Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO 145 of 2007 – Court of Appeal of Tanzania at Dar es Salaam. Coram: MSOFFE J.A, MBAROUK J.A AND ORIYO J.A	**AMBROSE SEVERIN LEKULE @ CHINA AND RAMADHANI KAMBI @ MADHEHEBU LUKINGA** _ (Appeal from the decision of the High Court at Dar es Salaam) – **Criminal Appeal No.116 of 2004** Mandia, J	Proper identification of an accused person is crucial in proving a criminal charge. This is important in order to ensure that any possibility of mistaken identity is eliminated. See Waziri Amani Vs Republic [1980] TLR 250 set out guiding principles in considering favourable conditions for identifying an accused person. Also Shamir John Vs Republic, Criminal Appeal No 166 of 2004.

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. 145 OF 2007

1. AMBROSE SEVERIN LEKULE @ CHINA
2. RAMADHANI KAMBI @ MADHEHEBU LUKINGA } **.....APPELLANTS**

VERSUS

THE REPUBLIC .....RESPONDENT

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

(Mandia, J.)

Dated 17th day of July, 2005
in
Criminal Appeal No. 116 of 2004

JUDGMENT OF THE COURT

22nd May, & 4th June,2009

MSOFFE, J. A.:

The notice of appeal lodged on 24/7/2006 indicated that there were two appellants, AMBROSE SEVERIN LEKULE @ CHINA and RAMADHANI KAMBI LUKINGA @ MADHEHEBU. It was, however, thumbprinted by the former only. This in effect meant that the so

called second appellant was not appealing because there was no notice of appeal lodged by him instituting an appeal under **Rule 61 (1)** of the **Tanzania Court of Appeal Rules, 1979**. At the hearing of the appeal it transpired that the said RAMADHANI KAMBI LUKINGA @ MADHEHEBU died on 11/7/2007. So, since he did not institute an appeal we could not make an order under **Rule 71 (1)** for abatement of an appeal. We ordered that his name be struck off from the Court Register. Henceforth, we shall hereinafter refer to AMBROSE SEVERIN LEKULE @ CHINA as the appellant.

The District Court of Temeke found the appellant and RAMADHANI KAMBI LUKINGA @ MADHEHEBU guilty of Armed Robbery contrary to sections 285 and 286 of the Penal Code. It convicted and sentenced them to thirty years imprisonment. Aggrieved, they unsuccessfully appealed to the High Court of Tanzania at Dar es Salaam. Still aggrieved, the appellant has lodged this second appeal. He appeared in person. Ms. Evelyne Makala, learned State Attorney for the respondent Republic, appeared and submitted in support of the appeal. With respect, we wish to say

from the outset that Ms. Evelyne Makala was justified in not supporting the conviction for reasons which will emerge hereunder.

The evidence adduced at the trial showed that on 28/6/2002 at 6.45 p.m. PW1 Amiri Ramji and PW2 Salum Seif closed their shop along Azikiwe Street, Dar es Salaam City Centre, and left for their home at Temeke. They carried with them a sum shs. 4,000,000/= and 120 mobile phone handsets of *Trium* make. At 7.40 p.m., at Mtoni area, the vehicle in which they were travelling in was blocked by another vehicle with Reg. No TZN 4240. The two people in the vehicle Reg. No.TZN 4240, who were identified to be the appellant and RAMADHANI KAMBI LUKINGA @ MADHEHEBU , alighted from the vehicle, each carrying a pistol, and confronted PW1 and PW2. In the ensuing encounter PW1 and PW2 were robbed of shs. 4,000,000/= and the mobile phone handsets.

In his defence the appellant denied knowledge of the alleged robbery. He raised the defence of *alibi*, and was supported that much by DW3 Fletcher Genesi @ Meela, that on 28/6/2002 he left

Temeke and went to Vikindu with the appellant and that they stayed there until 8/7/2002.

In the memorandum of appeal the appellant has canvassed a number of points. The said points, however, crystallize or hinge on one major ground of complaint. That the available evidence of identification did not establish the prosecution case against him beyond reasonable doubt. In this respect, his basic assertion, as reflected in the first ground of appeal, is that this was a case in which an identification parade was necessary in determining whether or not PW1 and PW2 actually identified him on the fateful day and time. In her brief, but very powerful, submission before us Ms. Evelyne Makala agreed with the appellant that much.

Admittedly the determination of the case depended on identification. The prosecution case was to stand or fall on this important aspect. The courts below were alive to this important point. In the end, both were satisfied that there were favourable

conditions for a correct identification. In this respect, the judge on first appeal stated:-

> *The time taken, the fact that robbers did not attempt to hide their identities, the slow and deliberate way the robbery was done afforded ample chance for the victims of the robbery to memorize the identities of the robbers.*

This is a second appeal where we derive our jurisdiction from **Section 6(7) (a)** of the **Appellate Jurisdiction Act, 1979.** Under this provision the Court has jurisdiction to deal with matters of law (except severity of sentence) but not matters of fact. Case law has, however, established that in a second appeal the Court may interfere with findings of fact when it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice - See **Daniel Nguru and Others v Republic,** Criminal Appeal No. 178 of 2004 (unreported) in which this Court cited a number of authorities on this

point, notably **Dr. Pandya v R** (1957) EA 336**, Amratlal D.M. t/a Zanzibar Silk Stores v A.H. Jariwala t/a Zanzibar Hotel** (1980) T.L.R 31 and **D.P.P v Norbert Mbunda,** Criminal Appeal No. 108 of 2004 (unreported).

The crucial issue in the appeal is whether there is basis for us to interfere with the concurrent findings of fact by the courts below. As already intimated, our considered opinion is in the affirmative.

In a case, such as this one, proper identification of an accused person is crucial in proving a criminal charge. This is important in order to ensure that any possibility of mistaken identity is eliminated. For this reason, the Court in the often cited case of **Waziri Amani v Republic** (1980) TLR 250 set out guiding principles in considering favourable conditions for identifying an accused person. The court said:-

> *Although no hard and fast rules can be laid down as to the manner a trial judge should determine*

questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would for example, expect to find on record questions as the following posed and resolved by him; the time the witness had the accused under observation, the distance at which he observed him; the conditions in which such observations occurred, for instance, ***whether it was day or night time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not.*** *These matters are but a few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity.*

(Emphasis supplied).

It is common ground that the incident took place at 7.40 p.m. Although no positive evidence came from PW1 and PW2 as to whether or not it was already dark by then, we are of the considered opinion that it must have been dark by that time. If so, one would have expected more evidence from PW1 and PW2 as to whether or not the place was well lit to allow for correct identification. We appreciate that, when cross – examined, these witnesses said that there were electric lights. But they did not say whether the electric lights came from nearby houses, street lights, fluorescent tube lights, bulbs etc. Neither did the witnesses say whether the lights were bright enough to enable them to identify the appellant correctly! Furthermore, PW1 stated in cross-examination by the appellant that he had never seen or met him before the date of incident. And PW2 did not say whether or not he had seen or known the appellant before that day.

In the light of the observations we have endeavoured to give above, we are in agreement with the appellant and Ms. Evelyne Makala that this was a case in which an identification parade was

necessary. The police ought to have invoked **Police General Order No. 232** and conduct an identification parade in order to ascertain whether PW1 and PW2 recognized the appellant. As happened, an identification parade was conducted in respect of RAMADHANI KAMBI LUKINGA @ MADHEHEBU only. As already conceded by Ms. Evelyne Makala, an identification parade in respect of the appellant was also necessary in the case. In the absence of evidence of an identification parade it cannot be safely said and concluded that the case against the appellant was proved beyond reasonable doubt.

In our conclusion on the aspect of identification we wish to reiterate the caution we gave in the case of **Shamir John v Republic**, Criminal Appeal No. 166 of 2004 (unreported) thus:-

> *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 judgment, whenever the case against*

an accused depends wholly or substantially on the correctness of one or more of 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.

There was yet another aspect of the case which we think we should mention here. RAMADHANI KAMBI LUKINGA @ MADHEHEBU recorded a cautioned statement before PW5 D2966 Sergeant Adam. The statement was later produced and admitted in evidence at the trial. In the statement RAMADHANI KAMBI LUKINGA @ MADHEHEBU did not implicate the appellant. Assuming he had, there is no evidence in the case which could have corroborated his testimony in

terms of **Section 33 (2)** of the Evidence Act (CAP 6 R.E. 2002) to ground a conviction against the appellant.

All said and done, we allow the appeal quash the conviction and set aside the sentence. The appellant is to be released forthwith from prison unless he is otherwise lawfully held therein.

DATED at DAR ES SALAAM this 28th day of May, 2009.

J.H. MSOFFE
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEL

K.K. ORIYO
JUSTICE OF APPEAL

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

P.B. Kihaday
DEPUTY REGISTRAR