

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

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

CRIMINAL APPEAL NO. 216 OF 2009

DISMAS ALOYCE MSOKE..... APPELLANT

VERSUS

THE D. P. P..... RESPONDENT

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

(Sambo, J.)

dated the 8th day of April, 2009

in

Criminal Appeal No. 120 of 2007

JUDGMENT OF THE COURT

21st & 24th February, 2012

MUNUO, J.A.:

The appellant, Dismas Aloyce @ Msoke was in Arusha District Court Criminal Case No. 549 of 2006 convicted of armed robbery c/s 287A of the Penal Code, Cap. 16 R. E. 2002 as amended by Act No. 4 of 2004. The prosecution alleged that on the 19th day of May, 2006 at about 19.30 hours at Manyata Village within Arumeru District in Arusha Region the appellant stole one Nokia mobile phone valued at

Tsh. 120,000/= the property of one Zanura d/o Ally and during the stealing cut the complainant with a panga on her left hand in order to obtain the said mobile phone. The trial court found the appellant guilty, convicted and sentenced him to the statutory scheduled minimum sentence of thirty years imprisonment. Aggrieved, the appellant filed Criminal Appeal No. 120 of 2007 in the High Court of Tanzania at Arusha. His appeal failed whereupon he ledged this second appeal.

The complainant Zanura Ally testified as P.W.1. She stated that at about 19.30 hours or the material evening, she was escorting P.W. 2 Ally Mnzava who had gone to treat cattle at their home. P. W. 1 was with P. W. 3 Gema Labani. On the way, near **Relini**, the appellant emerged from behind, armed with a panga and stood between P. W. 1 and the veterinary doctor. The appellant then demanded the mobile phone P.W. 1 had. Meanwhile, the appellant cut the complainant's left hand with the panga he had. In that attack, the mobile phone dropped down. The appellant picked the mobile phone and ran away. P.W. 1 raised an alarm but by then the

appellant had disappeared. She reported the armed robbery to the area leader, one Charles. In the morning P.W. 1 reported the matter to the police where she got a PF3 for treatment which PF3 PW 1 tendered as Exhibit P1 without objection from the appellant.

The armed robbery occurred on the 19th May, 2006 at about 19.30 hours. Three days later, that is on the 21st May, 2006 the appellant passed by the residence of P.W. 1 and threatened to cut her legs if she dared report the armed robbery to the police and thence disable her from going to Court. People heard the threatening utterances so they chased, arrested the appellant and called the police to apprehend him. Subsequently the appellant appeared in the trial court to answer the present charge.

The complainant stated that the appellant was a neighbor. He is popularly known as Deo but he writes his name as Dismas. P.W. 1 recorded the same in her police statement, Exhibit D1 wherein stated:

"...Nakumbuka mnamo tarehe 19/5/2006 majira ya saa 19.30 hrs. huko maeneo ya Manyatta nikitokea nyumbani nikimsindikiza mgeni, njiani nilikutana na Deo s/o Msoke, kisha kutufuata kwa mguu nyuma nikiwa na DR. Mnzava, ndipo akaamuru nitoe simu yangu hadi akiwa na silaha aina ya panga akanikata mkono wa kushoto, na alifanikisha kuninyang'anya simu niliyokuwanayo aina ya NOKIA na baada ya tukio hilo alikimbia hivyo leo nimekuja kufungua kesi kwa hatua zaidi."

Meaning:

".....I remember on the 19/5/2006 at about 19.30 hrs at Manyata area I was escorting a guest. On the way I met Deo s/o Msoke, who walked behind us. While I was walking with DR. Mnzava, Deo demanded that I give him my mobile phone. In the fracas he cut my

left hand with a bush knife, seized my NOKIA mobile phone and ran away with it so I have today come to report the matter.”

The testimony of P.W. 1 was corroborated by P.W. 2 Ally Mnzava, a veterinary doctor and P.W. 3 Gema Laban, a younger sister of P.W.1 who was in company of the complainant at the material time. P.W. 2 observed that there was moonlight and he too knew the appellant because he resided near the railway and he had met him several times. The evidence of P.W. 1 and P.W. 2 was further corroborated by the testimony of P.W. 3 Gema Laban. P.W. 5 E 8303 PC Bakary, the investigating officer, deposed that the appellant was arrested by the people and turned over to the police whereupon he was accordingly charged with the present offence.

The learned judge upheld the decision of the trial court giving rise to this second appeal.

The appellant denied the charge of armed robbery saying that he had gone to the police in connection with some other matter in which he was a complainant only to be arraigned and brought to court for an offence he had not committed. He said that P.W.1 did not identify him. He tendered P.W. 1's police statement Exhibit D1, which he claimed showed that P.W. 1 did not identify him.

The appellant appeared before us in person. He adopted his memorandum of appeal and also tendered a written submission insisting that he did not rob the complainant and that the identification evidence adduced at the trial was not watertight so the prosecution failed to discharge the burden of proving his guilt beyond all reasonable doubt.

The learned Principal State Attorney, Ms Veritas Mlay supported the conviction and sentence on the strong evidence adduced by P.W.1, P.W.2 and P.W.3 who were familiar with the appellant and identified him without any doubt whatsoever. The conditions of identification were favourable, the learned Principal State Attorney

Not signed

pointed out, noting that there was moonlight as stated by the veterinary doctor, Ally Mnzava who testified as P.W.2.

The learned Principal State Attorney cited the case of **Rajabu Khalifa Katumbo and Three others versus Republic (1994)**

TLR 129 wherein the Court held that:

"(ii) Where the accused were known to the witnesses well before the day of the incident; the witnesses, therefore, were extremely unlikely to mistake them."

The issue before us is whether the prosecution witnesses properly identified the appellant.

From the evidence adduced at the trial, the learned judge correctly observed, and we quote:

".....P.W. 1, P.W.2 and P.W. 3 told the trial court that they knew the appellant well before he committed the offence. He is living in their neighborhood with P.W. 1 and P.W. 3 who clearly stated that his name is Dismas and sometimes he is called Deo....."

The learned judge further noted that the appellant and the prosecution witnesses came into close proximity which enabled the witnesses to identify the appellant by moonlight bearing in mind that they knew him before just as was the situation in **Rajabu Katumbo's case cited supra.**

Under the circumstances, the learned Principal State Attorney rightly supported the conviction. We are fortified in our view by the appellant's threats to P.W. 1 on the 21/5/2006. On that day the appellant threatened to cut the complainant's legs if she dared report the armed robbery to the police. By uttering those threats he also corroborated the report P.W.1 made to the police on the previous

day. The said threats prompted the people to arrest and turn him over to the police. In view of such glaring evidence, we find the appeal lacking in merit. We accordingly dismiss the appeal.

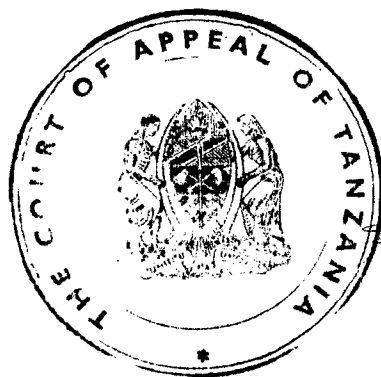
DATED at ARUSHA this 22nd day of February, 2012.

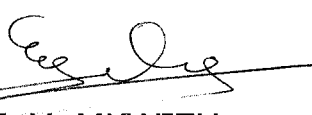
E. N. MUNUO
JUSTICE OF APPEAL

E. A. KILEO
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