

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

(CORAM: MSOFFE, J.A, MJASIRI, J.A and JUMA, J.A)

CRIMINAL APPEAL NO. 280 OF 2008

**1. HUSSEIN RAPHAEL
2. SEIF HUSSEIN
3. GIDEON BARABARA** } **APPELLANTS**

VERSUS

THE REPUBLIC RESPONDENT

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

(Bwana, J.)

**dated the 28th day of February, 2008
in**

Criminal Appeal No. 124 of 2007

JUDGMENT OF THE COURT

26th February, & 4th March, 2013

MJASIRI, J.A.:

In the District Court of Babati, the appellants Hussein Raphael, Seif Hussein and Gideon Barabara were charged with and convicted of the offence of armed robbery contrary to Section 285 and 287A of the Penal Code Cap 16, R.E. 2002. They were sentenced to 30 years imprisonment. Their appeal to the High Court was unsuccessful, hence this second appeal.

The background to this appeal is as follows. On August 19, 2004 at about 22.00 hours, the three appellants invaded the house of PW1, Jeremia Nada at

Kiru Six village within Babati District in Manyara Region. They stole the sum of TShs. 9,000 which they removed from a suit case. It was the prosecution case that they used violence in order to obtain the said money. PW2, Nada Amnay and PW3 Shauri Sulumbu witnessed the incident as they happened to be at the house of PW1 when the armed robbery took place. PW1, PW2, and PW3 were beaten up by the appellants. They called for help and the neighbours came to their assistance including PW4, Petro Tarimo. They managed to lock the appellants in the house. The appellants were therefore arrested at the scene of crime. According to PW1, PW2, and PW3 the second appellant Seif Hussein was their neighbour and was well known to them. All the appellants strongly denied that they were arrested at the scene.

In the course of the trial the second appellant, Seif Hussein jumped bail and was therefore not present when PW5 PC Shida gave his testimony. He also did not have the opportunity to present his defence.

At the hearing of the appeal, the three appellants appeared in person and were unrepresented and the respondent Republic had the services of Mr. Zakaria Elisaria, learned Senior State Attorney. The appellants presented three similar grounds of appeal which are reproduced as under:-

1. *That the learned trial magistrate and the appeal Judge erred in law and in fact in holding that the appellant was at the scene of crime.*
2. *That the learned magistrate and the appeal Judge erred in law and in fact by failing to scrutinize deeply the evidence adduced by PW1, PW2, PW3 and PW4.*
3. *That the learned trial magistrate and the appeal Judge erred in law and fact in holding that, the charge laid against the appellant was proved beyond reasonable doubt.*

The second appellant presented an additional ground of appeal, ground No. 4 which states as follows:-

"The learned trial magistrate erred in law and in fact by failing to comply with Section 226 (2) of the CPA (CAP 20, RE 2002)

The appellants being lay persons did not have much to say. They merely asked the Court to adopt their grounds of appeal and insisted that they were not arrested at the scene.

Mr. Elisaria supported the conviction of the 1st and 3rd appellants but did not support the conviction in respect of the 2nd appellant. He submitted that whereas the 1st and 3rd appellants were present when the prosecution witnesses testified in court and were given a chance to present their defence, the 2nd appellant only heard the testimonies of PW1, PW2, PW3 and PW4 and did not have a chance to present his defence. As the appellant was sentenced in absentia, he was supposed to be taken before the trial magistrate upon his arrest in order to be heard on the causes of his absence. Mr. Elisaria stated that Section 226 (2) of the Criminal Procedure Act Cap 20, R.E. 2002 was not complied with. He made reference to the case of **Marwa Mahende v Republic** (1998) TLR 249. He therefore asked the Court to make an order directing that the 2nd appellant should be sent back to the trial court to give an explanation for the cause of his absence.

In relation to the 1st and 3rd appellants he submitted that there was ample evidence to show that the appellants were arrested at the scene of crime. He stated that the courts below relied on the evidence of PW1, PW2 and PW3 who were present when the incident took place and also the evidence of PW4 who came to assist PW1. He stated that the evidence presented did not require identification as the appellants were arrested at the scene.

The main issue for consideration is whether or not the 1st and 3rd appellants were arrested at the scene. We have carefully considered Mr. Elisaria's submission and the evidence on record. There is overwhelming evidence that the appellants were arrested at the scene. The testimonies of PW1, PW2, PW3 and PW4 were simple and straight forward and clearly narrated the sequence of events. We are of the considered view that the involvement of the appellants in the armed robbery was clearly established.

The appellants were arrested at the scene shortly after the incident. When PW1, PW2, and PW3 raised an alarm, the neighbours responded immediately leading to the arrest of the appellants who were locked in the house. The chain of events was unbroken and therefore there was no possibility of mistaken identity - See **Robert Jackson v Republic**, Criminal Appeal No. 207 of 2007, CAT (unreported)

We therefore find no basis in faulting the decisions of the courts below. We find the appeal filed by the 1st and 3rd appellants lacks merit and is hereby dismissed.

In relation to the 2nd appellant on the non - compliance with Section 226 (2) of the Criminal Procedure Act, Cap 20 we entirely agree with the submissions made by Mr. Elisaria. Section 226 (2) of the Criminal Procedure Act 1985 provides as follows:-

"If the Court convicts the accused person in his absence it may set aside such conviction upon being satisfied that the absence was from causes over which he has no control and that he had a probable defence on the merit."

The 2nd appellant was absent when the case came up for hearing on June 24, 2005 and he continued to be so absent right through the time all the prosecution evidence was received to the time of his conviction in absentia. This was therefore a fit case for the exercise of the trial magistrate's discretion under subsection (2) of section 226 of the Criminal Procedure Act.

In Marwa Mahende v Republic (*supra*) it was held thus:-

"A proper construction of Section 226 (2) of the Criminal Procedure Act is that upon apprehension of a person convicted and sentenced in absentia, he should not be taken straight to serve his sentence but should

be brought before the trial court to enable the Court to exercise the discretion to set aside the conviction or not."

The Court held that:

"The failure to take the appellant before the trial court to exercise its discretion under Section 226 (2) of the Criminal Procedure Act denied the appellant his fundamental right to be heard and vitiated the proceedings."

See also **Olanyo Lemuna and Another v R** (1994) TLR 54.

The circumstances in this appeal are similar. The 2nd appellant immediately after being apprehended was sent to prison to serve a sentence passed in absentia. It is not on record as to when he was apprehended.

In the interests of justice and in order to uphold the 2nd appellant's fundamental right to a fair trial under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 the right to be heard being paramount, we hereby set aside the proceedings and judgment of the High Court and remit the case to the trial court with a direction that the second appellant be brought

before the magistrate to be dealt with in accordance with the provisions of Section 226 (2) of the Criminal Procedure Act. The appeal in respect of the second appellant is therefore allowed to this limited extent.

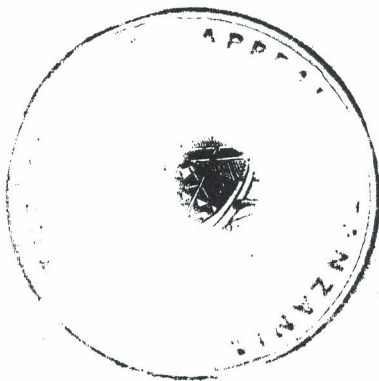
DATED at ARUSHA the 2nd day of March, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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




Z.A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL