Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL No.202 of 2007 – COURT OF APPEAL OF TANZANIA AT DODOMA. Coram: RUTAKANGWA J.A, KIMARO J.A AND MBAROUK J.A	**HATIBU MBARA VS THE REPUBLIC** (Appeal from the decision of the High Court of Tanzania at Dodoma) (DC) **Criminal Appeal No.6 of 2006** (Kwariko ,J)	Dependence on a single identifying witness such evidence must be also absolutely watertight to justify a conviction. Maselo Mwita@Masele and Another V R Criminal Appeal No.63 of 2005 (Unreported) Also Yohanis Msigwa VR [1990] TLR 148 and masudi Amlima VR [1989] TLR 25. Waziri Amani V R [1994] TLR 25 Court sets the guiding principles in considering favourable conditions for the identification of the accused person. See also Kulwa S/o Makwajape and two others VR, Criminal Appeal No.35 of 2005 (unreported) issa S/o Mgara@Shula VR, Criminal Appeal No.37 of 2005 (unreported)

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 202 OF 2007

HATIBU MBARA ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Kwariko, J.)

dated the 19th April, 2007
in
(DC) Criminal Appeal No. 6 of 2006

JUDGMENT OF THE COURT

24th & 28th November, 2008

MBAROUK, J.A.:

This is a second appeal from Criminal Case No. 78 of 2005 in the District Court of Singida at Singida. The appellant Hatibu s/o Mbara was convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap.16 of the Laws. He was sentenced to thirty (30) years imprisonment and ordered to pay the complainant (PW3) Shs. 30,000/- and a handset. In his appeal at the High Court (Kwariko, J.) upheld the conviction, sentence and the order of the trial court. Undaunted, hence this second appeal.

The facts giving rise to the case are simple and short. On 13.3.2005 at about 22.00 hours, while the complainant Erasmus Sombe (PW3) was coming from his work place, he met on his way two people. Thereafter he was robbed his wallet containing cash Shs. 31,000/-, his identity card and a mobile phone. A bush knife was used in the course of robbing PW3. He was cut on his hand. PW3 identified his assailants as the appellant and the second accused Muhidin Ibrahim who was later acquitted by the trial District Court. It was by the help of electrical lights from the house adjacent to the street where PW3 was passing which enabled him to identify the appellant. PW3 further stated that the appellant was his neighbour, hence he could easily identify him. Just after the incident of robbery, PW3 reported the matter to the police. Thereafter PW1 E. 6831 PC Matiku gave PW3 a PF3 for treatment at the hospital.

In his defence, the appellant naturally denied the charges and raised a defence of alibi by claiming that he was away on safari on the 13.3.2005, as he went to Iguguno area construction work. The

trial magistrate rejected the appellant's defence and found the appellant guilty as charged. In his appeal at the High Court, the learned judge found no reason to fault the decision of the trial court. The appeal was dismissed.

In this second appeal, the appellant filed six grounds of appeal which can conveniently be reduced into four major complaints, namely:-

1. *That, Honourable Judge of the 1st appellate Court grossly erred in law and fact in his (sic) judgment without complying with the mandatory requirement provided under section 312 (2) of the Criminal Procedure Act, Cap. 20 R.E 2002.*

2. *That, Hounorable Judge and the trial resident magistrate grossly erred in law and facts after admitting the visual identification of evidence PW1.*

3. *The Honurable Judge and the trial resident magistrate grossly erred in law and facts after working upon the evidence of PW5 which was not in support of the identification parade.*

4. *That, the Honourable Judge and the trial resident magistrate grossly erred in law and fact after admitting the evidence of PW2 which is hearsay evidence.*

In this appeal, the appellant appeared in person, while Mr. Anselm Mwampoma, learned Principal State Attorney appeared for the respondent Republic.

At the hearing the appellant submitted additional grounds claiming that the whole prosecution evidence relied upon the testimony of PW3, whereas PW2 who corroborated the evidence of PW3 was his employee. Hence he said through that relationship between PW3 and PW2, that made PW2s' evidence not reliable. He also claimed that the trial court should have gone to the scene of the crime to satisfy itself as to whether the intensity of the electric light was enough to sufficiently identify the appellant. Furthermore, the appellant questioned as to why a ten cell leader was not informed of the incident of robbery and later be called to testify. Lastly the appellant complained that the robbery happened on 13.3.2005, but he was arrested on 16.3.2005. He questioned why it took three days

to arrest him while he is known to PW3 and others in their locality. He prayed therefore for his appeal to be allowed.

On his part, Mr. Mwampoma, learned Principal State Attorney was quick to respond to the appellants' grounds of appeal. He supported the conviction and sentence imposed on the appellant by the trial court which was upheld by the High Court. He firmly urged that there is no dispute as to the fact that the said robbery happened on the night of 13.3.2005. He said the only dispute is on whether the appellant was satisfactorily identified by PW3.

He started by submitting that there is no dispute as to whetherPW3 and the appellant knew each other before and that they were neighbours. Even the appellant does not dispute that he said. The learned Principal State Attorney also maintained that PW3 was identified through the electric light from the house adjacent to the street he was passing. Hence, he said, he was easily identified. Furthermore, he said the struggle between PW3 and the appellant took some time, hence PW3 had enough time to identify the

appellant. He vehemently stressed that there was no mistaken identity because the identification of the appellant was watertight and clear.

As to why it took three days to arrest the appellant after the incident of the said robbery while the appellant was the neighbour of PW3, Mr. Mwampoma apparently did not have much to submit. He just submitted that PW1 E. 6831 PC Matiku and sungusungu were searching for him.

As to why the prosecution had not called the neighbours or a ten cell leader to testify, Mr. Mwampoma submitted that the prosecution are not required by provisions of the law to call a certain number of witnesses to testify. He maintained that, the prosecution opted for the quality of evidence from its witnesses rather than quantity.

In his response to some other grounds, Mr. Mwampoma contended that the issue of alibi raised by the appellant was just an

afterthought, because the appellant has failed to give notice at the trial court before he delivered his defence. On the issue of the trial court and the High Courts' failure to consider the importance of the identification parade, Mr. Mwampoma said that where an accused person is known by the complainant, the identification parade issue does not arise as in this case. On the issue of non-compliance with the mandatory requirements under section 312(2) of the Criminal Procedure Act, Cap. 20 R.E. 2002, the learned Principal State Attorney submitted that the judgment was well written and complied the requirements of the law.

Finally, he submitted that in its totality, the whole evidence was watertight, there was no broken chain. Hence he urged us to dismiss the appeal.

Looking at this appeal in its totality, we think, it is hardly necessary to overemphasize that the issue of identification of the appellant is a major issue to be closely looked at in our analysis. Both courts below centred their decisions to convict the appellant

after being satisfied that the appellant was sufficiently identified. But looking at it more closely it can be found that it was only PW3 who was depended upon by the prosecution on the issue of identification. However, this Court in a case of **Maselo Mwita @ Masele and Another V. R,** Criminal Appeal No. 63 of 2005 (unreported), alerted us on the issue of dependence on a single identifying witness by stating that:-

> *"... it is now settled law that in a case entirely depending on the evidence of a single identifying witness such evidence must be also absolutely watertight to justify a conviction."*

Also see; **Yohanis Msigwa V. R.** [1990] TLR 148 and **Masudi Amlima V. R.** [1989] TLR 25.

Hence the dependence on PW3 by the prosecution has to be justified if his evidence was watertight to justify conviction of the appellant. It is our task now to examine whether the prosecution has fulfilled that task.

The two courts below, we think, did not seriously address themselves on the need of an objective evaluation of the identification evidence. For that error apparent, we are justified to make a re-evaluation of such evidence.

We are of the considered opinion that, proper identification of an accused is crucial in proving a criminal charge of this nature. This will avoid a possibility of mistaken identity. In a landmark case of **Waziri Amani V. R.** [1984] TLR 250, this Court set out guiding principles in considering favourable conditions for the identification of the accused person. However these guidelines are not exhaustive.

Let us examine whether in the instant case the conditions for the proper identification were favourable or not. As pointed out earlier, the record tells us that it was only PW3 who was relied upon as a prosecution witness to identify the appellant. PW3 raised mainly three points for his identification of the appellant:-

1. *The appellant was his neighbour and he knew him for a long time.*

2. *There was electric light from the house adjacent to the street he was passing.*

3. *It took sometime when he was trying to take the handset and he was resisting, so he observed the appellant.*

Discussing all the three points together, we are convinced by the decision of this Court in the case of **Kulwa s/o Makwajape and Two Others V. R.**, Criminal Appeal No. 35 of 2005 (unreported) which states that:-

> *"... the fact that evidence of prior knowledge of the suspects is a relevant factor that facilitates the identification of suspects.* ***But this should not be considered in isolation from the pre-requisite requirement that conditions for the proper identification of suspects are favourable.***
> *(Emphasis added).*

One of the pre-requisite requirements for proper identification of a suspect during night time is to show the intensity of the light. However, in the instant case, we are of the considered opinion that bare assertion was taken. As the record has shown PW3 testified that there was electric light from the house adjacent to the street. That bare assertion we think was not sufficient. In the case of **Issa s/o Mgara @ Shula V.R**, Criminal Appeal No. 37 of 2005 (unreported), this Court observed that:-

> *"It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc., give out light with changing intensities. .... **Hence the overriding need to give in sufficient details the intensity of the light and size of the area illuminated."***
> *(Emphasis added).*

Also see: **Said Chally Scania V. R.**, Criminal Appeal No. 69 of 2005 (unreported).

In the circumstances, we are increasingly of the considered opinion that the evidence on record did not justify the claims of correct identification of the appellant, because the evidence of a single identifying witness (PW3) did not sufficiently give details of the intensity of the light and size of the area of illumination. PW3 just gave a bare assertion that there was electric light at the scene of the crime, which was not sufficient to avoid a possibility of mistaken identity.

Had the two courts below addressed themselves fully on those issues, we think they would have reached a different conclusion, and held that the identification of the appellant was doubtful.

For the foregoing reasons, we are of the considered opinion that on the evidence available, it is very doubtful that the appellant was positively identified by PW3. We think, this point alone can dispose of the appeal. That being the case we hold that the conviction of the appellant cannot be legally sustained on that doubtful identification evidence.

In the event, we accordingly allow the appeal, quash the conviction and set aside the sentence of imprisonment and order of payment for a handset. The appellant is to be released forthwith from prison unless otherwise lawfully held.

DATED at DODOMA this 26th day of November, 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.

COURT OF APPEAL OF TANZANIA

(S.S. MWANGESI)
SENIOR DEPUTY REGISTRAR