

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 167 OF 2006

MARTIN MPENZI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the conviction and sentence of the RM's Court of
Tanzania
at Mtwara)**

(Kinemela (SRM EJ.))

**Dated the 16th day of June 2006
in
Criminal Appeal No. 3 of 2006
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JUDGMENT OF THE COURT

29 SEPTEMBER & 4 OCTOBER, 2010

MBAROUK, J.A.:

In the District Court of Newala at Newala the appellant Martin s/o Mpenzi was charged with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code and was sentenced to thirty (30) years imprisonment. Aggrieved, he appealed to the Resident Magistrate's Court with Extended Jurisdiction

(Kinemela, SRM Extended Jurisdiction) where his appeal partly succeeded only on the question of sentence which was substituted with that of fifteen years imprisonment. Conviction was upheld. Undaunted, hence this second appeal has been preferred.

The evidence leading to the conviction of the appellant was that, one Ali Halfani (PW1) and his wife Shakila Nankoma (PW2) on 11-5-2005 at 18.30 hrs. were on a bicycle along Namiyonga – Likuna road in Newala District while PW2 having a baby on her back. On the way PW2 noticed somebody with a bush knife running towards them and notified PW1. The man with a bush knife identified by PW1, PW2 and PW3 as the appellant hit PW1 with the back of the bush knife on his right forearm. Thereafter, PW1 released the bicycle. The appellant then rode the stolen bicycle towards Kiduni road. PW1 then reported the matter to the Police through the chairman of Likuna village. Thereafter, the appellant was arrested by the police and accordingly charged.

The appellant categorically denied the charges preferred against him mainly relying on the defence of alibi. His defence was supported by Francis Rashidi Husia (DW2).

In this appeal, the appellant was unrepresented, whereas the respondent Republic was represented by Ms Angela Kileo, the Learned Senior State Attorney.

The appellant filed a lengthy memorandum of appeal containing six grounds of appeal with an additional memorandum containing four other grounds, making the total of ten grounds of appeal. However, we think the ten grounds of appeal can boil down to the following grounds: **Firstly**, that the appellant was not properly identified at the scene of the crime. **Secondly**, that the trial magistrate and the Appellate Senior Resident Magistrate (Ext. Juris.) erred in law when they failed to take into consideration the appellant's defence of alibi. **Thirdly**, that there was no proof that PW1 owned the said bicycle before it was stolen. **Fourthly**, there

was a delay in arresting the appellant but was not taken into consideration by the two courts below.

At the hearing of the appeal, the appellant simply adopted his grounds of appeal and had nothing useful to add, understandably so being a lay person.

On her part Ms Kileo, from the outset supported the conviction and sentence. She responded to each and every ground of appeal. However, for convenience and simplicity we have opted to condense the ten grounds of appeal into mainly four.

As on the issue of identification. Ms Kileo submitted that the evidence on identification was watertight to the extent that there was no element of mistaken identity. She submitted that all the prosecution witnesses like PW1, PW2 and PW3 all testified on how they managed to identify the appellant at the scene of the crime. For example she said, PW1 stated that he managed to identify the appellant, because they came face to face, and since the appellant

was well known to PW1, hence he fully identified the appellant during the struggle which led him to be very close to him. She said the time was 18.30 hrs. when sun shine was still visible. Ms Kileo added that PW1 and PW3 managed to give a description of the clothes wore by the appellant at the scene of the crime. In support of her argument, the Learned Senior State Attorney referred us to the Case of **Waziri Amani v. R.** [1980] TLR 250 where conditions for identification were stipulated and added that all conditions stated therein were covered in this case, hence possibilities of mistaken identity have been eliminated.

We on our part, are of the considered opinion that the record is very much clear on how the prosecution witnesses were able to show how they managed to identify the appellant at the scene of the crime. The record shows that the crime was committed at 18.30 hrs, according to the prosecution witnesses the sun shine was still visible. Furthermore, as PW1 testified, he managed to identify the appellant after having struggled with him when his bicycle was taken, hence he managed to see the appellant face to face. Furthermore, there is no

dispute that the appellant is known to PW1, PW2 and PW3 who testified in court by giving his description of the clothes he wore when the crime was committed. Even the appellant himself do not dispute that he is known to the prosecution witnesses.

All in all, we are of the considered opinion that the principles for identifying the appellant as laid down in the case of **Waziri Amani v. R.** (supra) were fully satisfied in this case. The following conditions were stated in the case of **Waziri Amani**:

*"We would for example expect to find on record questions such as the following posed and resolved by him: **the time the witness had the accused under observation, the distance at which he observed him, the conditions in which such offence occurred, Whether it was day or night time, whether there was good or poor lighting at the scene; and further whether***

the witness knew or had seen the accused before or not.” [Emphasis added].

As pointed earlier, the record shows that such conditions were satisfied. Hence, we are of the opinion that the ground of appeal on identification has no merit.

On the issue of alibi, Ms Kileo submitted that this ground of appeal is without merit. After all, the appellant himself failed to give a notice to the trial magistrate as required by section 194(1) of the Criminal Procedure Act, (Cap. 20 R.E. 2002) (the Act).

We on our part are of the opinion that the trial magistrate correctly invoked section 194(6) of the Act after using his discretion and accorded no weight of any kind to the defence of alibi. The record shows that the trial magistrate saw that no reasonable doubt was raised to convince the court to believe the appellant. We are increasingly of the view that, as far as the appellant spent only a day at the place where he went to work, hence his defence has no basis.

DW2 said, the work was done on 15-5-2006 and not 11-5- 2006 when the crime was committed. This contradictory statement raised doubt on the truthfulness of the real day the appellant was absent at the crime scene. Hence, we support the trial magistrate in not according any weight to the appellant's defence of alibi. In the end, we are of the opinion that the defence of alibi has no merit.

On the issue of proof of ownership of a bicycle claimed to have been stolen, Ms Kileo submitted that, there was no other person who claimed ownership to that bicycle, hence the appellant's complaint has no basis. She added that, after all, the record showed that the stolen bicycle belonged to PW1's father. She further submitted that no injustice was occasioned for not considering the appellant's claim.

There is no doubt that the record shows that the stolen bicycle belonged to the PW1's father where PW1 testified to that effect. What the appellant was charged with is the charge of robbery with violence, where a bicycle was stolen from PW1. The issue of ownership cannot arise here, because the evidence tendered by the

prosecution proved beyond reasonable doubt that it was the appellant and no other person identified to have committed the offence at the crime scene. So long as PW1 was in possession of the bicycle it was immaterial who was the real owner. PW1 was a special owner for all purposes of offences against property. For that reason only, we are of the opinion that this ground has no merit and should not detain us.

As to the issue pertaining to the unexplained delay in arresting the appellant, Ms Kileo had not given a useful answer to it. However, on our part, we are of the considered opinion that the issue was not raised nor addressed by the trial magistrate and at the appeal before the Learned Senior Resident Magistrate with Extended Jurisdiction. In the event and for the earlier stated reason, we are of the opinion that this ground of appeal too has no merit.

Lastly, Ms Kileo raised the issue of the illegality of sentence imposed by the Learned Senior Resident Magistrate with Extended Jurisdiction. Ms Kileo submitted that, since a lethal weapon was

used, hence, the earlier sentence of thirty (30) years imprisonment imposed by the trial court on the appellant be upheld. She urged us to invoke section 4(2) of the Appellate Jurisdiction Act and enhance the sentence from that of fifteen (15) years to that of thirty (30) years imprisonment.

In reply, the appellant had nothing much to submit except for praying for his appeal to be allowed.

We are of the considered opinion that, since the appellant was charged with the offence of robbery with violence the trial magistrate imposed the sentence of thirty (30) years imprisonment without regard to section 5(a)(i) of the Minimum Sentence Act Cap. 90 R.E. 2002. That section sets a sentence of imprisonment of not less than fifteen (15) years as a minimum sentence for such an offence. With the support of the provisions of the Minimum Sentence Act and since armed robbery although cognate was not minor to robbery with violence, we are increasingly of the view that the trial court was wrong in imposing a higher sentence for armed robbery for which the

appellant was not changed with, and so, the Senior Resident Magistrate with Extended Jurisdiction was right when he reduced the sentence to that of fifteen (15) years.

In the event and for the reasons stated herein above, the appeal is dismissed. The sentence of fifteen (15) years is upheld.

It is so ordered.

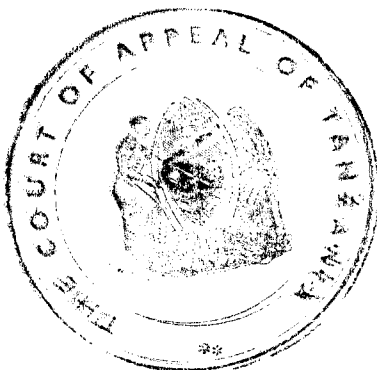
DATED at MTWARA, this 1st October, 2010.

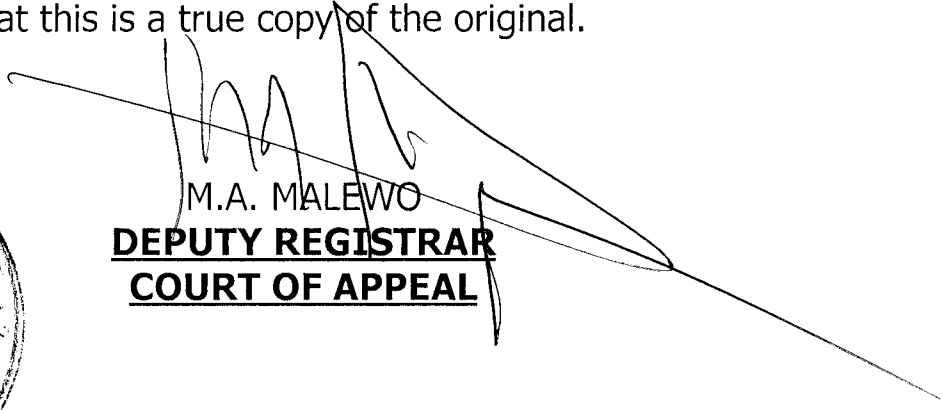
M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
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