CRIMINAL APPEAL NO.27 OF 2007- COURT OF APPEAL OF TANZANIA AT TANGA. Coram: MROSO, J.A, KIMARO, J.A AND LUANDA, J. A	**SUDI ATHUMANI, SAMWEL NTAKIBIDYA VS THE REPUBLIC-** (Appeal from the judgement of the High Court of Tanzania at Tanga)- **Criminal Appeal no.44 of 2003** Mkwawa, J.	Offence of Robbery with violence C/s 285 and 286 of the Penal Code They were both convicted and sentenced to 30 years imprisonment.

IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MROSO, J.A., KIMARO, J.A., And LUANDA, J.A.)

CRIMINAL APPEAL NO. 27 OF 2007

SUDI ATHUMANI
SAMWEL NTAKIBIDYA } **.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court
Of Tanzania at Tanga)

(Mkwawa, J.)

dated 6th June 2005
in
Criminal Appeal No.44 of 2003
.....

JUDGMENT OF THE COURT

18th & 26th June, 2008

KIMARO, J.A.

Sudi Athumani and Samwel Ntakibidya were jointly charged in the District Court of Handeni with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code [CAP 16 R.E.2002]. They were both convicted and sentenced to thirty years imprisonment each. Their appeal to the High Court was dismissed.

The prosecution case was that; on the night of 19th October, 2001 at around 11.30 p.m. one Mwijuma Saidi (PW1) was in his house sleeping. He was with Idirisa Saidi (PW3), his young brother. A person who introduced himself as a relative of one Mavumba, his close friend, knocked at his window. As PW1 opened the door to find out what that person wanted, three persons forced their entry into the house, threatened him with a knife, beat him, ransacked the house and left with cash T shs. 670,000/-, and a video deck, video screen and an assortment of other items belonging to Hatibu Mohamed (PW2). It would appear from the evidence of PW2, though not specifically stated so, that he is also known as Mavumba because he said the deck, screen and cassettes which were stolen from PW1 belonged to him. In that process of ransacking the house PW3 was cut with a knife on his knee.

Soon after the culprits left, PW1 and PW3 shouted for help. People from the neighborhood gathered at the house of PW1. Zuberi Omari(PW4), the Village Chairman and Gutrum Simon(PW5), a

watchman of a shop belonging to one Hussein Mwijuma, were among the persons who turned up to assist PW2 and his brother. As chairman of the village, PW4 instructed the villagers who gathered at the house of the victims of the offence to mount a search of the culprits during that same night. Using torch light, the villagers managed to apprehend both appellants in the bush within the vicinity of the village, not very far away from the house where the theft took place. Although they attempted to run away, they were not successful.

Save for the cash of T shs. 670,000/- the deck, screen and the cassettes that were stolen were recovered. It was in prosecution evidence that the first appellant had the screen and the second one the deck and the bag. The properties were found hidden in the grass. The appellants also showed three bicycles they used for their transportation to the village as they were not residents of that Mumbwi village where the offence was committed, but were from Kitumbi. According to Ally Rajabu Mgolo, (PW6) the first appellant hired from him two of the bicycles which they were found with earlier

on that day. The bicycles had to be returned on the next day but that was not done. It was after PW6 learnt of the arrest of the second appellant and upon making a follow up at the police station that he found the bicycles there, and he identified them. The appellants did not claim ownership of the stolen property.

In their defence both appellants denied involvement in the commission of the offence. They even denied that they were arrested within the vicinity of the village of Mumbwi on that same night. The first appellant said he was arrested on 20th October, 2001 while coming from Luiye village where he went to sell commodities. The second appellant said he was arrested at Kwedikwazu where he went to see his friend but missed him.

The trial court was satisfied with the version of the prosecution evidence that the offence of robbery against the appellants was proved, particularly because none of the prosecution witnesses had grudges with any of the appellants. The first appellate court upheld the findings of the trial court on the ground that the appellants were

arrested on the same night, hiding in a nearby bush and with the properties that were stolen by use of force from the house of PW1.

The appellants were aggrieved by the decision of the High Court and they are now before us with several grounds of appeal but most of them are repetitive. In the memorandum of appeal by the first appellant he is basically complaining of two matters. The first one is that he was not properly identified because the offence was committed during the night and there was no identification parade which was conducted for purposes of his identification. The second one is that the prosecution evidence was not sufficient to ground his conviction.

In the grounds of appeal by the second appellant, together with the additional ones he submitted to us before the hearing of the appeal, he complained of contradictions in the prosecution evidence, doubted the evidence of PW3 on his identification and he wondered why the knife which was claimed to have been used in the commission of the offence was not tendered in court as an exhibit.

During the hearing of the appeal the appellants appeared in person and the respondent Republic was represented by Mr. Vicent Tangoh, learned State Attorney.

Elaborating on his grounds of appeal, the first appellant said there is a contradiction in the prosecution evidence on how the stolen property was recovered and who was found with which of the stolen property. He contended that while PW1 said he was found with the screen, PW5 said he was found with the deck. There was not even proper identification of the stolen property, the first appellant claimed. On the evidence that he hired two of the bicycles from PW6, the first appellant said PW6 did not bring any documentary evidence to show that he hired the bicycles. He prayed that his appeal be allowed.

The second appellant did not elaborate on his grounds of appeal. He opted to leave them for the scrutiny and determination of the Court. Essentially, what the second appellant is also claiming is

that he was not properly identified. Like the first appellant, he complained that the evidence against him was not sufficient to ground his conviction. He prayed that the appeal be allowed.

The respondent Republic supported the conviction and sentence. The learned State Attorney submitted in response to the submission by both appellants that the totality of the evidence leaves no doubt that the appellants committed the offence. Soon after the house of PW1 was invaded, the learned State Attorney said, people gathered at the house of PW1 and a search was conducted immediately. During the same night the appellants were arrested and the stolen property recovered. In such circumstances, Mr. Tangoh said, it was not necessary to conduct an identification parade for purposes of identifying them, as the appellants had no opportunity to run away. They were arrested before leaving the village. Moreover, the learned State Attorney contended, the appellants did not dispute the ownership of the property that was recovered.

As regards the additional grounds of appeal by the second appellant on his identification by PW3 that he was the one who cut him with a knife, the learned State Attorney said voire dire examination on PW3 was conducted, therefore he was a credible witness. As to why the knife was not tendered in court as an exhibit, Mr. Tangoh said the culprits left with it and not all of them were arrested. As regards the charge sheet, the learned State Attorney said all the ingredients of the offence of robbery were clearly indicated in the charge which was preferred against the appellants.

This is a straight forward case which does not need to task our minds so much. There is the evidence by both PW1 and PW3 that their house was invaded. While keeping both PW1 and PW3 under threat as well as injuring PW3, the house was ransacked and a video screen and video deck together with an assortment of other items which were stolen, including cash T shs. 670,000/-. According to PW4, the village chairman, a search was mounted soon after, and within half an hour both appellants were arrested within the vicinity of the village, not far away from the house where the theft took

place. Except for the cash, the property which was stolen was also recovered in the area where the appellants were arrested. PW1 said the first appellant was found with the video screen and the second one with video deck and the bag. Both appellants did not claim ownership of the properties. The properties were identified by PW2 as being his property that was under the custody of PW1. In addition, the appellants were found with three bicycles; two of which PW6 identified as being the ones that the first appellant hired from him earlier on that day.

With such prosecution evidence on record, the appellants' claim that they were not properly identified or that an identification parade was necessary cannot assist them. As correctly submitted by the learned State Attorney the appellants did not have the opportunity to run away. They were arrested sometime after the commission of the offence and within the vicinity of the village, not far away from the house where the offence was committed. Similarly, the first appellant's complaint that he did not hire the bicycles because there was no documentary evidence to support the evidence of PW6 is of

no help to him because that was not the only evidence which linked him with the commission of the offence.

We indeed agree with the second appellant, and with respect to the learned State Attorney, that the evidence of his identification made by PW3 that he was the one who cut him with the knife can not be relied upon because the identifying circumstances were not favourable. The offence was committed at night and there is no evidence showing what assisted PW3 to identity the second appellant. See the case of **Waziri Amani Vs R. [1980] T.L.R. 250.** A voire dire examination on PW3 was not proof of his credibility and reliability of his evidence. This shortfall notwithstanding, in view of the evidence on record which implicates the second appellant, with the commission of the offence, this ground will not assist the second appellant either.

Regarding the knife which the second appellant said was not tendered in court as an exhibit; we do agree with the learned State Attorney that the omission to tender the knife because it was not

recovered does not affect the prosecution case. Moreover, what was more important was the credibility and reliability of the evidence of the witnesses. Another important matter for our observation is the defence of the appellants that they were arrested at a place outside the vicinity of the village where the offence was committed. In our considered opinion this evidence cannot be true because there is nothing in the prosecution evidence suggesting that any of the prosecution witnesses had grudges with any of the appellants.

The prosecution evidence on record against the appellants sufficiently proved the offence against the appellants. The first appellate court properly upheld the conviction and sentence.

In this respect, their appeal has no merit. It is dismissed in its entirety.

DATED at Tanga this 24th day of June, 2008.

J.A. MROSO
JUSTICE OF APPEAL

N.P.KIMARO
JUSTICE OF APPEAL

B.M.LUANDA
JUSTICE OF APPEAL

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

(F. L. K. WAMBALI)
REGISTRAR