IN THE COURT OF APPEAL OF TANZANIA AT MWANZA CRIMINAL APPEAL NO 63 OF 2005 RUTAKANGWA, J.A	- **MASELO MWITA @ MASEKE** - **MARWA CHACHA @ CHARLES VS. REPUBLIC (Appeal from the judgment of the High Court of Tanzania at Tabora by Masanche, J.)**	- Settled law on a case entirely depending on the evidence of a single identifying witness, such evidence must be absolutely water tight to justify a conviction. - Case of Yohanis Msigwa Vs. R. (1990) TLR 148 - Case of Masudi Amlima Vs. R (1989) TLR 25 -The guidelines to be followed were stated in the case of WAZIRI AMANI vs. R (1989) TLR 250

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 63 OF 2005

1. MASELO MWITA @ MASEKE
2. MARWA CHACHA @ CHARLES } ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Tabora)

(Masanche, J.)

dated the 10th day of December, 2003
in
HC Criminal Appeal No. 29 and 30 of 2003

JUDGMENT OF THE COURT

7 & 16 March 2007

RUTAKANGWA, J.A.:

The appellants and one Stephen Waitara were charged with and tried for the offence of armed robbery c/ss 285 and 286 of the Penal Code before the District Court of Mwanza at Mwanza. The appellants were convicted as charged and sentenced to thirty (30) years imprisonment. They unsuccessfully appealed to the High Court at Mwanza against the entire decision of the trial District Court. Being aggrieved by the High Court decision they have lodged this appeal.

Each appellant filed his own memorandum of appeal. Their main grounds of complaint against the decision of the High Court, are basically three. **First,** that they were wrongly convicted on the basis of very weak prosecution visual identification evidence.

Second, the doctrine of recent possession was wrongly invoked in finding them guilty as charged. **Third,** the 1st appellant's caution statement had no evidential value as it was extracted from him through torture. They accordingly urged us to allow this appeal, quash their conviction and set aside the sentence of imprisonment imposed on them.

For the respondent Republic in this appeal, is Mr. Kiria, learned State Attorney. Mr. Kiria supported the appeal for almost similar reasons. He emphasized that the evidence of the victim of the alleged robbery one John Daniel, who testified as PW1, ought not to have been given much weight by the courts below as he was too inconsistent. He further argued that the weighing scale upon which the doctrine of recent possession was based was never admitted in evidence for PW1 to identify as the one robbed from him. He, too, pressed us to allow the appeal in its entirety.

The prosecution case against the appellants was built on the evidence of four witnesses. These were John Daniel (PW1), No.

E.1242 D/C Sanya (PW2), No. D.3455 D/Corporal Kaled (PW3) and No. B.7285 S/Sgt. Reuben (PW4).

PW1 told the trial court that on 4th January, 2001 at about 01.30 hours, as he was asleep at his home he was suddenly awakened by the smashing of the door of his shop with a big stone. Then many people entered his house. They told him to keep quiet if he wanted to live longer. Thereafter they demanded money from him. PW1 told the trial court that the bandits then "took cash 100,000/= one Nora radio four band, two weighing scales and two weighing stones and two cartons of soap." Also stolen were imperial and family soap, sweet heart lotion, six packets of salt, two packets of sportsman and embassy cigarettes, two pairs of shoes, weaving thread, nylon bags and 20 litres of cooking oil. They then left. He was very specific that the robbers did not assault him.

PW1 claimed that he only managed to identify the appellants out of the whole lot. His evidence is silent on their approximate number. After the bandits' departure, he reported the incident at Nyakato Police Post and investigations started.

After some time an unidentified man told PW1 that some people have approached him looking for a buyer of a weighing scale. The police were alerted and a trap laid. According to PW1 the trap was successful. The appellants were caught red-handed trying to sell the weighing scale. They then mentioned Stephen Waitara as their accomplice. The appellants were arrested and charged accordingly.

Another piece of incriminating evidence came from PW4. This witness told the trial court that following the arrest of the 1st appellant on 14/01/2001, he recorded his caution statement on 15/01/2001 in which he voluntarily confessed to have committed the robbery together with the 2nd appellant. The 1st appellant told the trial court that it was an involuntary one, because he was forced to sign it after being tortured. The trial magistrate held that it was made voluntarily and admitted it in evidence as Exhibit P3.

The appellants gave sworn evidence in which they denied committing the offence. The 2nd appellant claimed that he was picked up by the police on 13/1/2001 together with 9 other people for being vagabonds. The 1st appellant claimed that he was arrested

on 9/11/2001 as a vagabond, sent to central police station and formally charged on 18/1/2001 with robbery. He insisted that he never signed Exhibit P3 voluntarily. He was tortured and forced to sign it, he claimed. To prove that he was tortured, he tendered in evidence a PF3 issued by Central Police Mwanza dated 18/1/2001, as Exhibit D1.

In convicting the appellants, the learned trial Senior Resident Magistrate found PW1 to be a credible and reliable witness who recognized the appellants at the scene of crime. He relied on the assertion of PW1 that there was light in the room. He went on to hold thus:-

> "There is another corroborative evidence from PW3 D.3455 who searched the house of 1st accused and found the weighing machine, plus a panga (machette) which had blood stains. PW1 had testified that the accused carried a panga".

Exhibit P3 was taken to be another piece of corroborative evidence. In the light of this evidence, he brushed aside the evidence of the appellants which he described as:-

> "… mere kicks of a dying horse so to say".

The learned judge on appeal reasoned in similar vein. In a judgment which was like a summary dismissal order, he dismissed the appellants' appeal.

The issue of identification of the appellants has taxed our minds greatly in this appeal. This is because, it is now settled law that in a case entirely depending on the evidence of a single identifying witness such evidence must be absolutely water tight to justify a conviction. See, for instance, **Yohanis Msigwa v. R** [1990] TLR 148 and **Masudi Amlima v. R.** [1989] TLR 25. The guidelines to be followed by the courts were stated with sufficient lucidity by the court in **Waziri Amani v. R** [1980] TLR 250. The same principle applies even to cases of recognition evidence as in this case. Even recognizing witnesses often make mistakes or deliberately lie. Was

the evidence of PW1 absolutely water tight? We think it was not for the following main reasons.

First, we really doubt if there was any light in the room of PW1, otherwise he would not have failed to say so in his evidence in chief. Assuming for the sake of it that the prosecutor never put that question to him, we are still convinced that the evidence on light was too vague. PW1 merely claimed that there was a lamp in the room. He never went beyond that to explain what type of lamp it was, and the intensity of the light, as the appellants supported by Mr. Kiria, rightly argued.

Different lamps produce light of different intensities. Light from a wick lamp is incomparable to that from a lantern, or a pressure lamp. The evidence of PW1 does not show the size of the room which, going by his evidence, was a bedroom-cum-shop. It is possible that it was reasonably big or even small. Therefore there was an overriding need to describe the intensity of the light which would have enabled PW1 to correctly recognize only the two appellants out of the many invaders. This was not done. It raises a

lot of reasonable doubts on the bare assertion of PW1 that he recognized the appellants.

Second, the feeling that PW1 might not have seen and recognized the appellants is reinforced by the fact that he never mentioned their names to the police when he reported the robbery that very night. Neither himself nor the other prosecution witnesses testified to that effect. That is why it took nearly two weeks to arrest the appellants and even then not on the basis of PW1's report.

These two basic shortcomings render the identification evidence of PW1 highly suspicious and unreliable. It is unfortunate that both the trial court and the High Court on appeal never addressed themselves to these shortcomings. We are convinced that had they done so they would not have so easily taken the evidence of PW1 at its face value.

Was there any corroboration of PW1's evidence? The two courts below found such evidence in Exhibit P3 and the allegations that the appellants were found in possession of a blood stained panga and a weighing scale.

Our own objective evaluation of the entire evidence on record has led us to two inescapable conclusions. **First,** the courts below misapprehended the evidence. It was nowhere alleged that anybody was injured in the course of the robbery. As already indicated in this judgement PW1 unequivocally told the trial court that the robbers never assaulted him. So the panga with stains of blood on it, which blood was not even proved to be human blood, was irrelevant. **Second,** the evidence regarding the recovery of a weighing scale was contrived. We shall offer a brief explanation.

The evidence of PW1 on how the weighing scale was recovered fundamentally conflicts with that of PW2 and PW3. PW2 testified that they first arrested the 2nd appellant through an informer. Thereafter he led them to the home of the 1st appellant who was also arrested. The two together took the investigators to where the weighing scale was. PW2 said:

> "At that place they asked to be given their weighing scale. They were given the weighing scale and we sent them to police station".

However, according to PW3 the weighing scale was recovered from the home of the 2nd appellant before they were led by him to the home of the 1st appellant.

Again, the two courts below never considered at all these fundamentally discrediting contradictions. Had they done so they would not have readily taken PW1, PW2 and PW3 as witnesses of truth. As it is now obvious that the appellants were not in fact found in possession of the weighing scale the doctrine of recent possession was wrongly invoked to implicate the appellants with the robbery.

The caution statement (Exhibit P3) was retracted. It accordingly needed corroboration in the peculiar circumstances of this case. Furthermore, we are convinced that the courts below erred in rejecting the evidence of the 1st appellant to the effect that he was tortured and forced to sign it.

If the evidence of PW2 and PW3 is to be taken for what it is worth, the 1st appellant was arrested without any struggle on 14/01/2001. There is no evidence on record to suggest that he had any bodily injuries on that day. However, the police themselves sent

the 1st appellant, on 18/05/2001, to Sekou Toure Government Hospital Mwanza for medical examination. The PF3 (Exhibit D1) reads:

> *"Mtajwa hapo juu amepigwa, tumemtuma kwako ili umpatie matibabu na kisha tufahamishe kiasi cha majeraha aliyoyapata".*

The 1st appellant was examined and found to have bruises and major wounds on the knees, ankle and back. They were classified as harm caused by a blunt weapon.

The question is: who caused these bodily injuries on the 1st appellant? The appellant claimed that the police were responsible in their bid to extract a forced confession from him. Since the 1st appellant was in police custody from 14th January 2001, going by their own reckoning, his claims cannot be justifiably called "the kicks of a dying horse", given the fact that the PF.3, Exhibit D1 is dated 15/01/2001. As this Court reiterated in **Dotto Ngassa v. R.,** Criminal Appeal No. 6 of 2002, where a retracted confession is established to have been made immediately after the suspect has

been tortured, the courts should be very cautious in admitting such statements in evidence even under s. 29 of the Evidence Act, 1967. The suspect is not a free agent by then. We accordingly doubt the voluntariness of Exhibit P3. It ought to have been excluded.

For the foregoing reasons, we agree with the appellants and Mr. Kiria for the respondent Republic, that the prosecution failed to prove its case against the appellants. The appeal is accordingly allowed in its entirety. The conviction of the appellants and the sentence imposed on them are hereby quashed and set aside. The appellants are to be released forthwith from prison unless they are otherwise lawfully detained.

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

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR