IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: KIMARO, J.A., LUANDA, J.A., And MANDIA, J.A.:)

CRIMINAL APPEAL NO. 180/2007

DEOCLES MERCHALD..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Bukoba)

(Sambo, J.)

dated the 31st day of May, 2007
in
Criminal Appeal No. 42/2006

JUDGMENT OF THE COURT

8th October & 15th October , 2010

MANDIA, J.A.:

The appellant was charged with Armed Robbery C/SS. 285 and 286 of the Penal Code in the District Court of Muleba. He was convicted and sentenced to thirty years imprisonment. He unsuccessfully appealed to the High Court of Tanzania at Bukoba. Still aggrieved, he has filed this second appeal.

The appellant filed a memorandum of appeal containing eight grounds of appeal. Being a self-help job, the memorandum is understandably mixed up, but the issues raised in it can he summarized as:- **one**, inconsistencies in the testimony of the eye witnesses in the trial court, **two**, evidence of identification which was not water-tight, **three**, unlawful search inside his house, a trial court judgment which did not conform to Section 312 of the Criminal Procedure Act and which was not read to him, and **lastly**, that the trial court shifted the burden of proof. The appellant prosecuted the appeal personally in this court and in the High Court. The respondent Republic, on the other hand, was represented by Mr. Edgar Luoga learned State Attorney.

Evidence led in the trial court tended to show that on 13/2/2000 at around 11 pm. PW2 Thomas Anselimu was asleep in his house with his wife PW4 Veladilina Thomas. These two heard the front door of their house being broken. Both shouted for help. At the same time PW4 Veladilina Thomas lit a kerosene lamp, after which her husband PW2 Thomas Anselimu climbed onto the ceiling of the house in order to hide and Veladilina crawled under the bed, also to hide. Both PW2 and PW4 heard

the sound of gunfire out from outside their house, after which they saw a total of four persons entering their house. From the light of the lamp they recognized their villagemate, the appellant, as one of the four persons who entered the house. Both witnesses testified that the appellant wore shortpants which whey described as "bukta", and the husband added that the appellant wore a black shirt.

PW2 and PW4 lived in the same house together with their son, PW1 Leopord Thomas, who also identified the appellant as one of four people who entered their house after breaking, and, that the appellant was wearing a "bukta". When the four persons entered, they demanded money from PW1. PW1 said he had no money. The four persons then left the son and went for the father which gave room to PW1 to escape and to go to alert neighbours. After PW1 had escaped, the four burglars discovered PW2 in his hiding place. They hit him on the face with a stone and then cut him with a panga. The PF3 which PW2 tendered in court as Exhibit P4 shows that he suffered extensive injuries, to wit, four cut wounds on the forehead, two cut wounds on the left arm, two cut wounds on the left leg and multiple bruises on the left leg, right leg and back. The burglars also

pulled out PW4 Veladilina from under the bed where she was hiding and slashed her on the face. Thereafter they ransacked the house and took away a jug, a cooking pan, a bicycle, a radio, one pair of shoes, one wristwatch and cash Sh 25,000/=. They ran away when PW Leopold Thomas, who had escaped them, came back with neighbours.

PW2 was taken to hospital and on the morning following the burglary PW1 made a report to the Village Executive Officer PW3 Rafael Rwahangaine. The village Executive Officer rounded up the suspects mentioned. During this round up the appellant mentioned that he had hidden PW2's bicycle inside his house. PW3 Rafael Rwahangaine detailed a militiaman, who did not testify, to go to the appellant's house in the company of PW1 Leopord Thomas. The evidence of PW1 Leopord Thomas shows that the appellant led the way to his house and pointed out the bicycle which PW1 identified as the one stolen from their house the previous night. The bicycle tendered in the trial Court as Exhibit P1 was also identified by PW2 Thomas Anselimu as the one stolen when his house was burgled on the night of 13/2/2000.

The appellant was charged jointly with six others, making a total of seven accused persons. They all gave their respective defences denying the charge. Four were found not guilty by the trial court and acquitted. Three were convicted, including the appellant. The convicted three preferred an appeal to the High Court and two of them had their appeals allowed. The appeal by the appellant was dismissed and he preferred the present appeal.

As we said earlier, the memorandum of appeal is a do-it-yourself job so it mixes up things. We will therefore discuss the memorandum generally.

Two complaints are raised against the judgment of the trial Court- that it was not read to the appellant and that it did not conform to section 312 of the Criminal Procedure Act. In this aspect we have examined the record and it tells a different story. The record shows that the judgment was read in the presence of the appellant who was found guilty and convicted on 12/12/2000. Immediately after conviction the prosecution told the trial Court the appellant had no previous record of convictions and the

appellant together with the other two accused persons he was convicted with gave their addresses in mitigation. After mitigation all three were sentenced to imprisonment for thirty years and orders for compensation made against each one of them. We have checked with original record of proceedings in the trial court. It shows that the appellant and the other two convicts were received by Muleba District Prison on 12/12/2000 and he was issued with Receipt for Convicted Prisoner G No. 468882 showing that he had been sentenced to thirty years imprisonment. It is therefore not correct for the appellant to say that the judgment was read in his absence. We have scrutinized the judgment of the trial court. We are satisfied that it conforms to Section 312 in all aspects.

The next aspect we would like to deal with is the issue of inconsistencies between the two identifying witnesses PW2 Thomas Anselim and PW4 Veladilina Thomas who are husband and wife. In referring to the source of light which enabled each one of them to identify the burglars PW2 referred to the source of light as a wick lamp (Kibatari), while PW4 referred to the source of light as kerosene lamp. Be it as it may, case law has held it that unless all possibilities of mistaken identity

are eliminated and the court is fully satisfied that the evidence of identification is watertight, courts should not act on the evidence of visual identification. We have in mind the case of **Waziri Amani v Republic** (1980) TLR 250. To make sure evidence of visual identification is beyond doubt, witnesses must state in their evidence conditions favouring correct identification or recognition of the accused person – see **Raymond Francis v Republic** (1991) TLR 100 and **Mengi Paulo Samweli Luhanga and Mengi Elias Chambewa vs Republic** Criminal Appeal No. 222 of 2006 (unreported). See also **Maloda William and Another v Republic,** Criminal Appeal No. 256 of 2006 (unreported). In the circumstances of this case where the three identifying witnesses escaped from the scene by running away in the case of PW1 Leopold Thomas, climbing onto the ceiling in the case of PW2 Thomas Anselimu and hiding under a bed in the case of PW4 Veladilina Thomas, and in the absence of evidence from any of them on the intensity of light and time each one took to observe the alleged burglars, no definite conclusion can be reached that the appellant was positively identified.

Despite the lack of positive identification of the appellant by the eye witnesses, there is however evidence by PW1 Leopold Thomas, PW2 Thomas Anselimu and PW3 Raphael Rwahangaine that while at Rwahangaine's house, the appellant mentioned that he kept in his house a bicycle belonging to PW2 Thomas Anselimu. The appellant led the way from Rwahangaine's house to his (appellant's) house, and from there PW1 Leopold Thomas and a militiaman who did not testify retrieved a bicycle which both PW1 Leopold Thomas and his father PW2 Thomas Anselimu identified as the bicycle which was in their house up to 11 p.m. on 13/2/2000 and was stolen by burglars at 11 p.m. on the mentioned date. The evidence of PW3 Rafael Rwahangaine shows that the appellant showed the way to his house at 9 a.m. on the morning of 14/2/2000 so only ten hours passed between the stealing of the bicycle and its recovery. A similar situation arose in **Hadija Salim and Doto Simba v Republic,** Criminal Appeals No: 11 and 32 of 1996 (unreported). We are satisfied that by showing the way leading to recovery of the bicycle proved positively that the appellant is one of the quartet which robbed the complainant the previous night.

We are satisfied that the appeal against conviction and sentence before us has no merit. The same is dismissed in its entirety.

DATED at MWANZA this 13th day of October, 2010.

N. P. KIMARO

JUSTICE OF APPEAL

B. M. LUANDA

JUSTICE OF APPEAL

W. S. MANDIA

JUSTICE OF APPEAL

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

W. P. Bampikya

SENIOR DEPUTY REGISTRAR