IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)

CRIMINAL APPEAL NUMBER 37 of 2010

(Originating from Kilosa District Court Criminal Case No. 144 of 2009-Odira Amworo-RM)

OMARY SAIDI..... APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 07-10-2011
Date of Judgment: 28-10-2011

JUMA, J.:

This is an appeal against the decision of District Court of Kilosa in the original Criminal Case Number 144 of 2009 wherein the learned trial Resident Magistrate Odira Amworo had found the Appellant (Omary Saidi) guilty of the offence of armed robbery contrary to section 287A of the **Penal Code** as amended by **Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2004**.

Being aggrieved by the conviction and sentence, the Appellant preferred this appeal challenging the conviction and the sentence of thirty (30) years in prison together with corporal

punishment of twelve strokes of the cane, which the trial court had imposed. The appeal, which was lodged in the registry of this court, is based on five (5) grounds of appeal which in essence amounted to the following three grounds–

1. That the trial magistrate erred in law and facts by convicting the appellant on the basis of identification evidence of the complainant who had testified as PW1.
2. That, the trial magistrate erred in law and fact for failing to satisfy himself as to whether the conditions at the *locus quo* was conducive for positive identification of the person responsible for attacking the complainant.
3. That, the evidence lead in court did not prove the guilt of the appellant beyond reasonable doubt.

Before looking at the substance of the grounds of appeal it is important to point out that the background facts giving rise to this appeal are very simple and straight forward. On 3rd June 2009 at around 20:00 hours the complainant Mika Kashu (PW1) was riding his motorcycle home from Dumila where he had attended an open market known as "*Mnada*" is Kiswahili. On the way, PW1 saw a wire tied across the road blocking his path.

With his lights still on, he stopped and saw four people standing by the road. He identified one person by calling out his name. Armed with a bush-knife (*panga*) the four set upon him, beating him up, robbed him and took his motorcycle to unknown destination.

At the hearing of this appeal on 29th July 2011, the appellant appeared in person and basically relied on his grounds of appeal which included his own written submissions. Mr. Solomon Mihayo learned State Attorney represented the Respondent Republic. According to his submissions asserted that the complainant PW1 who was riding a motorcycle at night could not have identified him at the scene of crime because riding a motorcycle entailed focusing attention straight ahead and it is inconceivable that PW1 could at the same time observe and identify him. Further, appellant noted that the complainant did not indicate the speed of the motorcycle and how that speed could relate to a wire which was allegedly tied across the motorcycle path. Appellant strongly believed that it was not possible for the complainant to have suddenly stopped before hitting the wire and at the same time be able to identify the people who suddenly pounced upon him.

The learned State Attorney opposed this appeal and supported the conviction and sentence. Mr. Mihayo submitted that the complainant who was riding his motorcycle at night was able to identify the appellant because the light from the motorcycle was not only adequate but also because the complainant knew the appellant. The learned State Attorney maintains that the conditions for identification of the appellant fit the parameters of visual identification set out by the Court of Appeal in the case of **Waziri Amani v R [1980] TLR 250**.

As correctly stated by the learned trial magistrate; the criminal case against the appellant solely hinged on the visual identification of the appellant by the complainant PW1. It is clear from the judgment; the learned trial magistrate convicted the appellant on the strength of the evidence of visual identification. From submissions made by the opposing parties, the main issue for my determination here is whether the learned trial magistrate was correct to find that appellant was properly identified at the scene of crime.

The law governing evidence of visual identification is now well settled by the Court of Appeal of Tanzania. As a first appellant

court, my re-evaluation of the evidence that was adduced before the subordinate court will seek to determine whether the conclusion reached by the trial court is in accord with the settled position of law regarding the evidence of visual identification.

Through several its several decisions, the Court of Appeal of Tanzania has expounded further its earlier decision in **Waziri Amani (supra)**. For instance, in the case of **Rashid Seba vs. Republic, Criminal Appeal No. 95 of 2005 (CA) at Mwanza- [Lubuva J.A. Mroso J.A. and Rutakangwa J.A.]** the Court of Appeal underscored the importance of elaboration of the quality of the lamp must be proper. In the case of **Said Chaly Scania v R, Criminal Appeal No. 69 of 2005**, Court of Appeal of Tanzania was very clear that visual identification at night is by any standard an unfavourable circumstances requiring evidence which leaves no doubt that identification is correct and reliable. The Court of Appeal held:

> *"We think that where a witness is testifying identifying another person in unfavorable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken*

identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger.

With due respect, the judgment of the learned trial magistrate clearly shows that he took some moments to warn himself of potential dangers of relying on light from motor cycle and satisfy himself of water-tightness of evidence of visual identification. On third paragraph of his judgment on page 3 the learned magistrate painstakingly evaluated the wire (admitted as exhibit P2) to be about 4 millimetres in its width and about 49 feet long and concluded that the complainant could easily have seen that wire which had been tied to block the road. I will agree with the trial court's evaluation of the evidence that if the powerful beam of motorcycle light could pick out the wire, it would not be difficult to also pick out the appellant who was well known to the complainant.

I am of the considered opinion that the conclusion reached by the learned trial magistrate is supported by evidence on record. PW1 specifically identified the appellant whom he called to as ***"Omary Ngidu, vipi rafiki yangu."*** There is also the evidence that two hours later, PW1 used his mobile phone to call and

inform Moses Makindu (PW2) about the assault. PW2 was informed by PW1 that appellant was one of the four assailants. When PW1 regained consciousness, he informed Corporal Ally (PW3) that the people who ambushed and assaulted him included the appellant.

The evidence that the appellant was identified was repeated by the complainant from the earliest possible moment leading the police to issue out an RB (Report Book) seeking his arrest. The fact that police were looking for him is to be found in appellant's own defence testifying as DW1. Appellant (DW1) stated that on 5th June 2009 at around 17:00 he was at Mabwegere when the Village Executive Officer came together with two members of peoples' militia to arrest him after showing him an RB from the police. Under cross examination, appellant admitted that he and complainant were known to each other but hastened to add that the complainant is implicating him because of their prior disagreements.

From my re-evaluation of evidence I am satisfied that the visual identification of the appellant at the scene of crime was not mistaken. Court of Appeal of Tanzania in the case of **ABDALLA MUSSA MOLLEL@ BANJOO** vs. **THE DIRECTOR OF PUBLIC**

PROSECUTIONS CRIMINAL APPEAL NO. 31 OF 2008 AT Arusha underscored the need to avoid mistaken visual identification:

> *In the case of* ***Shamir s/o John v The Republic,*** *this Court observed as follows:-... "...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relations and friends are sometimes made".*

Appellant was not simply identified by the complainant merely because they knew each other but because the appellant was visually identified as one of the four assailants who had blocked his path with a wire and robbed him of his motorcycle. The fact that the complainant called out the name of the appellant clearly reinforced the evidence of visual identification.

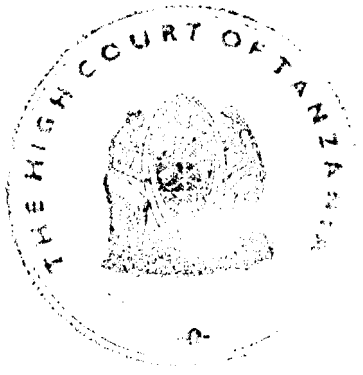
From the foregoing, I hereby find and hold that the identification evidence by the complainant met the requirements laid down by the Court of Appeal of Tanzania in **Waziri Amani V R (1980) TLR 250** and subsequent elaboration on this decision of the Court of Appeal. I am satisfied that motorcycle lighting was sufficient to enable positive visual identification of the appellant. I am similarly satisfied with the evaluation of evidence by the learned trial magistrate leading to

the conclusion that the alleged grudge between the complainant and the appellant was an afterthought.

For the above reasons, the appeal clearly lacks merit. The minimum sentence for an offence of Armed Robbery under section 287A of the **Penal Code** as amended by **Written Laws (Miscellaneous Amendments) (No. 2) Act No. 4 of 2004** is thirty years in prison with or without corporal punishment. I do not see any reason to interfere with the decision of the trial court to impose the prescribed mandatory minimum sentence of thirty years imprisonment. Appeal is dismissed in its entirety.

I.H. Juma,
JUDGE
28-10-2011

Delivered in presence of Appellant in person and Ms Tumaini Mfikwa – State Attorney (for Respondent)



I.H. Juma,
JUDGE
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