THE COURT OF APPEAL OF TANZANIA AT MWANZA (CORAM: LUBUVA J.A, MROSO, J.A, RUTAKANGWA) CRIMINAL APPEAL NO 95 OF 2005	RASHID SEBA…. APPELLANT VERSUS THE REPUBLIC.. RESPONDENT (Appeal from the judgment of the High Court of Tanzania at Tabora) Mwita J. Criminal Appeal No. 138 of 2003	The principle of identification as stated in Waziri Amani V.R [1980]TLR 250, in which the Court underscored the need for a court to eliminate all possibilities of mistaken identity and ensure that such evidence of identification is water-tight. The principle of cognizance of the defence. Here the Court in reference with section 194(4), (5) and (6) of CPA said that where the Court fails to take cognizance of an *alibi* it amounts to a mistrial and a consequential miscarriage of justice. See Charles Samson VR [1990] TLR 39.

IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

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

CRIMINAL APPEAL NO. 95 OF 2005

RASHID SEBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mwita, J.)

dated the 25th day of February, 2005
in

Criminal Appeal No. 138 of 2003

JUDGMENT OF THE COURT

9 & 16 March 2007

MROSO, J.A.:

The appellant and one Francis s/o Sweke were convicted for robbery with violence contrary to sections 285 and 286 of the Penal Code, Cap. 16 of the Laws by the District Court of Urambo. They were each sentenced to a fifteen year term of imprisonment. Francis Sweke was not in court to receive his sentence because he was at large. The appellant was not satisfied with the conviction and, so, appealed to the High Court. He lost the appeal and resorted to this Court by making a second appeal.

In his appeal to this Court the appellant has filed four substantive grounds of complaint against the decision of the High Court, Mwita, J. But as submitted by Mr. Bulashi, learned State Attorney, those four grounds can be conveniently reduced to three main grounds. These are that there was unsatisfactory evidence of identification, that he had an alibi and that the High Court did not

fully evaluate the evidence which was before the trial court and as a result wrongly dismissed the appellant's appeal to the High Court.

At the hearing of the appeal in this Court the appellant was unrepresented whereas the respondent Republic was represented by Mr. Bulashi, learned State Attorney. Before discussing the grounds of appeal we consider it helpful to give the salient facts which led to the appellant being convicted by the trial court for the offence charged.

On 6th July, 2000, PW2, Clement s/o Mwendogali, a school teacher, was in Urambo town to collect his salary. He slept in a guest house known as Utulivu Guest House. At about 11 p.m. he heard a door being hit by something. Then he heard someone cry and say repeatedly – *"Seba unaniua".* He went outside his room but suddenly a voice ordered him to sit down. He then saw someone he identified as the appellant who has the name Seba. The appellant allegedly told him – *"Kwa usalama wako toa pesa uliyonayo".* He showed the person shillings 10,000/= which was under the bed and the money was taken and the person went away.

When the police soon appeared at the scene a worker at the Guest House mentioned the name of Francis as one of the robbers. The man Francis, apparently the first accused at the trial, was arrested during the same night and found to have a fresh wound on his jaw. The appellant too was arrested on the same night. Later both the appellant and Francis Sweke were prosecuted for having robbed the school teacher and, as already said, were found guilty of robbery with violence and sentenced. Both the trial court and the High Court were satisfied that the appellant was proved to have participated in the robbery. But the appellant has all along protested his innocence. The question, therefore, is whether the appellant was sufficiently identified as the perpetrator of the offence of which he was convicted.

Both the trial court and the High Court were of the view that identification did not cause difficulty. This is because they found that the appellant had been seen during daytime at the guest house premises by PW1 – the guest house watchman. The appellant was then drinking *pombe* with the first accused at the trial. Secondly, the appellant was well known to PW1 and Clement s/o Mwendogali –

PW2. Thirdly, that during the night, just before the theft of PW2's money, PW1 mentioned appellant's name – *"Seba unaniua"*. The fourth reason was that at the time of the alleged robbery there was light from a lamp.

It is not correct, of course, that the appellant was well known to PW2. The witness said he saw the appellant for the first time when allegedly he was drinking *"moshi"* at the guest house premises and learned of his name at that time. Furthermore, it is by no means clear from the evidence of PW2 if it was during day time. It may well have been night time as the following words of PW2 suggest. He said –

> "I was surprised to see this accused person drinking openly that is why I was pulled to ask his name and I was told he is called Seba, there was a lamp light".

There would not be lamp light during daytime.

Considering that the appellant was a stranger to PW2 and it was night time when he saw the person he believed was Seba at night, do the words "there was lamp light" give assurance that there was sufficient light to enable PW2 to identify the person who stole from him to be the appellant? It will be recalled that when the police went to the guest house a waiter who worked there "mentioned" the first accused at the trial. She did not name the appellant. There is a real possibility, therefore, that PW2 may have mistaken someone else for the appellant.

PW1 – Francis Kakwaya – undoubtedly knew the appellant. As a watchman the witness reported for duty at the guest house at 8.15 p.m., which was night time. He saw seven people seven paces away drinking pombe. He said he asked them to leave the guest house premises but they refused. But at about 11 p.m. all except the first accused at the trial had left. PW1 locked himself inside the guest house while the first accused remained outside the door. Subsequently, a heavy object hit the door of the guest house and it gave way. PW1 went outside and to use his own words:-

> "saw the 2nd accused person (appellant) having a torch and putting down the light of the lamp which was at the *sebule*. They lighted torches at me. Then they attacked me … Then I heard the 2nd accused person saying that *'lete upanga huyo mzee mkorofi'.* They cut me with a *panga* on my fore head. I fell down unconscious".

Since PW1 said he went outside the door of the guest house after it gave way from the impact of the heavy object which hit it, it is not clear where the *"sebule"* was located. Was the person who went to put off the lamp light facing the witness or was he walking away from him? Was the lamp light before it was put off strong enough to show the identity of the person who walked to it? We are not told what kind of light it was or how far away the lamp was from the witness. These are not idle questions because as we shall see hereinafter, the appellant put up an alibi which was supported by witnesses he called.

The need for clear evidence of identification in circumstances which are unfavourable for accurate identification cannot be over emphasized. A person can be honest but mistaken. Thus, where light is not good enough a person may honestly believe he saw and identified another person or object who or which in reality was not. In the oft quoted case of **Waziri Amani v. R. [1980] TLR 250** this Court underscored the need for a court to eliminate all possibilities of mistaken identity and ensure that such evidence of identification is water-tight.

In the present case PW1 and PW2 simply said there was lamp light or simply light without any attempt to elaborate on the quality of the light. That will not do and we are of the considered opinion that the evidence of identification was unsatisfactory.

In his defence the appellant said he was not at Utulivu Guest House at the time of the theft. He said that on the day when PW2's money was stolen he returned home drunk at about 9.00 p.m. and did not go out again. His wife, DW2, supported him on that claim. PW3 – Simba Ramadhani, who lived in the same house in which the

appellant was a tenant confirmed that the appellant returned home drunk at about 8.30 p.m. DW4 – Alfred Msengi, said he was drinking pombe with the appellant at Cashman bar from 4.00 p.m. till 8.45 p.m. when he accompanied him on his way home. They parted company at appellant's home. DW4 candidly said he could not know if the appellant went out again during that night.

The High Court treated the issue of appellant's defence of alibi in a summary manner. All it said about it is:-

> "The defence of alibi was not available to the appellant because it was disclosed after the prosecution closed its case. In any case the defence of alibi does not raise doubt about the prosecution's case in view of the correct identification of the appellant at the scene of crime".

But as we have attempted to show, the identification of the person who robbed PW2 might not be correct. It is fraught with unanswered questions.

Section 194 (6) of the Criminal Procedure Act, 1985 does not say that if an accused person raises an alibi without disclosing the intention to do so to the court and to the prosecution, then it will not be considered. The sub-section reads as follows:-

> "(6) If the accused raises a defence of alibi without having first furnished the particulars of the alibi to the court or to the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence."

When considering the proper import of section 194 (4), (5) and (6) of the Criminal Procedure Act, 1985 this Court has said:-

> "… (O)n a proper construction of the provisions of this section … the court is not exempt from the requirement to take into account the defence of alibi, where such a defence has not been disclosed by an accused person before the prosecution closes its case.

> What this section means is that where such a disclosure is not made, the court, though taking cognizance of the defence "may in its discretion, accord no weight of any kind to the defence". Where the court fails to take cognizance of an alibi it amounts to a mistrial and a consequential miscarriage of justice."

See **Charles Samson v. R. [1990] TLR 39.**

So, although in this case the appellant indeed did not disclose that he would rely on a defence of alibi the High Court on appeal was not entitled to ignore it so off-handedly but should have considered whether in view of the unsatisfactory nature of the evidence of identification that was a fit case for the trial court to exercise its discretion to consider the appellant's alibi.

All in all, we think that on the totality of the evidence before the trial court there was real doubt if the appellant was party to the

robbery which took place at about midnight at the Utulivu Guest House, in Urambo township on 6th July, 2000.

We allow the appeal. The appellant is to be set free forthwith unless he is held for some other lawful cause. It is so ordered.

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