IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(HC) CRIMINAL APPEAL NO. 8 OF 1994

ORIGINAL CRIMINAL CASE NO. 1 OF 1994

OF THE DISTRICT COURT OF SHINYANGA DISTRICT

AT SHINYANGA

SAID SALUM ..... APPELLANT
(Original Accused)

VERSUS

THE REPUBLIC ..... RESPONDENT
(Original Prosecutor)

J U D G M E N T

Charge: Robbery with violence c/s 285 and 286 of the Penal Code Cap. 16.

KATITI, J.

Shinyanga District Court, before which, SAID s/o SALUM, and SAIDI s/o RASHIDI, as first and second accused persons' respectively were facing the charge of robbery with violence c/s 285 and 286 of the Penal Code Cap. 16, convicted them as charged, sentenced each of them to fifteen years imprisonment, under the Minimum sentences act 1972 as amended by act No. 10/1989.

However aggrieved, was SAIDI SALUM, the first accused herein to be called the appellant, who engaged a Shinyanga based advocate Mr. Mahuma, to prosecute his appeal. In his armoury of complaints were -1- that the evidence by PW1 and PW2, was so weak, that it could not sustain conviction, -2- that the trial Magistrate misdirected himself, in holding that Shs. 10,000/= belonged to the complainant, without evidence in that direction, -3- that the appellant was not properly identified by the complainant - PW1, -4- that the trial Magistrate errered in law, in basing the conviction of the appellant on the evidence of one witness alone - (PW1), -5- that the evidence by PW1 and PW2, was so fundamentally contradictory, that it could not found the conviction, and -6- that the trial Magistrate erred in ordering the disposal of money exhibit P1 Shs. 10,000/= in favour of PW1. Mr. Mahuma sought, that the appeal be allowed, and liberty of freedom be restored, unto the appellant. On the other, hand, the Senior State Attorney Mr. Kaduri submitted that the evidence was tenaciously, tight against the appellant, and that the conviction

was unbeleoable. He resisted the appeal, and urged that, the same be dismissed,

This case, it seems covers a narrow compass, with a terrain that is hardly slipperly. It is confounding challenge, that at about mid-night - on the 30/12/1993, between Bukone and Maline Railway Stations, the appellant, and the second accused, were travelling in the Mailtrain heading towards Isaka. Equally travelling in the same train, was the complainant PW1 C. 8816 CPL. JOEL, PW2 D. 5474 PC. ANGELO, and PW3 C. 5335 CPL. SAID. As the said train reached ISAKA Railway Station, and as the complainant PW1 was disembarking, he was unsuspectingly sandwitch by people his trouser pocket torn, and Shs. 10,000/= stolen, and hence his report to PW2. Immidiately, PW2 arrested the youths thereat, searched them, and from, the appellant Shs. 15,163/50, that included seven notes in Shs. 1,000/= denomination, and Shs. 3,000/= in Shs. 200/= denomination, and hence the charge. The appellant while conceding, that he was travelling in the said train, and further admitting he had Shs. 15,300/= on him, he insisted it was his property, he denied stealing the same from PW1, nor from anybody at all.

The trial Magistrate, religiously believing PW1, and that Shs. 10,000/= found upon the appellant by PW2, in deonominations mentioned by PW1, actually bebnged to PW1 concluded therefore, that the said money and amount, must have been stolen from the complainant, by the thief who was no other, than, the appellant, and hence, the conviction, and therefore this appeal.

Having exposed the evidence, to scrutinous and purposeful judicial attention, I am minded to think, that the case, is not as simple as it is made to appear. Conceding as we all do, that the crucial witnesses in this case are PW1 and PW2, and if we are to concede, that PW1's Shs. 10,000/= were stolen from his pocket, which was cut to facilitate such thievish removal, the question following on heels must be, - who stole, and how was he known ?

The complainant PW1 told the Court that, the money was stole as he was getting out of the train, and as he was Sandwitched by the appellant, and the second accused. This, it seems to me,

presupposes, that the said complainant saw, and identified the one who cut his pocket, and removed his Shs. 10,000/=. But on reflection this appears, to have been not the case, for the very complainant upon discovery of theft, he reported such theft to PW2. If the said complainant PW1, had any one, or the appellant in mind, he would have, either personally apprehended the thief, as such thief cut the pocket, and removed Shs. 10,000/=, or pointed him out. But as it seems, he did neither of these. This is vindicated by PW2's, conduct upon receipt of such theft report of, "ambushing the area, and arresting all the youths", and that, hence, the complainant identifying the second accused, who showed them the appellant, who was searched and hence the recovery of Shs. 15,663/50. On further serious reflection, since the complainant, as I have above argued, had not identified the thief, and hence the arrest of the youths, identifying the second accused to point out the appellant, does not easily, logically, and rationally follow. It would therefore seem to me, that, the evidence by PW1. and PW2, does not easily render itself, to impeccable credibility, I as did argue, the appellant in his first ground of complaint.

As argued by Mr. Mahuna, the advocate for the appellant, it would seem, that, the link between the crime charged, and the appellant was Shs. 10,000/= whose denomination PW1, insists he had earlier told PW2 about. With respect, bank notes serial numbers, of a particular amount, are official impeccable distinguishing marks of bank notes, of a particular amount, and. I would seriously shudder to think, that denominational amounts, or differences thereof, which anybody could carry with him carry carry little if any evidential weight. In the light of such arguement, I hope, the complainant, and I hope the Republic too would not seriously argue, that in that Mail Train, anybody with bank notes of Shs. 1000/= each, and Shs. 200/= each, and whose total amount in his, her possession, exceeding Shs. 10,000/=, this latter amount would necessarily have stolen from the complainant. Further it is in recorded evidence, that the appellant was in possession of Shs. 15,163/50, though the appellant told the court sworn, that, he had Shs. 15,300/= on his person, his personal property. But we have not been told, as to what denominations either in Shs. 1000/=, or in shs. 300/=, the appellant had, to exclude the possibility of the conviction prone prosecution (all prosecution witnesses are Police Officers) from picking the

amount, that suited its case most. Once again, I am in agreement with the appellant, that, there was no reliable evidence to show, that the money taken, from the appellant, was the very money stolen, from the complainant.

That the complainant, had not identified the one who stole his money, has by necessary implication, been delt with in ground of complainant No. (1), above. But to demonstrate it, further without prejudice, I have to point out the following, -1- that it became necessary for PW2 to arrest, chase, -2- that he only reported the theft to PW2, shows he did not know the thief, and theft was committed when he was unaware, -3- the contradiction in the evidence by PW1, that the appellant threatened to stab him, and yet could not point him out - all either cummulatively, or severally vindicate, the appellant that the complainants theif, was not identified.

From the aforegoing, it is difficult to say, by any stretch of legal thinking, that, theft by the appellant had been established. And it is even worse, when the evidence is considered in relation to the offence charged-Robbery with violence c/s 285 and 286 of the Penal Code Cap. 16. If Section 285 of the Penal Code, is read judiciously and dutifully, the will readily realise, that to constitute the crime of robbery, the force used, must be, at or immidiately after the time of stealing to any person or property, and such force must be of such a nature as to show, that it was intended to obtain, or retain the property stolen, or to prevent, or over come resistence to its being stolen, or retained. And the type of violence, for purposes of robbery, is ably demonstrated, as nearing that demonstrated in Section 286 of the Penal Code Cap. 16 for aggravated robbery, and Section 287 Cap. 16 - attempted robbery. So that I fail to surmise and even conceptualise, how a person, can have the offence of robbery with violence c/s 286 of the Penal Code committed upon him, while he is unaware of it. Surely it is impossible.

From the above, it is clear, that the Republic did not prove the charge beyond reasonable doubt, and the appeal is hereby allowed, conviction quashed and sentence set aside.

However and lastly, the appellant contends that, the trial Magistrate, grossly erred in ordering Shs. 10,000/= to be returned to the complainant. This would be a ligimate complaint, if the trial Magistrate, had acted on the wrong side of the law. It is, I think familiar law, that, where anything has been tendered, or put in evidence, in any criminal proceedings as Exhibit, and its ownership is contentious, and it is not subject to speedy and natural decay, the Court may make an order in favour of any person who appears to be entitled thereto, provided such order shall not, be carried out until the period for lodging an appeal has elapsed, and if an appeal has been lodged, until such appeal has been finally decided, and disposed of - see Section 353 (5) of the Criminal Procedure Act 1985. In this case the trial Magistrate, did heed such provisions to the letter, and that the appellants appeal has been allowed, he shall be entitled to his money. The appeal is allowed.

Delivered this 12th day of October, 1994.

E. W. KATITI,

JUDGE