

IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(HC) CRIMINAL APPEAL NO. 79 OF 2002

(Original Criminal Case No. 325 of 2002 of the
District Court of Tabora at Tabora

Before: N. A. S. Mwakasanga, Esq., P.D.M.)

DORIKI S/O KAGUSA - APPELLANT

V E R S U S

THE REPUBLIC - RESPONDENT

J U D G M E N T

MWITA, J.:

On 14.11.2001 at 2.30 a.m. the residence of one Laurent Revocatus (P.W.1) situated at Bachu Area, Tabora Municipality was invaded by armed bandits who beat up P.W.1 and his tenants. They stole money and other items then disappeared. Ally Ramadhani and Doriki Kagusa were suspected to be among the said bandits. They were charged with armed robbery contrary to sections 285 and 286 of the Penal Code. At the conclusion of the trial they were convicted as charged and sentenced to thirty (30) years imprisonment each by the Tabora District Court.

Aggrieved by both conviction and sentence, Doriki Kagusa has appealed to this Court.

At the hearing of this appeal the Appellant was represented by Mr. Kayaga, learned Advocate. The Republic had the services of Mr. Rweyongeza, learned State Attorney.

The gist of Mr. Kayaga's contention is to the effect that the charge was not proved to the required standard

because the prosecution case hinges on visual identification. As the incident took place at night, the conditions were not favourable for correct identification; and secondly, that the Appellant's defence of alibi was not given due weight.

On his part Mr. Rweyongeza argued that the Appellant was correctly identified because he was not a stranger to P.W.1 and P.W.2; there was electric light at the scene of crime and the bendits stayed with the witnesses for more than 10 minutes. Hence the conditions were favourable for correct identification. With regard to the defence of alibi Mr. Rweyongeza argued that the defence was duly considered and found to cause no reasonable doubt to the prosecution's case; and that in any case section 194 of the Criminal Procedure Act 1985 was not complied with in that the Appellant disclosed the defence of alibi when the prosecution had closed its case.

I will start with the issue of visual identification.

Both P.W.1 and P.W.2 told the Court that the Appellant was well known to them and they identified him at the scene of crime with aid of electric light and had stayed with him for about 10 minutes. They also identified him at the identification parade conducted on 16.11.2001.

In CHAMBO RAMADHANI V. REPUBLIC (1985) T.L.R. 178 some villagers, having been tipped off that robbers were planning to raid a house on the material night, placed a burning lamp in front of the house and kept vigil in the nearby surrounding bushes. The gang of robbers appeared at 11.00 p.m. Among them, the hiding villagers saw the Appellant, a fellow member of their village, before the light was put out and the house broken into. The gang fled when the villagers started shouting. It was held that the Appellant was correctly identified although the circumstances in which he was identified were not as easy.

as they would have been had the incident happened in the day time, because the Appellant was not a stranger to the villagers who identified him.

In *EVA SALINGO AND TWO OTHERS V. REPUBLIC* (1995) T.L.R. 220 the incident took place at night, the Appellants were not strangers to the identifying witnesses. It was held that identification with aid of light from a pressure lamp was correct.

In the instant case the Appellant was not stranger to P.W.1 and P.W.2. There was electric light at the scene. P.W.1 and P.W.2 had ample time to observe the Appellant. P.W.1 and P.W.2 identified the Appellant at the identification parade conducted two days since the incident took place. Hence chances of mistaken identification were very minimal.

I now turn to consider the defence of alibi.

In his defence the Appellant testified to the effect that on the night of 14.11.2001 he was asleep with his sister (D.W.3) in the same house but separate rooms. He was awakened by loud voice of alarm. He went outside to follow up the voices. Before going to the scene he heard bullets and returned to his room. His sister also woke up and he stopped her when she wanted to run to the front house. After 20 minutes they heard people talking outside. They accompanied neighbours to the scene of crime.

D.W.3, Mawazo Haruna, told the Court that on 13.11.2001 she was with the Appellant at their home. They ate food at 8.00 p.m. and at 9.00 p.m. they went to sleep in separate rooms. At about 2.00 a.m. she heard an alarm. She went with the Appellant to the scene of crime.

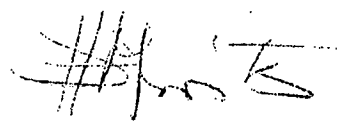
The trial Magistrate considered this evidence. He formed the view that as the Appellant and D.W.3 slept in

different rooms, it was possible for the Appellant to go out with the knowledge of D.W.3, commit the offence at the neighbouring house, then come back and awaken D.W.3. He was entitled to come to that conclusion.

In any case the provisions of section 194 of the Criminal Procedure Act, 1985 were not complied with in that the defence of alibi was disclosed after the prosecution had closed its case. Hence the trial Magistrate had a discretion to accord it no weight.

The sentence imposed is the statutory minimum sentence.

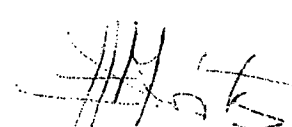
For the above reasons the appeal is dismissed in its entirety.



D. M. MWITA,

JUDGE.

Delivered in the presence of Mr. Mtaki Advocate for Mr. Kayaga, Advocate for the Appellant and Mr. Rweyongeza, State Attorney.



D. M. MWITA,

JUDGE.

10th August, 2004.

/AHM.