IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 44 OF 2006

EX. E.6937 D/C HARUNA PEMBE GOMBELA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Oriyo, J.)

dated the 31st day of October, 2005
in
HC. Criminal Appeal No. 155 of 1992

JUDGMENT OF THE COURT

20 May & 9 June, 2011

MUNUO, J.A.:

The appellant, Ex-B.6937 DC Haruna Pembe Gombela was in Ilala District Court Criminal Case No. 1426 of 1990 jointly with others who are not parties to this appeal, convicted of robbery with violence and sentenced to 20 years imprisonment. Aggrieved by the sentence, the Director of Public Prosecution challenged the same in Criminal Appeal No. 155 of 1992 resulting in the sentence of 20 years being enhanced to 30

years, the scheduled statutory minimum sentence for armed robbery. The appellant had meanwhile lodged Criminal Appeal No. 84 of 1992 which through oversight was not consolidated with Criminal Appeal No. 155 of 1992 as ordered by the High Court. Later, Criminal Appeal No. 84 of 1992 was struck out to enable the present appellant's appeal to be determined in Criminal Appeal No. 155 of 1992, though unsuccessfully. Thereafter, the appellant lodged this appeal to challenge the conviction and sentence.

On the 27th August, 1990 the complainant, P.W.1 Shabani Alli had parked his taxi Registration No. TZA 9743 at Mwembechai, Dar es Salaam. At about 8.10 p.m 3 bandits hired the material taxi to Sinza. At Sinza the bandits ordered the taxi driver to take them to Ubungo and to Mabibo. When they reached Mabibo, the bandits threatened PW1 with a pistol and forced him to sit between the two bandits at the rear seat. The bandits then drove to Mikocheni where they dropped P.W.1 from the taxi, abandoning him there. P.W.1 and reported the matter at Kijitonyama police station. The following day, the police recovered a gear box, engine and tyres suspected to have been dismantled from the stolen taxi. P.W.1

identified the tyres by silver marks he had placed thereon. The present appellant was implicated by the 2nd accused who was acquitted.

The appellant filed eight grounds of appeal complaining that he was wrongly convicted on the statement of his co-accused and that the trial court failed to conduct a preliminary hearing under the provisions of section 192 of the Criminal Procedure Act, Cap 20 R.E. 2002. He further challenged the identification evidence adduced at the trial saying the complainant did not give the descriptions of the bandits so the visual identification at night was unfavourable and uncertain to sustain a conviction considering that he was implicated by a co-accused who was himself acquitted by the trial court.

Ms Angela Lushagara, learned State Attorney, represented the Republic. She supported the appeal on the ground that the visual identification evidence gave no description of the attire, and, or apparel of the bandits so the complainant might not have identified the bandits during the night. She, furthermore, faulted the courts below for grounding the conviction of the appellant on the caution statements of DW3 and DW4

who were acquitted. Hence the learned State Attorney urged the Court to quash the conviction and set aside the sentence thereby allowing the appeal.

The issue in this appeal is whether the identification of the appellant was watertight.

The learned judge upheld the conviction of the appellant on the ground that the complainant identified the appellant. The learned judge stated, *inter-alia*:

> *"...Three independent testimonies visually identified the appellant, the 3rd accused who stole the car from the complainant; 4th accused who bought the stolen taxi's engine and other spares. I find that this is the type of evidence the Court of Appeal had in mind in requiring the evidence of visual identification must be watertight before a court can convict on it. I am satisfied that the visual identification of the appellant was watertight, and the trial court cannot be faulted*

transaction, and a confession of the

one of those persons effecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person.

(2) ***Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused.***

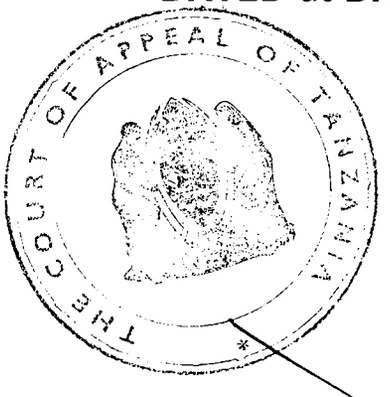
(3) In this section "offence" includes the statement of, or attempt to commit the offence charged, and other offences which are minor and cognate to the offence charged, which are disclosed in the confession and admitted by the accused..."

It appears to us that the appellant was wrongly convicted on the incriminating caution statement of the 3rd accused who was acquitted by the trial court. There is no sufficient evidence to support the conviction of the appellant. Moreover, under the provisions of section 33 (2) of the

Evidence Act cited **supra**, the conviction of the appellant cannot stand because the incriminating statement of accused No. 3 who was acquitted requires independent corroborating evidence as stipulated under the provisions of the said section 33(2) of the Evidence Act, Cap 6 R.E. 2002.

In view of the above, the Republic rightly supported the appeal. we have no justification to differ with the Republic. We are satisfied that the identification of the appellant was not watertight. Hence we accordingly quash the conviction and set aside the sentence. The appellant to be set at liberty forthwith if he is not detained for other lawful cause. The appeal is hereby allowed.

DATED at **DAR ES SALAAM** this 1st day of June, 2011.



E. N. MUNUO
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(M.A. Malewo)
DEPUTY REGISTRAR
COURT F APPEAL