

Citation	Parties	Legal Principles Discussed
<b>CRIMINAL APPEAL NO. 181 OF 2003-</b> COURT OF APPEAL OF TANZANIA AT DODOMA- MUNUO, J.A., RUTAKANGWA, J.A., And KIMARO, J.A.	1. MBIJIMA s/o MPIGAA, 2. MHANDO s/o KILAMEI Vs. THE REPUBLIC (Appeal from the Judgment of the High Court of Tanzania at Dodoma- Criminal Appeal Nos. 18 c/f 69 of 2002-Kaji, J.)	Robbery with violence c/s 285 and 286 of the Penal Code, Cap 16 R.E. 2002

**IN THE COURT OF APPEAL OF TANZANIA  
AT DODOMA**

**(CORAM: MUNUO, J.A., RUTAKANGWA, J.A., And KIMARO, J.A.)**

**CRIMINAL APPEAL NO. 181 OF 2003**

**1. MBIJIMA s/o MPIGAA ]**  
**2. MHANDO s/o KILAMEI ]..... APPELLANT**  
**VERSUS**  
**THE REPUBLIC..... RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania at Dodoma)**

**(Kaji, J.)**

**dated the 5<sup>th</sup> day of September, 2003**  
**in**  
**Criminal Appeal Nos. 18 c/f 69 of 2002**

-----  
**JUDGMENT OF THE COURT**

**21 & 22 JUNE, 2007**

**MUNUO, J.:**

Both appellants were convicted of robbery with violence c/s 285 and 286 of the Penal Code, Cap 16 R.E. 2002 in Kondoa District Court

Criminal Case No. 72 of 2000 for allegedly, stealing with violence, 82 head of cattle and 52 goats from the grazing ground, the property of PW1 Ernei Ndeje, on the 5<sup>th</sup> January, 2000 at about 11.00 a.m.

The single eye witness, PW2 Gelelemu Mkoke, deposed that while grazing the complainant's cattle, ten suspects including the appellants appeared with sticks, assaulted him and drove away the complainant's 82 head of cattle and 52 goats. Out of the ten robbers, PW2 said he only identified the appellants, residents of the same Division because he often met them at the auction and was, therefore, familiar with them. The appellants ordered him to sit down while the 2<sup>nd</sup> appellant, Mhando, beat him with a stick on the head. They blind folded him, tied his hands with a coat, and led him into a bush under guard. In the meantime, the other suspects drove away the cattle. PW2 stayed in the bush until evening when he managed to wriggle out of the tying and proceeded to a nearby house where he reported the matter to PW3, Ndorobo Sube. The latter raised an alarm for help. The villagers mounted a search for PW2 and the head of cattle because the said herdsman did not

return home before six o'clock in the evening, as he routinely did before the robbery. Since PW2 identified the appellants, they were traced, arrested and charged with the present offence. They categorically denied the charge. The District Court found both appellants guilty and sentenced them to 30 years imprisonment. Aggrieved, they lodged DC Criminal Appeal No. 18 c/f 69 of 2002 in the High Court of Tanzania at Dodoma. Kaji, J. dismissed the appeal on conviction. He declined to interfere with the sentence for the reason that although no lethal weapon was used to execute the robbery, it was gang robbery so the mandatory minimum sentence of 30 years imprisonment was correctly imposed on the appellants. Not satisfied with the decision of the High Court, the appellants preferred this second appeal.

Mr. Nyabiri, learned advocate, represented the appellants. He filed one ground of appeal contending –

That both the trial court, the District Court of Kondo District and the first appellate court erred in law and in fact in deciding that there

was enough evidence of identification of the appellants and of the allegedly stolen herd of cattle.

Contending that the identification of the appellants by PW2 was weak and not reliable, counsel for the appellants cited the cases of **Waziri Amani versus R** (1980) TLR 250; and **Mwita Karani and Another versus Republic**, Criminal Appeal No. 35 of 1998 (CA) (unreported), in which the court held that visual evidence of identification must be watertight to support a conviction. He maintained that the herdsman must have been horrified when the gang confronted him with sticks so he could not have properly identified the suspects.

On the identification of the 4 head of cattle recovered from Mdaira's kraal where the 2<sup>nd</sup> appellant had kept them, counsel for the appellants contended that PW1 and PW2 could not have properly identified the said cattle because they had the brand mark of the 2<sup>nd</sup> appellant as well.

Mr. Mwampoma, learned Principal State Attorney, supported the conviction and sentence and urged to sustain the same. He observed that the robbery occurred at 11.00 a.m. in broad daylight which enabled PW2 to identify the appellants, the only suspects he knew before, among the ten suspects who robbed the herd of cattle PW2 was grazing. The learned Principal State Attorney distinguished the case of **Waziri Amani versus R** (1980) TLR 250 where conditions of identification were unfavourable unlike in the present case where the robbery was committed in broad daylight under favourable conditions of identification. He further observed that PW2 reported the appellants to PW3, Ndorobo Sube, the first person he met after wriggling himself out of the blind folding and tying which showed that the said herdsman properly identified the appellants.

On the identification of the 4 cattle found in Mdaira's kraal where the 2<sup>nd</sup> appellant had kept the same, a fact the 2<sup>nd</sup> appellant admitted, Mr. Mwampoma pointed out that PW1 and PW2 identified their brand marks in the ears of the recovered cattle although the 2<sup>nd</sup>

appellant interfered with complainant's marks by imposing fresh marks thereon.

The issue is whether the appellants were properly identified by the single eye witness, PW2.

We wish to point out here that this is a second appeal. The trial court had the advantage of hearing the witnesses and upon finding their evidence credible, grounded a conviction. The learned judge traversed through the evidence on record and found no cause to disturb the findings of fact by the trial court considering that the robbery was staged at midday in broad daylight when visibility was good. This being a second appeal, we find no misdirection or error in the record to cause us to reverse the findings of fact by the courts below. This principle was reiterated in the case of **DPP versus Jaffari Mfaume Kawawa** (1981) TLR 149 at Page 153 in which the Court stated, inter alia:

The next important point for consideration is whether it is proper for the court to evaluate evidence afresh and come to its own

conclusion on matters of fact. This is a second appeal brought under the provisions of Section 5 (1) of the Appellate Jurisdiction Act, 1979. The appeal thereafter lies to this court only on a point or points of law. Obviously this position applies where there are misdirections ---

We are also mindful of the decision in *Peters versus Sunday Post Ltd.* (1958) E.A. 424 at Page 429 in which the court held:

It is a strong thing for an appellate court to differ from the findings of a trial court on a question of fact by the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate Court, has indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate Court might itself have come to a different conclusion.

As for the identification of the 4 recovered cattle, the complainant identified them by stating, and we quote from his testimony at Page 15 of the record:-

I managed to identify three head of cattle and the fourth which was a calf born by the third cow was not yet marked ---. On the right ear used to cut "n" the symbol of the saw. On the left there is a hole and cut. But these marks were destroyed and put with other marks the cuttings were fresh --. On interrogation Mdaira Mdeme told (us) these heads of cattle were brought to him by Mhando (2<sup>nd</sup> appellant).

It appears the 2<sup>nd</sup> appellant attempted to tamper with PW1's brand marks by imposing fresh marks thereon, a fact PW1 and PW2 noted. That PW2 only identified the appellants was corroborated by PW3, the first person to receive the cattle theft report. The appellants were well known to the herdsman. He told the appellants during cross-examination:

XXD By the 1<sup>st</sup> Accused: (1<sup>st</sup> Appellant). I know you for a long (time), I used to see you at Farkwa auction ---.

XXD By 3<sup>rd</sup> Accused: (2<sup>nd</sup> Appellant) you are the very person who beat me with a stick ---.

PW2 was beaten on the head and he tendered his PF3, Exhibit P2, without objection from the appellants. Like the courts below, we have no cause to fault the identification of the appellants or of the recovered 4 head of cattle. The appeal is devoid of merit.

We accordingly dismiss the appeal.

DATED at DODOMA this 22<sup>nd</sup> day of June, 2007.

E. N. MUNUO  
**JUSTICE OF APPEAL**

E. M. K. RUTAKANGWA

**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**