CRIMINAL APPEAL NO.202 OF 2004 COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM – MROSO, J.A, MSOFFE, J.A AND KAJI, J.A	Stuart Erasto Yakobo Vs. The Republic (Appeal from the Conviction of the High Court of Tanzania at Mtwara (Kaganda, J)	1. Evidence identification should only be relied upon when all possibilities of mistaken identity are eliminated and court satisfied that the evidence before it is absolute watertight as enunciated in Waziri Amani Vs. Republic (1980) TLR 250 pg.252. 2. Voice identification is one of the weakest kinds of evidence for it to be relied upon it must be established that witness is very familier with voice in Question being the same of person at scene of crime and there must exist a relationship before data of incident – see Badwin Komba@Ballo Vs. Republic (C.A.T) Criminal Appeal No.56 of 2003, also see Kanganja Ally and Juma Ally Vs Republic (1980) TLR 270

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J. A., MSOFFE, J, A. And KAJI, J. A.)

CRIMINAL APPEAL NO. 202 OF 2004

STUART ERASTO YAKOBO..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kaganda, J.)

dated the 8th September, 2002

in
Criminal Appeal No. 38 of 2002

JUDGMENT OF THE COURT

27 November, 2007 & 17 December, 2007

MSOFFE, J. A.:

The District Court of Nachingwea found the appellant and two others, namely Celestine John Joseph Mandale and Raphael Dickson Machemba, guilty of the offence of Robbery with violence contrary to sections 285 and 286 of the Penal Code, Cap 16. It sentenced each of them to a fifteen year term of imprisonment. Aggrieved, they appealed to the High Court at Mtwara. They lost. The appellant has now come to this court. The other accused persons are not appealing. The appellant appeared in person. Ms. Lydia Choma, learned State Attorney, appeared for the respondent Republic.

The appellant filed nine grounds of appeal. At the hearing of the appeal he came up with three additional grounds. It occurs to us however, that they all crystallize on three major grounds of complaint. **That,** the evidence of PW1, and PW2 was cooked up. **That,** the evidence of PW1 and

PW2 needed corroboration because they were members of the same family. **That,** no positive evidence of identification was forthcoming in the case.

Before we discuss the grounds of appeal we think it is helpful to give a brief account of what led to the appellant being convicted as charged.

At around 1.00 a.m on 15th October 2000, PW1 John Raphael and PW2 Marisela Shaibu, a husband and wife respectively, were asleep at their home. A number of bandits wielding machetes broke and entered into the house demanding cashewnuts. PW1 and PW2 identified the appellant, and the other accused persons who are not appealing, with the aid of firelight. PW1 and PW2 further identified the appellant by voice. Having broken into the house the bandits attacked PW1 till he lost consciousness. Thereafter, they stole three sacks of cashewnuts weighing 160 kgs. and fled away.

At the hearing of the appeal the appellant reiterated the complaints in the above grounds of appeal. In the process, he urged that the evidence of identification by firelight was unreliable. That, the evidence of PW1 and PW2, being that of husband and wife respectively, needed corroboration

which, according to him, was lacking in the case. And finally that, if PW1 and PW2 identified him on the fateful night it was inconceivable that it took two days before he was arrested.

In response, Ms. Lydia Choma was of the general view that the case against the appellant was proved beyond reasonable doubt. It is not true that the evidence of PW1 and PW2 was cooked up. These were credible witnesses who were at the scene and saw what happened, she urged, citing the provisions of **Section 62 (1) (a)** of **The Evidence Act** (Cap 6 R. E. 2002). As for corroboration, she maintained that under **Section 127 (1)** of the Evidence Act, PW1 and PW2 were competent witnesses and therefore, their evidence needed no corroboration. On the aspect of identification, Ms. Lydia Choma contended that the appellant was identified by firelight. And that he was also identified by his voice when he uttered words to his fellow bandits to the effect that they should spare PW2 from an assault because she was sick.

Finally, Ms. Lydia Choma invited us to vary the sentence and impose the statutory thirty year term of imprisonment because it was in evidence that the appellant and his colleagues were armed with machetes which are

offensive weapons. Regarding the other accused persons, who are not appealing, she invited us to invoke our powers of revision and enhance their sentences to thirty years imprisonment.

We do not entertain any doubts that the evidence of identification of the appellant at the scene of crime was that of PW1 and PW2. The appellant in his appeal to the High Court and again in this Court has strenuously contended that the prosecution evidence of identification was unreliable and uncorroborated. We would like to point out at this juncture that it is very rare that an appellate court will interfere with concurrent findings of fact by the courts below. The fundamental issue before the trial District Court and the High Court was whether, on the available evidence, the appellant had been identified as being among the bandits who had raided the house of PW1 and PW2, attacked PW1, and stole their cashewnuts.

At this juncture, we should also point out that the evidence of identification was both visual and by voice. The law is settled that evidence of visual identification should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence

before it is absolutely watertight. The principles to be taken into consideration were enunciated by this Court in **Waziri Amani v Republic** (1980) TLR 250 at page 252. We are fully satisfied that the evidence of visual identification of the appellant was watertight. PW1 and PW2 knew the appellant before the date of incident. There was firelight at the scene of crime. The witnesses stood and saw the appellant at close range. The incident took a considerably long period of time. With the above evidence, we find no basis in faulting the courts below in their concurrent findings of fact on visual identification.

As for voice identification it will be recalled that PW1 and PW2 said that, besides the firelight, they also identified him by voice. The issue is whether voice identification is reliable in law. In our considered opinion, voice identification is one of the weakest kinds of evidence and great care and caution must be taken before acting on it. We say so because there is always a possibility that a person may imitate another person's voice. For voice identification to be relied upon it must be established that the witness is very familiar with the voice in question as being the same voice of a person at the scene of crime – see **Badwin Komba @ Ballo v Republic**

(C.A.T), Criminal Appeal No. 56 of 2003 (unreported). (Also see **Kanganja Ally and Juma Ally v Republic** (1980) TLR 270). In this case, there was no dispute that the appellant was PW2's son. Given this relationship we think that she must have been familiar with the appellant's voice and it was highly unlikely that she could have mistaken his voice. Indeed, for a mother to mention her own son is not an easy thing to do. So, like the courts below we are satisfied that PW2 identified the appellant by voice. Likewise, although the appellant was not "fathered" by PW1 we think that having stayed with him for sometime he too was familiar with his voice.

This brings us to the complaint by the appellant that the evidence of PW1 and PW2, being that of husband and wife respectively therefore members of the same family, needed corroboration. With respect, the point need not detain us. As correctly submitted by Ms. Lydia Choma, these were independent and credible witnesses whose evidence needed no corroboration. In terms of **Section 127 (1)** of the Evidence Act they were competent witnesses, hence their evidence did not have to be corroborated.

As for the last complaint on the arrest being made after two days, we are of the view that this is not a strong point. We say so because the crucial issue in the case was whether or not the appellant was seen and identified at the scene of crime. Since, as already indicated, the evidence established that he was identified it did not matter when he was arrested.

The only point of law involved in this second appeal is whether or not the evidence established the ingredients of robbery. The offence of robbery is defined in **Section 285** of the Penal Code, Cap 16. It provides:-

> *285. Any person who steals anything, and, at or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed " robbery".*

For an offence under **Section 285** the prosecution has to adduce evidence to establish the ingredients, that is whether actual violence or threat of actual violence was used to obtain or retain the thing stolen. The nature of violence must also be proved. Violence to the person of the

complainant is a prerequisite for the crime of robbery. There must be evidence to establish that the accused person used or threatened to use actual violence to obtain or retain the stolen property. The word "violence" is not defined in the Penal Code. In **Black's Law Dictionary** (Sixth Edition) at page 1085 it is defined as:-

> *"Unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury. Physical force unlawfully exercised; abuse of force; that force which is employed against common right, against public liberty. The exertion of any physical force so as to injure, damage or abuse."*

In the instant case, there is no doubt in our minds that violence was used on the person of PW1. The appellant and the other bandits broke and entered into the house wielding machetes; attacked and injured his right eye; he lost consciousness and had to be treated in hospital. In the process, they stole the cashewnuts in question. Like the courts below, we too think that the offence of robbery was established in the circumstances.

In the light of the evidence on record, we are satisfied that the appellant was rightly convicted by the trial District Court which decision was justifiably upheld by the High Court. We dismiss the appeal against conviction.

Now we come to the question of sentence. The appellant was convicted of robbery with violence and sentenced to fifteen (15) years imprisonment. The offence was committed on 15th October, 2000 after the **Written laws (Miscellaneous Amendments) Act No. 6 of 1994** had come into force on 18/3/1994. **Section 5 (b)** of **The Minimum Sentences Act, 1972** as amended by **Act No. 10** of **1989** and **Act No. 6** of **1994** reads:-

> *"(b) Subject to paragraph (ii) of this paragraph-*
>
> *(i) any person who is convicted of robbery shall be sentenced to imprisonment for a term of not less than fifteen years;*
>
> *(ii) if the offender is armed with any dangerous or offensive weapon or is in company with one or more persons, or if at or immediately before or immediately after the time of robbery, he*

wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to imprisonment for a term of not less than thirty years."

Section 5 (b) (ii) applies to all robberies in which the offender is armed with a dangerous weapon or instrument, or is in company with one or more persons, or where in the course of committing the robbery he wounds, beats, strikes or uses any other personal violence to any person. (Also see **Mwita Sibora v Republic,** (C.A.T.) Criminal Appeal No. 49 of 1996 (unreported). In this case, as already stated, the offence was committed on 15/10/2000 when Act No. 6 of 1994 was operational. The evidence clearly shows that there was personal violence to PW1. The appellant was in the company of the other accused persons. They were armed with machetes. Under these circumstances, the appropriate sentence was thirty (30) years imprisonment.

At this juncture, we have to address the question whether or not we should enhance the sentence to thirty years imprisonment. As stated above, Ms. Lydia Choma was of the view that we should invoke our powers of

revision under **The Appellate Jurisdiction Act, 1979** as amended by **The Appellate Jurisdiction (Amendment) Act No. 17 of 1993**, and enhance the sentence to thirty years imprisonment.

In the case of **Herman Henjewele v Republic,**(C. A. T.) Criminal Appeal No. 164 of 2005 (unreported) the appellant upon conviction by the District Court of Songea of committing an unnatural offence contrary to section 154 (1) (a) and 2 of the Penal Code Cap 16 of the Revised Edition 2002, was sentenced to a thirty year term of imprisonment. He appealed to the High Court at Songea and lost. On appeal to this Court, it was observed:-

> "*As was rightly pointed out by Mr. Boniface, the Sexual Offences Special Provisions Act, 1998 provides in section 16 which amended section 154 of the Penal Code that where a person has carnal knowledge of a child under the age of ten years against the order of nature he shall be sentenced to life imprisonment. The trial court as well as the High Court overlooked this legal requirement. The sentence of thirty years imprisonment which was imposed on the appellant was therefore illegal. Although the*

Director of Public prosecutions did not appeal against that sentence, this Court will not allow the illegal sentence to stand, having been made aware of the illegality. We, therefore, invoke the revisional powers of this Court under Section 4 (2) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1992 to quash the sentence of 30 years imprisonment and substitute thereof the correct sentence of life imprisonment."

And in the case of **Zubell Opeshutu v Republic,**(C.A.T.) Criminal Appeal No. 31 of 2003, the appellant was convicted by the District Court of Mwanga of robbery with violence contrary to Sections 285 and 286 of the Penal Code, and sentenced to 15 years imprisonment. On appeal to the High Court at Moshi, the sentence was not disturbed. On a second appeal to this court the sentence was set aside and the correct sentence of 30 years imprisonment. was substituted thereof.

In the light of this Court's decisions in **Henjewele** and **Opeshutu** (supra) we hereby invoke our revisional powers under **Section 4 (2)** of the **Appellate Jurisdiction Act No. 17 of 1993** to quash the sentence of 15

years imprisonment meted on the appellant and substitute thereof the correct sentence of 30 years imprisonment.

This brings us to the final point. This is whether we should also vary the sentence of 15 years imprisonment imposed on the accused persons who are not appealing.

In the case of **Ifunda Kisite Vs Republic**, (C.A.T.) Criminal Appeal No. 47 of 2003 (unreported), it was observed that one Erick Anzigar Makita, the first accused at the trial, did not appeal to the High Court against the conviction and the sentence. And the Judge on first appeal by the appellant therein, did not interfere with the sentence of 15 years imprisonment imposed on him upon a conviction of robbery with violence contrary to sections 285 and 286 of the Penal Code. On appeal to this court it was observed as follows in relation to the first accused:-

> *"... in effect, this means that he is now serving the illegal 15 year term of imprisonment meted on the offence of robbery with violence. We think this is wrong. Since a weapon was used in the robbery,*

> *coupled with the other factor that the offence of robbery was committed in the company of more than one person, the 1st accused too ought to have been sentenced to the statutory minimum sentence of 30 years imprisonment. Therefore, we will have to revise the 15 year term of imprisonment imposed on the 1st accused."*

Accordingly, the sentence of 15 years imprisonment was set aside and a sentence of thirty years imprisonment was substituted thereof.

Applying the principle in **Ifunda Kisite** (supra) we think this is a fit case for interfering with the sentence of 15 years imprisonment meted on the two accused persons who are not appealing. Therefore, in exercise of our revisional powers under **Section 4(2)** of The **Appellate Jurisdiction Act,1979** as amended by **The Appellate Jurisdiction Act No. 17 of 1993** we hereby quash and set aside the sentence of 15 years imprisonment meted on CELESTINE JOHN JOSEPH MANDALE and RAPHAEL DICKSON MACHEMBA and substitute thereof the correct sentence of thirty (30) years imprisonment.

DATED at DAR ES SALAAM this 12th day of December, 2007.

J.A.MROSO
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S.N.KAJI
JUSTICE OF APPEAL

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

I.P. KITUSI
DEPUTY REGISTRAR