

<b>THE COURT OF APPEAL OF TANZANIA AT MWANZA</b> <b>CORAM:</b> <b>LUBUVA, J.A,</b> <b>MROSO, J.A,</b> <b>RUTAKANGWA</b> <b>J.A CRIMINAL APPEAL NO. 166 OF 2004</b>	SHAMIR S/O JOHN .... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the Judgment of the High Court of Tanzania at Mwanza) MIHAYO, J Criminal Appeal No. 200 of 2003	For the accused person to be convicted basing on the evidence of identification, the quality of identification should be that there was favorable light at the night of the alleged crime to have been committed. See Waziri Amani VR [1980] TLR 250, Raymond Francis VR [1994] TLR 100 Augusto Mahiyo V R [1993] TLR 117 Alex Kapinga and 3 others VR Criminal Appeal No 252 of 2005 (unreported)
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**IN THE COURT OF APPEAL OF TANZANIA  
AT MWANZA**

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

**CRIMINAL APPEAL NO. 166 OF 2004**

**SHAMIR S/O JOHN ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Mwanza)**

**(Mihayo, J.)**

**dated the 21<sup>st</sup> day of May, 2004**

**in**

**Criminal Appeal 200 of 2003**

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## **JUDGMENT OF THE COURT**

**1 & 16 March 2007**

### **RUTAKANGWA, J.A.:**

The appellant, together with Godfrey Albinus and Guston Mahindi were jointly charged before the District Court of Musoma with the offence of armed robbery c/ss 285 and 286 of the Penal Code. They were alleged to have stolen two boat engines, one National torch, 140 fishnets, and two pieces of 'kavero' with a total value of TShs. 12,616,500/= the property of one Zakaria s/o Kakwaya and immediately before such stealing that they used a gun in order to obtain the property. The armed robbery, which the learned appellate judge called "lake piracy" took place on the night of 21<sup>st</sup> November, 2001 at Bwai area within Lake Victoria.

The appellant and his colleagues denied the charge. However, after considering the evidence of seven witnesses who testified for the prosecution and the defence evidence, the trial Resident Magistrate was of the settled mind that the prosecution had managed

to prove its case to the required standard in respect of the appellant and Godfrey Albinus, who were accordingly convicted as charged. They were sentenced to thirty (30) years in jail. The third accused was acquitted of armed robbery but was found guilty of retaining stolen property c/s 311 (1) of the Penal Code and was sentenced to five years in jail. Godfrey, however, was tried, convicted and sentenced in absentia.

Dissatisfied with the conviction and sentence, the appellant appealed to the High Court at Mwanza. In its judgement dated 21<sup>st</sup> May, 2004, the High Court (Mihayo, J.) found the appeal patently wanting in merit and dismissed it. The appellant was again aggrieved and hence this appeal.

The appellant lodged, at first, a three page typed memorandum of appeal containing six grounds of appeal. On the day when the hearing of his appeal took off he filed an additional memorandum of appeal containing four grounds of complaint. Both memoranda are discursive in nature and they can be easily taken as written submissions. Furthermore, the grounds of complaint in both

memoranda of appeal appear to be overlapping. All in all, his grievances are clear. The bottom line of his complaints against the decisions of the two courts below is that:-

- (a) he was not adequately identified by the victims of the armed robbery, and so his conviction was unjustified by the evidence on record;
- (b) he was not found in possession of any incriminating article;
- (c) he never confessed to have committed the robbery or any other kindred offence and
- (d) the two courts below did not judicially consider his evidence but only made a fleeting reference to it.

In this appeal, as was the case in the courts below, the appellant is unrepresented. Mr. Kakolaki, learned State Attorney, for the respondent Republic, is vigorously resisting the appeal.

Before deciding on the merits or demerits of the appeal, we find it desirable to look briefly at the evidence which led to the conviction of the appellant.

At the appellant's trial it was not disputed that the properties of Zakaria Kakwaya, who testified as PW2 were robbed on 20<sup>th</sup>/21<sup>st</sup> November, 2001 as shown in the charge sheet. It was also undisputed that PW2 Zakaria is a local fishing magnate in his area who has invested a lot in the fishing business. He had a fleet of fishing boats equipped with outboard engines and a host of other fishing gear as fishing nets, buoys, etc. Most of those pieces of equipment were marked "**UKOMBOZI**" for easy identification. Also, he had at his command a number of employees in this business, among whom were PW5 Amos Musa and PW6 Yunus Ramadhani. The appellant had, prior to the robbery, been an employee of PW2 Zakaria. As to how the robbery took place and its prelude the story was best told by PW1 Musa Mariko, PW5 Amos and PW6 Yunus. Their evidence was precise and clear.

PW5 Amos and PW6 Yunus testified that on 20/11/2001 together with their co-workers put out to the lake at 4.00 p.m. for fishing. They had two fishing boats fitted with outboard engines and about 140 fishing nets with buoys. Each one was piloting his own boat. Once safely in the lake at their chosen fishing zone they lowered their nets into the waters, anchored their boats and rested. They also had torches.

While PW5 Amos and PW6 Yunus and their colleagues were in the lake at about 6.00 p.m., four people in a boat arrived at Muroba, the home of PW1 Musa, a sardine fisherman. Of the four people PW1 Musa recognized the appellant, who was well known to him as they had once worked together. The appellant wanted to know the residence of one Julius. Fortunately, Julius joined them almost immediately. After a brief conversation they all headed for Julius's home. From the home of Julius they returned to their boat with an outboard engine which they fixed onto their boat. Leaving their own engine behind, the appellant and his three colleagues put out to the waters. That was in the evening.

Going by the undisputed evidence of both PW5 Amos and PW6 Yunus the night of 20<sup>th</sup> and 21<sup>st</sup> November, 2001 was well blessed with full moonlight. During that night as they were on their fishing business, a boat powered by an engine closed in on them. It had four occupants in it. The four immediately jumped out of the boat and descended upon PW2 Zakaria's fishermen, and beat them up. The invaders who were armed with a gun and iron bars ultimately made away with two boat engines, a torch, 140 fishing nets and two "kaveros". All this evidence was undisputed by the appellant. PW5 Amos and PW6 Yunus further testified that of the four robbers they only managed, through the help of a bright light from the full moon and the torch light (which was used while searching in the boats), to recognize the appellant. PW5 Amos and PW6 Yunus who were left helpless in the lake were rescued at about 4.00 hours and they immediately mentioned the appellant, a former co-worker, as one of the four bandits.

While PW5 and PW6 were left stranded in the lake, the appellant and his three companions returned to Muroba the same

night. PW1 Musa again saw them. They were carrying things in sacks. They went straight to Julius's place deposited their luggage there, changed their engine and left. Later that day (21/11/2001), PW1 Musa went to Paris to buy oranges. There he learned of the 'lake piracy' of the previous night. PW2 Zakaria was around and PW1 Musa narrated to them what he had witnessed the previous evening and night. The police were informed and a determined search for the marauders was mounted. The appellant was arrested immediately thereafter on the basis of the report by PW1 Musa, PW5 Amos and PW6 Yunus. He was found in possession of the stolen torch which had PW2 Zakaria's identification mark of "**UKOMBOZI**".

The appellant told the trial court that he was a victim of a frame-up by PW2 Zakaria because after leaving his employment due to a misunderstanding, he set up a rival but very successful fishing business. As a result PW2 Zakaria had sworn to avenge.

As already indicated above both the trial court and the first appellate court did not buy the story of the appellant. Both courts were of the view that since the appellant was well known to PW1

Musa, PW5 Amos and PW6 Yunus before the undisputed armed robbery, there was a strong moonlight and an exchange of words during the robbery there was a lot of opportunity to identify the appellant.

As the offence of armed robbery was well established by the evidence of PW5 Amos and PW6 Yunus and was not disputed at all, the crucial issue in this appeal, as was the case in the courts below, is that of identification of the robbers. Was the appellant properly identified among the robbers as the courts below were so convinced or was he mistakenly identified or is he a victim of a frame-up as he has persistently claimed?

In this appeal, as in the High Court, the appellant has vehemently argued that the identification evidence relied on by the trial court was very weak and ought to have been rejected. He has assigned four reasons. **Firstly**, no identification parade was held at all. **Secondly**, no exhibit was tendered in evidence to bear out PW5 Amos and PW6 Yunus on their claims that they saw him during the robbery. **Thirdly**, there was no independent civilian or police

witness to confirm that the torch (Exh. P1 (a)) was found in his possession. **Fourthly**, there was no police officer who testified. He is also claiming, now, that the prosecution witnesses on the issue of identification were unknown to him, save for PW2 Zakaria who was formerly his employer.

Resisting the appeal on the aspect of identification, it was strongly contended by Mr. Kakolaki, learned State Attorney, that the appellant was adequately and positively identified as one of the four robbers. He gave three reasons in support of his stand. **Firstly**, there was full moonlight. **Secondly**, the appellant who was known to the witnesses, and his fellow three bandits jumped into the boats and ordered the witnesses to load their fishing nets into the bandits' boat. **Thirdly**, the victims and the bandits had torches. With these factors in mind he ruled out the possibility of any mistaken identity. He referred us to two decisions by this Court on the issue. These are: (a) **Samwel Silanga v. R** [1993] TLR 149 and (b) **Rajabu Katumbo v. R.** [1994] TLR 129.

Admittedly, identification in cases of this nature, where it is categorically disputed, is a very tricky issue. There is no gainsaying that evidence in identification cases can bring about miscarriage of justice. In our judgement, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the courts should warn themselves of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. We are saying so advisedly. This is because it often happens that there is always a possibility that a mistaken witness can be a convincing one. Even a number of such witnesses can all be mistaken.

It is now trite law that the courts should closely examine the circumstances in which the identification by each witness was made. The Court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows: How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any

way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? What interval had elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance? See, for instance, the cases of **Waziri Amani v. R** [1980] TLR 250, **Raymond Francis v. R** [1994] TLR 100, **Augusto Mahiyo v. R** [1993] TLR 117, **Alex Kapinga & 3 Others v. R.**, Criminal Appeal No. 252 of 2005 (unreported) among others.

We would like to take this opportunity to emphasize here, that in order to accord to an accused person his constitutional right to fair trial under the equality before the law clause (see Article 13 (6) of the 1977 Constitution), if, in any case, the prosecution has reason to believe that there is such a material discrepancy as referred to above, they should supply the accused or his advocate with

particulars of the description the witnesses first made at their earliest opportunity. Furthermore, if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Also, in all cases tried with the aid of assessors, the judge should remind them of any specific weaknesses which had appeared in the identification evidence. Finally, 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 relatives and friends are sometimes made.

To us, all these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened. But the poorer the quality, the greater the danger. What then was the quality of the identification evidence in this case?

Admittedly, the evidence going to incriminate the appellant was recognition evidence coming from PW1 Musa, PW5 Amos and PW6 Yunus. Their evidence to the effect that they knew the appellant

prior to 20<sup>th</sup> and 21<sup>st</sup> November 2001 was not challenged either during cross-examination or in his sworn evidence. We take it as an established fact, therefore, that the appellant was well known to the identifying witnesses. For this reason there was no need of conducting an identification parade. From the uncontradicted evidence of both PW5 Amos and PW6 Yunus, on the night of the robbery there was full moonlight, the bandits stayed with them for an appreciable long period of time collecting the engines and the 140 fishing nets and there was an exchange of words. In short, the observation of the appellant by PW5 and PW6 was long and unimpeded. For these reasons we are constrained to concur with the two courts below that the quality of the identification was impeccable and remained so at the close of the appellant's case. On the evidence of PW1 Musa, PW5 Amos and PW6 Yunus, we would be prepared to dismiss the appeal.

Fortunately, there is also the evidence of PW2 Zakaria, PW3 Chiru Mabula and PW4 Haji M. Matiko to the effect that the appellant, immediately after the robbery, was found in possession of the

complainant's torch (Exh. P1 (a)) which was one of the articles robbed. The appellant never challenged this evidence at all in his defence. Both PW3 Chiru and PW4 Haji, contrary to the claims of the appellant now, were independent civilian witnesses. Indeed their evidence which was not disputed by the appellant, is to the effect that PW3 Chiru is his neighbour and PW4 Haji is a friend of the appellant's brother. The appellant has not attempted to show why these independent witnesses chose to align themselves with PW2 Zakaria to victimize him. We think the appellant was drawing a red herring in his defence.

All in all, an objective evaluation of the entire evidence on record, which also the lower courts carried out, leaves us entertaining no reasonable doubts on the guilt of the appellant. He was rightly convicted as charged. Even if the courts below had considered his written submission which is not evidence the end result would have been the same. As his appeal has no iota of merit, it is accordingly dismissed in its entirety.

DATED at MWANZA this 16<sup>th</sup> day of March, 2007.

D. Z. LUBUVA  
**JUSTICE OF APPEAL**

J. A. MROSO  
**JUSTICE OF APPEAL**

E.M.K. RUTAKANGWA  
**JUSTICE OF APPEAL**

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

(S. M. RUMANYIKA)  
**DEPUTY REGISTRAR**