

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

(CORAM: MBAROUK, J.A., MANDIA, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 267 OF 2008

MOHAMED S/O RASHID @ KAGULU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mwita, J.)

dated the 30th day of June, 2008

in

DC. Criminal Appeal No. 19 of 2005

JUDGMENT OF THE COURT

9th & 17th September, 2013

MANDIA, J.A.:

MOHAMED s/o RASHID @ KAGULU appeared before the District Court of Tabora at Tabora on a charge of Armed Robbery c/s 285 and 286 of the Penal Code. He was convicted and sentenced to fifteen years imprisonment. Aggrieved by both the conviction and sentence, he preferred an appeal to the High Court of Tanzania at Tabora. His appeal was dismissed, and the sentence was enhanced to thirty years

imprisonment. Further aggrieved, he preferred a second appeal to this Court.

Evidence was received in the trial court that on 1/11/2002 in the morning PW1 Mustafa James was pedaling his bicycle of Dragon make from Tabora town to his village at 11 a.m. PW1 met the appellant who ran towards him while carrying a bushknife. PW1 testified that the appellant commanded him to leave his bicycle and disappear or else be killed and he (PW1) obliged. The appellant then pedaled away on the bicycle. He reported to the police on 2/11/2002. The appellant tendered the bicycle reportedly stolen from him as Exhibit P1 after the trial court recorded the appellant's disclaimers over the bicycle. PW1 did not explain to the court how the bicycle came into his possession after it was allegedly robbed from him.

The prosecution also fielded one Hadija Mrisho as PW2. Her evidence is that she is the mother of PW1 Mustafa James, and that on 1/11/2002 she was at Tuli area on her way to attend a funeral at a place she did not disclose. She said while she and other persons she did not

name were resting at Tuli one Tausi James went over to her and told her the appellant had robbed a bicycle from Mustafa James, her son. She went to the funeral place after which she went over to the appellant's house where she saw the stolen bicycle. Thereafter the appellant, who is related to PW1 and her, was arrested and taken to the Police Station, though she did not disclose who effected the arrest.

The last witness for the prosecution was PW3 F. 1677 PC Nyama who testified that on 2/11/2002 the appellant was brought to Tabora Central Police Station by two militiamen who were accompanied by a woman whose identity PW3 PC Nyama did not disclose. Later, two relatives of the appellant brought the bicycle to the Police Station. The record is silent on whether PC Nyama took the bicycle as an exhibit or he handed the bicycle back to the persons who took it to the Police Station. Under cross-examination PC Nyama admitted that he did not record any statement from the appellant, but the appellant confessed orally to have stolen the bicycle. The witness also admitted that when the appellant was sent to the Police Station the bicycle was not handed over to him but was sent there later by some unknown relatives.

The trial court found that the evidence as narrated above was sufficient to put the appellant in his defence. This the appellant did, and in his defence he denied being related to the appellant or committing the offence as alleged.

In its judgment the trial court relied on evidence of visual identification at the scene of the crime to found the conviction. The trial court, however, found that there was no evidence to support the charge of Armed Robbery, and instead entered a conviction for robbery with violence and prison. Aggrieved by both the conviction and the sentence, the appellant preferred an appeal to the High Court upheld the finding of the trial court that the appellant was positively identified at the scene of the crime, but ruled as inadmissible the confession which the appellant purportedly made to PW3 F 1677 PC Nyama.

Curiously, the appellate High Court made the following observation/order: -

"Conviction is accordingly upheld. The appeal is dismissed. A person armed with an offensive

weapon at the time of robbery must be sentenced to 30 years imprisonment.

For the above reason the sentence of 15 years imprisonment is set aside and the sentence of 30 years imprisonment imposed."

While convicting, the trial court observed thus:-

"I have no reason to disbelieve this evidence but doubtful enough is whether the offender was armed with a panga. This needs to question mind as to how he managed to afford pedaling a bicycle with a panga in his hand. This could have been supported with any enough evidence. Otherwise the complainant would have managed to arrest him therefore.

Since this is not clearly put, I believe and so hold that the accused did commit the offence with violence. He is therefore convicted under robbery with violence and not armed robbery as charged."

If the trial court discounted the use of a panga during the commission of the offence and convicted of simple robbery, and the

appellate High Court upheld the conviction entered by the trial court, one would have expected the High Court to go along with the finding of fact of the trial court that a panga was **not** used during the commission of the crime. Instead the High Court remarked that a panga was in fact used and used this finding during the enhancement of the sentence of without first reversing the finding of fact of the trial court that a panga was **not** used. We are of the view that this was a misdirection error on the part of the appellate High Court.

It is clear from the quotation above that the trial court substituted the offence of Armed Robbery, for which the appellant was charged, with the offence of Robbery with violence. The trial court then proceeded to convict the appellant with the offence of Robbery with violence and then proceeded to sentence the appellant accordingly. The substitution was predicated by the finding of fact that there was no evidence that a panga was used during the commission of the offence. On appeal, the High Court did not disturb this finding of fact when it upheld the conviction, but enhanced the sentence for the reason that a panga was used during the commission of the offence so this made the offence to be one of Armed

Robbery. This enhancement of sentence without first reversing the finding of fact made by the trial court that a panga was not used was a misdirection on the part of the appellate High Court. Invoking our powers of revision under Section 4(2) of the Appellate Jurisdiction Act, Chapter 141 R.E. 2002 of the laws we quash the finding of the appellate High Court showing that a panga was used.

The net effect of quashing the finding of the appellate High Court is that the appeal for conviction on a charge of Robbery with Violence was not heard and determined by the High Court. In the normal course of things, the proper order was to remit the record to the High Court for hearing of the appeal. We are of the feeling, however that this would be an exercise in futility. We hold this view because the trial in the trial court were marred with so many defects that it did not deserve the name of a trial.

First, the appellant was alleged to have robbed a bicycle from PW1 Mustapha James and that the bicycle was taken to Tabora Police Station as an exhibit, but on the date of the trial Mustapha James tendered the

bicycle himself without showing how the bicycle changed from an exhibit in police hands to his own possession, while he Mustapha James had shown in his evidence that he did not take part in the recovery of the bicycle. **Secondly**, PW2 Hadija Mrisho, who is the mother of PW1 Mustapha James, is shown to have gone to the appellant's house with some unnamed person to arrest the appellant and recover the bicycle which the appellant had reportedly said was pawned to some unnamed person for sh. 13,000/=. Neither the person who arrested the appellant nor the person to whom the bicycle was pawned appeared in court to testify. **Thirdly**, the basic charge is robbery which is the use of force to facilitate stealing of something of value. Neither Mustapha James nor his mother Hadija Mrisho gave identifying characteristics of the bicycle so as to lay ownership of the bicycle. Lastly, the question who sent the bicycle to the Police Station and who took it from there is not answered. All these questions created doubt on whether there was a trial at all in the court of first instance which could lead to a conviction, the reason being that the prosecution did not discharge its burden of proving the case beyond reasonable doubt in the trial court. Remitting the record to the appellate High Court for hearing of the appeal will be a time wasting exercise. Taking a cue from **Shabani**

Iddi Jololo and 3 others v R, Criminal Appeal No. 200 of 2006 (unreported) which was cited with approval in **Maiko Charles versus The Republic**, Criminal Appeal No. 20 of 2008 (unreported), we allow the appeal, quash the conviction entered and set aside the sentence of imprisonment. The appellant is to be released from prison forthwith unless he is held on some other lawful cause.

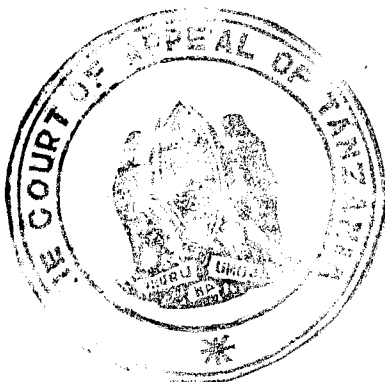
DATED at TABORA this 17th day of September, 2013.

M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL