IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 69 OF 2005

SAID CHALY SCANIA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court (Appellate Extended Jurisdiction) at Tabora)

(Somi, PRM, Extended Jurisdiction)

dated the 19th day of January, 2004
in
Criminal Appeal No. 5 of 2003

JUDGMENT OF THE COURT

8 & 16 March 2007

MROSO, J.A.:

The appellant and one Kurwa Sebastian were prosecuted for robbery with violence in the District Court of Tabora. His co-accused was acquitted but he was convicted as charged and was sentenced to a term of 30 years imprisonment. His appeal to the High Court was transferred to the Court of Resident Magistrate at Tabora to be heard

by Mr. J. Somi, Principal Resident Magistrate with extended jurisdiction. It was heard and dismissed and, still feeling aggrieved, he has appealed to this Court. His appeal has six grounds of appeal. Those six grounds, however, boil down to two main complaints. The first is the question of identification and the second is whether the property allegedly stolen was found in the possession of the appellant.

The appellant was undefended and the respondent Republic was represented by Mr. Kakolaki, learned State Attorney. Mr. Kakolaki did not support the decision of the two lower courts. In fact, even during the first appeal the Republic did not support the conviction. But before discussing the two above-mentioned grounds of appeal we wish to give a short background to the case which led to the appellant being found guilty of robbery with violence by the trial court.

One Mbuga Nghobo (PW2) informed the trial court that at about 02.00 hours on 6th June, 2000 while he was sleeping some people "stormed" into his house and demanded to be given money.

He gave them TShs. 385,000/=. The bandits also took from his house trousers, radio cassette, spanners and ladies clothes. The witness also informed the trial court:- *"I have some marks and scars on the back, breast and head"* but does not explain how he got the injuries which left him with the marks and scars on his back except to say the appellant and the second accused terrorized him. He also explained during re-examination by the Public Prosecutor that his wife and sister were beaten up but, again, he did not say who beat them. The appellant and the second accused at the trial were arrested by the militia popularly known as ***sungusungu***. Presumably those two were arrested because, according to PW2, they had come to his home the day before the theft of his property was committed and asked him to show them the way to a place known as Mwanashokolo.

The ***sungusungu*** who arrested the appellant and his original co-accused are said to have taken the appellant "to town where he showed the properties and sent (them) to the police station". It is not made clear if the witness also accompanied the ***sungusungu*** and the appellant to "town".

The only other prosecution witness in the case was a Detective Constable Duncun (PW1). He rearrested the appellant after the ***sungusungu*** surrendered him to the police. According to PW1, the appellant mentioned the name of the second accused at the trial who, presumably was then also arrested. The two, that is the appellant and the original second accused, took Detective Constable Duncun to a house of one Mayunga where the stolen things were found. Those were a panga, cassettes, khanga and vitenge clothes. According to this witness, nothing incriminating was found in the room of the appellant but that the appellant said that the things which were found in Mayunga's house were stolen property. Mayunga does not appear to have been arrested and prosecuted or even called to the trial to give evidence regarding the property which was found in his house.

In his defence the appellant had told the trial court that he was simply arrested by ***sungusungu*** who beat him up and he was taken to a house where he met his co-accused at the trial. In the house 2 mattresses, a long cushion and 4 bags were found. It was then the

police were called to collect those things. It was not known what was contained in those bags.

It was on that evidence that the trial court convicted the appellant and Mr. Somi, Principal Resident Magistrate with extended jurisdiction, upheld the conviction.

Mr. Kakolaki submitted that he could not support the decisions of the two courts below because, in the first place, the conditions during the robbery were not conducive to accurate and reliable identification. If the intruders shone torchlight in the face of PW2 it is unlikely, if at all, PW2 would be able to identify them or any of them.

Mr. Kakolaki also submitted that there were contradictions between the evidence of PW1 and that of PW2 such that it was difficult to know who of the two was speaking the truth. To illustrate on the kind of contradictions he had in mind, he said that while PW1 said the appellant and his co-accused at the trial took him and the ***sungusungu*** "to where they hid the theft (sic) properties", PW2 said only the ***sungusungu*** were taken to a place in town where two bags

were found and were taken to the police station. He went to the police station and identified certain items as belonging to him. But PW2 did not say how he was able to identify those things as belonging to him. It was on those grounds that Mr. Kakolaki submitted that with such evidence the first appellate court should not have upheld the decision of the trial court. He asked the Court to allow the appeal.

The appellant did not need to say anything after the learned State Attorney supported his grounds of appeal. We think, too, with respect, that the case against the appellant was so weak that the trial court should not have convicted him of the offence charged and the first appellate court should have seen the glaring weaknesses and allow the appeal to it.

Although PW2 did not say in his evidence that he recognized the appellant as one of the bandits who "stormed" into his house, it is highly doubtful at any rate if he could reliably recognize any of the bandits in the circumstances as he explained in his evidence. As correctly stated by Mr. Kakolaki, it is highly improbable that a person

in whose face torchlight is shone at night would be able to see clearly and recognize reliably the person directing the torchlight to his face. Such light would have a temporary blinding effect on his eyes and, consequently, disable him from seeing clearly in front of him. It does not need expert opinion in order to appreciate this commonsense fact.

It was unfortunate the public prosecutor was not eliciting clear evidence from PW2. After the witness said the robbers directed torchlight to his face and, perhaps realizing that such evidence was not helpful, he then said *"There was light in my room"* again, without elaborating. Was it light from the bandits' torch or from another source? If from another source, which was it and how intense was it? We think that where a witness is testifying about identifying another person in unfavourable 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 and its intensity, the length of time the person being identified was within view and also

whether the person is familiar or a stranger. We are not attempting to exhaust the circumstances for accurate identification but this Court has on many occasions emphasized on the need to consider with great caution evidence of visual identification. Some of those decisions are the celebrated decision in **Waziri Amani v. R** [1980] TLR 250 at page 252 and **Lusabanya Siyantemu v. R** [1980] TLR 275. The Eastern Africa Court of Appeal had the following landmark decisions on evidence of identification, **Abdallah Bin Wendo and Another v. R** [1953] 20 EACA 116 and **R v. Mohamed Bin Ally** [1942] 9–10 EACA 72.

Needless to say, in the case under discussion, the evidence of identification was very poor if not altogether lacking.

We also agree with Mr. Kakolaki that the two prosecution witnesses conflicted among themselves significantly on where the stolen goods were found. While PW2 said the ***sungusungu*** found the property at the home of the appellant after he showed them where he had kept them, PW1 said both the appellant and the original second accused took him to the home of Mayunga where the

stolen property was found. As mentioned earlier, Mayunga was neither arrested and prosecuted nor called as a witness to explain the circumstances which led to the stolen property being found in his house. The sum total of all this is that it is not at all certain if, in fact, the appellant had possession of any of the stolen property.

We are satisfied that had the first appellate court alluded to those unsatisfactory features of the case against the appellant it would not have upheld the judgment of the trial court.

We allow this appeal by quashing the judgments of the lower courts and order the appellant to be set free forthwith unless he is held for some other lawful cause.

DATED at MWANZA this 16th day of March, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL