Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO.16 OF 2007 – COURT OF APPEAL OF TANZANIA AT ARUSHA. Coram: RAMADHANI C.J. BWANA J.A AND MJASIRI, J.A	**MATHEW STEPHEN@LAWRENCE VS THE REPUBLIC** (Appeal from the judgment of the High Court of Tanzania at Arusha – **Criminal Appeal No.75 of 2002** (Sheikh, J)	Visual Identification. Waziri Amani Vs Republic (1980) TLR. A case involving evidence of visual identification,no Court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely water tight….." Also in Raymond Francis Vs Republic [1994] TLR 100, Musa Abdallah Vs Republic, Criminal Appeal No.36 of 2005 (unreported): Rizali Rajabu Vs Republic, Criminal Appeal No.110 of 2006 (unreported) Maselo Mwita and another Vs Republic, Criminal Appeal No.63 of 2005 (unreported; Aidan Mwalulenga Vs Republic, Criminal Appeal No.207 of 2006 (unreported)

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RAMADHANI, C.J., BWANA, J.A., and MJASIRI, J.A.)

CRIMINAL APPEAL NO. 16 OF 2007

MATHEW STEPHEN @ LAWRENCE ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Arusha)

(Sheikh, J.)

dated the 3rd day of February, 2005
in
Criminal Appeal No. 75 of 2002

JUDGMENT OF THE COURT

16 & 29 May 2009

BWANA, J.A.:

Mathew Stephen @ Lawrence was charged with two counts of Armed Robbery contrary to Sections 285 and 286 of the Penal Code. He was convicted on both counts and sentenced to serve two prison terms of thirty years, to run concurrently. His first appeal before the High Court was unsuccessful, hence this second appeal.

It was the prosecution case that on 27 June 1998 at about 19.15 hrs, at Njiro area of Arusha, the appellant stole one motor

vehicle, a Peugeot 504 by make, Registration No. MB 5303 valued at Shs. 2.5 m/= and that immediately before such stealing, he did use firearm in order to obtain the said motor vehicle. That was count one.

In so far as the second count is concerned, it was the prosecution's further allegation that on the same day at about 20.45 hrs at Manji's BP Petrol Station, Sokoine Road Arusha town, after stealing the Peugeot motor vehicle referred to above, the appellant did steal cash money, Shs. 3,000,000/=, from one Mgaza Amani, the property of the said Manji's BP Petrol Station and immediately before such stealing, did use firearm in order to obtain the said cash money.

The facts of the case show that on the material day and time, the appellant hired the Peugeot vehicle operating as a taxi. The taxi driver one Stephen Laurent, PW1 – had parked his vehicle at the Central Market taxi stand of Arusha. The appellant hired him to take him to Njiro area of Arusha. At Njiro the appellant got off the taxi but asked PW1 to wait for him. After a while, the appellant came

back in the company of four other armed people. They roughed up PW1 and forced drugs into his mouth after forcing him onto the back seat of the vehicle. Later they threw him at a maize farm in Njiro area.

Meanwhile Mgaza Amani – PW2 – a pump attendant at the Manji's BP Petrol Station, was on duty that evening. It is his testimony that on that day at about 8.45 p.m., people in a Peugeot 504 Saloon with Registration No. MB 5303 drove in to buy fuel. While attending the car, the occupants of the said car came out, slapped him. He fell down. Then they ordered him to give them all the money. That he did, in order to save his life. After collecting the money they left. The petrol station had full lights on.

According to D/Sgt. Mussa – PW1 – who investigated the matter, the Peugeot vehicle was subsequently found abandoned at Ilboru area, deserted. Upon searching it, an identity card (ID) belonging to the appellant was found. It had been issued to him on

15 June 1998. The recovery of the ID eventually led to the arrest of the appellant.

In his defence, the appellant told the trial court that at that particular time, he was in Tanga, not Arusha. As to the ID found in the stolen vehicle, it was the appellant's averment that the ID had been stolen and that he had reported the matter to both his Ten Cell Leader and to the police. Copies of both the ID and the report to the police were tendered as defence exhibits. Likewise a letter by the said Ten Cell Leader addressed to the Arusha Municipal Council and informing that the appellant had lost his ID and that he should be given another, was tendered.

We would like to note here that Mr. Kaishozi, State Attorney tried to impress upon us that the ID which had been recovered from the Peugeot vehicle had indeed been reported lost, some days earlier. We were therefore, asked to hold that the ID may have been used by another person, other than the appellant. Based on that argument, he did not support the conviction. Instead he supported

the appellant's argument as raised in his supplementary memorandum of appeal.

Both the appellant and Mr. Kaishozi for the Republic missed one crucial point – the dates on those documents. It is true that the Ten Cell leader wrote his letter to the Municipal Council on 11 June 1998. It is also correct that the appellant reported the loss of the ID to the police on 12 June 1998 vide AR/RB/6714/98. On the same date he filled in "Fomu ya Kuomba Kitambulisho cha Mkazi" at the Municipal Council (Exh. P2). He was given a new ID with number 0282697, on 15 June 1998. However, the ID recovered from the stolen Peugeot vehicle on the day of that robbery, i.e. on 27 June 1998, bore the number 0282697 (Exh. P1). It means, therefore, that the ID found in the stolen vehicle, bearing the appellant's photo and dated 15 June 1998 did belong to the appellant. He had a new ID by the time the alleged robbery took place. On this point, we decline to agree with both the appellant and Mr. Kaishozi that at the time of the commission of the alleged robbery, the appellant had no ID. He had one, validly issued by the relevant Municipal authority. There was

also the submission that the same ID was found in another vehicle involved in a Bureau de Change robbery. We do note that the two offences took place a few days after each other.

On the defence of alibi, both the trial court and the first appellate court rejected it. They did so not only because the appellant had failed to comply with the provisions of section 194 of the Criminal Procedure Act (the CPA) 1985, but also because there were other irregularities established. Those irregularities included, *inter alia,* different names of the passenger on the tickets used to travel between Arusha and Tanga. The trial magistrate who examined the said tickets, came to the conclusion that they were not valid. The first appellate court did observe that it is "obviously a palpable lie which the accused had advanced for the sole purpose of deceiving the court". We have no reason to differ with the findings of those two courts on this subject of alibi.

We are now left with the issue as to whether the appellant was adequately identified by PW1 and PW2. PW1's contact with the

appellant was around 7.15 p.m., hence darkness had fallen. But this PW is adamant that it is the appellant who hired him. Before starting off their trip towards Njiro, PW1 avers that the appellant approached him at the Central Market Taxi Stand. Obviously they negotiated the fare and the like. We are satisfied and do hold the view that such negotiations and early contacts between a taxi driver and a would be customer cum passenger, brought the two together, at least to have visual knowledge of each other.

Again, it is PW1's averment that the two drove together all the way to Njiro. They had to stop at a petrol station to refuel. Whether during this time the appellant was seated at the back seat of the taxi or in the front passenger seat, we are of the view that PW1 had ample time to visually identify the appellant. The issue of positive identification at night hours has been, in our view, well considered by this Court. We will revert to it shortly.

PW2's evidence is uncontroverted when it comes to the issue of visual identification. He had gone to the petrol pump to attend to

customers in a Peugeot saloon car. The appellant disembarked from the car and slapped him, forcing him to lay down and surrender all the money he had. The whole area of the petrol station was lit, leaving no darkness that could be seen as preventing identification.

In the much celebrated case of **Waziri Amani vs Republic** (1980) TLR this Court stated:-

> "---in a case involving evidence of visual identification, no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight ---"

That cardinal principle of the law is reflected in many other decisions of this Court, including **Raymond Francis vs Republic** (1994) TLR 100; **Musa Abdallah vs Republic,** Criminal Appeal No. 36 of 2005 (unreported); **Rizali Rajabu vs Republic,** Criminal Appeal No. 110 of 2006 (unreported); **Maselo Mwita and Another vs Republic,** Criminal Appeal No. 63 of 2005 (unreported); **Aidan Mwalulenga**

vs Republic, Criminal Appeal No. 207 of 2006 (unreported); **Shamir John vs Republic,** Criminal Appeal 166 of 2004 (unreported); **Stuart Yakobo vs Republic,** Criminal Appeal No. 202 of 2004; and **Baldwin Komba vs Republic,** Criminal Appeal No. 56 of 2003 (unreported).

In the above cases, this Court did insist on the need for watertight evidence, to exclude all possibilities of mistaken identity. The Court has therefore to consider the following. **First,** the period under which the accused was under observation by the witness. **Second,** the distance separating the two during the said observation. **Third,** if it is at night, whether there was sufficient light; **Fourth,** whether the witness has seen the accused before and if so, when and how often. **Fifth,** in the course of examining the accused, did the witness face any obstruction which might interrupt his concentration. **Sixth,** the whole evidence before the court considered, were there any material impediments or discrepancies affecting the correct identification of the accused by the witness.

The evidence of both PW1 and PW2 leave no doubts that the appellant was positively and visually identified so as to leave to doubts. There was ample opportunity for the two to identify him. And where such ample opportunity does exist then, as was stated in the case of **Kichele Mrange vs Republic** (1983) TLR 158; an identification parade can be dispensed with. There was no mistaken identity. The evidence of both PW1 and 2 is watertight. It leaves no doubt that the appellant is the person who committed the two armed robberies with which he was charged, convicted and sentenced to two concurrent terms of thirty years imprisonment. We do not see the reason to disturb those findings. Therefore this appeal is dismissed in its entirety.

DATED at ARUSHA this 29th day of May, 2009.

A.S.L. RAMADHANI
CHIEF JUSTICE

S.J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(S.S. MWANGESI)
SENIOR DEPUTY REGISTRAR