IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., KAJI, J.A., And KALEGEYA, J.A.)

CRIMINAL APPEAL NO. 49 OF 2005

1. SALEHE JUMA]
2. NASSORO MENGI] ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Manento, J.)

dated the 13th day of September, 2004
in
HC. Criminal Appeal No. 22 of 2004

JUDGMENT OF THE COURT

12 March & 25 September 2008

LUBUVA, J.A.:

This is a second appeal. It arises from Morogoro District Court Criminal Case No. 293 of 2003. The appellants were charged with and convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code as amended by Acts Nos. 27 of 1991 and 10 of 1990. Upon conviction, they were sentenced to a term of thirty (30) years imprisonment together with corporal punishment.

The facts as established at the trial were that on 11.7.2003 at about 9.30 p.m., the house of Anthony Gaitan (PW1) and John s/o Ngoima (PW2) at Msamvu within the outskirts of the Municipality of Morogoro was invaded by a group of armed robbers. In the course of the robbery, PW1 was slashed with a panga on the head and left hand. An assortment of items of their (PW1, PW2) property were stolen. Cash money, T.Shillings 1,030,000/= was also stolen.

At the trial, the first appellant, Salehe Juma, vehemently denied any involvement in the robbery. While he admitted knowing each other with PW1 for a long time as they worked together in the butcher and abattoir business, he strongly maintained that PW1 fabricated evidence against him because they had long standing grudges with each. He denied knowing PW2 who he said was not telling the truth in his evidence. Similarly, the second appellant, Nassoro Mengi, denied involvement in the alleged offence. He also refuted that PW1 had identified him. Upon evaluation and analysis of the evidence, the trial magistrate was satisfied that the appellants were properly identified among the bandits. Accordingly, they were

convicted and sentenced. Unsuccessfully, the appellants appealed to the High Court where Manento, J. (as he then was) held that the appellants had been identified to the exclusion of any mistaken identity. The appeal was dismissed and hence this appeal has been preferred.

In this appeal, the appellants appeared in person and on the other hand, Ms Choma, learned State Attorney, represented the respondent Republic. At the commencement of hearing the appeal, the first and second appellants presented five (5) and thirteen (13) additional grounds of appeal respectively. Otherwise, they did not have much to say, understandably, being lay persons who are not conversant with legal technicalities. In totality, these grounds boil down to one central issue. That is that, it is the contention of the appellants that they were not properly identified.

On this, Ms Choma, learned State Attorney, made elaborate submissions. She ardently maintained that in the circumstances of the case, the appellants were properly identified. The following

reasons were advanced as grounds in support of her submission that the appellants were properly identified. First, that though the incident took place at night time, there was sufficient light from an electric tube light which, according to PW3 was bright.

Second, the proximity was such that PW1 and PW2 were able to see and identify the appellants. She said from the evidence of PW1, PW2 and PW3, the appellants were within a range of about 8 paces away. In that situation, the State Attorney submitted, the witnesses (PW1) and (PW2) were able to identify the appellants properly. Third, prior to the incident, the appellants were known to PW1 and PW2. In support of her submission, the Court was referred to its decision in **Waziri Amani V Republic** (1980) TLR 250 and **Sijali Juma Versus Republic** (1980) TLR 206, among others.

The central issue for determination in this appeal is whether the appellants were identified such that possibilities of mistaken identity were eliminated. From the record, it is common ground that the identification of the appellants was based on the evidence of the

complaints, PW1 and PW2. In their evidence they state in no uncertain terms that they saw and identified the appellants among the invading bandits.

Having regard to the fact that at the time, there was bright light from an electric tube light, that the invading robbers were within close proximity to the complainants, PW1 and PW2; that the incident took considerable time from the start to the time the robbers disappeared and the fact that the appellants were well known to PW1 and PW2, we can find no reason for not agreeing with the concurrent finding of fact by the trial court and the first appellate court that the appellants were properly identified by PW1 and PW2.

It is common knowledge that in a second appeal such as this which is brought to the Court under section 5 (7) of the Appellate Jurisdiction Act, 1979 the appeal lies to the Court only on a point of law. In such a situation the Court does not interfere with the concurrent finding of fact by the courts below unless there are misdirection or non-direction on the evidence by the trial court or first

appellate court. This was stated by this Court in **DPP v Jafferi Kawawa** (1981) TLR 149, among others numerous cases. Further afield, in **Peters v Sunday Post Limited** [1958] EA 424 the erstwhile Court of Appeal for Eastern Africa set out the guiding principle upon which an appellate court can interfere with the finding of fact by a trial court. The Court held:

> (i) whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decided.

In similar vein, in this case, we are unable to find any reason for differing from the concurrent finding of fact by the court's below with regard to the identity of the appellants. From the record we are

unable to find any misdirection or non direction on the part of the courts below.

In **Waziri Amani v Republic** (supra), the Court was emphatic that evidence of visual identification is of the weakest kind, and that no court should act on it unless it is satisfied that all possibilities of mistaken identity are eliminated and that the evidence is watertight. Similarly, in **Sijali Juma** (supra) in which one of the issues raised was that the conditions for identification obtaining at the time of the incident were unfavourable, the Court *inter alia* held:-

> **(1) The conditions in the house did favour correct identification of the appellant as the tube light under which a person could read was sufficiently bright to enable the deceased to identify the appellant who was well known to him before the incident.**

In this case, as correctly observed by the learned judge on first appeal, we are satisfied that the requisite elements for proper

identification set out in **Amani Waziri** (supra) were satisfied. The conditions for favourable identification of the appellants at the time of the robbery were favourable.

In the event, we are increasingly of the firm view that the appellants' complaint that they were not properly identified is without foundation. Their claim that the evidence of PW1 and PW2 was fabricated is likewise, not only unfounded but an afterthought. We find no merit in the appeal.

Consequently, for the foregoing reasons, the appeal is dismissed in its entirety.

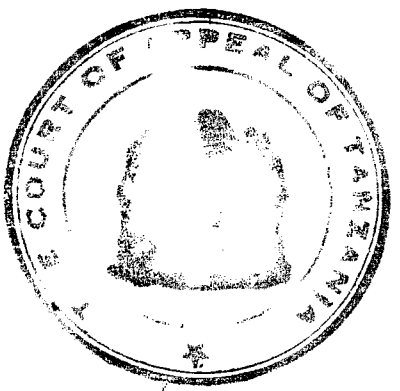
DATED at DAR ES SALAAM this 12th day of September, 2008.

D.Z. LUBUVA
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

L.B. KALEGEYA
JUSTICE OF APPEAL

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



(S.S. MWANGESI)
Ag. SENIOR DEPUTY REGISTRAR