not including severity of sentence) but not on a matter of fact. Notwithstanding the above provisions of the law, this Court in the case of **Salum Mhando v Republic** (1993) TLR 170 at page 174, restated the law in the following terms: -

.....On a second appeal to this Court, 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. If 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 interests of justice intervene.....

So, as this Court also stated in **DPP v Safari Mfaume Kawawa** (1981) TLR 149, where there are misdirections or non-directions on the evidence, a court of second appeal is entitled to look at the evidence and make its own findings of fact.

Admittedly, the appeal stands or falls on the issue of the appellant's identification by PW1 and PW2 at the scene of crime. Without hesitation, we are in agreement with Mrs. Ringo that the evidence on record did not establish that the appellant was positively identified at the scene of the crime.

We will begin with the evidence of PW1 and PW2 that they knew the appellant before the date of incident. With respect, this factor alone was not sufficient because it did not eliminate the possibility of mistaken identity. One would have, for instance, expected PW1 and PW2 to give a detailed description of the appellant, the type of clothes he wore on that night, whether he stood at a close range, whether the appellant uttered any word(s) and if so whether they were familiar with his voice etc. in the absence of evidence along the above suggested lines, we will, with respect,

repeat that the evidence by PW1 and PW2 that they knew the appellant prior to the date of incident did not in itself eliminate the possibility of mistaken identity.

This brings us to the evidence of PW1 and PW2 on the electricity light. In the evidence of these witnesses there is nothing to show whether the light came from a bulb or a fluorescent tubelight. With respect, one would have expected the witnesses to disclose the source of the light in question i.e. whether it was from a tubelight or a bulb. What is more important, however, in this regard is that the witnesses did not say anything on the intensity or otherwise of the light in issue. It was important for the witnesses to say whether the light was bright enough to allow for correct identification of the appellant. In underscoring the above point, this Court in **Magwisha Mzee and Another v Republic**, Criminal Appeal Nos. 465 and 465 of 2007 (unreported) stated at pages 10-11 thus:

.....This Court has consistently held that when it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to see and positively

identify the accused person. Bare assertions that "there was light"..... would not suffice.....

Finally, there is no dispute that neighbours assembled in the house of PW1 and PW2 in response to the alarm raised by these witnesses. Yet, as correctly observed by Mrs. Ringo, PW1 and PW2 did not mention the name of the appellant to these neighbours. With respect, one would have expected PW1 and PW2 to name the appellant at that early opportunity. By doing so, that would have helped in lending credence to their evidence of identification of the appellant. In a more or less similar situation, in the case of **Marwa Wangiti and Another v Republic**, Criminal Appeal No. 6 of 1995 (unreported) this Court stated, *inter alia*: -

We think the failure of PW1 in particular to name at least the first appellant before or during the operation was not consistent with identification of any of the bandits.

The Court went on to state: -

The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability,

*in the same way as unexplained delay or complete failure
to do so should put a prudent Court to inquiry.*

In this case, we are of the view that the failure on the part of PW1 and PW2 to mention the appellant to the neighbours as having been among the robbers raises doubt that they had in fact identified the appellant on that fateful night.

For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be set free forthwith unless otherwise lawfully held in custody.

DATED at **ARUSHA** this 17th day of August, 2010.

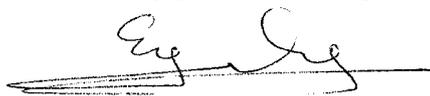


J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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


E. Y. MKWIZU
DEPUTY REGISTRAR