IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MROSO, J.A., And MSOFFE, J.A.)

CRIMINAL APPEAL NO. 115 OF 2002

RICHARD ATHANAS ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Kimaro, J.)

dated the 18th day of July, 2002
in
HC. Criminal Appeal No. 97 of 2001

REASONS FOR THE JUDGMENT OF THE COURT

28 June & 10 July 2006

MROSO, J.A.:

When we heard this appeal we allowed it by quashing the conviction and setting aside the sentence of 30 years imprisonment which had been imposed on the appellant. We ordered that he be set free forthwith unless he be held for some other lawful cause. We reserved our reasons which we now give.

The appellant together with five others were prosecuted in the Court of Resident Magistrate at Kivukoni, in Dar es Salaam, on two counts, the first count of armed robbery

contrary to sections 285 and 286 of the Penal Code, and the second count of being in unlawful possession of stolen property, contrary to section 311 (1) (sic) of the Penal Code. At the close of the prosecution case the trial magistrate, Mr. Mtotela, Principal Resident Magistrate, ruled that the original 3rd accused person Ally s/o Issa and the original 6th accused person Iddi s/o Said had no case to answer and, consequently, acquitted them. The appellant who was the original first accused person together with the remaining three other accused persons were found to have a case to answer. At the end of the trial all the remaining four accused persons were convicted as charged and were each sentenced to 30 years imprisonment, apparently for both counts.

Aggrieved by the conviction and sentence the appellant appealed to the High Court. It is not clear if the other three persons who were similarly convicted and sentenced appealed to the High Court. Be it as it may, the High Court dismissed the appellant's appeal in its entirety. Undaunted, he has appealed to this Court, giving five grounds of complaint. In all those five grounds of appeal there are only two substantive complaints; first that there was no cogent evidence of identification and, second, that the conviction on the charge of being found in possession of stolen property

was not maintenable in law. Before we discuss those two main grounds of appeal we consider it appropriate to give brief facts of the case.

During the night of 13th May, 2000 bandits broke into the house of one Urban Litiga – PW1, in Mbezi, Dar es Salaam. They assaulted him and his wife Olivia Litiga – PW2. They also stole cash money in the sum of Shs. 115,000/= and an assortment of household goods such as clothing, a radio, a television set, clocks and watches. The estimated value of the stolen property was Tshs. 1,250,000/=. They were said to be more than 6 in number and after committing the assault and theft they left. The incident was reported to the police.

At about 6.00 a.m. of the morning after the theft a Police Constable, one Kabwewe, PW3, intercepted an Isuzu Trooper motor vehicle at the Uhuru Street round-about in the City of Dar es Salaam. The motor vehicle contained goods which were badly soiled and there were five people in it. He became curious and questioned the five people in connection with the goods. The policeman was not satisfied with their explanations. He took them and the motor vehicle to Msimbazi Police Station where they were detained. Subsequently PW1 – Litiga, was called to the police station

and he identified the goods from the motor vehicle as the property which had been stolen from him when bandits broke into his house. The five suspects were then charged with the two offences as mentioned earlier.

At the trial Litiga (PW1) and his wife (PW2) claimed that they identified the appellant and the fifth accused (at the trial) when the robbery was being committed. PW1 said he identified those two because “there was light”. PW2 on her part said she identified the two because they beat her up.

In his defence at the trial the appellant said he boarded the motor vehicle at Buguruni intending to go to Kariakoo and paid shillings 2,000/= as fare and on the way the policeman ordered the motor vehicle to be taken to the Police Station at Msimbazi.

The trial court and the first appellate court were satisfied that the evidence of identification as given by PW1 and PW2 was reliable. The two courts below also believed that the appellant was found in possession of the stolen items on the morning immediately after the theft and that the appellant and the other three accused persons at the trial had given “contradictory words”. Regarding the appellant specifically, the two courts below said they could not believe him when he said he had paid shillings two

thousand as fare from Buguruni to Kariakoo. It was for all those reasons that it was found that the appellant was guilty of the two offences as charged.

It must be said at once that, in fact, there was no evidence of identification worth the name. Both PW1 and PW2 who were the victims of the robbery said they identified the appellant but did not explain how they were able to identify him unmistakenly. According to PW1, while he and his wife – PW2 – were asleep, two out of more than six people entered his house and started beating him and his wife using clubs and sticks. Because of poor prosecution of the case no question was asked by the prosecutor to elicit evidence from either PW1 or PW2 on how they were able to identify the appellant in the circumstances as given above. It was only when the original fifth accused was cross-examining PW1 that the witness said –

> "There was light that is why I was (sic)
> you. I had identified"

The public prosecutor did not take a cue from the question of the fifth accused and seek elaboration from the witness when he got the opportunity to re-examine him. He could have asked the witness to explain what the source of the light was, how strong it was and whether the light shone on

the face of the intruder in order to give the court the assurance that the witness actually saw and identified the intruder. Instead, the prosecutor did not ask the witness any question in re-examination. With respect, it cannot be enough in evidence of identification during night time for a witness to simply say –

" I identified you. There was light"

It is obvious, we think, that conditions for reliable identification were unfavourable. PW1 and PW2 had been aroused from sleep and were immediately beaten up by the bandits who had entered their room. There is no clear evidence of the kind and extent of lighting in the room. In such a situation it was unlikely that those witnesses could make unmistaken identification of the intruders.

This Court has said in numerous decisions, the most cited being **Waziri Amani v The Republic** [1980] TLR 250, that evidence of visual identification is easily susceptible to error. A witness can honestly but mistakenly believe that he identified the offender. This can happen especially where the conditions obtaining are not favourable to correct and unmistaken identification. Utmost care should be taken when acting on evidence of visual identification to eliminate all possibilities of error. In that connection we will also cite the very apt words of this Court in the **Waziri Amani** case at

page 251 of the report. The Court said:-

> --- evidence of visual identification ... is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.

Surely, the evidence of identification as given by PW1 and PW2 cannot be by any stretch of the imagination to have met the test. It is surprising that both lower courts were able to find that there was sufficient evidence of identification against the appellant. In fact, although PW1 made the general statement that he was able to identify the original fifth accused because there was light, without elaborating, neither that witness nor PW2 gave a hint how they were able to identify the appellant. Since the evidence of identification was so crucial in the case, the two lower courts should have found that such evidence was so weak, the appellant should have been acquitted.

The only other evidence against the appellant was that he and five others were found in the Isuzu Trooper

motor vehicle which carried the stolen goods. The appellant explained how he got into the motor vehicle at Buguruni intending to go to Kariakoo. The trial court rejected the appellant's explanation simply because it could not believe that a person would pay a fare of shillings two thousand for the distance between Buguruni and Kariakoo. But it was not said that the Isuzu was a passenger bus which normally plys along the route. At any rate, even assuming that the fare the appellant said he paid was unbelievable, that cannot be evidence which proved the appellant was guilty of the offences with which he was charged. An accused person is convicted of a criminal offence because of the cogency of the prosecution evidence against him; not because the defence evidence is weak or even untrue. Thus, even the claim by the trial court that the "words" of the accused persons before it were contradictory, assuming that was true, and we could not find evidence of such contradiction, that could not be a ground for convicting the appellant.

The next question we wish to consider very briefly is whether the second count, which was not in the alternative to the first count, and section 312 (1) (b) of the Penal Code ought to have been cited, was proper in law. If a person is charged with robbery it means he used force in stealing. So, if subsequently he is found in possession of the things he robbed he is not charged with being in possession of those

stolen things as a separate and additional offence to that of robbery. But if there is doubt that the offence of robbery might not be proved then, as a precaution, he can be charged in the alternative with being found in possession of stolen goods. We think, therefore, that the second count was superfluous and the trial court should not have made a finding on it, let alone that there was no evidence to prove that the appellant was in law in possession of those goods. We wish to add that even if it were found that the appellant was properly convicted on the second count which, of course, was not the case, then he should have been sentenced separately on it instead of the omnibus sentence of thirty years for the first and second counts as imposed by the trial court and wrongly upheld by the High Court.

We considered, therefore, that had the first appellate court adverted to those fatal weaknesses in the prosecution case it would not have concurred with the trial court but would have allowed the appellant's appeal to it. It was for the reasons that we have attempted to give here that we allowed the appeal by quashing the convictions and setting aside the omnibus sentence which had been imposed on the appellant. We should also point out that Mr. Luoga, learned State Attorney for the respondent Republic, did not support the conviction of the appellant.

DATED at DAR ES SALAAM this 5th day of July, 2006.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

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

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR