

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



(CORAM: LUBUVA, J.A., MROSO, J.A. AND RUTAKANGWA, J.A.)

CRIMINAL APPEAL NO. 94 OF 2005

ANTHONY KIGODI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mwita, J.)

dated the 9th day of March, 2005

in

Criminal Appeal No. 2 of 2005

JUDGMENT OF THE COURT

9 March & 16 March 2007

LUBUVA, J. A.:

This is an appeal from the decision of the High Court (Mwita, J.) sitting at Tabora. The matter originated from Nzega District Court Criminal Case No. 153 of 2002 in which the appellant together with others had been charged with and convicted on the first count of the

offence of burglary and another count of armed robbery contrary to Sections 294(1) 285 and 286 of the Penal Code respectively. He was sentenced to a term of five years and 30 years with 12 strokes of corporal punishment. He was also ordered to pay shillings 20,000/= to the complainant (PW.1) for the injuries sustained and the unrecovered items. The sentences were to run concurrently. Unsuccessfully the appellant appealed to the High Court. Hence this second appeal.

Briefly stated, the background giving rise to the case is that Joseph Laurent, the complainant (PW.1), resided at Magengati Village within the District of Nzega, Tabora Region. On 8.6.2002, at about midnight the door of his house was forced open by bandits. Two bandits entered the house who assaulted PW.1 and his wife. The wife of PW.1 raised an alarm and people from around the area came to the residence of PW.1 in response. Immediately, PW.1 told the people gathered that the appellant was among the invading bandits. The appellant was arrested by sungusungu the same night. The other co-accused were also arrested and charged together with the appellant but as said before they were acquitted.

At the hearing of the appeal before us, Mr. Kameya, learned State Attorney, appeared for the respondent Republic. The appellant was unrepresented. He filed six grounds of appeal the sum total of which we think boil down to one major point of complaint. That is embraced in grounds one and three which in part reads:-

"That the trial judge (sic) erred on a point of law to dismiss my appeal basing in the evidence of identification of the appellant by the complainant PW.1".

In elaboration of the grounds of appeal, the appellant at great length stressed two points. One, that he had been severely tortured by sungusungu from 9.6.2007 when he was arrested until 10.6.2002 when he was forced to show his panga which was not the weapon used at the robbery. That, he showed under torture his own panga was not an admission to the commission of the offence as alleged. The Village Executive Officer (V.E.O.) (PW.2) had also forced him to pay

compensation by taking his 17 goats, 8 bags of rice and 1 cow. He also said that in his defence at the trial he had raised the issue of torture which is supported by medical evidence in PF.3 Exh. P.1 but was rejected.

The second point of complainant raised that his identification was not satisfactory, it was based on the evidence of a single witness, namely, the complainant (PW.1). He urged that the conditions for correct identification at the time were not favourable.

Mr. Kameya, learned State Attorney, resisted the appeal. A summary of his submission is to the following effect: That the complainant as found by the trial court and the High Court on first appeal was a credible witness who was a relative of the appellant and a neighbour as well. At the time of the robbery PW.1 was able to identify the appellant because there was light in the room from a lamp which was on. PW.1 was threatened with a panga by the appellant while demanding money and ordering him (PW.1) to sit down. In that situation, PW.1 and the appellant were close to each other. The State

Attorney also said that the time taken by the bandits taking the various items until they disappeared was considerable. Furthermore, Mr. Kameya pointed out that the complaint that the appellant was not mentioned to the people gathered at the scene of crime soon after the incident is not true. That the complainant mentioned the appellant to the people gathered at the scene soon is supported by Lucia Manota (PW.2). Finally, the State Attorney stated that the appellant led the people gathered to the place where the panga Exh. was in his house. On the basis of this evidence, the State Attorney charged that the appellant had been correctly identified. He also submitted that the conditions set out in **Waziri Amani v. Republic** (1980) TLR. 250 for proper identification of an accused person were satisfied in this case.

The central and contentious issue in this appeal pertains to the identification of the appellant, namely whether there was sufficient evidence for the identification of the appellant at the time of the incident. From the evidence it is not disputed that the trial magistrate supported by the learned judge on first appeal relied almost entirely on the evidence of PW.1 regarding the identification of the appellant. The

question arises whether it was proper to found a conviction on the evidence of a single witness at the identification of an accused person without corroboration. The learned judge was alive to this issue, he addressed it when inter alia, he stated:

"The Court of Appeal held in a number of cases that it is a rule of practice, not of law, that corroboration is required of (sic) the evidence of a single witness of identification of the accused made under unfavourable conditions; but the rule does not preclude a conviction on the evidence of a single witness if the Court is fully satisfied that the witness is telling the truth".

In support of this proposition of law, the learned judge relied on the decision of this Court in **Lusabanya Siyantemi v. Republic** (1980) TLR275 and **Hassan Juma Kenenyeva and Others v. Republic** (1992) TLR. 100. In this light, in the instant case the learned judge was satisfied that conditions were favourable for the correct identification of

the appellant and that PW.1 was a witness of truth. In the event, the learned judge was settled that the conviction of the appellant based on the evidence of PW.1 was properly founded.

With respect, we think the learned judge correctly set out the legal position regarding the question whether the court may act on the evidence of a single witness. **First**, as provided under Section 143 of the Evidence Act, 1967, it is common ground that no particular number of witnesses is required for proof of any act or offence. **Secondly** as correctly stated by the learned judge, this Court has held in numerous cases that the court may act on the evidence of a single witness if it is satisfied that the witness is truthful. Apart from the cases cited above, see for instance, **Yohanis Msigwa v. Republic** (1990) TLR. 148 and **Masudi Amlima v. Republic**, TLR. 25.

In the instant case, in view of the clear rule of practice regarding the evidence of a single witness of identification and the fact that the trial court as well as the learned judge on first appeal concurrently

found PW.1 as a witness of truth, the trial court correctly acted on the evidence of PW.1. The ground on this point is dismissed.

The next issue for consideration is whether the evidence as found by the trial court was sufficient for correct identification of the appellant. A close examination of the circumstance which enabled PW.1 to identify the appellant at the time of the incident is desirable at this stage. First, as submitted by the State Attorney, according to PW.1, when the robbers entered the house of PW.1, there was light from a lamp which was on in the room. Secondly, we think the appellant was at close range with PW.1 when he was ordering PW.1 to sit down threatening with a panga. **Thirdly**, it took considerable time in taking the various items stolen which afforded ample opportunity to PW.1 to identify the appellant.

Fourth, without delay, PW.1 mentioned the appellant to the people gathered at the scene as having taken part in the robbery. **Fifth**, the appellant being a relative of PW.1 living in the same village as the appellant was known to PW.1 before the incident. In these

circumstances, it seems unlikely that PW.1 had any reason to implicate the appellant with the robbery if infact, he (PW.1) had not seen and identified him during the robbery.

From the evidence of PW.1 as analysed by the trial court as well as the first appellate High Court judge, both of which courts found PW.1 a credible witness, we are satisfied that the conditions at the time of the robbery were favourable for correct identification of the appellant. We are aware of the cardinal principle laid down by the erstwhile Court of Appeal for Eastern Africa in **Abdallah bin Wendo and Another v. Rex** (1953) 20 E.A.C.A. 116 and followed by this Court in the celebrated case of **Waziri Amani v. Republic** (1980) TLR. 250 regarding evidence of visual identification. The principle laid down in these cases is that **in a case involving evidence of visual identification, no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight.**

In this case, having regard to the circumstances of the case and in particular, the evidence of PW.1, we are satisfied that the principle laid down in **Wendo** and **Waziri Amani** (*supra*) was satisfied.

Finally we shall deal briefly with the complaint that the evidence relating to the Exhibit P.III, panga, should not have been relied on in convicting the appellant. The reason stated by the appellant was that he showed his own panga as a result of severe torture inflicted on him as borne out from the PF.3 Exh. D.1.

We need not be delayed in this ground. The legal position regarding any torture in an alleged confession by an accused person is common knowledge. That where actual torture is involved the purported confession should not be admitted in evidence because it is doubtful that the accused was a free agent when he made the confession. In **Brasius Maona and Gaitan Mgao v. Republic**, Criminal Appeal No. 215 of 1992 (*unreported*) the Court stated:

"Once torture has been established, courts should be very cautious in admitting such statements in evidence even under the provisions of Section 29 of the Evidence Act, 1967 which in our considered view was not meant to be invoked in a situation where the inducement involved is torture".

The Court also reiterated this position in **Dotto Ngasa v. Republic**, Criminal Appeal No. 6 of 2002 (*still unreported*).

In this case, it was erroneous on the part of the trial magistrate to admit and rely on the evidence relating to the panga (Exh. P.III) on the ground that the appellant led to where the panga was in his house as admission that the appellant had taken part in the robbery. In the light of the injuries shown in PF.3 and the fact that he had been under police custody and sungusungu until the recovery of the panga, it was likely that the appellant showed the panga under torture.

However, on appeal in the High Court, the learned judge was of the view that the evidence in this regard should not have been taken into consideration. The reason the learned judge stated was that it was doubtful that the confession made to the Village Executive Officer (PW.2) and his showing of the panga was induced by sungusungu. Nonetheless, the learned judge was satisfied that even with the exclusion of the alleged confession, still the evidence of visual identification by PW.1 was sufficient to sustain the conviction. With respect, it is our view that the learned judge was correct.

For the foregoing reasons, the appeal is dismissed in its entirety.

DATED at MWANZA this 16th day of March, 2007.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

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




S. M. RUMANYIKA
DEPUTY REGISTRAR