Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO.109 OF 2006- COURT OF APPEAL OF TANZANIA AT DODOMA- MUNUO,J.A., KAJI,J.A., And KIMARO, J.A.	ANUARY NANGU, 2. KAWAWA ATHUMAN Vs REPUBLIC- (Appeal from the judgment of the High Court at Dodoma- Criminal Appeal No.79 of 2002- MJASIRI, J.)	**Basis for the conviction by the trial court was the identification of the appellants-** the evidence of visual identification is of the weakest kind and most unreliable. See **Waziri Amani Vs Republic** [1980] TLR 250.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: MUNUO,J.A., KAJI,J.A., And KIMARO,J.A.)

CRIMINAL APPEAL NO.109 OF 2006

1. **ANUARY NANGU**
2. **KAWAWA ATHUMAN.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

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

(MJASIRI,J.)

dated the 19th December, 2005

in

Criminal Appeal No.79 of 2002

JUDGMENT OF THE COURT

13 & 22 June, 2007

KIMARO, J. A.

The appellants were charged in the District Court of Iramba at Kiomboi with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code and they were convicted and sentenced to fifteen years imprisonment. Their appeal to the High Court was dismissed and the sentence was enhanced to thirty years imprisonment.

The case for the prosecution in the trial court was that on 8th October, 2000 at about 8.00 p.m. while Shingadeda Kitamka (PW1) was returning home from Basuto auction, in the compamy of Stephano Marembo (PW2), the appellants attacked him with a stick and knife at Ishinsi village, and stole from him cash T.shs 35,000/=, one bed sheet valued at T.shs 3,500/= together with one shirt valued at T. shs. 1,500/= making the total value of the items stolen T. shs. 40,000/=.

The basis for the conviction by the trial court was the identification of the appellants. The testimony of the complainant (PW1) on the identifying circumstances was the time taken to commit the offence, which was long, there was moonlight, the appellants lived in the same village and he had seen the appellants several times before. He was also able to describe the

type of clothes which each of the appellants wore when the incident took place. PW2 identified the first appellant on the same conditions. As for the second appellant, PW2 saw him for the first time but he said he was able to identify him because of moonlight and the time taken to have the offence committed.

The trial court was satisfied that the identifying conditions left no room for mistaken identity and convicted the appellants as charged.

Among the grounds of appeal in the first appeal court was identification of the appellants. The first appellate judge was satisfied with the appraisal of the evidence on identification by the trial court and dismissed the appeal. The first appeal court also noted that in terms of Act No 10 of 1989 which amended the Penal Code, the sentence of fifteen years imprisonment imposed on the appellants was unlawful and enhanced the sentence to thirty years imprisonment.

The appellants were aggrieved and they have come for a second appeal to this Court. At the hearing of the appeal, the appellants appeared in person. Mr. Anselm Mwampoma Principal State Attorney, represented the respondent Republic.

The appellants filed about eight grounds of appeal but the most important ground, as correctly submitted by the learned Principal State Attorney, is the one on the identification of the appellants. In fact that was the only contentious issue in the trial court. On the robbery, there was no doubt at all that it was committed. The undisputed evidence of PW1 was that he was attacked by a knife and his own stick which the culprits picked up when they fell him down, and the properties already mentioned stolen.

In upholding the decision of the trial court, the first appellate judge remarked on the identification of the appellants as follows:

> The basis of the conviction by the trial court is the evidence by PW1 and PW2. It is my finding that the trial court had justification in relying on the evidence of identification. The evidence of PW1 was corroborated by PW2. The evidence was to the effect that the first appellant and second appellant were known by PW1 and the first appellant was known to PW2 as they were from the same village …Both PW1 and PW2 gave a description of what the appellants were wearing.

The appellants' complaint on their identification, found on grounds 4, 5 and 6 of their joint memorandum of appeal was that the first appeal court misdirected itself by accepting identification by voice because it was the most unreliable method of identification. They cited the case of **Nuru Selemani Vs Republic** [1984] TLR 93. As regards the identification of the clothes they had on, they contended that the description given by the witnesses was not sufficient because no particular mark of identity was given. The appellants relied on the case of **Salehe Karonga and Another Vs Republic** CAT Criminal Appeal No.46 of 2001 (Mwanza) (Unreported). The appellants further argued that it was dangerous to accept the evidence of visual identification without taking precaution. As the witnesses did not describe the brightness of the moonlight and the offence was committed under confusion since the complainant was assaulted, a mistaken identity could not be ruled out.

On his part the learned Principal State Attorney submitted that the identification of the appellants by PW1 and PW2 left no doubt. He revisited the evidence of the prosecution witness and argued that it shows favourable conditions for identification. First, there was moonlight. Second, Pw1 knew both appellants before and they lived in the same village, while PW2 who lived in the same village as PW 1, also identified the first appellant as their village mate and he too, had seen the first appellant several times before

the commission of the offence. Third, before PW1 was attacked, a conversation took place between the complainant and his assailants and so there was sufficient time to recognize the appellants. The time taken before the commission of the offence also assisted PW2 to identify the second appellant.

Mr. Mwampoma agreed that the decision of **Nuru Selemani** (supra) cited by the appellant was correct but he argued that the facts of the case can be distinguished from the facts of this case because the appellants were not only identified by voice. He prayed that the ground of appeal on identification be dismissed.

As already mentioned, the main ground of appeal is the identification of the appellants. We do not hesitate to say that we entirely agree with the learned Principal State Attorney that both appellants were sufficiently identified. We are aware that the evidence of visual identification is of the weakest kind and most unreliable. See **Waziri Amani Vs Republic** [1980] TLR 250.

The conditions for identification in this case, as gathered from the evidence were favourable. The complainant knew the appellants before, they were staying in the same village and there was moonlight. He was also able to identify the type of clothes the appellants wore, and also their colour and the voice of the

appellants. It took sometime before the offence was committed, as the attack was preceded by a conversation. PW2 corroborated the evidence of PW1 on the identification of the first appellant. Under these circumstances, we agree that there was no room for mistaken identity. We also agree that the appellants were not convicted on the identity of voice only, but on a combination of all the elements mentioned above. In this context, the cases of **Nuru Selemani** (supra) and **Salehe Kalonga And Another** (supra) relied upon by the appellants are irrelevant.

The appellants also complained why a person who assisted the complainant (PW1), one Boniface, was not summoned as a witness. PW1 said in his evidence that after he was attacked by the appellants, one Boniface, who passed by and found the complainant, assisted him (complainant) and escorted him home. The answer by the learned Principal State Attorney was that he was not a necessary witness. Our considered view is that the prosecution was at liberty to choose the witnesses whom they considered important because what matters was to discharge their burden of proof and not the number of witnesses they summoned. **See section 143 of the Law of Evidence Act, 1967.** If Boniface was not important for purposes of proving their case, he was not a necessary witness and the omission to bring him did not affect the prosecution case.

In the event there is no reason to fault the decision of the first appeal court. The appeal by the appellants is dismissed.

DATED at DODOMA this day of June, 2007.

E.N.MUNUO

JUSTICE OF APPEAL

S.N.KAJI

JUSTICE OF APPEAL

N.P.KIMARO

JUSTICE OF APPEAL