Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO 139 of 2007 – COURT OF APPEAL OF TANZANIA DAR ES SALAAM Coram:MSOFFE,J.A, MBAROUK J.A AND ORIYO J.A	**JACKSON KIHILI LUHINDA AND MUSSA ABDALA MADEBE VS THE REPUBLIC-** (Appeal from the decision of the High Court of Tanzania at Dar es Salaam – **Criminal Appeal no. 53 of 2006** Mihayo,J	It is not in every situation that description in detail of the identity of the accused is necessary -in Raymond Francis Vs Republic (1994) TLR 100. Also in Hassan Juma kanenyera and others Vs Republic (1992) TLR 106 quoting Sarkar, Law of Evidence, and 13th edition persons put on the parade to be identified are known to the persons who are to make the Identifications.

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE,J.A.,MBAROUK,J.A.And ORIYO,J.A.)

CRIMINAL APPEAL NO. 139 OF 2007

1. JACKSON KIHILI LUHINDA
2. MUSSA ABDALLAH MADEBE } **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mihayo, J.)

Dated the 23rd day of November, 2006
in
Criminal Appeal No. 53 OF 2006

JUDGMENT OF THE COURT

19th May, & 3rd June 2009

MSOFFE, J. A.:

This is a second appeal. As correctly submitted by Mr. Timon Vitalis, learned State Attorney for the respondent Republic, under **Section 6(7) (a)** of the **Appellate Jurisdiction Act, 1979** an intended appellant may appeal on a point of law (not including severity of sentence) but not on a matter of fact. According to case law, it is now well settled that in a second appeal the Court may

reverse findings of fact made by the courts below if they are on the face of it perverse or unreasonable. This may occur where there have been misdirections or non-directions on the evidence, a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice - See **DPP v Jaffari Mfaume Kawawa v R** (1981) TLR 149 at 153 and **Daniel Nguru and Others v Republic,** C.A.T. Criminal Appeal No. 178 of 2004 (unreported). It is common ground that in the instant case the decisions of the courts below were based mainly on matters of fact. The question is whether there is basis for us to interfere with the concurrent findings of fact by the courts below.

The District Court of Kibaha (Bampikya, RM) found the appellants JACKSON KIHILI LUHINDA and MUSSA ABDALLAH MADEBE guilty of Armed Robbery contrary to sections 285 and 286 of the Penal Code. It accordingly convicted and sentenced them to thirty years imprisonment. Aggrieved, they appealed to the High Court of Tanzania at Dar es Salaam (Mihayo, J.). They were unsuccessful, hence this second appeal.

In their respective memoranda of appeal the appellants have raised a number of points. In a nutshell, however, they centre on one major ground of complaint. That the case against them was not proved beyond reasonable doubt. In particular, they are of the view that the available evidence of identification was insufficient to ground the conviction. At the hearing of the appeal, they submitted at great length on this aspect of the case and urged us to rule in their favour and accordingly allow the appeal. On the other hand, Mr. Vitalis was of the firm and strong view that there was enough evidence of identification in the case, and that there is nothing to fault the concurrent findings of fact by the courts below.

At this juncture, we think, it is pertinent to give a brief background of the case against the appellants.

It is common ground that PW3 Emily Reuben owned a motor vehicle Reg. No. ARV 759 Toyota Corolla. He employed PW2 Cosmas Joseph @ Samaki to operate, or drive, it in his taxi business. PW2 was employed in that capacity and business since November 2002. He used to park the vehicle at Mwenge Bus Station. PW2 testified and stated further that he knew the first appellant by his other name

SUMA. At the material time he used to see him frying and selling chips at the bus station. As for the second appellant he knew him by his facial appearance only.

On 13/2/2004 PW2 parked the vehicle at the bus station as usual. At around 4.30 p.m. the appellants approached and hired him to Kawe. On the way the first appellant asked him how much it would cost him to travel to Bagamoyo to pick up his sick sister to Muhimbili Hospital and PW2 quoted a figure of shs. 30,000/=. After the talk the two agreed to meet on the following day as the first appellant said he did not have that sum of money on that day. PW2 gave the first appellant his cell phone number – 0744 343320.

As to what happened thereafter the judgment of the High Court is so clear that let it speak for itself thus:-

> *On 14/2/2004 at 3.00 p.m the 1st appellant indeed called PW2 asking him to start their journey to Bagamoyo at 06.00 pm. At that time, PW2 had one of his regular passengers in the car, one Farida Bugozi Mekindo (PW 4). So, PW2 and the 1st appellant agreed*

to meet at Kawe junction at 6.00 am (sic) and indeed PW2 met the 1st and 2nd appellant at the Kawe junction at 6.00 took them in his car, dropped PW4 at Mbezi and proceeded to Bagamoyo. At Tegeta on request from 1st appellant, PW 2 stopped and picked a lady who had covered herself with khangas. On reaching Bagamoyo, the 1st appellant asked PW2 to fill the radiator of the car with more water as they would go beyond Bagamoyo. PW2 started filling his radiator with water and at that time the 1st appellant came and hit PW2 with something the latter did not see causing him (PW2) lose consciousness. When he came out, he found himself in the bush, his car and personal properties including his Nokia cell – phone missing. He was assisted by good Samaritans to the police station.

PW3 was informed by E.6111 Cpl Robert (PW6) of what had happened to his driver (PW2) so he went to Bagamoyo and took PW2 to Muhimbili hospital for management. On 16/2/2004 PW3 was informed his vehicle had been recovered. He went to Bagamoyo

and identified it. The suspects had by then been apprehended. The suspects informed the police that the spare tire had been sold to one Sudi Iddi Mohamed, who was the 4th accused at the trial.

As was the case in the lower courts, the appellants complained to us generally of lack of evidence of identification in the case against them. The second appellant further complained of the lack of evidence of description and an identification parade.

As correctly observed by the High Court, the prosecution case against the appellants fell or stood on the issue of identification. The lower courts addressed this crucial issue citing the famous case of **Waziri Amani v R** (1980) TLR 250 on evidence of visual identification. In the end, the learned judge on first appeal reasoned:-

In the present case PW4 stayed with the two appellants for sometime. She had time to identify them properly. PW2 knew the 1st appellant and stayed with both appellants for a very long time up to Bagamoyo. He, (PW2) was under no threat for he

thought he had genuine customers. I would agree with the learned State Attorney that conditions favoured proper identification and the appellants were properly identified by PW2 and PW4. In fact PW4 was very clear in her evidence that she sat with the 2nd appellant in the back seat while the 1st appellant sat in the front seat.

With respect, we are in agreement with the judge on the above reasoning. We will only add, by way of emphasis, that PW2 knew the first appellant since 2002 when he used to see him in his chips business at Mwenge Bus Station. In similar vein, he knew the second appellant by face for a long time. On 13/2/2004 the appellants hired him from Mwenge to Kawe. On 14/2/2004 from around 6.00 p.m to 7.45 p.m. PW2 was with the appellants all along from Mwenge to Bagamoyo. In our view, this was more than adequate time for him to identify the appellants properly. Indeed, his identification of the appellants was made much easier in view of the fact that he knew them quite well before the date of incident, as already stated.

On the second appellant's complaint that no evidence of description was forthcoming in the case we wish to associate ourselves with our observation in the case of **Juma Shabani @ Juma v Republic,** Criminal Appeal No. 168 of 2004 (unreported) that:-

> *... It is common knowledge that details of the identification of an accused person are required particularly where the witnesses did not know the accused before the incident. In the instant case, the evidence of PW1, PW2 and PW3 is to the effect that they knew the appellant before the incident. They were not seeing the appellant for the first time during the incident. In that light and as this Court held in* ***Raymond Francis v Republic*** *(1994) TLR 100, it is not in every situation that description in detail of the identity of the accused is necessary. Where the accused, as in this case the appellant, was known to the witnesses before the incident such details of the description of the identification of the appellant could well be missing without necessarily affecting the*

essence of the evidence of the witnesses on identification...

With respect, the above reasoning equally applies in this case. PW2 knew the second appellant before the date of incident. He travelled in the taxi with both appellants on 13/2/2004 and 14/2/2004. Furthermore, PW4 was very clear that on 14/2/2004 the second appellant wore a *khaki* jeans trouser; and that she sat with him on the back seat of the taxi as they travelled from the Mbezi/Kawe Road junction (where PW2 picked the appellants) to Mbezi Beach where she disembarked. Surely, in the light of all this evidence there was no need for further evidence describing the physical outlook of the second appellant.

As for an identification parade, we are of the considered view that there was no need for conducting one. The available evidence of visual identification was sufficient in the circumstances of the case. Indeed, as was observed by this Court in **Hassan Juma Kanenyera and Others v Republic** (1992) TLR 106 quoting SARKAR,LAW OF EVIDENCE, 13th Edition at page 99:-

An identification parade is useless if the persons put on the parade to be identified are known to the person who is to make the identification.

In this case, PW2 knew the second appellant for a long time. PW4 identified the second appellant adequately as they sat and travelled together in the taxi on 14/2/2004. So, there was no need for an identification parade in the circumstances of this case.

We are aware that in one of his grounds of appeal the first appellant questioned the admission in evidence of the appellants' cautioned statements. The trial Resident Magistrate acted on them in grounding the conviction. The judge on first appeal said nothing about them. Since Mr. Vitalis has readily conceded that they were wrongly admitted in evidence we propose to say nothing more on the statements. It will suffice to say that even without the statements the available evidence established the appellants' guilt beyond reasonable doubt.

In our objective evaluation of the entire evidence on record we are of the view that the appellants were rightly convicted as charged.

In fact, we wish to observe here that this is a case in which we could have easily invoked or exercised our jurisdiction under **Section (4) (4)** of the **Appellate Jurisdiction Act, 1979** as amended by the **Appellate Jurisdiction (Amendment) Act No. 17 of 1993,** and summarily reject the appeal.

The appeal has no merit. We dismiss it in its entirety.

DATED at DAR ES SALAAM this 29th day of May, 2009.

J.H. MSOFFE
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APEAL

I certify that this is a true copy of the original

P.B. KHADAY
DEPUTY REGISTRAR