

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

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

CRIMINAL APPEAL NO. 270 OF 2009

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| <ol style="list-style-type: none"> 1. LEONARD SYLVESTER @ KISUSI 2. SAMWEL HENRY @ LUHANGAKA 3. JAMES KATO @ BARAKA @ PETER @ MBASHA 4. THOMAS EMMANUEL JOHN | } | APPELLANTS |
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VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tabora)

(Kaduri, J.)

dated the 20th day of July, 2009

in

(Dc) Criminal Appeals No. 212,213,214 and 215 of 2008

JUDGMENT OF THE COURT

17 & 29 June, 2011

MANDIA, J.A.:

On 4/5/2006 at 7.30 a.m PW12 Elikana Kaswahili, a peasant residing at Ngula village in Kwimba District, and the chairman of Mwabuhili "Kitongoji" of Ngula village, left his home for his shamba to harvest his cotton. As he approached his shamba, PW12 saw a motor vehicle parked in the shrubs without any driver inside it. Outside the vehicle but near it PW12 saw one person making a telephone call. PW12 approached the person making the telephone call and asked him what the problem was. The person making the telephone call

told PW12 he had run out of fuel and was telephoning his colleague to bring fuel. PW12 Elikana Kaswahili testified that the vehicle which had run out of fuel was of Land Cruiser make "Khaki" in colour and had the vodacom logo on its sides. When testifying PW12 Elikana Kaswahili identified the person who was waiting for fuel for the stalled vehicle as the second appellant.

After the explanation PW12 Elikana Kaswahili left the second appellant alone and went on with his activities, presumably of harvesting cotton. One hour later, he heard the sound of gunfire. He went to the scene and found many people attacking the person he had earlier left with the stalled vehicle i.e. the second appellant, and the police were firing in the air to scare away the crowd which wanted to kill the second appellant. According to PW12, the crowd had already dug a grave to bury the second appellant after killing him, and that up to the date PW12 testified in court on 24/5/2007 the grave is still there. PW12 testified that the police contingent included the Regional Police Commander of Mwanza Region and they took the second appellant away, and that as the police contingent drove off, a car of RAV 4 make came onto the scene. When the driver of the RAV 4 vehicle approached the Police contingent he

stopped the car and ran away on foot. He was shot in the left leg. PW12 Elikana Kaswahili identified the person who was driving the RAV 4 vehicle, and who was shot while attempting to flee, as the first appellant.

A more or less similar account is given by PW11 Clement Malaba, the Village Executive Officer of Nyamatala-ngula village in Kwimba District. He testified that on 4/5/2006 he and his village militia were engaged in a round up of persons who had not paid their contributions for the construction of their secondary school. At 8 a.m. the militia group was taking tea at their village centre tea joint, which PW11 called an "hotel". As the group took tea the driver of a "Vodacom" car went along to the owner of the "hotel" and asked for water to brush his teeth after buying a tooth brush and tooth paste. PW11 testified that he and his group continued with their search for contribution defaulters. One hour later they heard gunfire and went towards it. They found the Vodacom vehicle parked and the driver, who he identified as the second appellant, under arrest by the police. After a while the first appellant arrived onto the scene in a car which he stopped and attempted to flee but was shot on the left leg by the police.

The police who shot the first appellant in the left leg as he attempted to flee were led by PW13 Superintendent Peter Ngusa, the officer in charge of C.I.D. at Magu. He testified that during the night of 3/5/2006 he received information of a robbery at gunpoint of a Motor Vehicle with registration number T 917 ACU the property of Vodacom and that the Motor Vehicle was fitted with a car tracking system which showed that it was heading towards Ngudu or Misungwi. On 4/5/2006 PW13 Superintendent Peter Ngusa went on patrol along the Sumve road and found the vehicle at Mwabuhili village with the second appellant being the driver. PW13 testified that the second appellant had burnt stickers with the words "Vodacom" near the vehicle, as well as other papers, and that the vehicle now had a new registration number T 388 AJY. PW13 also testified that the second appellant told him the vehicle had mechanical defects which he was trying to repair and was also waiting for his colleague Kisusi who had given him the vehicle. PW13 also testified that he and other policemen joined the second appellant in waiting for Kisusi. When the wait became too long and Kisusi was not appearing PW13 Superintendent Peter Ngusa telephoned the Regional Police Commander of Mwanza Region for transport to Mwanza since the

vehicle which the second appellant was driving was not mechanically sound. Instead of sending transport the Regional Police Commander of Mwanza Region, PW5 ACP Zelothe Stephen, went in person to the scene. At the same time policemen from Shinyanga who were also part of the effort to trace the stolen vehicle arrived at the scene at Mwabuhili village. One of them was PW15 D 3421 Detective Sergeant Sopilian. PW5 ACP Zelothe Stephen, PW13 Superintendent Peter Ngusa and PW15 D 3421 Detective Sergeant Sopilian testified that many villagers had gathered around the stolen vehicle and wanted to lynch the second appellant and PW5 ACP Zelothe Stephen had to use effort to restrain the crowd. The police witnesses also testified that the first appellant came to the scene driving a car of RAV 4 make, and that when he found policemen at the scene he stopped the vehicle he was driving, abandoned it, fled on foot, and was shot in the left leg as he fled.

All three witnesses also testified that the first appellant Leonard Sylvester @ Kisusi told the police three things. First, that there were two confederates waiting for them at King Palace Hotel in Mwanza who go by the names of **Mganda** and **Chongo**. Secondly, that the Motor Vehicle which the second appellant was seized with was

robbed using Pistols which were hidden under a tyre inside the boot of a Toyota Corolla Motor Vehicle belonging to the second appellant but which was parked in the first appellant's yard. Acting upon this information PW5 ACP Zelothe Stephen talked over the telephone to the Regional Police Commander of Shinyanga Region, ACP Simon Nyakoro Siro about the whereabouts of the pistols. PW6, ACP Simon Nyakoro Siro went to the first appellant's house in the company of a street cell leader PW9 David Nkulila and his driver PW7 Detective Sergeant Apolinary.

At the first appellant's house the policemen found the vehicle mentioned to contain the pistols locked, and they used the services of PW8 Gerald Daud to pick the locks of the Toyota Corolla motor vehicle, after which PW7 Detective Sergeant Apolinary searched the boot of the vehicle and recovered two pistols hidden under a tyre in the boot of the car. Together with relaying the information on where the pistols were hidden, PW5 ACP Zelothe Stephen sent PW15 D 3421 Detective Sergeant Sopilian to King Palace Hotel to stake out the hotel. At the same time PW5 ACP Zelothe Stephen used his own telephone, which he put on the speaker so that all around could hear

everything, and made the first appellant talk to the third and fourth appellants.

The third and fourth appellants confirmed that they were indeed at King Palace Hotel. PW5 ACP Zelothe Stephen as well as PW15 D 3421 Detective Sergeant Sopilian testified that at King Palace Hotel it was the first appellant who pointed out the third appellant and the fourth appellant. These were arrested together with the decoy PW15 D 3421 Detective Sergeant Sopilian and other persons. On 5/5/2006 Detective Sergeant Sopilian took the four appellants to Shinyanga and recorded the statement of the third appellant James Kato @ Baraka @ Peter Mbasha. On the same date 5/5/2006 PW10 D 7471 Detective Sergeant Andrew recorded the statement of the fourth appellant at Shinyanga Police Station. The statement was tendered in evidence as Exhibit P13 despite objection from the defence that it was not voluntary and was improperly recorded. Similarly, when PW15 D 3421 Detective Sergeant Sopilian tendered in evidence the statement of the third appellant the defence objected to it but nevertheless the court admitted it in evidence without inquiring into its voluntariness. On 9/5/2006 at 10.00 a.m PW4 Felix Nyalanda, a primary court magistrate for Bubiki and Negezi

Primary Courts in Shinyanga District recorded the extra-judicial statement of the first appellant, and on 10/5/2006 the same witness recorded the extra-judicial statements of the second appellant Samuel Henry @ Luhangako and the fourth appellant Thomas Emmanuel John. PW4 Felix Nyalanda testified that the third appellant refused to record a statement. He further testified that the first appellant had a leg injury and complained that he had not eaten for two days so he could not make a statement unless food was first brought and that this was done. The witness went on to say that the second appellant had wounds on the hand, without saying which hand, and that the fourth appellant had a broken leg.

Another witness fielded by the prosecution is PW3 Amin Mshumbusi who testified that on 3/5/2006 at about 2.30 p.m. the first appellant bought from him one and a half litres of engine oil and three drums of twenty litres each full of diesel. The prosecution also fielded as their witness PW2 Donati Assenga, the proprietor of Concordia Bar and Guest House in Shinyanga town. His testimony is to the effect that on 26/4/2006 the third and fourth appellants booked rooms at his guest house and stayed there under assumed names of Peter Mbasha for the third appellant and John Kuyungu for

the fourth appellant. The witness went on to say he left for Dar es Salaam on 27/4/2006 and did not come back to Shinyanga until the 1st of May, 2006 and that in his absence he left his business in the care of his attendant who he did not name. The witness tendered a Guest House register as Exhibit P6. He went on to say he next saw the third and fourth appellants on 7/5/2006 at the Regional Government Hospital where a crowd had gathered to watch suspects claimed to be robbers of a Vodacom vehicle.

Next, and last witness in this interesting saga is the witness who set the ball rolling, PW1 Daniel Mwandia, an engineer employed by Vodacom and residing at Majengo Mapya, Shinyanga town. He testified that on 3/5/2006 he stopped a motor vehicle he was driving, a Land Cruiser with registration number T. 917 ACU, outside the gate of his house at Majengo Mapya area of Shinyanga town. As he hooted outside for the gate to be opened a person drew up to the opened window on his side and pointed a pistol at his head. PW1 then struck out at the hand holding the pistol. The pistol went off and the bullet hit the roof of the vehicle, leaving a hole. PW1 then shouted for help. Persons whose number PW1 estimated to be not less than three converged on him, pulled him out of the vehicle and

beat him up. As the unknown persons beat him up they asked him whether he wanted to live or to protect the vehicle. He told the persons they could take the vehicle. Some three people put him at the rear of the vehicle and sat on him, while others sat in the driver's cabin. The vehicle was then driven along the Shinyanga/Tabora road. At Kitangili the robbers, who had tied up PW1 and blind folded him, threw him out of the vehicle and drove on. PW1 managed to untie himself and walked to a nearby hut where he narrated his ordeal. He was escorted back to Shinyanga town by the owner of the hut and he reported the hijack to the police. PW1 learned that information of the hijack had reached the Police and joined in the hunt for the stolen vehicle. He was in the Police search party from Shinyanga which went to Mwabuhili village where they found the stolen vehicle recovered by Policemen from Mwanza. PW1 identified two personal computers (laptops) with his name (Exhibit P1) digital camera (Exhibit P2), a quickset driver (Exhibit P3) a partly burnt identity card (Exhibit P4). Pw1 testified that when he was hijacked the identity card was not burnt, but when the vehicle was recovered the identity card was partly burnt. The same witness also tendered in court motor vehicle Reg. No. T. 388 AJY which had the logo "Vodacom" painted in

black scratched from the sides. The same witness also identified the bullet hole made by the pistol pointed at him the previous night as he hit the hand of the person who held the pistol. The vehicle was put in evidence as Exhibit P5.

The prosecution also adduced evidence showing that the first appellant gave information to PW5 ACP Zelothe Stephen to the effect that inside a motor vehicle belonging to the second appellant but parked in his (i.e first appellant's) yard, there were two pistols hidden in the boot of the car. After getting this information, PW5 ACP Zelothe Stephen telephoned PW6 ACP Simon Nyakoro Siro, the Regional Police Commander of Shinyanga Region who presided over a search in the mentioned car. The search was witnessed by a local street leader PW9 David Nkulila. The car supposedly bearing the pistols was found to be locked, and PW6 ACP Simon Nyakoro Siro had to find a locksmith PW8 Gerald Daud to pick the lock of the Toyota Corolla vehicle before the police gained access to the boot of the car. The pistols were found hidden under a spare tyre on the right side of the boot as the evidence of PW7 Detective Sergeant Apolinary shows.

On the basis of the evidence outlined above, the appellants were arraigned in the District Court of Shinyanga at Shinyanga where they appeared on 25/7/2006 to face a charge sheet containing one count of Conspiracy to commit a felony c/s 384 of the Penal Code, one count of Armed Robbery c/s 287A of the Penal Code, one count of being in unlawful possession of firearms, and one count of being in unlawful possession of ammunition. On 15/9/2006 the charge sheet was substituted and a joint charge sheet containing one count of conspiracy to commit a felony and a second count of Armed Robbery was read over to the appellants. The prosecution also preferred an alternative count of being in unlawful possession of firearms and ammunition.

At the closure of the case for the Prosecution, each one amongst the four appellants gave his defence on oath, and elected to call no witness in support of their respective defences.

The first appellant Leonard Sylvester @ Kisusi told the trial court that on 4th May, 2006 at about noon his friend Samuel Henry who is the second appellant placed a telephone call to him in which he said he was at Mwabuhili village in Mantare area and was facing problems. The telephone went dead before Samuel could tell him

what problem there was. He decided to go to the area mentioned.

On approaching the area he saw ahead of him a contingent of policemen which included the Regional Police Commander of Mwanza Region. The policemen stopped him and ordered him to lie on the ground. He told the policemen the purpose of his visit to the area and while lying down he was searched and dispossessed of personal belongings and then shot in the left leg. Thereafter the police took him and the second appellant to Mwanza where he was engaged in a series of questionings and beatings until 9/5/2006 when he was sent to a Justice of the peace to record his statement. The first appellant denied the charges and denied making the statement tendered in evidence as Exhibit P7.

On his part the second appellant Samuel Henry @ Luhangaka testified in defence that on 3/5/2006 he was at his house at Shinyanga Tambuka Reli. He left Shinyanga for Lumeji Ndagalu on 4/5/2006 by train, taking with him his six – year old son who he was setting to a traditional doctor for treatment. On the way between 9 a.m. and 10 a.m. he was at Mwabuhili where he was stopped by policemen from Mwanza who asked him to help identify a deserted stolen car. There was a watchman near the car called Elikana

Kaswahili who said nobody had claimed the car. The police detained him until 2 p.m. when PW13 allowed him to contact his friend the first appellant using the Policeman's telephone. Another group of Policemen from Shinyanga joined them, and then left for Mwanza. On the way they got stuck and the first appellant was shot. They were taken to Mwanza and from there to Shinyanga where he was tortured in order to confess to stealing a Vodacom vehicle and being in possession of firearms. The second appellant denied the charges against him. Under cross – examination by the State Attorney the second appellant claimed the child he sent for treatment died on 30/6/2006.

As for the third appellant, his defence is that he is a Ugandan trading between Kampala and Mwanza. On 3/5/2006 he left Kampala for Mutukula Border where he arrived at 2 p.m. and proceeded to Bukoba where he arrived at 3 p.m. He boarded M/V. Victoria for Mwanza where he arrived at 6 a.m. on the next day 4/5/2006. He supplied commodities to his customers up to 1 p.m. after which he registered at King Palace Hotel Mwanza. At 1.30 p.m. he was arrested in a police swoop. The police took away his personal things

and questioned him about the "Vodacom problem" which he denied. He was beaten up, sent to hospital and then to court.

The fourth appellant on his part claimed to be a trader in sardines (dagaa) doing business between Dar es Salaam and Mwanza. He left Dar es Salaam on 3/5/2006 with sh. 1,560,000/= for the sardines business and arrived in Mwanza at 1.30 p.m. on 4/5/2006. He booked himself in at the King Palace Hotel. As he ordered fish and chips at the hotel restaurant he and others were arrested by policemen who took away his identity card and money sh. 1,500,000/=. He was taken to Shinyanga in a police vehicle where he was questioned about a VODACOM car. He was assaulted and had his left leg broken which made him sign an already prepared statement to save himself from further torture. Next he was taken to a Justice of the Peace and from there to court where he had charges read to him.

The last witness for the defence is DW5 Georgia Thomas Tindika, a prison medical officer who testified that on 13/5/2006 she treated the first appellant for a bullet wound on the leg and swellings in the hands. The same witness also testified that she treated the

second appellant for bruises on the head, the third appellant for a swollen hand and the fourth appellant for a broken leg.

At the end of the trial the District Court found all the appellants guilty of Armed Robbery, convicted them and sentenced them to thirty years imprisonment each plus twelve strokes of the cane. The trial court also confiscated two vehicles tendered in court as exhibits. This is Exhibit P10 which is the motor vehicle driven by the first appellant to the point where he was arrested at Mwabuhili village, and Exhibit P12 the Toyota Corolla inside which two pistols were recovered.

The appellants were aggrieved with the convictions in the trial court and preferred an appeal to the High Court of Tanzania at Tabora. Their respective appeals which were consolidated were found to be devoid of merit and were dismissed. The appellate High Court however vacated the order of confiscation of two Motor Vehicles on the ground that there was no proof that they were used to facilitate the robbery.

After dismissal of their respective appeals in the High Court, the appellants filed this second appeal. The first appellant was

represented by Mr. Dea Outa, learned advocate. The memorandum of appeal for the first appellant was filed before Mr. Dea Outa, learned advocate, took up the brief to represent the first appellant, and this is why the memorandum shows that it was drawn by the appellant himself. All the same the learned advocate adopted it, but before arguing it he prayed to abandon grounds 1,2,3,4,5,6,7,8,9,12 and 13. He was left with grounds 10,11,14,15 and 16. He started his argument with grounds 14 and 15, but midway in his argument the court pointed out to him that in a substituted charge filed on 15/9/2006 the charges against all the appellants were one joint count of Armed Robbery C/S 287A of the Penal Code, and an **alternative** count of Being found in unlawful possession of arms and ammunition. The trial court did not enter a conviction in respect of the alternative count, and that it did not pass sentence in respect of it either. Faced with this situation, the learned advocate also abandoned ground 10 and 11. He was therefore left with grounds 14,15 and 16. Ground 16 is not a substantive ground because it is a conclusion that the case against the first appellant is not proved beyond reasonable doubt so he deserves an acquittal. This leaves ground 14 and 15 only.

Ground 14 and 15 hinge on the extra-judicial statement Exhibit P7 and a cautioned statement Exhibit P21 which the first appellant made respectively to a justice of the peace and to a police officer. The record, at page 504, shows that the first appellate court discounted all confessional statements in respect of all the appellants when the first appellate judge remarked thus:-

*"Even if there were no confessions or extra-judicial statements **which I find to have discrepancies** there is enough direct and circumstantial evidence to hold each of the appellants responsible for the stolen Vodacom car the subject of the charge"*
(emphasis added).

This takes care of grounds 14 and 15.

The learned advocate went on to argue that the presence of the first appellant at the scene of arrest, Mwabuhili village, could be explained innocently. The explanation which the first appellant gave was that he received a telephone call requesting for help from his friend who is the second appellant, but the second appellant did not give him details of the specific help sought. The learned advocate

claims when the second appellant telephoned the first appellant in the presence of PW13 Superintendent Peter Ngasa he was not free agent so evidence of this telephone call through the police may be a forced effort to incriminate the first appellant.

The submission by the learned advocate suggests that the second appellant made only **one** telephone call to the first appellant while in control of the police in the form of PW13 Superintendent Peter Ngasa. The record, however, tells a different tale. It shows that the second appellant's presence at Mwabuhili village was first observed by PW12 Elikana Kaswahili, a village leader, as the latter was on his way to harvest cotton in his farm. Elikana Kaswahili asked the second appellant what the problem was, and the appellant replied that he had run short of fuel and was telephoning his friend to bring fuel. Listen to the record at p. 209:-

"When I approached my farm I saw a car parked in shrubs. There was nobody in the car. Beside the car there was a person who was making a call. I asked him what was a problem and he replied he had run short of fuel and was calling his colleague to bring the fuel. The car was make land cruiser pick

up with "Khaki" colour. It had words "Vodacom on its sides. I did not know that person before that day."

Another village official PW11 Clement Malaba had seen the second appellant buying a toothbrush and toothpaste at a local village shop, and had asked for water with which to brush his face. The witness described the second appellant as a driver of a car which he described thus:-

"I knew the car belonged to Vodacom because it had words "Vodacom."

The extracts of evidence quoted above show that the first appellant was not on a visit whose purpose he did not know. He knew the purpose, which was communicated to him by telephone by the second appellant by telephone before the police arrived at the scene. His purpose was to supply fuel for a vehicle driven by the second appellant, a vehicle which had stopped abruptly at Mwabuhili village. There is evidence, which the second appellant does not contradict, that while he was in police hands the second appellant was made to telephone the first appellant again and talk about the fuel without the first appellant knowing that the call was being

monitored by the police. When the first appellant approached Mwabuhili village he was under the belief that the second appellant was alone. When he found Police vehicles and Policemen blocking the road he stopped his car, jumped out and started to run. He was shot in the left leg while doing so.

As for the second appellant, he put up an alibi that he was on a visit to treat a sick son when he was accidentally drawn into the area where he was arrested. Under the law the second appellant did not have to prove his alibi but only raise a reasonable doubt that it could be true-see **Charles Samson v R** (1990) TLR 39. Both courts below placed the appellant at Mwabuhili village at about 7.30 a.m. on the morning of 4/5/2006 in possession of a motor vehicle for which he was requesting fuel from a colleague by telephone. The vehicle the second appellant was in possession of was stolen at gunpoint barely nine hours previously at 9.30 p.m. When arrested, the vehicle was found to contain personal items of the driver from whom the motor vehicle was robbed. The second appellant did not explain away his possession of the motor vehicle. His alibi was rightly rejected by the trial court, a finding which was affirmed by the first appellate court. The courts below rightly invoked the doctrine of recent possession.

We will therefore start with the second appellant whose appeal we find devoid of merit and dismiss in its entirety.

As for the first appellant, we have outlined the circumstances in which he was found to be at Mwabuhili village which show clearly that he had repeated telephone links with the second appellant before the police arrived at Mwabuhili village, and after. The telephone links related to how to refuel a vehicle stolen at gunpoint at Shinyanga town which was now stationary at Mwabuhili village. The doctrine of common intention links the first appellant with the armed robbery he is charged with. We find his conviction justified. The appeal he has filed in this court is without merit and we dismiss it in its entirety.

As for the third and fourth appellants, an attempt was made to link them with Shinyanga town through the evidence of PW2 Donati Asenga, the proprietor of Concordia Bar and Guest House, who claimed to have seen the third and fourth appellants on 26/4/2006 only, and then on 7/5/2006. The witness however admitted the person who registered the appellants for their stay in his guest house is his assistant, but the assistant was not called to testify. Abo, the

witness claims he left for Dar es Salaam on 27/4/2006, which means he could not be privy to details of the third and fourth appellants' stay in Shinyanga from 27/4/2006 onwards. The witness also claims he saw the third and fourth appellants at Shinyanga Hospital on 7/5/2006, but there is evidence from the defence that the appellants were sent for treatment at Shinyanga Hospital on 13/5/2006, and this evidence has not been contradicted by the prosecution. We are of the opinion that the two lower courts erred in taking PW2 Donati Asenga to be a credible witness in view of the obvious shortcomings in his evidence. As a second appellate court we cannot interfere in findings of lower courts based on the demeanour of a witness but, where a finding is based on the credibility of a witness and there is an obvious error which can occasion miscarriage of justice, we are duty bound to interfere.

At page 502 of the record the first appellate court observed thus: -

"... the evidence by PW2 Donat Asenga the proprietor of Concordia Bar and Guest House located at Ngokolo area within Shinyanga Municipality who identified the

3rd and 4th appellants as having lodged in his guest house since 26th April, 2006 and stayed for about five or six days, leaves no doubt that the 3rd and 4th appellants entered the guest house together. The 3rd appellant registered in the guest register book the assumed name of Peter Mbasha while the 4th appellant registered as John Kuyungu, another assumed name. as the credibility of PW2 was not shaken, I hold that the 3rd and 4th appellants did stay at Concordia guest house for 5 or 6 days from 26th April, 2006 which time is material to the robbery."

Under cross-examination, at p. 65 of the record, the same witness said this: -

"I left the 2nd day upon their arrival. I left for Dar es Salaam."

It is clear that PW2 could not testify on events which happened in his absence, and if he did then his evidence becomes hearsay and his credibility lessened. We therefore discount the evidence of PW2 Donati Asenga.

This , however, evidence on record shows that at Mwabuhili village, in the presence of PW13 Superintendent Peter Ngasa and PW5 ACP Zelothe Stephen and PW15 Detective Sergeant Sopilian the first appellant mentioned the third and fourth appellants as confederates. PW5 ACP Stephen Zelothe then made the first appellant talk to the 3rd and fourth appellants using PW5 ACP Stephen Zelothe's mobile telephone with the telephone speaker put on so that everybody could hear the conversation. In the telephone conversation the first appellant assured the third and fourth appellants that everything was alright, and the third and fourth appellants assured the first appellant that they were at King Palace Hotel waiting for the first appellant. PW5 ACP Stephen Zelothe sent PW15 Detective Sergeant Sopilian to King Palace Hotel for a covert observation of the third and fourth appellants. The evidence of PW5 ACP Zelothe Stephen and PW13 Superintendent Peter Ngasa shows that it was the first appellant who pointed out the third and fourth appellants for arrest at the King Palace Hotel, Mwanza.

The monitored telephone conversation between the first appellant and the third and fourth appellants in which the third and fourth appellants assured the first appellant that they were waiting at

King Palace Hotel, and the evidence of PW15 Detective Sergeant Supilion on how he kept the third and fourth appellants under observation before the arrest, proves that the third and fourth appellants were participants in the robbery at gunpoint which took place on 3/5/2006 at 9.30 p.m. Both the third and fourth appellants admit they were at the King Palace Hotel during the arrest, but contend that their presence there was for lawful trade and not for unlawful purposes. The evidence of PW5, PW13, PW15 discounts these claims. The lower courts rightly invoked the doctrine of common intention to link the third and fourth appellants with the Armed Robbery they were charged with.

The fourth appellant also raised a complaint about an unsavoury comment which the trial magistrate made about him, and which he alleges was the basis of his conviction and sentencing. At page 456 of the record, the trial magistrate made the following remark about the fourth appellant in his judgment: -

"The fourth accused, whose face resemble (sic) that of a high criminal, spoke shamelessly that he does not know any of the accused?"

of the Justice of the Peace who recorded an extra-judicial statement was questioned, the trial magistrate remarked thus about the witness: -

"He is one of the best PCMs in our locality. He is calm and well disciplined. He knows the laws as regard confessions well. I really know him as one of those who are finishing their LLB degree recently from the open University. Telling the court that he could record his own stories and force the accuseds to sign is something which is unbelievable."

The only advice we would offer to the learned trial magistrate is to avoid being carried away and get personal when assessing evidence in trials before him to avoid unnecessary comments like those quoted above.

These comments notwithstanding, we find that the evidence adduced against the third and fourth appellants has established the common intention necessary to join them in the charge of armed

robbery as has been done. We find that their respective appeals lack merit and we dismiss them each in its entirety.

In the final analysis we find all the appeals devoid of merit. The same are dismissed in their entirety.

DATED at **TABORA** this 28th 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.



A handwritten signature in black ink, appearing to read "E.Y. Mkwizu", is written over a horizontal line.

E.Y. Mkwizu
DEPUTY REGISTRAR
COURT OF APPEAL