IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: RUTAKANGWA, J.A., MBAROUK, J.A. AND MASSATI, J.A.)

CRIMINAL APPEAL NO. 259 OF 2007

1. **MOHAMED HARUNA@ MTUPENI**
2. **MAJALIWA SEIF MTUPENI** } ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Kihio, J.)

dated the 6th day of May, 2005
in
Criminal Appeal No. 102 cf 103 of 2005

JUDGMENT OF THE COURT

1 & 4 JUNE, 2010

RUTAKANGWA, J.A.:

The two appellants and six others were jointly arraigned before the trial Tabora Resident Magistrates' Court at Tabora for the offence of Armed Robbery contrary to sections 285 and 286 of the Penal Code, Cap 16, Vol.1 R.E. 2002. The particulars of the charge partly show that the accused persons:-

> *"...on **28th day of February, 2004** at about 02.00 hrs at Ibaya Village within Sikonge District ... did steal cash Tshs.67,000/=, four pairs of vitenge valued at Tshs.16,000/= and **various building items** valued at Tshs.241,000/=, All total valued at Tshs.324,000/= the property of TASAF and immediately before such stealing did fire a number of bullet in the air in order to obtain the stolen properties".* [Emphasis is ours].

The accused persons pleaded not guilty and a full trial was held.

At the conclusion of the trial, only these appellants and one Ally s/o Haruna @ Mtupeni were found guilty as charged and convicted. They were all sentenced to thirty (30) years imprisonment. They were aggrieved by the conviction and sentence and appealed to the High Court at Tabora. While the appeal of Ally Haruna was allowed in its totality, the appeal by these two appellants was dismissed. Still protesting their innocence they have lodged this appeal.

In this appeal each appellant filed his own memorandum of appeal, although their grounds of complaint are almost similar. The judgments of the two courts below are being assailed on these grounds. **One,** the doctrine of recent possession was wrongly invoked because they were not found in actual possession of the alleged stolen articles. **Two,** they were not identified at the scene of the crime. **Three,** the two courts below relied on their alleged confessions without conducting a trial within a trial. To argue the appeal, the two appellants appeared in person and had nothing to say either in elaboration of their grounds of appeal or in the form of additional grounds.

For the respondent Republic, Ms. Neema Ringo, learned Principal State Attorney, appeared, and did not support the conviction of the appellants. To her the prosecution case was with riddled inconsistencies on the date when the robbery was committed and implausibilities. Further, she said, evidence on the use of violence and/or threats of violence is hardly available and PW2 did not adequately identify the stolen goods. For these reasons, she urged us to allow the appeal.

Before canvassing the grounds of appeal and the reasons why the respondent Republic supported this appeal, we have found it convenient to look at the evidence which led to the appellants' conviction. Briefly, it was as follows.

Maganga Hassan, who testified as PW2 at the trial of the appellants, is a peasant residing in Itibaya village. In the early hours of **28th January, 2004**, as he was asleep with his wife in their residence, he allegedly heard a sound of gunshots. Then two strangers entered their house and demanded money. According to him, the bandits simply took Tshs.67,000/= from a locker, a box of tools containing "*door locks nails, stoppers and screws etc",* belonging to TASAF. They then left. It was PW2 Maganga's evidence that following this incident, other robberies were committed on divers dates. This was confirmed by PW3 Waziri Juma, whose evidence however, is silent on when these robberies took place.

Following these spates of alleged robberies, a number of people were arrested as suspects. Among them were the two appellants. The suspects were found in possession of various articles, which included stoppers,

locks, screws, soaps, mosquito coils and a gun. The evidence of PW2 Maganga and PW3 Waziri does not show when these arrests were effected. However, PW1 Nasibe Ndegeya, the Itibaya Village Executive Officer, claimed in his evidence that he interrogated them on 10th March, 2004. They allegedly confessed committing the robbery. After PW2 had positively identified the recovered locks, stoppers and screws, which were tendered in evidence as exhibit P1 collectively, to be the ones stolen from him, the appellants were charged accordingly.

In their evidence the two appellants testified that they were each arrested separately on 9th February, 2004. Each one of them admitted to have participated in stealing at PW2 Maganga's house at night. They also admitted that exhibit P1 was part of the loot, which they had hidden in the forest. The appellant Majaliwa, categorically stated that the plan to steal was hatched up at the home of Selemani Hassan, who was the second accused in the trial court. All the same the appellants unequivocally denied using a gun during the commission of the offence.

On the basis of these admissions, and their acceptance of exhibit P1 to have been found in their constructive possession, the two lower courts convicted them as charged because a gun was used.

In disposing of this appeal, we have found it appropriate to first dispose of this crucial question: was there any robbery committed at the home of PW2 Maganga on 28th January, 2004 as he himself testified or on any other date? To us, this major question begs this subsidiary but equally important question: what is robbery? The answer to this latter question is provided by section 285 of the Penal Code.

Section 285 reads thus:-

> *"Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen, or to prevent or overcome resistance to its being stolen or retained is guilty of robbery."*

In very simple words, robbery is stealing coupled with the use of actual violence or threats to use actual violence to any person or property.

Of course in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence. But as the learned first appellate judge rightly observed in his judgment, "*if the accused person in the course of his defence gives evidence which carries the prosecution case further, the court will be entitled to take into account such evidence of the accused in deciding on the question of his guilt.*" After all, the very best of witnesses in any criminal trial is an accused person who freely confesses his guilt.

With the above pertinent general observations in mind, it is apt to return to what this Court succinctly stated in the case of **ZUBELL OPESHUTU V. R.**, Criminal Appeal No.31 of 2003 (unreported) on the offence of robbery. It said:-

> *"The prosecution has to adduce evidence to establish the essential ingredients of the offence, that is, whether actual violence or threat of actual violence was used to obtain or retain the thing stolen. The nature of the violence must also*

be proved. A pre-requisite for the crime of robbery is that there should be violence to the person of the complainant. There must be evidence to establish that the appellant used or threatened to use any actual violence to obtain or retain the stolen property."

In the case before us, there is no gainsaying that on the night of 28th January, 2004, a number of unknown bandits entered the dwelling house of PW2 Maganga and stole therefrom cash money, four pairs of vitenge and exhibit P1. Going by the evidence of PW2 Maganga, it is very clear that the thieves did not use any sort of violence on him personally or any other person, while the theft was being committed or immediately thereafter.

We understand that in his evidence PW2 Maganga had mentioned that before two bandits had entered his dwelling house he had heard two gunshots being fired. This evidence, however, does not show from where the gunshots emanated. There is no clear evidence on record to prove, even on a balance of probabilities, that the gunshots were fired at the house of PW2 Maganga or in the immediate neighbourhood. No single

empty cartridge was seen at or near the scene of the crime. Furthermore, neither PW1 Nasibu nor PW3 Waziri testified to having heard any sound of gunshots at their village on 28th January, 2004 or on any other day. In view of all this, we have found ourselves disposed to agree with the two appellants that no gun was used when they stole exhibit P1 from PW2 Maganga's house. It is for this reason that we are in agreement with Ms. Neema Ringo in her contention that the offence of robbery, leave alone armed robbery, was not proved beyond reasonable doubt.

We are aware of the discrepancy between the evidence of PW2 Maganga and the charge sheet on the date when the appellants stole from PW2. We are convinced that since the appellants confessed stealing exhibit P1 from PW2 and were arrested on 9th February, 2004, the date appearing in the charge sheet was a typographical error, which never prejudiced the appellants at all. We accept the evidence of PW2 Maganga that the theft took place in the early hours of 28th January, 2004. This piece of evidence gains support from PW1 Nasibu, who while under re-examination said that the appellants were arrested in February while "*the events took place in January.*"

Having held that the offence of robbery was not proved we are constrained to allow this appeal against the conviction for armed robbery and the sentence of imprisonment of thirty years, as rightly argued by the appellants and supported by Ms Ringo. We accordingly quash and set aside the said conviction and sentence. However, since the appellants freely admitted (confessed) in their evidence to have stolen from PW2 Maganga, as already shown above, having acquitted them of armed robbery, we hereby substitute therefor, under section 300(1) of the Criminal Procedure Act, Cap. 20, Vol. 1 RE 2002, a conviction for theft under section 265 of the Penal Code.

The maximum sentence for theft is seven years imprisonment. The appellants have already served nearly six (6) years, of the thirty – year jail sentence imposed on them. In our considered opinion, it will not be in the interests of justice to detain them further in custody, given the fact that they freely confessed to the offence, which is a clear sign of their remorse. We accordingly impose a sentence which will result in their immediate release from prison unless they are otherwise lawfully detained.

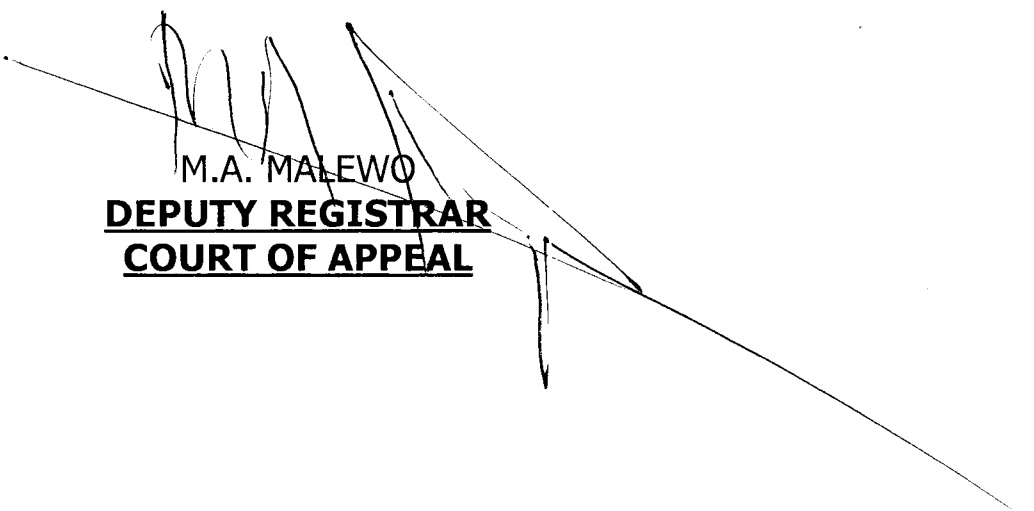
DATED at TABORA this 2nd day of June, 2010.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL