

Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO.23 OF 2007 – COURT OF APPEAL TANZANIA AT DODOMA. CORAM: RUTAKANGWA J. A, KIMARO J.A AND MBAROUK J.A	TANO MBEHO VS THE REPUBLIC – Appeal from the judgment of the High Court of Tanzania at Dodoma Criminal Appeal No. 54 of 2004 (Masanche J.)	Identification The Court has stressed on the importance of ensuring that the identifying conditions favour a correct identification and leave no room for any possibility of a mistaken identity. Raymond Francis Vs Republic (1994) TLR 100, Waziri Amani VR (1980) TLR 250

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 23 OF 2007

TANO MBEHO.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

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

(Masanche,J.)

dated 27th November, 2006
in
Criminal Appeal No. 54 of 2004
.....

JUDGMENT OF THE COURT

2 & 4 December, 2008

KIMARO, J.A.

The appellant was tried in the District Court of Dodoma with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code. He was convicted and sentenced to a term of thirty years imprisonment. He was alleged to have invaded the house of Cleovias s/o Mrosso on 27th April, 2003 at about 8.15 p.m. and after threatening him with an arrow and a club made away with an

assortment of items whose total value was estimated to be Tshs. 410.000/-. Aggrieved by the decision of the trial court the appellant filed an appeal in the High Court but it was dismissed. Still aggrieved the appellant is now before us with this appeal.

The appellant has filed about eight grounds of appeal but basically he is complaining that the prosecution did not prove the case beyond reasonable doubt, particularly his identification.

Before us he appeared in person, and Ms Neema Mwanda, learned State Attorney appeared for the respondent Republic.

Briefly, the evidence that led to the conviction of the appellant in the trial court was that, on 27th April, 2003 Clovius Mrosso (PW1) the complainant, was at his house alone, in his bedroom sleeping. At 8.45 p.m. a group of about three or more people who were armed with clubs, spears and arrows entered into his bedroom abruptly, forced him to hide under the bed and they began ransacking the house and made away with a bag containing various clothes, and a Radio Panasonic 4 Band. According to the complainant he was able

to identify the appellant because of a lantern lamp which was on, his voice and also he was a person familiar to him as his brother married from his family.

The matter was reported to Philemon Msasu(PW2) the ten cell leader of the area on the same night. Efforts made to recover the stolen properties during that night and even thereafter, did not yield any fruits. The incident was also reported to his co-employees; Mayala Kidatta (PW3) and John Mwakaposya (PW5) on the next morning of 28th April, 2003. PW3 was informed of the incident as he passed at the house of the complainant while heading towards his work place. Both witnesses said the complainant specifically mentioned the name of the appellant as being among his robbers. At the Central Police Station where the incident was reported, it was C. 2061Dt Sgt Steven (PW4), who arrested the appellant on 3rd May, 2003. All the other witnesses said the appellant could not be arrested earlier because he was not seen at his house, and even when they attempted to arrest him on 3rd May, 2003 they could not do so because the appellant threatened to attack them using a club and arrows. Apparently, the complainant, PW3 and PW5 were all soldiers

who were then attached at the JKT Makutupora Camp and the complainant said that the appellant said he would kill them because they were disturbing him.

The appellant denied the commission of the offence, alleging that the case was framed up.

With that evidence the trial court was satisfied that the appellant was correctly identified, convicted him as charged and sentenced him as aforesaid and the first appeal court sustained his conviction and sentence.

Arguing in support of his appeal, the appellant challenged the first appeal court for sustaining the conviction and the sentence, claiming that the identification evidence on record was very weak. He contended that the complainant failed to explain about the intensity of the lantern lamp and the size of the room. He referred us to the case of **Waziri Amani Vs R** [1980] T.L.R 250. The appellant also lamented that the judgment of the trial court is one-sided because his defence was not considered at all. He also challenged the judgment

of the trial court for failure to comply with the provisions of section 312(1) of the Criminal Procedure Act [CAP 20 R.E.2002]. The other grounds of complaint by the appellant were lack of coherency in the prosecution evidence; the stolen property was not tendered in court and his delayed arrest. He said this created doubt in the prosecution evidence. He prayed that his appeal be allowed.

Responding to the submissions made by the appellant, the learned State Attorney supported the conviction and sentence. She said that the major issue in the appeal is the identification of the appellant. In her opinion, the complainant sufficiently identified the appellant because he explained that it was with the assistance of a lantern lamp that he was able to see him and he was a person known to him before. Moreover, submitted the learned State Attorney, he heard his voice and he also mentioned him to the Police as well as to PW3 and PW5. To her, these identifying circumstances fall squarely within the guidelines given in the case of **Waziri Amani**(supra) and the identification of the appellant could not have been mistaken. She referred to the case of **Rajabu Khalifa Katumbo and 3 others Vs R** [1994] T.L.R. 129 to augment her submission.

On the other grounds of complaints by the appellant the learned State Attorney insisted that they were minor shortfalls which did not water down the prosecution case. For instance, the learned State Attorney contended that, the omission by the complainant to mention to the ten cell leader (PW2), that the appellant was among the robbers who invaded him did not affect the evidence of PW1 on the identification of the appellant. Regarding the delay in the arrest of the appellant Ms Mwanda said it was his absence from the village which caused the delay. Being highly convinced that the prosecution evidence was water -tight, she prayed for the dismissal of the appeal.

In this appeal we entirely agree with the learned State Attorney that the major issue is that of the identification of the appellant. The question we pause is whether the identification evidence was water-tight. There is no dispute that the offence was committed at night, and the only identifying witness was the complainant (PW1). The Court has repeatedly stressed on the importance of ensuring that the identifying conditions favour a correct identification and leave no room for any possibility of a mistaken identity. Emphasizing this

important requirement, the Court in **Raymond Francis Vs Republic**

[1994] T.L.R.100 said:-

“It is elementary that in a criminal case whose determination depends on essentially on identification, evidence on conditions favouring a correct identification is of utmost importance.”

The case of **Waziri Amani** supra, gives some of the factors which must be considered by the court in determining whether the identification was made correctly. These include the time which the witness had to observe the accused, the distance at which he made the observation, the conditions in which the observation occurred, for instance , whether it was day time, or night time , whether there was good or poor lighting at the scene, and previous acquaintance with the accused. The list of course is not exhaustive because each case depends on its own circumstances.

The complainant apart from saying that he identified the appellant through a lantern lamp did not say about the intensity of the lamp and how it assisted him to identify him. This was important because at the time he was invaded he was already in bed. It is common ground that the intensity of lantern lamps can be controlled to give bright or deem light depending on the choice of the one using it. The complainant went to the extent of saying that he identified the appellant even by his voice. According to his (complainant's) evidence the appellant was not alone but was with two or more other persons. What surprises us is that the complainant did not mention any specific words spoken by the appellant that made him to identify him by his voice. In his examination in chief he said:-

"there were 3 or more people... they were armed with clubs spears and arrows. There was a lamp (lantern) which was on. They forced me to hide under a bed...they began to take away things. I recognized the accused among the people who attacked me. The accused name is Tino. I knew him even

before that day. His brother had married in
our home.”

Looking at his evidence, he spoke about the persons who invaded him generally. He did not point out anything specific about the appellant that made him to identify him and not the others. Moreover, the complainant said that the invasion was abrupt. Without pointing out specifically how he was able to identify the appellant under such circumstances, it is difficult to say with certainty that the complainant made a correct identification of the appellant. Moreover, he said he was ordered to hide underneath the bed. This further shows the importance of the specific factors about the appellant which we said the complainant was required to mention so as to satisfy the court that he did not make any mistake in the identity of the appellant. Another factor which also strikes us is the failure by the complainant to mention the name of the appellant to PW2 that he was among the robbers. If the complainant had really identified the appellant why did he not tell PW2 so while he was the first person to whom he reported the robbery incident?

Given the questions which arise from the identification of the appellant which find no answers in the evidence of the prosecution we are hesitant to agree with the learned State Attorney that the appellant was correctly identified. His identification leaves a lot of doubts. It is true that in the case of **Rajabu Khalifa Katumbo** supra, referred to by the learned State Attorney the Court said that a witness who knows the accused person before is unlikely to make a mistaken identification even where the identification is made at night. But we hasten to add that it all together depends on the circumstances under which the identification is made, and the ability of the witness to point out the specific factors which assist him/her to identify the accused.

As we have shown above, the complainant in this appeal failed totally to point out specifically how he was able to identify the appellant. It was very crucial for him to point out the factors which assisted him to identify of the appellant and not to make an omnibus identification as he did in this case. The evidence on the identification of the appellant was not water-tight. We fault the first appeal court for sustaining the conviction.

This ground having succeeded, it means that the prosecution was not able to prove the case against the appellant on the standard required. In the event the appeal succeeds. The conviction is quashed and the sentence set aside. The appellant to be released forthwith unless he is held for any other lawful cause. It is accordingly ordered.

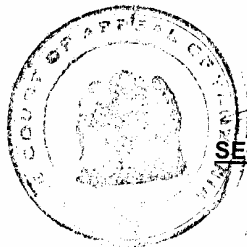
DATED at DODOMA this 3rd day of December, 2008

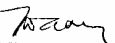
E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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. MWANGESTI)
SENIOR DEPUTY REGISTRAR