

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

**(CORAM: MSOFFE, J.A., LUANDA, J.A., And MANDIA, J.A.)**

**CRIMINAL APPEAL NO. 331 OF 2009**

**NYANGA s/o JULIUS..... APPELLANT**

**VERSUS**

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

**(Appeal from the Judgment of the High Court of Tanzania  
at Tanga)**

**(Mussa, J.)**

**dated the 26<sup>th</sup> day of August, 2009  
in  
Criminal Appeal No. 371 of 2009**

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**JUDGMENT OF THE COURT**

21 & 24 March, 2011

**MSOFFE, J.A.:**

Very briefly, the courts below were satisfied that on 11<sup>th</sup> February, 2005 at Sindeni Village, Handeni District, PW1 Hawa Sangali Mbago and PW2 Omari Mcharo, a wife and a husband respectively, had left home for a road side bus stop for purposes of boarding a commuter bus destined for Handeni township. At the bus stop the couple encountered two men one of whom happened to be the appellant. The appellant was

known to PW1 prior to the above date. The two men commanded the couple to vacate the bus stop as they had some business to conduct thereat. Thereafter, they forcefully seized the couple's luggage and a sum of Shs. 120,000/= and led them into a bush. In the course of taking them to the bush PW1 and PW2 were hit several times by the men; and at the same time there was also a gun shot fired by one of the men which led to PW2 sustaining injuries from the gun fire. A few minutes later, a bus christened *Burudani* arrived at the bus stop and one of the passengers resolved to report the incident to the police. A good while later PW1 and PW2 were picked up by another bus named *Hajeas* and taken to Korogwe for medical treatment. In the meantime, PW4 Zainabu Juma testified and told the trial court that on 12<sup>th</sup> February 2005 the appellant spent a night at her room. Apparently the appellant had come in with a plastic bag unto which he had stuffed his belongings. Among the belongings were ladies clothes. Upon a police swoop at the room the bag was seized. In the bag there was a "jeans" pair of trousers, a cap, a blouse and a pair of khangas. In the jeans' pocket the police further retrieved an empty bullet cartridge. The above clothes were later identified by PW1. It is also known from the evidence of PW3 No. E.7017 D/C Jerome Tembo that the bullet cartridge was fired from the gun the appellant was found with.

There is no serious dispute that the appellant's conviction was based on two factors. **One**, the evidence of visual identification by PW1 and PW2. **Two**, the evidence on the doctrine of recent possession. The courts below discussed at length these two aspects of the evidence. The Judge on first appeal in particular had this to say:-

*... First, there was positive evidence of visual identification at the scene of the crime as testified by both Hawa and Omari. Second, some items traced with the appellant and; retrieved at Zainabus' were, again, positively, identified by Hawa to be amongst those stolen by the appellant at gun point. The insinuation was, thus, that the appellant had reference to the gun point incident on a doctrine of recent possession. Third, was an allegation that the appellant was found in possession of a pistol and an empty cartridge, one way or the other, sought to be linked to the incident. To straight away express on this latter allegation, the cartridge was not retrieved at the scene of the crime and; one may not link it*

*with the Sindeni incident. Just as there neither was sufficient material to connect the retrieved gun. But, Hawa's positive identification of some of the items retrieved at Zainabu's residence; as well as her testimony to the effect that the appellant was one of the culprits at the scene; are factors telling against the appellant. true; the victims had differed on the detail as to whether the appellant was wielding one or two knives but; they were testifying upon a fast moving occurrence to which an identical version is scarcely the norm. and; in any event, it is, to me, a discrepancy which does not quite detract the substance of the accusation that the appellant was seen at the scene. The appellant was known to both Omari and Hawa, that is, at least, facially and; the witness could not have mistaken his identity, more so, as the occurrence was in broad daylight. As for Zainabu, I could adjudge nothing unangeiic about her status so long as there was nothing to suggest that she connived to any of the appellants' doings.*

*And, to fortify her account about ownership of the retrieved items; there was this expertise opinion to the effect that the cartridge found in a jeans pocket; was actually fired from the gun which the appellant was found with.*

In both the memorandum of appeal and in his oral submission before us the appellant has generally canvassed points related to the above aspects of the evidence seeking to fault the courts below in their respective findings of fact. With respect, as correctly submitted by Mr. Faraja Nchimbi learned State Attorney representing the respondent Republic, there is nothing to fault the courts below in their concurrent findings of fact on the above aspects of the evidence. To this end, we are in agreement with the courts below in their respective findings and conclusions on the said points. We will only add a few points by way of emphasis.

PW1 in particular was positive that she knew the appellant prior to the date of incident. Indeed, PW1 knew that the appellant was a resident of Kwamsala Village. The incident took place in broad daylight. In fact, the evidence as it unfolded at the trial shows that the incident took place in the

morning. A look at the evidence in its totality indicates that the incident took a fairly long period of time; starting from the time PW1 and PW2 encountered the appellant and his colleague, the encounter at the bush and eventually the rescue that was made possible by the arrival at the scene of *Burudani* bus. Surely, this was a fairly long period of time. In the circumstances, PW1 and PW2 positively identified the appellant, as correctly opined by the courts below.

In similar vein, the doctrine of recent possession was properly invoked in this case. PW1 positively identified the clothes found with the appellant to be her properties. Her evidence on these properties was not shaken by the appellant in cross-examination and in his oral testimony in court.

On the above evidence, the appellant's conviction of armed robbery contrary to Section 287(A) of the Penal Code as amended by the relevant provisions of Act No. 4 of 2004 was justified. The sentences of an imprisonment term of thirty years and corporal punishment by whipping of twelve strokes are legal in the sense that under Section 287 A the mandatory minimum sentence of thirty years imprisonment may be meted

with or without corporal punishment save that the Resident Magistrate's order that the twelve strokes should be administered "six strokes in and six strokes out" is not borne out by the law. In terms of section 8 (2) of the Corporal Punishment Act (CAP 17 R.E. 2002) the corporal punishment should not exceed twenty four strokes in the case of an adult or twelve strokes in the case of a juvenile. Under sub-section (3) thereto, it is clearly spelt out that the sentence of corporal punishment should not be carried out by instalments. We may as well point out here in passing that under Section 2 of the Corporal Punishment Act "corporal punishment" means:-

- (a) In the case of an adult, whipping; and*
- (b) In the case of a juvenile, caning*

Under the same section a juvenile is defined as a person below the age of sixteen years. In this case, at the time of sentence the appellant was not a juvenile because the charge sheet shows that he was 26 years old. He was therefore an adult for purposes of this Act.

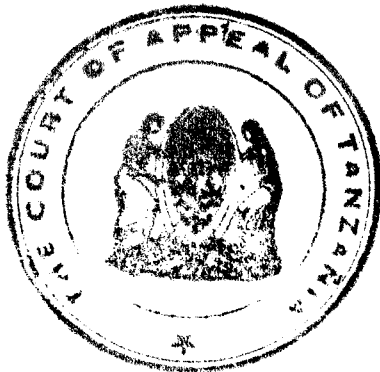
For the foregoing reasons, this second appeal has no merit. We hereby dismiss it save that in exercise of our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act (CAP 141 R.E. 2002)

instalments. Instead, there will be only one instalment of twelve strokes.

DATED at TANGA this 23<sup>rd</sup> day of March, 2011

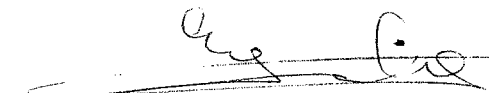
J. H. MSOFFE  
**JUSTICE OF APPEAL**

B. M. LUANDA  
**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**