

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 209 OF 2006

1. AMIRI ATHUMAN }
2. FADHILI YAHAYA } APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania
at Arusha)

(Mussa, J.)

dated 22nd May, 2006

in

Criminal Appeal No. 76 of 2002

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JUDGMENT OF THE COURT

17th & 23rd April, 2008

KIMARO, J.A.

This is an appeal against the judgment of the High Court at Arusha which upheld the decision of the District Court of Arusha. The appellants and two others, namely Yahaya Juma and Ariseni Joachim were jointly charged with the offence of armed robbery

contrary to sections 285 and 286 of the Penal Code. Yahaya Juma and Ariseni Joachim were acquitted but the appellants were convicted and sentenced to thirty years imprisonment. In addition they were ordered to pay compensation of Tshs 50.000/- to the victim of the offence. Being aggrieved, the appellants appealed to the High Court but their appeal was dismissed in its entirety.

The appellants were aggrieved and they have come to this Court with this appeal.

In the trial court the case for the prosecution was that on the 27th of April, 1999 at around 11.00 am the appellants and their co-accused who were acquitted, stole a TV set, video deck, a bicycle and a sum of Tshs. 20,000/- belonging to one Eliza Martine.

A brief summary of the prosecution evidence was that on 27th April, 1999 at around 11.00 am one Eliza, (PW1) a wife of Martin Danford (PW2) was at home. According to the testimony of PW1, the 1st appellant who was known to PW1 before, as he had

approached her some weeks back seeking for tenancy at their residence, went to their house. He was with the 2nd appellant. PW1 offered them seats and the 1st appellant started to account for his failure to occupy the room that PW1 rented him. As the conversation was going on, the other accused persons who were acquitted came in one, after the other at a short interval, and they were armed. Suddenly the appellants removed pangas from their coats and threatened PW1 not to raise any alarm. One of them kept vigil on PW1 in the kitchen while the others fulfilled their wicked intention of taking the properties mentioned above. Halima Shabani, (PW4) a tenant of PW1 was the first one to meet the appellants as they arrived at the premises and she referred them to PW1. When she entered into her room the culprits locked her door from outside and it was until they left, that she called the daughter of PW1 to open it.

The armed robbery was then reported to PW2 and to the police. Following information from an informer that the 2nd appellant had a deck and was looking for a buyer, D4829 Cpl Davis (PW5), in the company of PW2 arrested the 2nd appellant on 3rd May 1999.

Upon interrogation the 2nd appellant disclosed the persons who were involved; the 1st appellant being one of them. It was also with the assistance of the 2nd appellant that all the properties which were stolen were recovered, and PW3 identified them all; the bicycle and radio cassette by their serial numbers, and they matched with the receipts for the purchase of the properties. As for the television set and video deck, PW2 said the receipts were in the bag that was also stolen. C 1124 D/Cpl Athuman (PW4) recorded caution statements of both appellants and they admitted their full involvement in the commission of the offence.

Both appellants raised the defence of alibi but it was rejected. They were convicted and sentenced as shown above and the first appellate court upheld the conviction and sentence.

The appellants raised three common grounds of appeal. Their first ground of complaint is on their identification. The second ground is that the caution statement was not taken in compliance with section 50 of the Criminal Procedure Act CAP 20 R.E 2002 and

the last one is the failure by the prosecution to summon as witnesses the persons from whom the stolen properties were recovered.

At the hearing of the appeal the appellants appeared in person. Mr. Mapinduzi, learned State Attorney, represented the respondent Republic.

In arguing the appeal the first appellant opted to rely only on the grounds of appeal filed. The second appellant added other grounds. First, he contended that PW1 was not a credible witness because she failed to disclose who threatened her and that her identification was doubtful because of the threat she encountered. Second, he challenged the evidence of his arrest claiming that it was contradictory versions given by PW2 who said he was arrested on 6th May, 1999 while PW5 said his arrest was on 3rd May, 1999. He told us that he was arrested on 3rd May, 1999. The last one which is also among the grounds he filed was the time within which his caution statement was recorded. He complained that his arrest was on the

3rd May, 1999 but his statement was recorded on 5th May, 1999, beyond four hours after his arrest.

Both appellants prayed that their appeals be allowed.

On his part the learned State Attorney supported the conviction and sentence. On the ground of identification, Mr. Mapinduzi submitted that the identification of the 1st appellant was not doubtful because PW1 had seen him before when he approach her with a request for tenancy. Moreover, the learned State Attorney argued, the incident took a long time and it was at day time, at around 11.00 am. As regards the 2nd appellant, Mr. Mapinduzi contended that although PW1 saw him for the first time during the commission of the offence, she could not have mistaken him, given the fact that the offence was committed at daytime after PW1 spent sometime with him before the offence was actually committed, when she was conversing with the 1st appellant about the tenancy.

The learned State Attorney submitted further that both appellants gave caution statements which were recorded in compliance with the law, admitting the commission of the offence, and the statements were admitted in court without any objection from the appellants. Besides, the learned counsel contended, the stolen property was recovered following the arrest of the 2nd appellant and the caution statements. The learned State Attorney prayed that the appeal be dismissed as it lacks merit.

Admittedly this is a straight forward case and we need not detain ourselves. Starting with the issue of identification, we are settled on our minds that there was no mistaken identity of either of the appellants. Both appellants went to the house of PW1 on the date the offence was committed. It was in broad daylight at 11.00 am. The 1st appellant was known to PW1 before as he had approached her some weeks back requesting for tenancy. As regards the 2nd appellant he spent sometime with PW1 as she conversed with the 1st appellant on the question of tenancy. At that time there was no threat. PW1's evidence was corroborated by that of PW4, a tenant

of PW1 who saw them first before they saw PW1. We entirely agree with the learned State Attorney that the identifying circumstances were excellent and the claim by the appellants that they could have their identity mistaken is too remote to be accepted. See the case of **Waziri Amani Vs Republic** 1980 T.L.R 250.

The sequence of events is another relevant factor enhancing our strong stand that the appellants were properly convicted. It was the arrest of the 2nd appellant that led to the arrest of the 1st appellant and the recovery of the properties which were stolen. The arrest came a few days after the commission of the offence. The 1st appellant wrote a caution statement on the same date he was arrested and he admitted commission of the offence. Even if the statement of the 2nd appellant is discarded on the ground that it was not recorded within the time prescribed by section 50 of the Criminal Procedure Act, Cap 20 R.E.2002 the evidence on record was sufficient for his conviction. In view of what has been said about his identification that will not have absolved him from the conviction and the sentence that was imposed on him.

In the event, we find the appeal lacking merit and it is dismissed in its entirety.

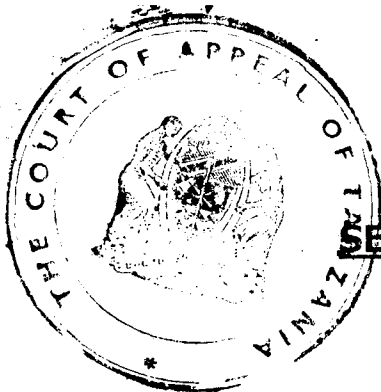
DATED at ARUSHA, this 21st day of April, 2008

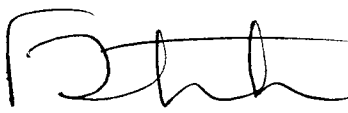
S. N. KAJI
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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




(F. L. K. WAMBALI)

SENIOR DEPUTY REGISTRAR