CRIMINAL APPEAL NO. 189 OF 2007 – COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CORAM: MSOFFE J.A, MBAROUK, J.A ORIYO J.A	Maswed Selemani Vs The Republic (Appeal from the decision of the High Court of Tanzania at Dar es Salaam) Criminal Appeal No.127 of 2006 (Nyerere J)	Unexplained delay in arresting a suspect costs doubt on the credibility of a witness: (See Kulwa S/o Makwajape and 2 others Vs Republic (Criminal Appeal No 35 of 2005 and Juma Shabani@Juma. Also Waziri Amani Vs Republic (1980) TLR 250 the evidence of visual identification costs doubts on the veracity of the witnesses.

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., MBAROUK, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 189 OF 2007

MASWED SELEMANI ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Nyerere, J.)

dated the 27th day of April, 2007
in
Criminal Appeal No. 127 of 2006

JUDGMENT OF THE COURT

22nd May, & 4th June 2009

ORIYO, J.A.:

The appellant was convicted of the offence of armed robbery contrary to Section 287A of the Penal Code, as amended by the Written Laws (Miscellaneous Amendments) Act, No 4 of 2004; by the District Court of Temeke at Temeke. He was sentenced to thirty (30) years imprisonment. His appeal to the High Court (Nyerere, J.) against conviction and sentence was dismissed in its entirety. Still

believing in his innocence he has appealed to this Court against both conviction and sentence.

His Petition of Appeal contains only one ground of complaint, namely:-

> *"That the honourable judge erred in both law and facts when she convicted the appellant based on incredible witnesses."*

Briefly, the background which gave rise to the charge is that the complainant, Ipyana s/o Mwambapa, (PW1) and his wife Janet Migelogelo, (PW2), lived at Yombo Shukuru, Kilakala area, Temeke District, Dar es Salaam. On the night of 15th July, 2005 at around 3.30 hours, the house of PW1 and PW2 was invaded by a group of armed bandits including the appellant. The bandits forced their way into the house by breaking the door. Once inside they demanded money and threatened to shoot if the money demanded was not forthcoming. With the assistance of one lit electric lamp in the room, PW1 and PW2 managed to see five people enter their house led by the appellant.

They were able to identify the appellant because they knew him from before as "*Mpiga Debe*" at a bus stand. PW1 and PW2 testified that it was the appellant who cut PW1 on the head using a "Panga", hit him continuously with the blunt side of the panga and

cut his finger. After ransacking the house, the bandits made away with an assortment of personal effects including a television set, a radio, watches, clothes, shoes and cash money, shs.205,000/=. The value of all the goods and cash stolen was put at around shs.2,120,000/=. It took sometime before the appellant was arrested on 2/8/2005 and charged in court.

At the trial the appellant denied the offence. He stated that he was arrested on 2/8/2005 while on his way home from the city and was locked up at the Changombe Police Station for four (4) days. On the fourth day he was interrogated by PW3; C.7307D/Sgt RICHARD; then he was sent back to the lock up. And it was not until 9/8/2005 when he was first arraigned in court. He branded the testimonies of the prosecution witnesses as untrue. In addition, he stated that the witnesses; PW1 and PW2 had actually suspected their neighbour as the perpetrator of the crime; but the police failed to arrest him. His defence was rejected by the trial court.

On appeal to the High Court, (Nyerere, J.) the learned judge was satisfied that the conditions for proper identification in the circumstances of the case were favourable and the appellant was properly identified at the scene of crime. Further, the appellant was known to PW1 and PW2 from before. The first appellate court relied on a decision of this Court in HASSAN J. KANENYERA AND OTHERS Vs R. [1992] TLR 101 to reject the appellant's complaint on the failure of the trial court to hold an Identification Parade. The Court

stated that such a parade was unnecessary where the accused is known to the witnesses before the incident. We cannot fault the learned first appellate judge on this aspect.

In this Court and the courts below, the appellant was unrepresented. As already stated at the beginning, the only issue in the appeal is that of visual identification. But before we proceed further, we should point out here that this is a second appeal. The law as stipulated under section 6 (7)(a) of the Appellate Jurisdiction Act, and the practice, is well settled that in a second appeal the Court has always to be cautious in reversing concurrent findings of fact made by the two courts below unless they are on the face of it, unreasonable or perverse. And such a situation can concur when it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice, or a violation of some principles of law or practice. Otherwise this is a jurisdiction which this Court exercises very sparingly; see this Court's decisions in the cases of:-
DR. PANDYA vs R (1957) E.A 336; AMRATLAL D.M. t/a ZANZIBAR SILK STORES vs A.H. JARIWALA t/a ZANZIBAR HOTEL [1980] TRL 31 and DANIEL NGURU AND OTHERS vs R; (MZA) Criminal Appeal No. 178 of 2004 (unreported)

At the hearing of the appeal the appellant elaborated on the sole ground of appeal on visual identification. He maintained that he had not been properly identified at the scene of crime for two reasons. One, he attacked the veracity of PW1 and PW2 for the

reasons of their being husband and wife and they could have their own motives against him. Further, their testimonies were not corroborated by some other independent testimony. Two, he questioned on the period of time it took to arrest the appellant and his subsequent arraignment. He stated that it took about 14 days from the date of incident on 15/7/2005 to the date he was actually arrested on 2/8/2005. And not only that but after the arrest on 2/8/2005 it took another seven (7) days to arraign him; that is on 9/8/2005.

Ms. Evelyne Makala, learned State Attorney for the respondent Republic supported the appeal. She maintained that in a criminal case, the proof of the guilt of the accused must be beyond all reasonable doubt. She stated that there is uncontroverted evidence of PW1 and PW2 that they identified the appellant at the scene of the crime by the help of an electric light and they knew the appellant from before. However, the learned State Attorney cast doubt on the veracity of the testimonies of PW1 and PW2. She stated that if the alleged offence took place on the night of 15/7/2005 and the appellant was arrested on 2/8/2005; one would expect some explanation as to why it took such a long time before the appellant was arrested; such as, if the appellant had run away and the police could not trace him. But, she further stated, the record in the instant case is silent on why it took over 14 days before the appellant was arrested.

Going through the record it is apparent to us that the arresting officer did not testify at the trial. However, PW3, C.7307 Dt Sgt. RICHARD who was the investigating officer testified to have visited the scene on 15/7/2005 and in his own words said:

> *"I saw that the door was broken using a brick because I found the bricks at the door after that I went back to the station and continued to investigate as to who could have done such a crime."*

PW3 does not state anywhere on record that PW1 and/or PW2 had informed him that the appellant took part in the robbery. Neither can such an inference be drawn from the language of PW3's testimony above.

The issue of the long delay to arrest the appellant raised by the learned State Attorney leads to a more fundamental issue of whether PW1 and PW2 at all informed the police that the appellant took part in robbery.

It is on record that PW1 testified to have been admitted to hospital for treatment of the wounds suffered at the hands of the bandits and was discharged after 3 days. Thereafter, he returned home, took rest and it was a week later that he went to the police to complain and subsequently an arrest was made on 2/8/2005.

We shall first deal with the appellant's complaint relating to the veracity of PW1 and PW2 on the basis of their being spouses. To us, this cannot be a good reason to doubt or discredit the evidence of PW1 and PW2. As this Court stated in the case of EZEKIEL NOEL vs R, Criminal Appeal No. 25 of 2002 (unreported); there is no law prohibiting evidence of persons in conjugal relationship from corroborating each other. This decision was followed in the case of DANIEL NGURU AND FOUR OTHERS vs R, (supra). So this ground of complaint has no merit. It fails.

Now we move to the other ground of complaint on the unexplained delay in effecting the arrest of the appellant. The issues of delay in effecting arrest and/or delay to name a suspect are issues which have been addressed by this Court on several occasions before.

The question of unexplained delay to name a suspect was dealt with by this Court in the case of MARWA MWITA vs R, Criminal Appeal No. 6 of 1995 (unreported) and the Court stated as follows:

> *"The fact that a witness names a suspect at the earliest opportunity is an assurance of his veracity".*

In dealing with a similar issue in the case of AZIZ ATHUMANI @ BUYOGERA vs R, Criminal Appeal No. 222/94 (also unreported) the Court observed, *inter alia,* that:

> *"While unexplained delay to name a suspect may justify fears on the veracity of a witness, it need not be where there is a plausible explanation..."*

In the instant case, there is no such explanation. Even if we agree to discount the 3 days that PW1 spent in a hospital bed; PW2, the wife, who also identified the appellant at the scene as "*mpiga debe*" could have in the meanwhile named the appellant to the police as one of the robbers. PW2; we are told is educated and a school teacher by profession; we are not told why she did not name the appellant earlier in the absence of PW1 who was in hospital.

The other aspect of delay is in arresting the appellant. Addressing the question of delay in effecting the arrest in the case of IBRAHIM SHABAN AND SHABANI ALLY KALULU vs R, Criminal Appeal No. 110 of 2002, (unreported) the Court, inter alia, observed:

> *"It is our opinion that, the slackness in arresting the appellants was not due to inefficiency, but to lack of information as to who they were to arrest."*

In another case of AZIZ ATHUMANI BUYOGERA vs R, (supra) the Court underscored the fact that unexplained delay in arresting a suspect casts doubt on the credibility of a witness; (see also the case of KULWA s/o MAKWAJAPE and TWO OTHERS vs R, Criminal Appeal No. 35 of 2005 and JUMA SHABANI @ JUMA (supra), (both unreported).

In this case, the delay in arresting the appellant casts doubts on the credibility of PW1 and PW2; as submitted by Ms. Makala. And further, the possibility that PW1 and PW2 did not mention the appellant to PW3 cannot be ruled out either.

To us, it is obvious this aspect of unexplained delay in arresting the appellant was not addressed by both courts below. In our opinion, had it been brought to the attention of the learned appellate Judge; she would have arrived at a different conclusion. As stated by this Court in JUMA SHABANI @ JUMA (supra):-

> *"It is an important aspect which if not resolved casts doubts on the veracity of the witnesses."*

On the foregoing, it cannot be said that the evidence of visual identification, in the circumstances of this case, is watertight and meets the standards set out in the case of WAZIRI AMANI vs R,

(1980) TLR 250. The evidence of visual identification casts doubts on the veracity of the witnesses.

We are satisfied that it is doubtful that the appellant was properly identified by PW1 and PW2. This being a Criminal Case, the benefit of doubt goes to the appellant. In this connection and as already stated, we are cautious but feel bound to reverse the concurrent findings of fact made by the two lower courts on this aspect.

Consequently, the appeal is allowed, conviction quashed and sentence set aside. The appellant is to be released from custody forthwith unless lawfully held.

DATED at DAR ES SALAAM this 2nd June, 2009.

J.H. MSOFFE
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

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

J.S. MGETA
(DEPUTY REGISTRAR)