Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO. 110 OF 2006- COURT OF APPEAL OF TANZANIA AT DODOMA- MUNUO, J.A., KAJI, J.A., And KIMARO, J.A.)	**RIZALI RAJABU Vs. THE REPUBLIC** (Appeal from the conviction of the High Court of Tanzania at Dodoma- Criminal Appeal No. 81 of 2004-Mjasiri, J.)	**Whether the identification of the appellant was watertight-**see the case of **Waziri Ally versus R** (1980) TLR 250 at Page 252.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 110 OF 2006

RIZALI RAJABU .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

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

(Mjasiri, J.)

dated the 7th day of December, 2005
in
Criminal Appeal No. 81 of 2004

JUDGMENT OF THE COURT

15 & 22 June, 2007

MUNUO, J.A.:

The appellant, Rizali Rajabu, was in Criminal Case No. 278 of 2002 in Kondoa District Court convicted of robbery with violence c/s 285 and 286 of the Penal Code, Cap 16 R.E. 2002 in that on the 27th

February, 2001 at 23.00 hours at Jangalo Village in Kondoa District within Dodoma Region, the appellant allegedly seized from the complainant, PW1 Omari Ally Chironchi, cash Shs. 190,000/= and 30 kgs of sugar valued at Shs. 15,000/= and at the time of stealing wounded the complainant's knees by using an iron bar and further fired three bullets in the air in order to obtain and retain the stolen property. The trial court sentenced the appellant to 30 years imprisonment plus 12 strokes of the cane. Aggrieved, the appellant unsuccessfully lodged DC Criminal Appeal No. 81 of 2004 in the High Court of Tanzania at Dodoma. He then instituted this second appeal to challenge the conviction and sentence.

Testifying at the trial, the complainant stated that on the material night he was sleeping with his wife, PW2 Sophia Hussein, when bandits broke into his house by using a heavy tool. Awakened from sleep, PW1 saw four bandits in front of him demanding money from him. He said that he identified the bandits through electric light. It is the evidence of PW1 that the appellant was among the 4 armed robbers, all dressed in black trousers and shirts, but faces

unmasked. PW1 said that the appellant wielded a stick and an iron rod while a co-suspect by the name of Sadiki Athumani, was armed with a gun which he fired to terrorize people so they dared not converge at the scene of crime until the four bandits exited. The bandits seized from PW1, cash Shs. 190,000/= and 30 kgs of sugar. With the help of his next door neighbour PW3 Adam Ally, the matter was reported to the police on the same night. PW1 was admitted at Kondoa hospital for a week. He tendered his PF3, Exhibit P1, at the trial. In the morning the Village Executive Officer, PW4 Mr. Rashid Shonde, was informed and also availed the names of the bandits. He could not trace the appellant at his home because he had absconded. His co-bandits were, however, arrested and convicted in Criminal Case No. 258 of 2001. When the appellant ultimately resurfaced in November 2002, he was arrested and charged with the present offence.

The evidence of PW1 was corroborated by the testimonies of PW2, PW3 and PW4. PW1 and PW2 identified the appellant by lamp light. PW3 Mr. Adam Ally whose house was about 10 paces from

PW1's house fled when he heard the gunshot but he hid under a nearby tree. He stated that there was bright moonlight on the material night so he identified the appellant when he was leaving the scene of crime. Like PW1 and PW2, PW3 knew the appellant because he lived in a neighbouring village.

The District Court grounded a conviction upon finding the prosecution evidence water-tight. The learned judge upheld the conviction and sentence giving rise to this second appeal.

In his memorandum of appeal, the appellant contended that the identification by PW1 and PW2 was not water-tight so the learned judge should have quashed the conviction and set aside the sentence thereby allowing his first appeal. He stated that the eye witnesses' evidence was inconsistent because PW1 claimed that the house was lit with electricity whereas PW2 said that a lantern lamp was burning when the bandits struck the complainant's house on the material night. The contradiction, the appellant maintained, should have been resolved in his favour resulting in acquittal.

Furthermore, the appellant contended that the conditions of identification were difficult and unfavourable in view of the firing of the gun which must have terrorized the eye witnesses and therefore impeded a proper identification so there was a possibility of mistaken identity even if the eye witnesses knew him before. He maintained that the evidence of identification was weak so the appeal should be allowed. He also faulted the prosecution witnesses for not knowing the name of his village which he said is called Njinji and not Chandema as alleged by the prosecution witnesses. He urged us to acquit him because the case had been finalized in Criminal Case No. 258 of 2001 to which he was not a party. He prayed that the appeal be allowed, therefore.

In response, Mr. Mwampoma, learned Principal State Attorney, supported the conviction and sentence and urged us to do the same. Correctly identifying the issue in this appeal as to whether the identification of the appellant was watertight, the learned Principal State Attorney argued that the two eye witnesses properly identified the appellant because they knew him before. He observed that there

was light from the lantern lamp in the house at the time of the robbery so visibility was good and the conditions of identification were favourable. He further observed that the type of light was not an issue in the courts below so it was not clarified by PW1 who is recorded to have said it was electric light while PW2 stated that the lantern lamp was burning. He stressed that PW2 stated that the lantern lamp was burning when the robbery occurred so the scene of crime was well illuminated, he contended. Pointing out that the appellant escaped and remained at large until he resurfaced and was arrested at the end of year 2002, the learned Principal State Attorney argued that such conduct on the part of the appellant was not consistent with innocence. He noted that PW3 Mr. Adam Ally identified the appellant in the bright moonlight, from a close range when the latter was leaving the scene of crime after the robbery. Mr. Mwampoma urged us to dismiss the appeal for want of merit.

The issue in this appeal, as rightly observed by the learned Principal State Attorney, is whether the identification of the appellant was watertight.

When determining the above issue, the learned judge, Ms Mjasiri, J., observed:

> On reviewing the record and judgement of the lower court it is my finding that the prosecution has proved the case against the appellant beyond reasonable doubt. The evidence on record is to the effect that the appellant was properly identified by PW1, PW2 and PW3 who all knew the appellant as the appellant was their neighbour. The appellant's name and description of what he was wearing was given to the police and to the Village Executive Officer.

That was indeed the case. The appellants' co-bandits were traced, arrested and charged in Criminal Case No. 258 of 2001 to which the appellant was not a party because his whereabouts were then unknown, having escaped from his home soon after the robbery.

The complainant was wounded in the armed robbery at his house. He tendered his PF3, Exhibit P1, without objection, at the trial. A bullet shell was retrieved from the scene of crime and tendered at the trial as Exhibit P2. More importantly PW1, PW2 and PW3 consistently described the black attire of the appellant and the fact that he was armed with an iron bar, his face was not covered to hide identity. Moreover, PW1, PW2 and PW3 knew the appellant as a resident of their neighbouring village. In this regard, there was no possibility of mistaken identity. We are mindful of the decision of the Eastern Africa Court of Appeal, as it then was, in the case of **R versus Elia Sebwato** 1960 E.A. 174 wherein it was held that identification evidence must be watertight in order to sustain a conviction and exclude possibilities of mistaken identity. In the case of **Waziri Ally versus R** (1980) TLR 250 at Page 252 (CA) the Court held that:

> Although no hard and fast rules can be laid down as to the manner a trial judge [court] should determine questions of disputed identity, it seems clear to us that he could not

> be said to have properly resolved the issues unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would for example expect to find on record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would for example expect to find on record questions such as the following posed and resolved by him: the time the witness had the accused under observation, the distance at which he observed him; the conditions in which such offence occurred, --- whether it was day or night time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not.

The record shows that the eye witnesses knew the appellant before as a resident of a neighbouring village whose name they also knew so they reported him to the police and to the Village Executive Officer. The latter proceeded to arrest him in the morning following the armed robbery but he was not located because he had absconded. The robbery was committed during the night, but the

lantern lamp was burning which rendered visibility good, so the eye witnesses clearly saw the appellant who wore black trousers and a shirt, and he was wielding an iron bar and a stick. He seriously injured the complainant with the iron bar. The appellant and his co-bandits spent considerable time in the illuminated room extorting money from the complainant during which time the appellant inflicted serious assault on the victim causing him to be hospitalized for a week as shown on his PF3, Exhibit P1. As there was light from the burning lantern, visibility was good. The eye witnesses must have been disgusted and horrified by the armed banditry but they identified the appellant as he and his co-bandits extorted money and ransacked the house for valuables. They extorted cash, Shs. 190,000/= from PW1 after which they looted 30 kgs of sugar from the house.

Under the circumstances, we do not have the least doubt that the guilt of the appellant was proved beyond all reasonable doubt. We are, satisfied, furthermore, that the identification of the appellant was watertight in that the eye witnesses and PW3 knew him before

as a resident of their neighbouring village and they gave his name to the police but the latter found he had escaped. He was subsequently arrested when he resurfaced almost two years later.

For lack of merit, therefore, we dismiss the appeal.

DATED at DODOMA this 22nd day of June, 2007.

E.N. MUNUO
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR