Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO 113 of 2007 – COURT OF APPEAL OF TANZANIA AT MBEYA. Coram: LUBUVA J.A, NSEKELA J, AND MBAROUK J.A	**ADOLFU PHILENUS MAPUNDA 3 OTHERS VS THE REPUBLIC** (Appeal from the judgement of the High Court of Tanzania at Songea) – **Criminal Appeal No.14 of 2001** (Manento, J)	The condition for the proper identification of the appellants was favorable for the correct identification, all possibilities of mistaken identity were eliminated as discussed in Waziri Amani Vs Republic [1980] TLR 250

IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: LUBUVA, J.A., NSEKELA, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 113 OF 2007

ADOLFU PHILENUS MAPUNDA & 3 OTHERS .... APPELLANTS
VERSUS
THE REPUBLIC .... RESPONDENT

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

(Manento, J.)

dated the 28th day of July, 2003
in
Criminal Appeal No. 14 of 2001

JUDGMENT OF THE COURT

27 August & 30 November 2007

LUBUVA, JA.:

The appellants together with other four people not subject of this appeal, were charged in Mbinga District Court on three counts with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code. They were convicted and sentenced to thirty (30) years term of imprisonment on each count. The sentences were ordered to run concurrently. Their appeal to the High Court against

conviction and sentence was dismissed (Manento, J. as he then was). Still dissatisfied, the appellants have preferred this appeal.

The case for the prosecution was based on the following facts. On 19/9/1999 at about 12.15 p.m., Henry Mwinuka (PW2), was driving motor vehicle, Landrover make Registration No. TZ 33469, from Mbinga to Songea. Travelling with him were Brighton Mkamba (PW1) and Hilda Mgeni (PW3). On the way, on reaching the Utiri road junction on the Mbinga-Songea road, at Mtama area, PW2 and his colleagues found a man staggering on the road waving a piece of cloth. In order to avoid knocking down the staggering man, PW2 stopped the vehicle. Shortly, the staggering man fired shots in the air after which PW1, PW2 and PW3 were invaded by a group of bandits who rushed out from the bush nearby armed with pangas and clubs.

The bandits ordered PW1, PW2 and PW3 to come out of the motor vehicle leaving behind many articles of value they had. In the course of the robbery, cash money shillings 4,500,000/= was taken from the bag of PW2, - shillings 100,000/= was also taken from PW1 and an assortment of various articles of property belonging to PW1, PW2 and PW3 were also taken.

For their own safety, PW1, and PW3 were the first to run away from the motor vehicle to take cover in a nearby bush from where they saw the bandits ransacking the motor vehicle after PW2 had shown where his bag was. The bandits fled towards the direction of Utiri Village nearby. The matter was reported to the police who mounted investigation leading to the arrest and prosecution of the appellants. The prosecution alleged that the appellants were among the invading bandits.

At the trial, the appellants raised the defence of alibi. They claimed that on the day of the incident, they were away in Mbinga. In that case, the appellants urged that they could not be involved in the alleged robbery at Utiri road junction in Mtama Village. Furthermore, the appellants claimed that they were identified at the identification parade by PW1, PW2 and PW3, the victims of the robbery, who had seen them before when they came with the police to arrest the appellants.

The trial magistrate was satisfied that as the incident took place during broad day time, the appellants were properly identified by PW1, PW2 and PW3. In the circumstances, the appellants were convicted and sentenced.

In this appeal, the appellants were unrepresented. On the other hand, the respondent Republic, was represented by Mr. Malata, learned State Attorney. In their joint memorandum of appeal, the appellants raised one ground of complaint. Essentially, the complaint

of dissatisfaction was that the appellants were not properly identified by PW1, PW2 and PW3. Two reasons were advanced. First, that the appellants were not properly identified by PW1, PW2 and PW3 who did not give detailed description of the appellants when they reported the matter to the police. Second, that the identification of the appellants at the identification parade by PW1, PW2 and PW3 was unreliable because these witnesses had already seen the appellants when they came with the police to arrest the appellants. The appellants also complained that the evidence of PW1, PW2 and PW3 on the identification of the appellants at the identification parade was of little evidential value because proper procedure in conducting the identification parade was not followed. Furthermore, the appellants also alleged that the trial magistrate and the learned judge on first appeal erred in sustaining the conviction of the appellants on the basis of the evidence of PW1, PW2 and PW3 which was characterized with inconsistencies on material aspects.

Mr. Malata, learned State Attorney, for the respondent Republic, did not support the conviction and sentence. He said that although the incident took place during broad day time, still in his view, the circumstances were such that it was unsafe to sustain the conviction against the appellants on such evidence.

First, he said the evidence of PW1, PW2 and PW3 was unreliable because when they reported the incident to the police, they did not give any description of the appellants. He maintained that if in fact they had identified the appellants at the identification parade, there is no plausible explanation why these witnesses did not give the description of the appellants to the police. Failure to do so, the learned State Attorney insisted, was indicative that these witnesses were not reliable. In support of this submission, the State Attorney referred to the decision of the Court in **Raymond Francis V Republic** [1994] TLR 100 and **Africa Mwambogo V Republic** [1084] TLR 240.

With regard to the identification parade, Mr. Malata, sought to fault the trial magistrate and the learned judge on first appeal in relying on the evidence on the identification parade. He submitted that apart from the fact that proper procedure was not followed in conducting the identification parade, the evidence of PW1, PW2 and PW3 on the identification parade was fraught with discrepancies.

The State Attorney further discredited the evidence of PW1 and PW3. He said that as the distance from where they (PW1 and PW3) took cover at the bush watching the appellants ransacking the motor vehicle at the road junction was not specified, it was not certain that PW1 and PW3 reliably saw what was happening at the scene of the alleged incident of crime. That is, it was not clear that at the time of the incident the condition was favourable for the correct identification of the appellants.

The determination of this appeal revolves around one issue, namely whether the appellants were correctly identified at the scene of the robbery. In other words were the conditions at the time favourable for the proper identification of the appellants by PW1, PW2 and PW3. In order to resolve this issue one way or the other, we think it is instructive to recapture briefly the surrounding circumstances in which the incident took place. It is not in dispute that the incident took place in broad day light at about 12.30 p.m. From the evidence of Henry Mwinuka (PW2) who was driving the motor vehicle and the co-passengers, Brighton Mkamba (PW1) and Hilda Mgeni (PW3) it is clear that these witnesses saw and identified the appellants. In their evidence, they vividly described how they saw one of the appellants, namely the 3rd accused at the trial, now the 3rd appellant in this appeal, staggering on the road firing gun shots in the air. These witnesses also saw and identified the 1st, 2nd and 4th appellants coming on to the scene where the motor vehicle had stopped.

Furthermore, it is also in the evidence of PW1, PW2 and PW3 that upon the demand and order of the 3rd appellant, PW2 had his money Shs. 4,500,000/= taken from a bag which was in the motor vehicle and PW3 surrendered her money, shillings 100,000/=. These witnesses (PW1, PW2 and PW3) also saw the appellants taking an assortment of various articles of property from the car where PW2 was still around seeing what the appellants were doing. All this time, we think PW1, PW2 and PW3 had ample time to see and identify the appellants.

Against such setting of the factual situation obtaining at the time, we revert to the basic issue which was raised earlier. That is whether the condition at the time was favourable for the proper identification of the appellants. Mr. Malata, learned State Attorney, was firmly inclined to the view that it was not. With respect, we are unable to agree with him on this point. As said before, the incident took place during broad day light at about 12.30 p.m. when there was no question of poor visibility at the time. From the evidence of

PW1, PW2 and PW3, who were found by the trial court and the High Court on first appeal credible, it is clear that these witnesses saw and witnessed the whole incident from the time the 3rd appellant appeared staggering on the road, firing gun shots in the air, the appearance of the 1st, 2nd and 4th appellants on the scene where the motor vehicle had stopped; the ransacking of the motor vehicle, the demand and snatching of the money and other items of property until the time when the appellants fled.

It is also to be observed that all this process and encounter took considerable time. This is evident from the fact that there was a face to face encounter between the 3rd appellant and PW2 followed by the demand for money, the snatching of money and various articles of property from PW1, PW2 and PW3 and the ransacking of the motor vehicle before the appellants ran away.

There is also another aspect of the evidence. After PW1 and PW3 were ordered to get out of the motor vehicle they took cover in a bush nearby. From there, they were also able to see the appellants ransacking the car at the road side.

From such evidence, we are settled in our minds that the condition for the proper identification of the appellants was favourable for the correct identification of the appellants. We are live to the decision of this Court in **Waziri Amani V Republic** [1980] TLR 250 in which the Court laid down, the often cited guiding principles on visual identification. The Court *inter alia* stated:-

> "Evidence of visual identification is of the weakest kind and most unreliable.
> ... no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight."

In this case, having regard to the fact that the incident took place during broad day time, and that PW1, PW2 and PW3 had ample opportunity of seeing and identifying the appellants, all possibilities of mistaken identity were eliminated. The evidence of visual identification was watertight. The case of **Raymond Francis** (supra) to which the Court was referred is, in our view, easily distinguishable. While in **Raymond Franci's** (supra) the robbery took place in darkness at night time, in this case, the incident took place during broad day light. In this case, unlike the situation in **Raymond Francis,** the question of poor visibility does not arise.

Therefore, in that situation, there is marked difference between the situation in which witnesses who have seen the accused person for the first under favourable condition as is the case here and the situation in **Raymond Francis** under unfavourable condition. In the circumstances of the case in **Raymond Francis,** it was necessary for the witnesses to give description of the accused but in this case we do not think that it was necessary.

The appellants had also raised complaint of dissatisfaction regarding the evidence based on the identification parade. We hardly need to be delayed in this aspect. As already indicated, the circumstances of this case were such that we do not think that it was necessary to conduct the identification parade. This is because, the visual identification evidence on the appellants was sufficient to establish the correct identification of the appellants to the exclusion of any possibility of mistaken identity.

It is common knowledge that once sufficient and credible visual evidence is established against an accused person, a conviction could be sustained on such evidence without the need for conducting an identification parade. It is question of fact based on the credibility of the witnesses. In this case, it is our view that the identification parade could safely be discounted without affecting the outcome of the case. PW1, PW2 and PW3 were found credible witnesses.

However, that notwithstanding, we are satisfied that the identification parade was conducted in terms of the proper procedure. Consequently, as the identification parade was conducted by following the proper procedure, we find no merit in the complaint that the proper procedure was not followed in conducting the identification parade. On the other hand, even if the complaint is accepted for whatever it is worth, the evidence on the identification parade could be excluded without affecting the outcome of the case. There would still be other evidence, sufficient to sustain the conviction.

Consequently, on the whole evidence and circumstances of the case, we are with respect, not in agreement with Mr. Malata, learned State Attorney, that the case had not been proved against the appellants. On the contrary, we agree with the trial magistrate and the learned judge on first appeal that the evidence of visual identification left no doubt as to the correct identification of the appellants as the ones who were involved in the robbery. The

evidence being watertight, the conviction against the appellants was justified.

Accordingly, the appeal is dismissed in its entirety.

DATED at DAR ES SALAAM this 13th day of September, 2007.

D.Z. LUBUVA
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

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

(F.L.K. WAMBALI)
REGISTRAR