

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

(CORAM: MUNUO, J.A., MASSATI, J.A And MANDIA, J.A.)

CRIMINAL APPEAL NO. 312 OF 2010

BUBERWA SYPIRIAN

ELIEZA FELICIAN APPELLANTS

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision of the High Court of Tanzania,
at Bukoba)**

(Lyimo, J.)

**dated the 17th day of September, 2010
in
Criminal Appeal No. 43 of 2010**

JUDGMENT OF THE COURT

24th & 28th November, 2011

MUNUO, J.A.:

The appellants are aggrieved by the decision in Criminal Appeals Nos. 43 and 44 of 2010 in the High Court of Tanzania at Bukoba, before Lyimo, J. The consolidated criminal appeals arose from Muleba District Court Criminal Case No. 72 of 2000 in which seven accused persons namely:-

1. Accd no 1 Elieza s/o Felician

2. Accd no 2 Deocres s/o Merchard
3. Accd no 3 Sypirian s/o Pancras
4. Accd no 4 Nicodemus s/o Augustino
5. Accd no 5 Buberwa s/o Sypirian
6. Accd no 6 Oscar s/o Samson; and
7. Accd no 7 Deograsias s/o William

were jointly and together charged with the offence of armed robbery contrary to the then provisions of sections 285 and 286 of the Penal Code, Cap 16. The offence of armed robbery is now provided for under the provisions of section 287 A of the Penal Code, Cap. 16 R.E. 2002 upon an amendment to the Penal Code in 2004 but the present charges were framed before the said amendment to the Penal Code. The prosecution alleged that the seven accused persons including the present appellants, on the 13th day of February, 2000 at about 23.00 hours at Kiteme Village within Muleba District in Kagera Region, seized

- (a) Cash sh 37,000/=;
- (b) 1 radio cassette make Sony valued
sh.120,000/=;

- (c) 1 4 band Panasonic radio valued at sh.28,000/=;
- (d) 1 3 band Panasonic radio valued at sh.22,000/=;
- (e) 1 Avon bicycle valued at sh 38,000/=;
- (f) 2 bags of clothes valued at sh 138,000/= ;

Total valued at sh 381,000/= the property of Thomas Anselimli and at the time of stealing, before and immediately after, fired one bullet in order to obtain and retain the stolen property.

At the close of the prosecution case, the trial court ruled that the 3rd Accused had no case to answer thereby acquitting him. Later on, the trial court determined the case and acquitted Accd no 4, 6 and 7 for want to sufficient evidence. The 1st, 2nd and 5th Accused were found guilty, convicted and sentenced to 30 years imprisonment on the 12th December, 2000. The 2nd Accused, Deocres Merchard, appealed vide Criminal Appeal No. 42 of 2006 in the High Court of Tanzania at Bukoba but he lost the appeal on the 31st May, 2006. The present appellants, Buberwa Sypirian and Elieza Felician lodged Criminal Appeals No. 43 and 44 of 2010 but they

too were unsuccessful. Further aggrieved by the conviction and sentence, the appellants instituted this appeal.

Before us, the appellants were unrepresented. The respondent Republic was represented by Mr. Castuce Ndamugoba, learned State Attorney.

The complainant, Thomas Anselimu deposed as PW2. He stated that he knows Accd no 1, 2 and 5 as co-villagers. On the night of the 13th February, 2000 at about 11.00 p.m. PW2 was sleeping when bandits broke into his house. PW2 stated that his kerosene lamp commonly known as **Kibatari** was burning. He stated, furthermore, that he climbed into the ceiling and saw some six bandits invade his house after breaking the door. He said that he saw the 2nd Accused Deocres Merchard who is not a party to this appeal break into his ward robe and therein stole cash sh 25,000/=, a 3 band radio and a wrist watch. In the 2nd room, the bandits stole 2 radio cassettes and other valuables. The bandits spotted the complainant hiding in the ceiling so they threw a stone at him hitting his face and causing him to fall down. The bandits who were outside discharged a bullet. PW2 stated that he fell unconscious and did not identify his

assailants. He tendered his PF3, Exhibit P4 which shows that he suffered multiple bruises on the legs, back, 4 cut wounds on the forehead measuring 4 cm by 2cm and 2 cut wounds on the left arm, harm caused by a blunt object.

PW1 Leopold Thomas, the son of PW2 and PW4 Veladilina Thomas, the wife of PW2 were in the house when armed bandits invaded PW 2's house. Both PW1 and PW4, like PW2, stated that they know Accd no 1, 2 and 5 as their co-villagers and that they were among the bandits who broke into their house on the material night attacking the complainants with sticks and a *machete*. PW4 said that she hid under the bed while PW2 climbed into the ceiling. She stated that accused no 2 spotted her and pulled her from under the bed, slashed her and also wounded her husband after pulling him from the ceiling. The bandits stole a radio cassette, a radio, a wrist watch and cash sh 25,000/= from the wardrobe. Although the complainant and his family raised an alarm, people feared to respond because the bandits discharged a bullet to scare off the villagers. The scene of crime was lit by a kerosene lamp, PW4 asserted.

The village chairman, PW3 Rafael Rwahangaine stated that he got a report of the armed robbery at PW2's house on the 14th February, 2000 at about 9.00 a.m. Meanwhile, accused no 4 turned up pretending to be a policeman from Nshamba on an assignment to arrest one Te-Byona, a co-villager of PW3. Accused no 4 had no identity card so PW3 suspected he was a conman. Accused no. 5 and 6 followed accused no. 4 so they were all arrested by PW3 and put in custody. It was PW3's evidence that he searched accused no 4 and found he had hidden a blood stained *machete* in his coat. PW3 stated that during interrogation, the 2nd Accused admitted that he was involved in the armed robbery at the complainant's house together with the 5th Accd, Buberwa Sypirian and others. The 2nd Accused led militiamen to his house where the complainant's bicycle was retrieved and restored to the owner on the 12th December, 2000 per the complainant's endorsement on the charge sheet. It was the evidence of PW3 that the house of the 5th Accused, the 1st appellant was searched by militiamen where upon a jug and a cooking pan alleged to belong to the complainant were recovered.

The arresting officer, PW6 C 348 Detective Corporal Ramadhani of Muleba police stated that he charged the appellants after they had been arrested for armed robbery at the complainant's house.

Both appellants denied the charge. In his sworn defence, the 2nd Appellant stated that he was apprehended by the village chairman for failing to pay development levy but that later on, was told he was a bandit which he denied. The 1st appellant gave his defence on oath as DW3 saying militiamen arrested him and took him to the village chairman whereafter he was taken to the police station and subsequently to court. He stated that no suspected property was found in his house when the militiamen searched it. In short both appellants denied being involved in the bandity at the complainant's house on the material night.

At the hearing the appellants adopted the memo of appeal they had filed insisting that their identification was unreliable, that the prosecution did not proved their guilt beyond reasonable doubt, that the conditions of identification were unfavourable so there were possibilities of mistaken identity.

Mr. Ndamugoba, learned State Attorney did not support the conviction. He observed that if the complainant and the eye witnesses had identified the armed robbers, they would have identified them by name to the village authorities and to the police considering that PW1, PW2, PW3 and PW4 stated that the appellants are their co-villagers. The learned State Attorney further observed that PW2 deposed that he did not identify the bandits. This PW2 stated at page 17 of the record.

"I didn't identify my assailants. I became unconscious. I was picked from my house and escorted to the hospital via police Muleba. This is my PF3..."

Mr. Ndamugoba further observed that a cooking pan and a jug were retrieved from the house of the 1st appellant, Buberwa Sypirian on the allegation that it belonged to the complainant but that the latter did not show any peculiar marks on the jug and cooking pan to distinguish them from other such articles which are common in peoples' homes for domestic use.

The question is whether the appellants were properly identified by PW1, PW2 and PW4.

The learned judge considered the issue of identification and observed:-

".....and from the circumstances, there is no doubt that the said identification was beyond the possibility of mistaken identity..... the recovery of the items Exhibit P1 to P3 immediately following the robbery lends support to the prosecution's evidence that indeed the suspects admitted complicity in the crime and facilitated the recovery of some of the stolen items."

The learned judge noted that the 6th Accd, Deograsias William named the appellants so they were arrested and prosecuted. As stated by the village chairman, Accd no 2 Deocres Mechard, was interrogated after he was apprehended upon being implicated by another suspect, Accd no 4 Nicodemus Augustino, who was found in possession of a blood stained

machete he had hidden in a large coat he was wearing. That is to say, the appellants were apprehended after their accomplices Accd no 2 and 4 had implicated them during interrogation.

In our considered view, if PW1, PW2 and PW4, the eye witnesses and victims had identified the bandits whom they said they knew before, they would have named them when the robbery was reported to PW3 and not wait for Accd no 2 and 4 to implicate them. It was held in the case of **R versus Mohamed Bin Allui** (1942) 9 E.A. C.A. 72 that where witnesses identify suspects, as PW1, PW2 and PW4 claim they did, the said witnesses should name the suspects at the earliest opportunity or in the case of mere visual identification, give a description of the suspect. The Court affirmed the same in the case of **Ibrahim Songoro versus Republic Criminal Appeal No. 298 of 1993 (CA)** (Unreported). In this case, the victims of the robbery did not name or give a description of the bandits. On page 17 of the record PW 2 said that he identified the bandits but again stated that he fell unconscious so he did not identify his assailants. It is also not clear whether the kerosene lamp was small or big or whether such source of light could illuminate the whole house.

We also wish to note that for fear of the bandits, PW2 climbed and hid into the ceiling only to be stoned and pulled out by the bandits who invaded his house. PW1 stated that he escaped and returned after the bandits had left. On her part, PW4 stated that she hid under her bed but that Accd no 2 fished her out. Under such terrifying circumstances, we are hesitant to say that PW1, PW2 and PW 4 had an opportunity to properly identify the appellants or that the identification of the appellants was water tight and free from possibilities of innocent mistaken identification.

The learned judge held that some of the stolen property was recovered soon after the robbery at PW 2's house. Indeed the 2nd Accd led the militia to recover the stolen bicycle of the complainant and the said bicycle was restored to the said complainant. We note, however, that the 2nd Accd and the 4th Accd who implicated the appellants are not parties to this appeal. More importantly, a confession by the 2nd and or 4th Accd cannot, under section 33 (2) of the Law of Evidence Cap. 6 R.E. 2002 support a conviction without corroboration.

We are mindful of a jug and cooking pan which were recovered from the 5th Accused's house by militiamen. As Mr. Nyamugoba submitted, the

prosecution did not call the militia who conducted the search. Furthermore, PW4 said that the domestic articles namely jug and the cooking pan, have the complainant's special identification marks but no such special marks were recorded. In this regard we are of the settled mind that the jug and cooking pan are common domestic articles so it was imperative for the complainant to show his special marks on the two articles. This, the complainant failed to do. In that situation the learned State Attorney properly refused to support the conviction.

Mr. Ndamugoba also observed that the said jug and cooking pan are not listed in the charge sheet as stolen items after all so it is doubtful whether they were among the properties the bandits looted from the complainant's house on the material time. The court has on numerous occasions held that under the doctrine of recent possession, the recovered property must be linked to the charged offence. See for instance, the case of **Ally Bakari and Pili Bakari versus Republic** (1992) TLR 10; **Salehe Mwenye and 3 Other versus Republic, Criminal Appeal No. 66 of 2006** (unreported) and **James Paulo Masibuka and Another versus R, Criminal Appeal No. 61 of 2004** (CA) (unreported)

In view of the above we are satisfied that the identification of the appellants was not water tight and that the jug and cooking pan found in the house of the 1st Appellant were not connected with the charged offence because the said articles are not listed in the charge sheet. We are satisfied, furthermore, that the learned State Attorney rightly declined to support the conviction.

We accordingly quash the conviction and set aside the sentence. Both appellants should be released forthwith if they are not detained for other lawful cause.


DATED at MWANZA this 25th day of November, 2011

E. N. MUNUO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

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


P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL