IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MUNUO, J.A., MSOFFE, J. A. And KIMARO, J. A.)

CRIMINAL APPEAL NO. 30 OF 2009

AMIRI MOHAMED @ MULEMULE .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Tanga at Tanga)

(Lema, SRM – Extended Jurisdiction)

dated the 15th day of October, 2008
in
Criminal Appeal No. 52 of 2007

JUDGMENT OF THE COURT

10 & 12 March, 2010

MSOFFE, J.A.:

The appellant was sentenced to fifteen years imprisonment by the District Court of Pangani (Kasonso, DM) consequent upon his conviction of the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code. Aggrieved, he made a first appeal to the Tanga Resident Magistrate's Court with extended jurisdiction (Lema, SRM Extended Jurisdiction). He was unsuccessful hence this second appeal.

The evidence as it unfolded at the trial showed that both PW1 Elias Mwaluko and PW2 Maulid Shabani were employed by PW5 William Greenwig as watchmen. They knew the appellant prior to the date of incident as a person who lived at Bushiri Village. On 31/7/2005 at around 1.00 p.m. PW1 and PW2 were on duty when they were invaded by robbers who included the appellant. The robbers were wielding a club, machetes and knives. They ordered PW1 and PW2 to remain calm lest they would harm them. Indeed, it is on record that one of the robbers actually threatened PW1 by saying *"ukipiga kelele tutakuuwa."* Further to the threats, the robbers also tied PW1 and PW2 with ropes on their hands and legs in order to prevent them from moving away or interfering with their "mission". In the process, the robbers went into the house of PW5, who was not in the house at the time, and stole a hand set mobile phone, a TV "sender", a radio and a sum of shs. 1,020,000/=, the properties of PW5, and then disappeared from the scene. The incident was reported to the police and a search for the robbers was quickly mounted. Eventually the appellant was arrested and eventually identified by PW1 and PW2 at an identification parade.

The appellant's defence was a general denial of guilt. He submitted at length in his defence. It will suffice to say in brief that he raised the defence of an *alibi*, contending in effect that on the fateful day he was at his home and not at the scene of the crime in issue.

In their respective and concurrent findings of fact the courts below were satisfied that the appellant was duly identified at the scene of the crime and also at the identification parade. The trial District Magistrate, in particular, had this to say:-

> ..... *The two witnesses i.e. PW1 and PW2 knew the accused no. 2 (the appellant herein) even before the alleged incident. These two watchmen saw the second accused on that material date; however the identification parade was made and the watchmen picked up the 2nd accused. The alleged incident took place in the broad day light so it is our view that it was not easy for PW1 and PW2 to mistake the identity of the 2nd accused who is their village mate. So, PW1 and PW2 rightly identified the 2nd accused .....*

In the memorandum of appeal the appellant has canvassed seven grounds of complaint. In a nutshell, however, they all crystallize on one major ground of complaint. That the evidence of identification was insufficient to warrant the conviction in question. In this regard, the appellant is of the affirmative view that the prosecution case against him was not proved beyond reasonable doubt.

At the hearing of the appeal Mr. Oswald Tibabyekomya, learned Senior State Attorney, appeared on behalf of the respondent Republic. He argued in support of the appeal. In his view, it was doubtful if PW1 and PW2 truly identified the appellant on the fateful day and time. PW5 told the trial District Court that PW1 and PW2 told him that the robbers were masked. If so, how could PW1 and PW2 identify the appellant in the group of robbers, Mr. Tibabyekomya wondered. Furthermore, he went on to urge that in their respective testimonies it is evident that PW1 and PW2 did not mention the name of the appellant at the very first opportunity when the matter was reported to the police. If PW1 and PW2 had identified the appellant at the scene of the crime they would have easily mentioned his name to PW4 D7292 D/Cpl. Living. As it is, it is clear in the evidence of PW4 that

PW1 and PW2 described to him only the physical features of the robbers. Mr. Tibabyekomya also went on to wonder why it took a month or so to effect the arrest of the appellant. If he was truly known to PW1 and PW2, it would not have taken all that long period of time for the appellant to be arrested, he asserted.

Admittedly the determination of the case depended much on the crucial aspect of identification. With respect, we are in agreement with Mr. Tibabyekomya in his submission on this aspect of the case. We will only add one or two other matters by way of emphasis. We too think that if, as testified by PW5, the robbers were masked it was doubtful that PW1 and PW2 ever identified the appellant as one of the people present in the group of robbers. We also agree that if these witnesses saw the appellant at the scene of the crime they would have mentioned his name to the police at the very early opportunity. They did not do so. Indeed, even in their examinations in chief in Court they did not mention the appellant. Actually, it was not until when PW2 was re-examined that he mentioned the appellant!

There is another aspect of identification which we wish to point out. As already stated, the evidence of PW1 and PW2 was to the effect that they knew the appellant prior to the date of incident, specifically that he was a resident of Bushiri village. If so, and given their other testimony that they identified him at the scene of the crime, then it occurs to us that in an ideal case there would be no need for an identification parade. As it is, in our understanding and appreciation of the evidence as a whole of these two witnesses, we are of the view that it was quite possible that they did not know the appellant prior to the fateful day. In fact, as already alluded to, it is also doubtful that they identified the appellant at the scene. It was because of these two factors that, we think, the police deemed it fit and prudent to conduct an identification parade in order to ascertain whether these two witnesses could truly identify the appellant as having been among the robbers who invaded the house of PW5 on the date and time of incident.

At this juncture we wish to make one point in passing. As already observed, the alleged robbers were wielding a club, machetes and knives. These are, no doubt, dangerous weapons. In this case,

the offence was alleged to have been committed on 31/7/2005, after the **Written Laws (Miscellaneous Amendments) Act No. 6** of **1994** had come into force on 18/3/1994. **Section 5 (b)** of the **Minimum Sentences Act, 1972**, as amended by **Act No. 10** of **1989** and **Act No. 6** of **1994** provides:-

> *(b) Subject to subparagraph (ii) of this paragraph –*
>
> *(i) any person who is convicted of robbery shall be sentenced to imprisonment for a term of not less than fifteen years;*
>
> *(ii) if the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more persons, or if at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to imprisonment for a term of not less than thirty years.*

Subparagraph (ii) above, applies to all robberies in which the offender is armed with a dangerous weapon or instrument, or is in

company with one or more persons, or where in the course of the robbery he wounds, beats, strikes or uses any other personal violence to any person. In this case, it was alleged, the robbers had dangerous or offensive weapons, the appellant was in company with more than one person, and there was personal violence to PW1 and PW2. So, having convicted the appellant, the District Court ought to have sentenced him to a term of imprisonment of not less than thirty years. In similar vein, in upholding the conviction the Resident Magistrate's Court with extended jurisdiction ought to have substituted the sentence of fifteen years to one of not less than thirty years imprisonment – Also see this Court's decisions in **Stuart Erasto Yakobo v Republic**, Criminal Appeal No. 202 of 2004 and **Zubell Opeshutu v Republic**, Criminal Appeal No. 31 of 2003 (both unreported).

For the reasons stated, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released from prison unless he is lawfully held therein.

DATED at TANGA this 11th day of March, 2010.

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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

(N. N. CHUSI)
DEPUTY REGISTRAR