

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

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

CRIMINAL APPEAL NO. 130 OF 2008

RICHARD LEMBELI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the judgment of the RM's Court of Tabora at Tabora)

(Mbuya, PRM Ext. Jur.)

dated the 10th day of June, 2008

in

Criminal Appeal No. 62 of 2006

JUDGMENT OF THE COURT

23 & 28 June, 2011

MANDIA, J.A.:

The appellant Richard Lr and eleven others appeared in the District Court of Urambo at Ura. on a joint charge of Armed Robbery c/s 285 and 286 of the Penal Code. At the end of the trial the District Court found four persons i.e the first accused, the second accused, the third accused and the tenth accused guilty as charged, convicted and sentenced them to imprisonment for thirty years each for the first, second and tenth accused persons and a term of imprisonment of three years for the third and eleventh accused

persons who were convicted of alternative courts of Receiving stolen property. Amongst all those who were convicted, only the present appellant preferred an appeal to the High Court of Tanzania at Tabora. The appeal which the appellant filed was heard by L.J. Mbuya, PRM (Extended Jurisdiction) after the same was transferred to the Court of Resident Magistrate of Tabora at Tabora under Section 45(A) of the Magistrates' Courts Act, 1984, chapter 11 of R.E. 2002 of the Laws. After due hearing, the appellant's appeal was dismissed in its entirety. This led to the present appeal.

The facts giving rise to this appeal show that on the evening of 2/10/1998 at about 5 p.m PW3 Maganga Andrea was on a walk around Urambo town when he met the appellant Richard Lembeli and one Charles James. PW3 Maganga Andrea described himself in court as a habitual thief and that his usual confederates in theft were the appellant **Richard Lembeli** and **Charles James**. At their meeting the appellant and Charles James told Maganga Andrea that they had surveyed the District Court of Urambo and found that there was property which can be stolen, and that access to the place was easy.

The three agreed to go on their stealing mission at 1 a.m. They went to the scene with PW3 Maganga Andrea carrying a small iron bar, a bigger iron bar carried by Charles James, and another iron bar and knife carried by the appellant Richard Lembeli.

At the District Court the trio found the watchman asleep in the corridor leading to the store. They crept up on the sleeping watchman and took a torch and knife lying beside him. As they took the torch and knife the watchman woke up and raised an alarm. PW3 Maganga Andrea tried to throttle the watchman to silence him but the watchman kept shouting for help. This made Charles James hit the watchman on the fore head with an iron bar. The blow quietened the watchman. The trio then tied up the watchman and gagged him using a T-shirt which they had torn into strips. They then broke into the District Court store and took from therein bed sheets and khangas, two cartons of laundry soap, bicycle seats and two mattresses. They moved on to Urambo airstrip and divided their loot, with PW3 Maganga Andrea setting for the two mattresses as his share of the loot and his confederates sharing the rest of the stolen

property which they had divided into two lots. The trio left each other at 3.30 a.m on the early hours of the morning of 3/10/1998. PW3 Maganga Andrea went home and hid the two mattresses he had stolen in the tobacco barn. In the evening of 3/10/1998 he met the appellant who told him that among the two lots divided between the appellant and Charles James, one lot had fetched sh. 115,000/=. The next Sunday he learned, while he was out on a walk, that there were Policemen waiting for him at home. He fled to Tabora town and stayed there until his brother in law Moshi Maganga apprehended him and handed him over to the Police.

Two hours from the theft the watchman who was hit on the forehead by the three robbers reported the crime to PW1 Alexander N.B. Ndibumenya, a District Magistrate stationed at Urambo District Court. PW1 found the watchman with a bleeding wound on the head. The two reported the matter first to the District Magistrate in charge and then to the Police. PW1 Alexander Ndibumenya, PW6 Jumanne Uledi the watchman and PW11, Inspector Faraji Mtambo visited the

scene of the breaking - in which was an exhibits store of Urambo District Court. They found court exhibits scattered on the floor.

On the morning of 3/10/1998 at 8 a.m, barely seven hours after the robbery, PW10 Selemani Mwakalobo saw the appellant selling Khangas to one Constantino Peter and a child gown to one Deogratias Kweka. What attracted the attention of PW10 Selemani Mwakalobo was the fact that the items sold had labels showing that they were court exhibits. He reported his suspicions to the Police and this led to the arrest of the appellant and the buyers of the clothes bearing tags showing that they were court exhibits. The two mattresses, which PW2 Maganga Andrea admitted he hid in a tobacco barn, were recovered after a search by PW11 Inspector Faraji Mtambo who testified that when recovered the mattresses still bore the tags showing that they were exhibits in Criminal Case No. 83 of 1998 at Urambo District Court. The seizure of the mattresses was witnessed by PW4 Abraham Patrick Kaposwe.

On 23/10/1998 PW2 William Suleiman Shunashu, then a Primary Court Magistrate at Urambo urban Primary Court recorded

the extra-judicial statement of PW3 Maganga Andrea in which he admitted taking part in the armed robbery and named the appellant and Charles James as co-robbers.

The appellant filed a memorandum of appeal containing five grounds of complaint. These were:-

1. That the trial court and the first appellate court erred in law in basing a conviction on the basis of uncorroborated confession of a co-accused.
2. That he was not caught in possession of the stolen property.
3. That the two courts below erred in failing to consider the defence of alibi which he put up.
4. That the appellate High Court erred in accepting the confession of PW3 Maganga Andrea who was a self-serving witness.
5. That the lower courts erred in shifting the burden of proof into the defence.

The appellant appeared in person, unrepresented, while the respondent/Republic was represented by Mr. Mgisha Kasano Mboneko, learned State Attorney.

Mr. Mgisha Kasano Mboneko, learned State Attorney, supported both the conviction and sentence. He argued that PW3 was a co-accused of the appellant who admitted his offence, was convicted and duly sentenced. The evidence of PW3 Maganga Andrea is therefore the evidence of an accomplice which, if credible, can be used to convict even without corroboration. In addition the learned State Attorney argued that the evidence of PW10 Selemani Mwakalobo was that he witnessed the appellant selling court exhibits.

We will deal first with the second ground of complaint in which the appellant claims he was not caught in possession of any stolen property. In this regard, the evidence of PW10 Selemani Mwakalobo says:-

"I remember one day during the morning of 3/10/1998 at about 8 a.m the 2nd 4th and 10th accused persons appeared at home Majengo ya Tabora having 2nd hand trousers, Khanga, track suit, wrist watch, table watch, bed sheets for sale. In the said clothes I saw label of the court.

I remember one label reads "Exhibit No. CC No. 82/98." On observing the word "exhibit" which means in Swahili "Kielelezo "I came to observe that the properties are court exhibits. So I went to report to Police.

The 10th accused person in the trial court who is mentioned by PW10 Selemani Mwakalobo is the appellant Richard Lembeli. When given a chance to cross-examine the witness the appellant kept quiet. Obviously the second ground of complaint has no merit and we dismiss it. We will tackle the issue of a confession by a co-accused and that of PW3 being a self-serving witness together. In this regard we take note of the fact that PW3 Maganga Andrea not only made an extra-judicial statement (Exhibit P2) before a justice of the peace PW2 William Suleiman Shunashu, but when he appeared in court on the same charge of Armed Robbery he admitted his guilt, was convicted and sentenced to thirty years imprisonment. When he came to testify in court as PW3 he described himself as a part of a three-man gang of habitual robbers comprising of himself, the appellant and one Charles James. PW3 described how the appellant and Charles James scouted the District Court premises before the

robbery to assess what property could be stolen, how they met and planned entry into the District Court, how they hit the watchman unconscious and stole and how they got away and divided the loot at Urambo airport. We are in agreement with Mr. Mgisha Kasano Mboneko that PW3 Maganga Andrea was a participant in crime (*particeps criminis*), an accomplice who was a competent witness under Section 142 of the Evidence Act. The evidence of PW3 Maganga Andrea was corroborated by the evidence of PW10 Suleiman Mwakalobo who saw the appellant selling clothing items bearing court exhibit labels barely seven hours after the robbery. Rather than blame anybody, the appellant should blame himself being dim-witted enough to sell clothing items which still bore proof that they were court property only seven hours after they had been stolen.

As for the ground of complaint relating to alibi, the trial court, at page 199 of the record, showed that the appellant claimed that when the offence was committed he was in police custody but a Police detention register showed that the appellant was taken into

custody on the night of 4/10/1998 while the offence was committed on the night of 3/10/1998. The trial court rightly rejected the defence of alibi, a finding which was rightly upheld by the first appellate court.

We are satisfied that this appeal lacks merit. We accordingly dismiss it in its entirety.

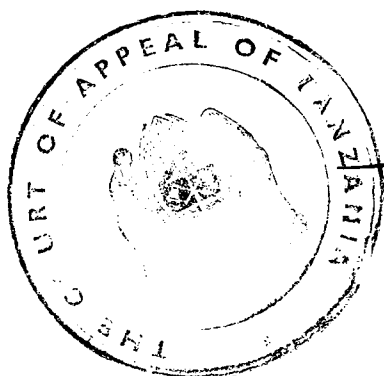
DATED at **TABORA** this 27th day of June, 2011.

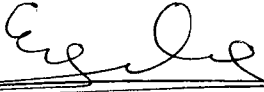
J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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




E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL