IN THE COURT OF APPEAL OF TANZANIA
AT SUMBAWANGA

(CORAM: RAMADHANI, C.J., LUANDA, J.A. And MJASIRI, J.A:.)

CRIMINAL APPEAL NO. 27 OF 2010

1. BRANIAM LYELA
2. SALAWA KISINZA.....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from Judgment/decision of the High Court of Tanzania at Sumbawanga)

(Kihio, J)

Dated 14th day of August, 2009
In
Criminal Appeal No. 2 of 2009
.....

JUDGMENT OF THE COURT

26th & 16th August , 2010

LUANDA, J.A.:

This is the second appeal. In the District Court of Nkasi at Nkasi Braniam s/o Lyela, Salawa s/o Kisinza (hereinafter referred to as the 1st and 2nd appellants respectively) with two others, were charged with armed

robbery c/ss 285 and 286 of the Penal Code, Cap. 16. The appellants, were convicted as charged and each was sentenced to thirty years imprisonment as mandated by law. The other two were acquitted.

The appellants were aggrieved by the finding of the District Court. They appealed to the High Court at Sumbawanga where they were unsuccessful, hence this appeal.

The appellants raised a number of grounds of appeal in their respective memorandum of appeal. However, the central issue in this appeal and which is the basis of the appellants conviction which will dispose the appeal, is whether the concurrent finding of fact of the lower courts that the appellants were positively identified was correct.

In this appeal, the appellant appeared in person; whereas the respondent/Republic was represented by Mr. Prudence Rweyongeza

learned Senior State Attorney. Mr. Rweyongeza did not support the conviction.

Briefly, the background of the case is this: On the mid-night of 21/4/2008 while Adriano Henda (PW1) and his wife Eredina Sadiki (PW2) were sleeping in one room and their son Martin s/o Henda in another, a group of bandits armed with panga and club invaded their homestead. The robbers first forced opened the room where PW1 and PW2 were sleeping and entered inside. According to the evidence of PW1 and PW2, three robbers entered inside. They started roughing up PW1 and demanded to be given money. Sensing that he might be killed, PW1 ordered his wife PW2 to take Tsh 500,000/= which was under the mattress and give it to the robbers. PW2 took it and gave them. The robbers demanded more. PW1 decided to fight with one of the robbers. He was overpowered. When PW1 and PW2 attempted to run away they were caught and beaten. PW1 lost consciousness. PW2 was taken outside the house. However, she found herself in a bush. She did not know what had happened. Then she heard a gunshot. Later, after satisfying herself that there was no danger, she returned home and started looking for PW1. She did not find him. When

going to the village chairman she met him on the way. However, it is not stated whether she met PW1 on the way to the village Chairman or when coming back. Be that as it may, PW1 said he reported to the said Chairman. Again the record does not show what actually PW1 had reported to the village Chairman. PW1 and PW2 claimed to have identified the appellants with the aid of a lamp and a torch shone by robbers.

PW3 on the other hand informed the trial Court that he heard his father (PW1) when quarrelling with the bandits. He was afraid to go out. Instead he hid underneath his bed. But not long, his door was also smashed and one bandit who had a torch, a panga and a club entered his room. He was pulled out from there and beaten with a blunt side of a panga. The robber demanded money. He gave him Tsh 46,000/= which he had in his trouser pocket. He claimed to have identified the 2nd appellant as the one who entered his room and roughed him up by aid of a torch shone by the 2nd appellant.

Both appellants denied to commit the offence.

In declining to support the conviction, Mr. Rweyongeza submitted that the case depends entirely on identification. So, evidence on conditions favouring a correct identification is of the utmost importance. He referred us to **Raymond Francis V R** (1994) TLR 100. It is his submission that PW1 and PW2 together claimed to have seen the assailants by aid of a lamp. But the intensity of the light was not stated. He said the claim by PW 3 that she saw with an aid of a torch shone by robbers is very doubtful. Further, he went on to say PW4 D/Cpl Julius said when cross examined by the 1st appellant, that when the incident was reported to police, the victim of the incident did not mention any name of a person involved. He referred us to the decision of this Court in the case of **Epson Michael and Another V R** Criminal Appeal No. 335 of 2007 (unreported). He accordingly supported the appeal of the appellants.

Before we go on to discuss the merits or otherwise of the appeal, we wish to point out that generally a higher court is precluded from interfering with the concurrent finding of fact by the lower Courts. However, a higher

Court is entitled to interfere with the concurrent finding of fact of lower Courts and make its own finding if it is shown that there are misdirections or non directions. (**see Peter V Sunday Post** (1958) EA 424; **DPP V Jaffari Mfaume Kawawa** (1981) TLR 149).

In this case both lower Courts were satisfied that the conditions prevailing were conducive for identification. However, it is shown the incident occurred at night time. So, it is important to satisfy ourselves whether the conditions prevailing were conducive for proper visual identification.

In the celebrated Case of **Waziri Amani V R** (1980) TLR 250 this Court set out some guiding principles in considering favourable conditions for identifying an accused person. The Court stated, we reproduce:

> "Although no hard and fast rules can be laid down as to the manner a trial judge (or Magistrate) should determine questions of disputed identity, it seems clear to us that he

could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would for example expect to find on record the following questions posed and resolved by him. The time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred; for instance whether it was day or night time; whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial judge (or Magistrate) should direct his mind before coming to any definite conclusion on the issue of identify."

In the instant case the trial Resident Magistrate and the first appellate court were satisfied that the place was lit with a "chimney lamp" and torch shone by robbers. The assailants were duly identified.

In **Epson Case** cited *supra* the Court was not satisfied with the conditions prevailing at the time of the commission of the offence. It accordingly intervened with the concurrent finding of facts of the lower Courts. The Court observed as follows, we quote:

> "We have carefully gone though the evidence pertaining to identification. The following are our observations. One, PW1 did not attempt to say where the hurricane lamp was placed so as to enable us know the distance whether it was near at the point of confrontation. This is important because it is common knowledge that hurricane lamp do not have bright light to cover a big portion of a room. Two, the size of the room is not shown. Three, PW1 did not

> say how and where the torches of robbers were directed taking into consideration the fact that robbers are not fools to the extent of exposing themselves to be easily identified. Lastly, and this is very important: If PW1 truly or really saw the 1st appellant we are wondering why he did not mention him when he narrated the incident to his village mates. Under these circumstances we are of the settled view that PW1 was unable to identify the 1st appellant because the light was not bright enough. We are of the settled opinion that both lower Courts misdirected themselves on this aspect."

In the instant case PW1, PW2 and PW3 merely said they identified the appellants. They did not give details as to how they identified them for instance say the intensity of the light of the burning lamp. In case of a torch how and when it was directed. They did not say what they reported

to the village Chairman. In fact it is the evidence of PW4 D/Cpl Julius that during cross-examination when the matter was reported to police, the victim of the incident did not mention any name of the assailant. If they knew their assailants why they failed to mentioned them? However, it is on record that the 1st appellant was a familiar face to them as he was a photographer. It might be so. Even if he was, still the witness must give detailed explanation as to how they identified the assailant at the scene of crime as the witness might be honest but mistaken. Under the above circumstances we are satisfied like in the case of **Epson** that the conditions were not favourable for correct identification. The criteria in **Waziri** case were not met.

With respect to Mr. Rweyongeza we agree that the prevailing conditions were not favourable for correct visual identification.

We accordingly allow the appeal, quash the conviction of the appellants and set aside the sentence of 30 years imprisonment passed on

them. The appellants are to be released from prison forthwith unless otherwise lawfully held.

Order accordingly.

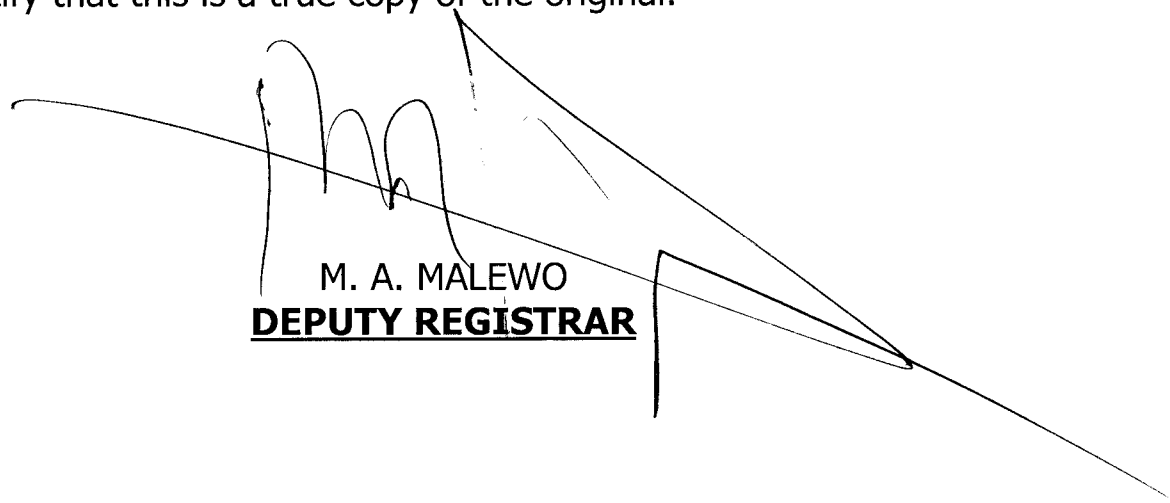
DATED at SUMBAWANGA this 16th day of August, 2010.

CHIEF JUSTICE

JUSTICE OF APPEAL

JUSTICE OF APPEAL

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



M. A. MALEWO
DEPUTY REGISTRAR