

IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(HC) CRIMINAL APPEAL NO. 136 OF 1975

(C/F. Gr. App. 141 of 1975)

ORIGINAL CRIMINAL CASE NO. 107 OF 1975

OF THE DISTRICT COURT OF NZEGA DISTRICT AT NZEGA

Before: C. A. C. Odongo, Esq., D/Magistrate.

NZE PELEZI ..... APPELLANT

versus

THE REPUBLIC ..... RESPONDENT

CHARGE: 1st Ct: Robbery with violence c/s 285 & 286 of P.C.  
2nd Ct: Receiving stolen property c/s 311(1) of P.C.

J U D G M E N T

SISYA, J:

The two appellants, Simon Iyambaniswa and Nzea alias Noa Pelezi, who appeared at the trial as first and second accused, respectively, and whom I shall hereafter continue to call them so, i.e. first and second accused, were convicted in the District Court, Nzega, of robbery with violence. The second accused alone was also charged with and convicted, on a second count of Receiving stolen property contrary to Section 311 (1) of the Penal Code. On the robbery count the accused were each sentenced to the statutory minimum of seven years imprisonment. On the second count the second accused was sentenced to a further period of three years imprisonment with an order, however, that the sentences should run concurrently. Both accused have appealed to this court and their appeals are consolidated.

It was not disputed at the trial that on the evening of 4/4/73 the dwelling house CUM shop belonging to the complainant was invaded by armed gangsters who, after using personal violence to the occupants of the building in question as well as to their neighbours as a result of which one person died, made away with various articles of merchandise which included American ... of white (Loriondi"

pairs of short trousers, one net, two bed sheets, two pillow cases, one brazier, four pairs of sandals, four tablets of marine soap, five underwears and one underskirt. They also made away with some cash. The total value of the articles stolen ran to Shs.20,000/=. Evidence was given at the trial by the complainant in the case, one-NASSORO ABDALLAH (PW.1) to the effect that on the fateful evening at about 9.00 p.m. he was sleeping in his room in a building in which he also owns and runs a shop. What actually happened is not very clear but according to Nassoro he was awakened from sleep by noises made by his sister-in-law, one Kashindye who, incidentally did not give evidence at the trial, and some children. The said noises were actually an alarm which the said Kashindye and the children were raising. Nassoro jumped out of his bed and intended to get out of his room. As he did so he came into a confrontation with one of the intruders who had a gun. It seems at that time there was pandemonium in the house. With the help of the light provided by a lamp which was then on in the house Nassoro saw the gangster with the gun, whom he i.e. Nassoro, apparently knew as he Nassoro called him, i.e. the gangster, Surambaya as his name, fire the gun at his, i.e. Nassoro's, mother. At once Nassoro got hold of the gun but nevertheless a shot very narrowly missed hitting her: It nevertheless cut open her skin on the head. As the struggle for the gun continued the first accused came forward with a bush knife (panga) and slashed Nassoro with it on the left side of his stomach. While so doing the first accused was saying that Nassoro should be killed lest he identified them later. The first accused then raised his "panga" again and this time he slashed Nassoro with it on the head. He, i.e. Nassoro, let go the gun and fell on the floor. Meanwhile he saw the other gangsters busy collecting and tying up articles of merchandise in the shop. Thereafter Nassoro lost consciousness. He regained it while he was admitted in the District Government Hospital, Nzega.

Another eye witness, MARIAM ABDALLAH (PW.2) testified to the effect that on the material evening between 9.00 p.m. and 10.00 p.m. while she was awake in her room she heard a gun being fired at the back door of the house where she and her brother, the complainant, their mother and others were. When she went and looked, at the said back door of their house she

came in Mariam saw the intruders ran out of the house. Later thinking that the thugs had run away she returned into the house. She found Nassoro (PW.1) and her mother both of whom she, Mariam, noticed had been badly injured. Suddenly the firing started again. Mariam and others who had entered the house began to scramble for the door. She met the savages at the door. The one with the gun fired at her but fortunately for her the shots missed her. They, however, shot the person who was immediately behind her and who had come in response to the alarm. The said person fell on the floor and died shortly afterwards. The first accused then struck her with a panga on the head and she fell on top of the dead person. The thugs ordered her to get up. Mariam pulled herself together and got up. The intruder with the gun then fired at her and this time she was hit on her left arm. She fell down again. Nevertheless she struggled and got up. She was marched into the shop. While there the intruders continued to assault her while others were busy collecting things. From her room the invaders collected a radiogram, one mosquito net and two bed sheets. While in the shop Mariam saw the second accused collect articles of merchandise which included khangas, vitenge, textile material etc. etc. from the shelves and put them in sacks. Meanwhile the neighbours who had come in response to the alarm ran back in fear.

In the course of the invasion the first accused suggested to his companions that they should kill the complainant for fear that he would identify them. It seems on hearing this the complainant's mother took out cash which, according to Mariam amounted to more than Shs.10,000/= and handed it over to the intruders while begging that they should not kill PW.1, the complainant. Eventually, Mariam saw the intruders carry the loot on their shoulders and go out of the shop.

A report was sent to the Police whereupon one Inspector Cornet (PW.4) and ASP. Frank Phillemon Gamaya (PW.6) took up the investigation of the case. They set off for the scene of the alleged crime at Mbogwe Village on 5/4/73 at about 7.30 a.m. While they were on the way they received some information as a result of which they, i.e. the Police Officers, changed their route. They followed the road leading to Tabara. When they arrived Mbogwe they were informed that the intruders

accused's house they saw four persons sitting outside the said house. Two of these were identified to be the first and second accused persons. However, on seeing the Police Officers approach the four persons took to their heels. The Police Officers tried to give chase while firing in the air. The first accused and two others continued to run away very fast and they managed to escape. The second accused's attempt to escape was, however short lived because he was apprehended almost immediately by the Police Officers. Outside the first accused's house were three bicycles. The two Police Officers, PW.4 and PW.6, then began to interrogate the second accused. In the course of the said interrogation the second accused led the Police Officer to a place in the bush about fifteen paces away from the house of the first accused. They found three sacks which were full. When opened the three sacks were found to contain five bales of cotton material, two bales of American khaki cloth, one bale of khaki material, one bale of "Jinja" material, fifty-nine pairs of vitenge, twenty-six pairs of khanga, eight pairs of shorts, four pairs of long trousers, seven shirts, fourteen nappies, thirty-four handkerchiefs, two bed sheets, five underwears, one underskirt, two pillow covers, one brazier, four tablets of Marine toilet soap, two pairs of sandals, one mosquito net, one radiogram, one Philips radio and one clock. The radiogram was produced in court and marked Exh. "A". The next of the articles were also produced as exhibits and they were collectively marked Exh. "B". The second accused's pockets were searched and cash Shs.218/35 were found and recovered therefrom. This was also produced and marked Exh. "C". Thereafter the Police Officers searched the house of the first accused. They found and seized a bicycle to which was tied a shot gun. On checking they found that it was loaded with one live cartridge. The four bicycles and the gun together with its cartridge were, however, not produced as exhibits at the trial.

The second accused was at first charged with murder. Meanwhile the search for the first accused and the others continued. On 7/10/73 acting on information received one Inspector Mustafa Selemani Luzinga (PW.5) proceeded to the remand prison, Tabara, where the first accused was then in connection with some other matter. He, first accused was

then charged with

The first accused in his sworn statement in defence told the trial court that on 5/4/73 at about 2.30 p.m. while he was at his house at Itwelyanguku village, Nkiniziwa area, repairing a bicycle he was visited by three persons. Each one of the three visitors had a bicycle and to one of the bicycles, which belonged to one Surambaya who was leader of the visitors and a friend of the elder brother of the first accused, was tied a gun. One of the said three visitors was the second accused. The said Surambaya and the third visitor did not appear in court. However on their arrival the first accused received them and they all sat outside the house. The visitors then told him that they were on their way from Tinde in Shinyanga District and that they had deviated only to have food at his, i.e. first accused's, house as directed by their friend, presumably the said elder brother of the first accused. One of the visitors asked him, first accused, what was wrong with his bicycle and offered to repair it for him. At the same time he, first accused, tried to borrow one of the bicycles brought by the visitors so that he could go to his neighbour to fetch a bag. The visitors refused saying they feared that he might delay. The first accused then went for the said bag on foot. He, however, missed the bag because his neighbour had gone to a funeral. He tried another neighbour of his but he too had gone to the same funeral. Eventually he returned to his house. On his arrival he found his wives and children outside and they were crying. His personal belongings had been taken from the house and scattered outside. His wives then told him that one of his visitors had been arrested because they shot a man to death from where they came and the other two had escaped. They further told him that the Police had also seized four bicycles including his own and some luggage which was recovered from the bush. His wives expressed ignorance of the person(s) who put the said luggage in the bush. On hearing this the first accused went to make further enquiries from his leader of ten houses. However the said leader of ten houses expressed ignorance of what had taken place except that he heard two gun shots which were fired from the direction of his, i.e. first accused's house and he, i.e. the leader of ten houses, said that he thought these were fired by hunters since the surrounding area was all bush. It seems the first accused

He found her and upon seeing him she tried to run away whereupon he assaulted her thereby causing her an injury on the head. This landed him in the remand prison, Tabora. On 2/5/73 a Policeman from Nzega arrived and told him that he, first accused, had broken into a shop and murdered a person. He, first accused, was then charged jointly with the second accused whom he said he did not know.

The learned trial Magistrate commendably gave the second accused an opportunity to cross-examine the first accused. In the course of the said cross-examination the first accused told the trial court that the second accused was one of the three visitors who had come to his house and asked for food. That was the first time for him, i.e. first accused, to see the second accused. The first accused went on to say that the leader of the "delegation" was one Ramadhoni Surambaya to whose bicycle was tied a gun.

When cross-examined by the learned Public Prosecutor the first accused denied that he ever lived at Mbagwe area. According to him, i.e. first accused, he was born and bred at Ugagerema Uyogu village which is separated by two villages from Mbagwe. The first accused, however, added that he, nevertheless, used to visit a bar in Mbagwe area often for local liquor and in this connection he conceded that many people at Mbagwe knew him. Cross-examined further the first accused is recorded to have said and I quote from the record of proceedings in the trial court:-

"When I shifted from Ugagerema Uyogu village to Nkiniziwa I left only one shop owned by Malembela not of Arabs. I have never seen PW.1 but I was told by my elder brother that he opened a shop at Mbagwe also that he had accused my young brother for stealing a bicycle. PW.1 told lies in court that I used to meet him. It was not me who stole the bicycle said by PW.1 but my younger brother (sic) who resembles me very much ....."

When questioned by the trial magistrate the first accused said that he shifted to Nkiniziwa from Ugagerema Uyogu in 1959. He, first accused, also said that he and his brothers resemble each other very closely. His elder brother lives at Ngulu village about three miles from Mbagwe and he, first accused, suggested that it might have been one of his brothers who went and committed the alleged offence.

The second accused in his sworn statement in defence told the trial court that on 5/4/73 he left Tabora by bus and arrived at Nkiniziwa village where he was arrested.

Thereafter he began to make house to house enquiry. There was no maize in the first three houses which he visited. In the fourth house he found and bought two tins of maize. Since his target was two sacks of maize he left the two tins of maize in the same house for collection later. Meanwhile he continued to look for some more maize. The second accused went on to say that he then came to a house where he found two women. Their man was not there nor did he, i.e. second accused, know who he was. The said two women whom second accused said he could no longer identify told him to wait outside their house. It seems he did as told. However, at 4.00 p.m. there, suddenly, appeared Policemen from behind the house. The said Policemen then arrested him together with the two women.

When he expressed surprise at his arrest one of the Police men slapped him in the face and this made him temporarily blind. Nevertheless, the Policemen alleged that he, i.e. second accused, had killed a person and demanded that he should show them his companions. He denied that he had any companions. Thereafter, he was taken together with his bicycle to the Police Station, Nzega, where he was charged with murder. When he was searched Shs.218/35 were found on and seized from him. This money was for buying maize.

Again, the learned trial magistrate, quite correctly, gave the first accused an opportunity to cross-examine the second accused and he did so. During the said cross-examination the second accused said that the maize which he was looking for was for domestic consumption. He, second accused, categorically denied any knowledge of the first accused. He also expressed ignorance of the fact that the house at which he, second accused, was arrested belongs to first accused. Cross-examined further the second accused told the trial court that anyone who testified in court that he, second accused, was at the house of the first accused in the company of other people gave false evidence cross-examined yet further by the first accused the second accused went on to say and I quote from the record of proceedings:-

"First accused was not repairing a bicycle at his home but I did not see him totally. I was not one of the guests of the first accused who looked for food. First accused has not seen me before this case so we met in remand prison Nzega. I did not show the Policemen the

When cross-examined by the learned Public Prosecutor the second accused went on to say and I quote:-

" ..... First accused is the owner of the home where I was arrested so he is the person concerned with the robbery in question. I have been arrested out of no reason only once in this case. I have framed lies on people many times."

The second accused called two witnesses on his side. The first was one DOLO SHUMBA (DW.3) who testified to the effect that on 4/4/73 at about 8.00 p.m. he met the second accused in a bar at Tabara. The latter then asked him if there was maize for sale in Nzega District. He replied that there was maize in the villages but he did not specify any particular villages. On the following day i.e. 5.4.73, he and the second accused boarded the same bus which was destined to Shinyanga. When the bus arrived at Nkiziziwa the second accused got down together with his bicycle and a sack which he brought with him for the purpose of buying maize. In an answer to a question put to him by the learned trial Magistrate Dolc said that since 5/4/73 the next time he saw the second accused was on 16/6/73 in Nzega Prison. The second witness whom the second accused called is KAPEMBE SWEYA (DW.4), a peasant at Puge area, Nzega District. This witness denied ever seeing second accused come to his, i.e. Kapembe's, house in search of maize. He also denied any knowledge of both accused persons. When questioned by the trial Magistrate Kapembe told the trial court that he was serving prison sentence at the time he gave evidence for stealing clothes. He, Kapembe, added that the second accused knew his name when the same was called out in prison.

The first accused had originally expressed a desire to call three witnesses. However, after two of them had given their evidence he closed his case. His first witness was his leader of ten houses, one LUTEJA SAIDA (DW.5). He testified to the effect that he was not present when the Policemen arrived at the house of the first accused. Later, however, he saw them with clothes which they alleged to have taken from the house of first accused.

When questioned by the second accused this witness, Luteja, said that he saw the second accused under the custody of the Police but he did not witness his arrest.

When cross-examined by the learned Public Prosecutor



that on 5/4/73 he saw the Policemen go to the house of First accused but added that they did not, however, talk to him. Later he saw them with three sacks full of clothes and the second accused was under their custody. They, i.e. the Policemen, told him that they had arrested the second accused but others had escaped and ran away. He, Luteja, did not see the first accused on that day and he had not seen him for many days. The next time he saw the first accused was when the latter was under arrest. Luteja also told the trial court that the Policemen kept four bicycles which they alleged to belong to the persons who ran away in his house as leader of ten houses.

In answer to a question put to him by the trial Magistrate Luteja said that he had lived in Nkiniziwa village for eight years. He denied that the first accused shifted in that village in 1959 but much later than that.

The second witness on the side of the first accused was his wife, MILEMBE KIJILE (DW.6). Her evidence was a mere reiteration of the testimony of the first accused.

When questioned by the second accused Milembe said and I quote:-

"I usually pay visits to first accused in remand prison where we usually talk in a private room without a Policeman or anybody but only two people .....".

She, however, denied that first accused told her what to say in court. She went on to say that one of the three visitors had a gun tied to his bicycle. Questioned further by the second accused Milembe told the court that it was the second accused who led the Police to where the sacks containing the clothes were after the Police had beaten him and herself up. She, however, conceded that she could not be happy if her husband, the first accused, was imprisoned.

During cross-examination by the learned Public Prosecutor Milembe told the trial court that at the time she gave evidence she had been married to the first accused for fifteen years. They, at first, cohabited at Ugererema Mbongwe area before they shifted to Nkiniziwa. At the time she gave evidence five years had passed since they shifted to Nkiniziwa. She never visited Mbongwe and therefore, she did not know that there were Arabs there. According to Milembe it took a very short time for the Policemen and second accused to go and

resemble each other very closely except, according to her, the said brothers are taller than himself. She then also made the suggestion that it was first accused's elder brother who stole from PW.1 and PW.2 but the witnesses mistakenly identified first accused.

In answer to questions put to her by the trial Magistrate Milembe denied that she and first accused moved in Itwelyanguku village Nkiniziwa area in 1959. According to her as late as 1961 she and first accused were living in Nyambewa village in Geita District. She also denied that second accused asked for maize at her house.

The learned trial Magistrate found both first and second accused guilty as charged on the first, i.e. robbery, count and he convicted them accordingly. He also found the second accused alone guilty on the second, i.e. receiving, count and he convicted him accordingly.

In his petition of appeal the first accused raises no new substantive ground of appeal except protestations of his innocence. The second accused too makes protestations of his innocence in his petition of appeal. However, in addition to this he contends that he could not be convicted of robbery and receiving stolen property at the same time.

It is trite procedure that the first appeal is by way of re-hearing. The first appellate Court does not merely have to scrutinise the evidence in order to see if there was some evidence to support the lower court's findings and conclusions. What the first appellate Court is required to do is to make its own findings and draw its own conclusions from the evidence on record. Indeed in so doing the first appellate court must be cautious by making allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Cases in which this was the decision are legion.

As I pointed out earlier there was no dispute at the trial of the fact that on the evening of 4/4/73 at about 9.00 p.m. the house cum shop of the complainant PW.1 was invaded by intruders who were armed with a gun and 'pangas'. The said intruders launched a very vicious and savage attack on the occupants of the building in question who included the complainant himself (PW.1), his sister (PW.2) and his mother who did not testify at the trial. The said attack was with the gun and pangas. Also attacked and, as a matter of fact,

the complainant's mother was also

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charge sheet and hereinabove. Neither of the accused disputes this on appeal either. The evidence on this aspect of the case was given by Nassero Abdalla (PW.1) and Mariamu (PW.2). In the event I am satisfied that the learned trial magistrate was perfectly entitled to find as a fact that a robbery with violence had been committed at Mbogwe village on the evening of 4/4/73.

However, the mere fact that it has been established that an offence was committed would not, per se, justify a conviction against the accused in the dock. It still is incumbent on the Prosecution to prove with moral certainty and to the exclusion of every real or reasonable doubt that the offence so established was perpetrated by the accused person(s) in the dock. Only then will a conviction be upheld for being sound in law.

In the instant appeal the only material issue for determination is whether these two accused persons were sufficiently identified to be some of the thugs who staged the robbery at Mbogwe village on the material evening. It has been held by this court as well as the court of appeal for East Africa that where the evidence implicating the accused is entirely based on identification, such evidence must be "absolutely watertight to justify conviction". (See R v. Sebwa (1960) EA. 1974; Emmanuel Tumbotele v. R (1968) H.C.D. 144; Wilson Ollie v R (1966) H.C.D. 183; Andrea v R (1971) H.C.D. 141).

As regards the identification of the first accused there is the evidence of Nassero (PW.1) and Mariamu (PW.2). Both these witnesses were positive in their identification of the first accused whom they said they knew very well long before the incident. Both PW.1 and PW.2 testified that the first accused was his neighbour at Mbogwe village for sometime before he, first accused, shifted to Nkiniziwa. He, first accused, used to visit the shop of PW.1 quite often. Mariam (PW.2) said the same thing and according to these witnesses they know first accused very well. The first accused in his defence denied that he ever lived in Mbogwe village. According to him he lived at Ugogerema Village which was separated by two villages from Mbogwe village. He, however, conceded that he used to frequent Mbogwe village for pombe drinking and thereby residents of Mbogwe used to see and know him. However, the first accused's allegation that he lived

According to Lutoja who, to my mind, was an independent witness in the case without anything to gain or lose out of the proceedings, the first accused was only six months old in the village at the time of the incident. It is evident, therefore, that by claiming to have shifted to Nkinisiwa in 1959 the first accused lied in open court. The learned trial Magistrate was, therefore, entitled to disbelieve the first accused on this point. On the other hand Nassoro (PW.1) told the trial court that he and the first accused lived in the same village at Mbogwe for five years and on one occasion he, first accused, was involved in an incident at a local liquor bar concerning his, i.e. Nassoro's, bicycle. This piece of evidence, I hold, is relevant for the purpose of establishing prior knowledge of first accused by Nassoro.

In his defence the first accused claimed that it was actually his, first accused's, brother who was involved in the said bicycle incident and that he, i.e. first accused, and his brothers resemble each other very closely. Strange enough the first accused who, from my reading of the proceedings in the lower court, would appear to be a fairly knowledgeable person and not a raw citizen, never cross-examined Nassoro on this point. He, first accused, did not question Nassoro or Mariamu on the issue of his having brothers whom he closely resembles either. At any rate his allegation was contradicted by his wife, Mirembe, who said that the first accused's brothers are taller than himself. Certainly, if the first accused and his brothers were exactly alike the better judge on this point would be his wife or some other third party or person and not the first accused himself.

All this said and done Nassoro (PW.1) said that he saw and identified the first accused with the help of a lamp which was then on in the building. The first accused came when he, Nassoro, held the gun which was used in the robbery. He slashed him, i.e. Nassoro, with a panga on his left hand and left side of the stomach and finally on the head which caused Nassoro to lose consciousness. Nevertheless, by then he had already seen and identified the first accused.

In addition to the evidence of Nassoro there is, as aforesaid, the evidence of Mariamu. As distinct from Nassoro who appears to have been awakened from sleep, Mariamu said that she was wide awake when the intruders first struck. The

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who was behind her. The first accused then struck her with a panga on the head and she fell on the person who had just been shot. From the account of Mariamu the first accused must have appeared in front of her in which case the two of them were face to face with each other. That was an opportunity for Mariamu to see and identify the first accused. She got up but was fired at and shot on the left arm. She fell down again but she was ordered to rise which she did and marched into the shop. While there the first accused continued to strike her with his panga while the others were busy collecting the loot. Again Mariamu had ample opportunity to see and identify the first accused. As aforesaid and as Mariamu too pointed out there was light provided by a lamp in her room and in the shop. The important thing to note here is that the first accused was not a stranger in the eyes of Nassoro and Mariamu. In this connection it may not be impertinent to recall that in his testimony, during cross-examination by the first accused, Nassoro said that before he lost his consciousness he heard the first accused tell his companions to kill him, i.e. Nassoro, because he might identify them later. Further, Mariamu also said that the first accused continued to assault her with a panga while the others were helping themselves to the loot. The said assault would appear to have been meaningless other than for the purpose of killing her. Indeed the first accused had a very good cause for fearing that his identity would be established unless Nassoro and Mariamu were liquidated.

On my evaluation of the evidence I would not hesitate to find that the evidence of Nassoro and Mariamu even if it were to stand alone, is sufficient to establish the identification of the first accused.

The evidence for the Prosecution goes on to show that on the following morning when the first accused saw the Police approach he took to his heels. If true, then the only reasonable if not the irresistible inference to be drawn from this conduct, in all the circumstances of this case, is that the first accused had a guilty conscious.

In his defence the first accused contended that when the Policemen arrived at his house he was away to his neighbours' houses where he had gone to borrow a bag. He, however, left behind three visitors one of them being a friend of his brother

the first accused was one of the robbers who invaded the complainants shop on the material night.

Suffice it to say that for all these reasons and on the evidence on record, like the learned trial Magistrate I am satisfied that the identification of the first accused as one of the robbers was fully established.

Turning to the second accused, in count one, both Nassoro (PW.1) and Mariamu (PW.2) testified to the effect that they saw him, i.e. second accused, among the robbers on the material night. Both PW.1 and PW.2 said that they saw second accused take articles of merchandise from the shop and both of them i.e. PW.1 and PW.2, added that that was their first time to see the second accused. This means that at the time of the robbery the second accused was a complete stranger to both PW.1 and PW.2. None of these two eye witnesses described how he or she identified the second accused. Though there was a almp on the events must have happened quickly and since, as aforesaid, the second accused was a complete stranger to them, circumstances favouring identification must, therefore, have been difficult. This, to my mind, raises the need for PW.1 and PW.2 to describe the second accused in court: A description of the second accused's attire at the material time or any other feature peculiar to him would suffice. In the instant case PW.1 said that he could not recall what type of clothes the second accused put on. This court has held that it is unsafe to support a conviction on the bare assertions of witnesses that they had recognised or identified the accused. (See Ludoivo s/o Kashabu v. R. (1967) H.C.D. 194; Meda Mzazi v R. (1972) H.C.D.206).

The second accused raised the defence of alibi. He dalled a witness, Dolo Shumar (DW.3), a convict, who testified to the effect that on 4/4/73 at 8.00 p.m. the second accused was in a bar at Tabora. The learned trial Magistrate rejected Dolo's evidence on the ground that since more th n two years had passed by the time Dolo gave evidence he, Dolo, could not remember the dates with precision. Secondly, Dolo conceded to have met the second accused in remand prison at Nzega. The learned trial Magistrate had the advantage of seeing and hearing the witnesses in this case. I have not had such advantage. I cannot therefore say that in disbelieving Dolo he erred.

led the Policemen to a place in the bush, fifteen paces away from where all the articles stolen from the complainants shop were recovered. The second accused in his defence told the trial court that he went to the house where he was arrested to look for some maize for sale. He was alone. To some extent he was supported in this by his witness, Dolo (DW.3). However, the first accused and his witness, Mirembe (DW.6) gave a different story as narrated hereinabove. The accounts given by second accused and Dolo (DW.3) on the one hand and the first accused and Mirembe (DW.6) on the other differs from that given by the two Police Officers, PW.4 and PW.6. The learned trial Magistrate accepted the evidence of PW.4 and PW.6 and acted upon it. I see no cause why the learned trial Magistrate's decision on this aspect of the case may be faulted. It may not be insignificant to observe at this juncture that the person whom the second accused called in order to establish that he, second accused, was looking for maize, Kapembe Sweya (DW.4), denied any knowledge of him, second accused, and his alleged maize purchasing mission. In his petition of appeal the second accused contends that the learned trial magistrate erred in taking into account Kapembe's evidence because Kapembe is very old and therefore, his capacity to remember things let alone the day second accused approached him for maize is doubtful if any. All I can tell the second accused is that Kapembe was a witness who was summoned on his, i.e. second accused's, application and on his, i.e. second accused's, own side.

The evidence of PW.4 and PW.6 to the effect that the second accused led them to a place where Exhs. "A" and "B" is relevant and admissible: - See Section 31 of the Evidence, Act, 1967. In all the circumstances it can safely be inferred that the second accused knew the presence of the exhibits where they were found and recovered. These exhibits were stolen in the course of a robbery during the proceeding night. If the second accused had seen some other person(s) put them, i.e. the exhibits, there or if he had seen or discovered them per chance he ought to have said so. However, he never said so. Instead he categorically denied any knowledge of the exhibits. This is not true as it is the second accused who gave PW.4 and PW.6 information which led to their discovery. Since the second accused was not a resident of that area and the evidence

and I have every reason to believe that it were so then it follows that the second accused must have possessed and conveyed the exhibits prior to their being deposited where he, second accused, led the Police later. In view of the fact that a short time, less than a day, had passed from the time of their being stolen to the time of their recovery with the cooperation of the second accused I am, in all the circumstances, of the firm view that the second accused was one of the actual thieves. In the light of this conclusion the defence of alibi raised by the second accused does not raise any reasonable doubt or any at all in my mind. It did not raise any doubt in the mind of the trial magistrate either.

It is thus open to find that the identification of the second accused by PW.1 and PW.2 has been supported in material particular by independent and credible evidence. In the event, again like the learned trial Magistrate, I am satisfied that the identification of the second accused as one of the robbers was sufficiently established.

Turning to the second count, I do not hesitate to say that the appeal on this count has merit. Put simply robbery is stealing with force or violence. There are numerous decided cases which lay down that a person cannot lay down that a person cannot be convicted of stealing and receiving the same thing. The addition of the second count together with the conviction thereon were, with respect, ill conceived. The same cannot therefore be allowed to stand. Accordingly the conviction against second accused in count two is quashed and the purported sentence passed thereon is set aside.

As regards sentence this was a heinous crime. The accused were members of an armed gang; armed with lethal weapons - a gun and a panga. The undisputed evidence shows that a person died in the course of the robbery. It would also appear to me that it was mere Grace of God that there were not more than one death. The complainant, his sister and his mother were brutally attacked and injured. The offence of robbery with violence is, as was correctly observed by the learned trial Magistrate, scheduled under the Minimum Sentences Act, 1972. The learned trial Magistrate also appears to have appreciated the gravity of the offence with which these two accused stood convicted. He was, however, influenced by the fact

that the accused



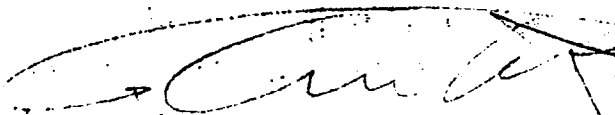
There are glaring aggravating circumstances in this case. These persons are, needless to say, very dangerous elements to the society and in my view the longer they are kept away the better for peaceful development of innocent citizens. No doubt these persons must still consider themselves extremely lucky that they were not tried for the capital offence of murder. On the other hand I fail to understand why the learned trial magistrate who is an experienced magistrate failed to see that this was a fit case for commitment to this court for sentence. Even then, however, this court still has power to enhance the sentence provided that the accused are given, at least, reasonable notice. I have intended to do so when the accused appeared for judgment. For reasons unknown to me each time this judgment was fixed for delivery none of the accused was brought from prison. This state of affairs has persisted until now when it is almost a year since judgment was due. In the event I have no alternative but to leave the sentence which, to my mind, gravely errs on the lenient side, undisturbed.

In the final result save in count two these appeals fail and they are dismissed.

Delivered in court this 28th March, 1977.

H. E. D. SISYA,  
JUDGE.

Certified true copy of the Original.

  
DISTRICT REGISTRAR,  
TABCRA.