IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MUNUO, J.A., MBAROUK, J.A., And BWANA, J.A.)

CRIMINAL APPEAL NO. 249 OF 2008

RASHIDI MTANGA AHAMADI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court

of Tanzania at Mtwara)

(Mjemmas, J.)

dated the 30th day of June, 2008

in

Criminal Appeal No. 110 of 2007

JUDGMENT OF THE COURT

19 & 29 September 2011

MBAROUK, J.A.:

In the District Court of Nachingwea at Nachingwea, the appellant was charged with the offence of robbery with violence contrary to sections 285and 286 of the Penal Code Cap. 16 Vol. 1 as amended by Act No. 10 of 1998. He was convicted and sentenced to fifteen (15) years imprisonment. Aggrieved by the conviction and sentence, he unsuccessfully appealed to

at the police station again. He was then kept under custody and on 30/8/2005 he was sent to court and charged.

In this appeal, the appellant appeared in person unrepresented, whereas the respondent Republic was represented by Mr. Ismail Manjoti, the learned State Attorney assisted by Mr. Prudens Rweyongeza, the learned Senior State Attorney.

The appellant preferred a seven grounds memorandum of appeal which can conveniently be reduced to the following grounds:-

(1) That, the appellant was not properly identified at the scene of crime.

(2) That, the requirements of section 240 (3) of the Criminal Procedure Act were not complied with.

(3) That, the age of the appellant at the time when the offence was committed was not considered.

127 (2). For instance, See: **Godi Kasenegala v. Republic,** Criminal Appeal No. 10 of 2008, **Omary Kurwa v. Republic,** Criminal Appeal No. 89 of 2007, **Ndongole Nyanga @ Hazole Repa v. Republic,** Criminal Appeal No. 163 of 2009 (all unreported) to name but a few.

Underscoring the importance of compliance with section 127 (2) this Court in the case of **Omary Kurwa v. Republic** (supra) stated that:

> "This Court had set the standards which must be followed before the evidence of a child of tender years is considered. First the court must form an opinion on whether or not the child understands the nature of an oath. Second, **the court must form an opinion and record this opinion in the proceedings, whether or not the child is possessed of sufficient intelligence to justify the taking of the child's evidence** at all, and if the court finds that the child is intelligent enough to testify, whether or not the child understands the duty of speaking the truth."
>
> (Emphasis added).

We agree with Mr. Manjoti that, the conduct of the appellant to run away without any reason leads us to associate the appellant with his guilty conscious to the act he has done to PW1. Section 10 (2) of the Evidence Act reads as follows:-

> "The conduct of any party, or of conduct of any agent of any party, to any suit or proceeding, in reference to such suit or proceeding or in reference to any fact in issue or relevant thereto in the conduct of any person an offence against whom is the subject of any proceeding is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."

In the instant case, we are satisfied that the appellant's conduct of running away just after he saw PW1 and PW3, is related to his guilty conscience to the act he has committed to PW1. Such conduct is inconsistent with innocence. Also, PW3 saw the appellant without a bicycle and his clothes were covered with blood. For those reasons, in the

On the issue of age of the appellant at the time he committed the offence, Mr. Manjoti submitted that the issue of the appellant's age was not raised in the lower courts, hence it cannot be raised at this late stage.

It is a fact that the two courts below have not considered the issue of age of the appellant, but for the interests of justice, we think, it was an important issue to be considered by the lower courts. Such a failure, we think has caused injustice to the appellant. The record shows that when the appellant submitted his defence in the year 2007 he was 19 years old, that means when he was charged in 2005 he was only 16 years old, hence he was a young offender according to the Children and Young Persons Act, [Cap. 13 R.E. 2002] then in operation. It has since been repealed by the Law of The Child Act, 2007. Section 22 (2) of Cap. 13 state that:-

> "**No young person shall be sentenced to imprisonment** unless the court considers that none of the other methods in which the case may be legally dealt with by the provisions of this Act or any other law is suitable."
>
> (Emphasis added).

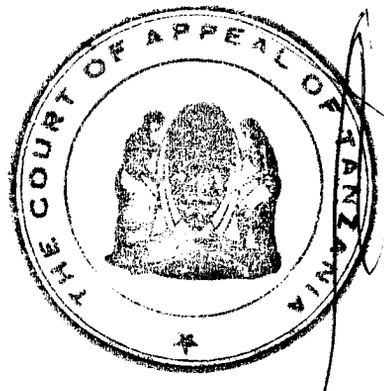
DATED at MTWARA this 21st day of September, 2011.

E.N. MUNUO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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



(M.A. MALEWO)
DEPUTY REGISTRAR