Citation	Parties	Legal Principles Discussed
CRIMINAL APPEAL NO. 206 OF 2006- COURT OF APPEAL OF TANZANIA AT DODOMA- MUNUO, J.A., KAJI, J.A., And KIMARO, J.A.	**1. MASHAKA HENRY, 2. ALLY SAID Vs. The REPUBLIC** (Appeal from the Judgment of the High Court of Tanzania at Dodoma- Criminal Appeal Nos. 51 of 2004 c/f 30 of 2005- Masanche, J.)	Offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16. Sentenced to 30 years imprisonment.

IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

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

CRIMINAL APPEAL NO. 206 OF 2006

1. MASHAKA HENRY]
2. ALLY SAID] ..... APPELLANTS
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Masanche, J.)

dated the 26th day of June, 2006
in
Criminal Appeal Nos. 51 of 2004 c/f 30 of 2005

JUDGMENT OF THE COURT

19 & 22 JUNE, 2007

KAJI, J.A.

Mashaka Henry and Ally Said, who are the 1st and 2nd appellants respectively, were jointly charged with and convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16. They were each sentenced to 30 years imprisonment. On first appeal to the High Court their appeal was dismissed for want of merit.

At the trial the prosecution adduced evidence to the effect that, on 1st August, 2003 at about 01.00 hrs, at Mission Area, within Manyoni District, while PW1 Asha d/o Ally and PW2 Nelly d/o Binamungu were asleep in separate rooms, the door of the house in which they were sleeping was forced open. PW1 who had switched off the lights in her room when she retired to bed, switched on the light to investigate. In so doing, two men burst into her room and ordered her to remain silent. PW1 claimed to have identified them to be the appellants whom she knew before the event. The appellants took her hand bag which contained Shs. 1,000/=.

They moved to PW2's room and picked up her hand bag which was on a table.

They ransacked their house and got away with an assortment of various properties which included a television set, a deck, a booster, a radio speaker, one set of hotpots, a thermos and other properties as listed in the charge sheet. The matter was reported to the police who arrested the appellants.

In their defence the appellants denied to have been involved in committing the offence charged and claimed to have been asleep in their respective houses at the material time.

On first appeal the crucial issue was whether the appellants were properly identified. After perusing the evidence on record the learned judge on first appeal (Masanche, J.) concurred with the trial court's finding that the appellants were properly identified by PW1 and PW2. The appellants were aggrieved; hence this second appeal.

Before us the appellants appeared in person. The respondent Republic was represented by Mr. A.D. Mwampoma, Principal State Attorney.

In their joint memorandum of appeal the appellants preferred seven grounds of appeal which basically boil down to one, that is, identification. In elaborating on this point the appellants pointed out that, PW1 who had switched off the lights in her room could not have identified the intruders. They further contended that, PW1 never knew them before although she might have seen them at the market for some time. Furthermore, that PW1 did not explain how long she observed them. The appellants also expressed some concern on why the owner of the house, David Mbaku, was not called as a witness despite the fact that there was no medical evidence that he was incapacitated. On PW2, the appellants contended that, since she had covered her face with a kitenge, she wouldn't have been able to identify either of them, especially that she never knew them before.

On his part, Mr. Mwampoma, learned Principal State Attorney, pointed out that, the appellants were properly identified by PW.1 and PW2. The learned Principal State Attorney observed that, PW1 switched on the light and identified them before they ordered her to switch it off. He further contended that, PW1 knew them before the

event as she claimed, and that she observed them for sometime before she switched off the light.

As for PW2, the learned Principal State Attorney observed that, there was electric light in her room throughout, and that she had only covered her body with a kitenge and not the face. He further pointed out that, the appellants were not strangers to PW2 who used to see them at the market.

Right from the trial, through the first appeal up to this stage the crucial issue has always been that of identification, that is, whether the appellants were properly identified at the scene of crime. The trial magistrate considered this extensively and came to the conclusion that the appellants were properly identified at the scene of crime. His finding was also supported by the learned judge on first appeal.

Going through the evidence on record, it is evident that when the appellants burst into PW1's room the light was on. She had switched off the lights when she retired to bed. But when she heard

some noise at the sitting room she switched on the light in an attempt to investigate who was there. It was at this stage when the appellants swarmed in and ordered her to switch off the light and threatened to kill her if she raised an alarm. PW1 knew them before. She said she used to see the 2nd appellant playing football at Jumbe play ground which was near their home, and also at the market. She also used to see the 1st appellant at the market. She even mentioned the type of weapon each had, that is, an iron bar for the 1st appellant, and a panga for the 2nd appellant. Under those circumstances we are satisfied that the prevailing conditions were favourable for a proper identification, and that PW1 properly identified the appellants as held by the two courts below.

As far as PW2 is concerned, she also claimed to have known the appellants before the event, although not by names. Here we hasten to say that, knowing someone does not necessarily require knowing even his name. PW2 claimed to have left the lights on in her room, and that she identified the appellants through that light. We had some difficulties in reconciling her conflicting answer when

answering a question by the court. It is recorded she replied as follows:-

> "I only covered my face with a kitenge. My face was not covered. My electric light was on all the time. I remained silent and the two people thought I was asleep."

But going through her evidence as a whole it would appear there was probably a slip of the pen when it was recorded "I covered only my face with a kitenge" followed by the words "my face was not covered".

We say so because at one stage she was recorded to have said as follows:-

> "I did not lock the door but locked it halfly. I did not extinguish the electric lights. All of a sudden I heard a bang outside my bedroom at the window way. I suspected the cattle from the kraal. I returned to bed. All at a sudden I witnessed two men. They never said a word to me. One of the people picked

> my hand bag from the table and opened it. The two people were armed with a panga and iron bar. The one who opened my hand bag was armed with a panga. The two people I saw in my bed room were accused No.2 (i.e. 1st appellant) and No.4 (i.e. the 2nd appellant). The other person mentioned the other opening my hand bag as Bwana Ally,"

That is why we say the conflicting words "I only covered my face with a kitenge. My face was not covered" was probably a slip of the pen.

At any rate, even if the evidence of PW2 is discarded with, the evidence of PW1 was sufficient to ground conviction on the appellants for the reasons demonstrated above.

The appellants' complaint as to why David Mbaku was not called as a witness, and that only his statement was tendered, has no merit. The trial court's decision was not based on David Mbaku's evidence which by the way had been tendered contrary to the requirements of section 34 B (2) of the Evidence Act, 1967. Obviously David Mbaku

could not come to court because he had been bed ridden for a long time as stated by the prosecution witnesses.

Since the appellants were properly identified at the scene of crime as demonstrated *supra,* and since the sentence imposed is the minimum, there is nothing to fault the concurrent findings of fact of the two courts below.

For the foregoing reasons, we dismiss the appeal in its entirety.

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