

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

**(CORAM: LUBUVA, J.A., MROSO, J.A., And NSEKELA, J.A.)**

**CRIMINAL APPEAL NO. 139 OF 2003**

**ONESMO ROGATI SWAI ..... APPELLANT  
VERSUS  
THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court  
of Tanzania at Kondoa)**

**(Kaijage, J.)**

dated the 19<sup>th</sup> day of September, 2003  
in  
**Criminal Appeal No. 67 of 2001**

**12 & 29 May 2006**

**REASONS FOR THE JUDGMENT OF THE COURT**

**LUBUVA, J.A.:**

On 12<sup>th</sup> May, 2006, after hearing submissions by Mr. Mdemu, learned State Attorney, for the respondent Republic, we allowed the appeal, quashed conviction and set aside the sentence. It was ordered that the appellant be released forthwith from custody unless otherwise lawfully held. Reasons were reserved which we are now set to give.

In the District Court of Kondo, at Kondo, the appellant, Onesmo Rogati Swai, and four others, were charged among other counts, with armed robbery contrary to sections 285 and 286 of the Penal Code. They were sentenced to a term of thirty (30) years imprisonment. On appeal to the High Court, the appellant was referred to as the second appellant (hereinafter, the appellant) and the others first, third, fourth and fifth appellants respectively. In this appeal the same reference shall be retained. The High Court (Kaijage, J.) allowed the appeal in respect of the first, third, fourth and fifth appellants in the High Court while the appellant's appeal was dismissed. Aggrieved, the appellant has come to this Court.

The background giving rise to the case is that during the night of 3<sup>rd</sup> March, 1999 at the village of Kaachini, Kondo District, the house of Omar Hoti (PW8) which was also used as a shop was invaded by a gang of armed bandits. PW8 and other members of his family (PW4, PW9) were violently attacked by the bandits who fired gun shots in the air. In the course of robbery, T.Shillings 500,000/= cash and an assortment of merchandise items worth T.Shillings

identification of the appellant and his co-accused. First, the learned judge took the view that PW4, PW8 and PW9 had failed to give description of the appellant and the others. For this reason, the learned judge held that mere assertion by PW4, PW8 and PW9 that they identified the robbers by appearance could not guarantee the reliability of the evidence on identification.

Secondly, it was also the view of the judge that the robbery incident took place under a charged and confused atmosphere. With gun shots fired and threats to PW4, PW8 and PW9, who were left lying down unconscious, their identification of the bandits was doubtful. In the circumstances, the learned judge further held that possibilities of mistaken identity could not be ruled out. Furthermore, because no evidence had been shown on the propriety of the Identification Parade; the learned judge discredited the evidence on the identification parade.

With regard to the evidence of Perpetua Bongola (PW3) the learned judge held that the evidence raised strong suspicion against

1,600,000/=, the property of PW8 were stolen. Upon investigation by the police, the appellant and the others were arrested. The appellant and his co-accused were identified by PW4, PW8 and PW9 at an identification parade. The trial District Magistrate was satisfied that the appellant and the others were properly identified and that they were sufficiently linked with the offence. Consequently, they were convicted. The appeal to the High Court against the first, third, fourth and fifth appellants was allowed and as for the second appellant, the appellant in this appeal, was dismissed.

Dealing with the appeal the learned judge addressed the central issue whether the appellant and his co-accused had been properly identified by PW4, PW8 and PW9, the victims of the robbery. The learned judge meticulously analysed the evidence of PW4, PW8 and PW9. In their evidence, both PW4, PW8 and PW9 stated that by aid of the light of two lantern lamps, they were able to identify the appellant and the others, not subject of this appeal. From the evidence relating to identification, the learned judge was satisfied that there were some unsatisfactory elements relating to the

the first appellant (1<sup>st</sup> accused at the trial) but remotely connected him with the offence. The evidence of PW3 was to the effect that on the day of incident the first appellant in the High Court hired a motor vehicle from the appellant in this case. We desire not to express views on the propriety or otherwise of discounting the evidence of PW3, an eye witness to the hiring of the motor vehicle from the appellant. No appeal was preferred on this issue. Having taken this view of the evidence, the learned judge held that the prosecution had not proved its case against the first, third, fourth and fifth appellants in the High Court. Consequently, their appeal was allowed. As for the second appellant, the appellant in this case, the judge held that there was sufficient evidence to sustain the conviction against him. The appeal was dismissed and as indicated earlier, he has appealed to this Court.

In this appeal, the appellant has lodged a twelve-point memorandum of appeal the essence of which is to the effect whether there was sufficient evidence to link the appellant with the offence. As mentioned earlier, Mr. Mdemu, learned State Attorney, for the

respondent Republic, at first prevaricated. However, upon reflection, he was settled and so, he did not support the conviction against the appellant. He said the judge having discredited the evidence of PW4, PW8 and PW9 and the identification parade, there was no other evidence upon which the conviction against the appellant could be sustained. He also said that factually, the learned judge erred in his finding that the appellant admitted having witnessed the commission of the robbery at the scene. This was not born out from the record, the State Attorney urged.

There is no dispute that at the time of the robbery the prosecution alleged that the appellant in this case was among the gang of bandits. The group included the first, third, fourth and fifth appellants in the High Court. The offence took place under the same condition which as we have observed earlier the learned judge held to be unfavourable for a proper identification of the first, third, fourth and fifth appellants in the High Court. The crucial issue is: After discounting the evidence of PW4, PW8 and PW9 with regard to the identification of the first, third, fourth and fifth appellants in the High

Court, what was the evidence upon which the conviction against the appellant in this case could be sustained?

Mr. Mdemu, learned State Attorney, firmly owned that there was none. With respect, we think he is correct. PW4, PW8 and PW9 were the eye witnesses to the robbery in which it was alleged the appellant in this case was also involved. If, as held by the learned judge the condition for proper identification was unfavourable in so far as the first, third, fourth and fifth appellants in the High Court, the same position would apply in the case of the appellant in this case. To hold otherwise would amount to double standard in a criminal charge.

From the judgment, it is apparent that the learned judge relied on the extra judicial statement of the appellant in this case (Exh. P1). In the statement, according to the judge, the appellant had admitted having been at the scene of crime where he passively witnessed the commission of the robbery. That the conviction of the appellant in

this case was based on this fact as perceived by the judge is evident from what the learned judge said:

In his defence and his extra judicial statement (Exh.P.1) the second appellant admits having been at the scene of crime and having passively witnessed the commission of the robbery but under compulsion. In my judgment, I find that that defence grounded on compulsion is untenable, and that it was raised as an afterthought. .... did not report the incident even at the time when he was no longer under any threat. His silence was inconsistent with his innocence and was, in fact, indicative of his participation in the commission of the offence he was convicted of.

We have had occasion to examine the defence statement of the appellant in this case at the trial and the extra judicial statement Exh. P.1. From these, we are unable to find any indication that the appellant admitted to have witnessed commission of the robbery. Factually therefore, what is stated by the learned judge to this effect



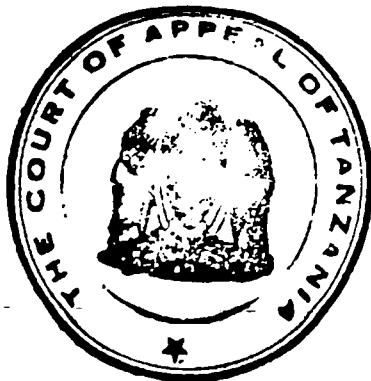
is not correct. The appellant did not say that he had witnessed the commission of the robbery. Based on incorrect factual position, the learned judge fell into the error of drawing a false inference. That is, that the appellant's failure to report the incident which he had witnessed was indicative of the appellant's participation in the commission of the offence. As stated earlier, if the appellant did not say he witnessed the commission of the robbery, there was nothing as it were, that the appellant could report. In that situation, it goes without saying that the conclusion by the learned judge that the appellant's silence was inconsistent with his innocence was without foundation. In the circumstances, we are increasingly of the view that the learned judge erred in sustaining the conviction based on a wrong perception of the facts. It has no leg on which to stand.

Admittedly, from the appellant's defence at the trial and the extra judicial statement (Exh. P1), the manner in which the appellant's motor vehicle was hired raises great suspicion against him. However, it is trite law that suspicion however strong it may be, is not in itself enough to ground a conviction in a criminal charge.

Such was the position in the instant case. Had the learned judge considered the evidence properly after discrediting PW4, PW8 and PW9, we think he would have come to the finding that the appellant's guilt had not been proved beyond reasonable doubt.

For these reasons, the Court allowed the appeal.

DATED at DODOMA this 29<sup>th</sup> day of May, 2006.



D.Z. LUBUVA  
**JUSTICE OF APPEAL**

J.A. MROSO  
**JUSTICE OF APPEAL**

H.R. NSEKELA  
**JUSTICE OF APPEAL**

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

( S.M. RUMANYIKA )  
**DEPUTY REGISTRAR**