

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

CRIMINAL APPEAL NO. 242 OF 2011

CORAM: KILEO, J.A., MJASIRI, J.A. And MUSSA, J.A.

ALLY ZUBERI MABUKUSELA..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the High Court of
Tanzania at Songea)**

(Kalombola, J.)

dated 14th day of September, 2011

in

DC. Criminal Appeal No. 10 of 2011

JUDGMENT OF THE COURT

6th & 10th December, 2012

MUSSA, J.A:

In the District Court of Namtumbo, the appellant was arraigned and convicted of armed robbery. The allegation as laid on the charge sheet was to the effect that on the 15th February 2010, at Minazini area Namtumbo District, the appellant stole a sum of shs. 50,000/= in cash along with three mobile phones, the property of a certain Mustafa Awami. It was further alleged that immediately before and after such stealing, the appellant used a bush knife in order to obtain or retain the stolen properties. Upon conviction, he was sentenced to a term of thirty years

imprisonment. His appeal to the High Court (Kalombola J.) was unsuccessful, hence this appeal.

From the factual setting unfolded in the trial proceedings, it was common place that Mustafa Awami (PW1) is proprietor of a shop situated at Minazini. Also undisputed, was the fact that Mustafa used to operate a business of charging mobile phones. On the fateful day, around 5.00 p.m or so, Mustafa was at his shop. Unfortunately, the record of the evidence is some what haphazard but; the way it appears, there were, in the shop, several phone handsets, ostensibly, taken there for charging. At that particular moment in time, the appellant emerged and gave Mustafa shs. 100/= with which to buy a piece of soap. Just as Mustafa turned to reach for the soap, the appellant, allegedly, grabbed three phone handsets. Apparently, Mustafa put an effort to retrieve back the phones in the course of which the appellant pulled out and threatened him with a bush knife. Throughout the encounter, Mustafa was wailing about and so, soon after, several persons came to his rescue. With their help, the appellant was securely apprehended there and then. According to Mustafa, the phone handsets in question were eventually retrieved from the appellant's pocket.

As regards the sum of shs.50,000/= in cash, he claimed, ironically though, that the money was lost .

In reply to the prosecution accusation, the appellant did not quite deny being at Mustafa's shop on the fateful day but, according to him, he went there to buy provisions which were worth a sum of shs. 3,600/=. His version was further that he gave Mustafa a shs. 10,000/= note for the provisions but the latter availed a sum of shs.3,400/= only as change on account that the appellant had a prior debt. A misunderstanding arose from the short fall of the change, in the course of which several persons joined Mustafa in, allegedly, assaulting the appellant and eventually taking him to Namtumbo police station. Thus, in a nutshell, the case for the appellant was to the effect that the prosecution accusation was fabricated upon him. Nothetheless, as already initiated, both courts below were inclined in favour of the prosecution version.

With eight points of grievance, the memorandum of appeal is lengthy and verbose but, fortunately, before us, the appellant eloquently summarized its content. Thus, the grievances boil down to non-production of material witnesses as well as exhibits; insufficient evidence of

identification of the mobile phones and; a complaint to the effect that the two courts below dispatched his defense without due consideration. Mr. Maurice Mwamwenda, the learned Senior State Attorney for the Republic, declined to support the conviction. In his submission, the evidence of identification of the three mobile phones was manifestly inadequate. In this regard, he referred us to two decisions-viz **Henry Gervas v. R [1967] HCD No. 129** and **Nassoro Mohamed v. R [1967] HCD No. 446**. On the premises, learned Senior State Attorney advised that the doctrine of recent possession could not be invoked in the situation at hand, more so as the mobile phones were not sufficiently identified.

Addressing the issue of identification of the three mobile phones, we wholly associate ourselves with the brief account of the appellant as well as the submission of Mr. Mwamwenda. In this regard, we should reiterate that the proper procedure for identification of property in court is as was stated in the two cases cited by the learned Senior State Attorney. In all such cases, the claimant should make a description of special marks on an item before it is shown to him and allowed to be tendered as an exhibit. That way, an identification of the item can be established to the court beyond reasonable doubt. On the contrary, in the situation at hand, the

complainant did not make a distinctive description of the mobile phones ahead of the same being shown to him and tendered in court. He simply made a blank assurance that he knew the phones and that there were names on them. He did not go so far as to relate those names with the mobile phones. Such a blank assurance could not have sufficed a proper identification.

The insufficient evidence of identification was not the only disquieting feature of the case for the prosecution. The appellant was, in addition, alleged to have stolen a sum of Sh. 50,000/= in cash. As hinted upon, the unresolved mystery was in the fact that the money was not retrieved from the body of the appellant followed by Mustafa's remark that it was lost. To say the least, we are unable to comprehend how this could have been possible given the fact that the appellant was securely apprehended in the immediate aftermath of the incident. It may be that some of the details of the occurrence were not revealed, exaggerated or, perhaps, there is truth in the appellant's complaint about the accusation being fabricated.

Taking into account all the circumstances of this case, we feel that it will be unsafe to uphold the conviction. Consequently, we allow this appeal, quash the conviction and set aside the sentence. The appellant is to be released from custody forthwith unless he is otherwise lawfully held.

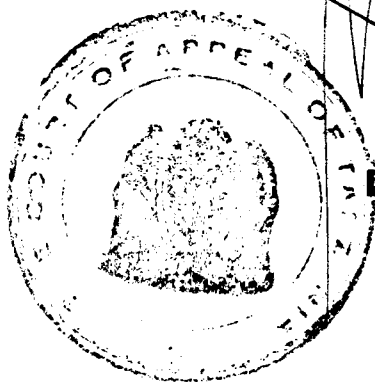
DATED at IRINGA this 7th day of December, 2012.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL