Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL No.201 of 2007 – COURT OF APPEAL OF TANZANIA AT DODOMA. Coram: RUTAKANGWA J.A, KIMARO J.A AND MBAROUK J.A	**GEORGE MSINGISA VS THE REPUBLIC** (Appeal from the decision of the High Court of Tanzania at Dodoma) **Criminal Appeal No.101 of 2006**. (Masanche,J)	Identification evidence should be free of doubt in order to ground a conviction on it.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A. And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 201 OF 2007

GEORGE MSINGISA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dodoma)

(Masanche, J.)

dated the 9th day of May, 2007
in
Criminal Appeal No. 101 of 2006

JUDGMENT OF THE COURT

4 & 5 December, 2008

RUTAKANGWA, J.A.:

One day in December, 1992 at about 19.00 hours, Jonas s/o Lyelu (PW1) was heading back home at Pwaga Village within Mpwapwa District. He was in company with Amon Mnandi (PW2). Each one was riding his own bicycle.

As one approaches Pwaga Village, there is a hill with bushes on both sides. When the pair reached this place, they got off their bicycles and began to push them. All of a sudden, they heard a voice

emanating from the bushes ordering them to stop. Within a split of second, one person emerged from the bush pointing a gun at PW1. PW1 and PW2 took to their heels. Before PW1 had gone far, he was fired at and sustained injuries on the left thumb. He abandoned his bicycle and sought safety in the bushes. From the safety of his hiding, he saw his bicycle being taken by the bandit. Having lost his bicycle he walked to Pwaga dispensary for treatment, where he was later joined by PW2 who had managed to escape unhurt. The incident was reported to the village authorities and the police. Both witnesses said that the appellant was the armed bandit. The appellant was arrested.

Following his arrest the appellant was charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 R. E. 2002. Although he denied the charge, after a full trial, on being satisfied that PW1 was robbed at gun point of his bicycle by the appellant, the trial District court found him guilty as charged and convicted him. He was sentenced to term of

imprisonment of thirty (30) years. He was also ordered to pay to PW1 the value of his stolen bicycle.

The appellant was aggrieved by the decision of the trial court. He appealed to the High Court. The High Court, sitting at Dodoma, after an evaluation of the only prosecution evidence on record, as the appellant had opted not to testify or call any witness, upheld the conviction of the appellant. It accordingly dismissed the appeal in its entirety. Still believing that he is innocent, he has lodged this appeal.

In his nine-point memorandum of appeal, the appellant has raised a number of complaints, some of which are overlapping. For most of the grounds of complaint he backed them up with decided cases, which, all things being equal, were relevant to such grounds of complaint. Essentially, the nub of the appellant's grievances is that his conviction was unwarranted for these reasons.

Firstly, PW1 and PW2 contradicted each other on the date when the offence was committed. Secondly, he was not adequately identified as the robber for the crime was committed at night (i.e at 7.00 pm)

and the conviction was based on mere suspicions. Thirdly, as no identification parade was held, it was wrong for the two courts below to have held that the two identifying witnesses had unmistakenly identified him as the robber. Fourthly, no PF3 was tendered in evidence to prove that PW1 was actually injured. Fifthly, neither the doctor who treated PW1 nor the police officer who took the statements of PW1 and PW2 gave evidence. Lastly, the voice identification was not cogent enough to sustain a conviction for robbery.

The appellant appeared in person to argue his appeal. He only adopted his grounds of appeal. The respondent Republic was represented by Mr. Anselm Mwampoma, learned Principal State Attorney, who did not oppose the appeal.

Mr. Mwampoma's position not to support the conviction of the appellant was predicated on what he described to be very weak identification evidence. He was of the view that since the alleged robbery took place in the month of December at 7.00 p.m., it was

likely as the appellant contended in his memorandum of appeal, that it was already dark and the possibility of the identifying witnesses making a mistake in their purported identification cannot be ruled out. To Mr. Mwampoma, the possibility of a mistaken identity is further heightened by their evidence to the effect that the armed bandit came from behind them and PW1 never mentioned the distance between him and the bandit. There is also a mix up regarding the date when the robbery was committed, he pointed out. While the charge sheet shows that it was committed on 24th December, 1992 and the evidence of PW2 is to that effect, PW1 testified that it was on 20th December, 1992. For these reasons, he urged us to allow the appeal in its entirety.

In our discussion, we have found it in order to start with the last ground of complaint listed above, that is voice identification. There is no doubt that voice identification is one of the recognized modes of identifying a suspect. But we must quickly point out that the trouble with this type of evidence, like miracles, is that it is both rare and mostly unreliable. So voice identification evidence is much

on the lower plane than visual identification evidence which, in turn, as we have consistently held is of the weakest kind and in order to ground a conviction on it, it must always be watertight. Having so observed, it is incumbent upon us to determine whether or not the conviction of the appellant was predicated upon the voice identification evidence of PW1 and PW2.

Although this is a second appeal, in order to satisfy ourselves on this issue we had to re-visit the entire evidence with our own minds. At the end of the exercise we came out convinced that the conviction of the appellant was not based on voice identification evidence either wholly or partly. The judgment of the trial district court vindicates us on this.

After stating the undisputed facts upon which the prosecution's case rested, the learned trial District Magistrate began his evaluation of the evidence. He said:-

> *"There is no dispute in this case on the fact that JONAS s/o LYELU (PW1) was robbed his bicycle on 24/12/1992 while he was on the*

way to Pwaga Village ... Also there is no dispute on the fact that the complainant was threaten (sic) and shot the gun (muzzle louder) on his thumb ... The complainant told this Court that the second accused GEORGE s/o MASINGISA is the one who robbed him his bicycle, he also told the court that he knew the accused for a long time before he was robbed his bicycle. He said the accused was looking for (sic) heads of cattle of MR. MNYANG'ALE , he further said that he identified him very well as he was very near to him. Also PW2 one AMON MNANDI said he saw the second accused at the scene and that is the one who threaten (sic) them with the gun .... From that evidence I found (sic) that the second accused was well identified and there is no reason for the witnesses to confuse him with any other person ..."

From the above extract from the trial court's judgment, it is clear that the magistrate never relied on voice identification evidence. He relied on recognition evidence of both PW1 and PW2 which he accepted as true.

We have noted from the record that this particular ground of complaint was not raised by the appellant in his appeal to the High Court. His repeated ground of complaint was the inadequacy of the visual identification evidence against him. Dealing with this complaint, the learned first appellate judge said:-

> *"The first material question that the trial court dealt with was whether the appellant was properly and adequately identified and it answered that issue in the affirmative. I too share that view. First of all there is the evidence of the complainant himself who testified that he knew the appellant even before the date of the incident. Indeed he knew him to the extent that even he knew that there was a time when this appellant used to graze the cattle belonging to one Mnyagare. Secondly, ... since the incident took place at around 7.00 p.m., when it was not yet very dark, PW1 and PW2 had no difficulty identifying the appellant more so because PW1 in particular was very near to him. In the circumstances of this case, it was*

therefore unnecessary to conduct an identification parade."

As already indicated herein, this is a second appeal. We have dispassionately read the evidence and the judgment of the two courts below. We have also applied our minds to the law governing the issue of identification evidence. Like Mr. Mwampoma we are increasingly of the settled opinion, that the sole issue for determination is whether or not the appellant was positively identified by PW1 and PW2 as the robber. The appellant is contending that the robbery was committed at night. He has drawn our attention to section 5 of the Penal Code which defines "night or night-time" to mean "the period between seven o'clock in the evening and six o'clock in the morning". It is his contention, therefore, that witnesses would not have identified the bandit even if he was known to them. On this he is supported by Mr. Mwampoma as already shown above.

The question whether or not PW1 and PW2, if they were together after all, unmistakenly identified the appellant as the robber has taxed our minds. In the first instance the trial court did not

direct its mind at all on the issue of the time when the robbery was allegedly committed. Equally, the first appellate judge, with due respect, did not adequately deal with this issue. No iota of evidence was given by the prosecution to show the state of the light at the scene of the crime.

If the offence took place either on 20th or 24th December, the Court takes judicial notice of the geographical fact that the sun was on its southernmost point from the Equator. By then it was definitely dark by 7.00 p.m. It was, night time as the appellant has correctly argued. It was therefore, certainly unsafe to accept the bare assertions of these witnesses without more, that they identified the appellant to be the bandit. Convincing evidence was needed to show that there was light. Furthermore, as correctly argued by Mr. Mwampoma, the bandit came from behind them as they were pushing their bicycles up the hill. The possibility that the two witnesses might not have been certain of the identity of the bandit gains weight when this other factor, which escaped the attention of the two courts below, is considered. The evidence of both identifying

witnesses is to the effect that the bandit who attacked them was single. So if they unmistakenly recognized the appellant as that bandit, then one would have affected that one person, the appellant, would have been charged. Unfortunately, that was not, the case. The appellant was charged with another person, Yohana s/o Chibungu, who was acquitted. This is a clear indication that the two witnesses named more than one suspect. It is our settled opinion, that the witnesses' identification evidence was not free of doubt. We, therefore, respectfully differ with the finding of the courts below that PW1 and PW2 unmistakably identified the appellant as the robber, regardless of whether the robbery occurred on either 20th or 24th December, 1992.

For the foregoing reasons, we are constrained to allow this appeal. The appellant's conviction for the offence of robbery is hereby quashed and set aside. We also set aside the sentence of imprisonment and the compensation order. The appellant is to be released from prison forthwith unless he is otherwise lawfully held.

DATED at DODOMA this 4th day of December, 2008.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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

(S.S. MWANGESI)
SENIOR DEPUTY REGISTRAR