

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APP. NO. 172/94

HIYARI ABDALLAH & OTHERS..... APPELLANT

Versus

THE REPUBLIC..... RESPONDENT

J U D G M E N T

KYANDO, J:

The appellants are appearing against their convictions for the offence of robbery with violence and a sentence of fifteen years imprisonment imposed on each one of them by the District Court at Kivukoni, Dar es Salaam (Shonga DM). They were charged with committing the robbery on 18.7.1990 at around 3.00 a.m at Buguruni kwa Malapa in Ilala District, Dar es Salaam. They were charged together with Kulwa Salum and Hamis Salum. Kulwa Salum was acquitted, Hamis Salum was sentenced to strokes of corporal punishment and he has not appealed. Nor has the Republic appealed against the sentence.

The evidence upon which the appellants convictions were based was that on the night of the alleged robbery Jumanne Mwamtemi (PW.1), the complainant, was at another place attending a funeral of his brother. He had left at his place a lady, Sharifa Ally (she did not testify) and the place was a room in a house which had eight tenants in all. At night, as shown, the place was invaded by ^{robbers} who stole a number of items, after threatening the occupants with death.

One of the tenants in the house was Abdul Hemed (PW.2). He testified that at the time of the alleged robbery he went out of his room to go and attend the call of nature. As he was returning to the room he heard noises of people in the complainant's room demanding, "leta pesa tutakua sisi" and a reply saying "pesa sijui zilipo na hakuna pesa". He said he climbed up the ceiling of his room and from there he peeped into the complainant's room. He said he saw ^{four} robbers but he was able to identify only Hiyari Abdallah the first appellant, amongst them.

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The first appellant, he told the trial court in his evidence, was neighbor of theirs. PW.2 testified further that later the robbers wanted to move to his room. He said he heard them say the should break the door of his room but he said he told them, after arming himself with a panga, that they should not bother themselves with breaking the door as he was opening it for them himself. He said on hearing this the group of robbers fled. He said he and neighbours who then turned up tried to give chase but the robbers escaped. He said he and two others, including Sharifa, then went to Buguruni Police Station to report the incident. He said they were given two Police Officers, D.46 39 PC. Manyika (PW.3) and D. 4947 PC. John (PW.5), and then returned to the scene.

At the scene they found marks of robbery but they were able also to notice foot prints of the alleged robbers. They followed those prints up to a house where they found an electric iron outside the door. The iron was one of the items stolen from the complainant's house. The Police Officers then fired gun shots in the air. The firing alleged extracted a reply from Selemani Khatibu, the second appellant, (who was the fifth accused at the trial) which was, "Vitu vimo humu ndani na vyote vimekuja na Hiari". Hiari then allegedly opened the door and all the suspected robbers were then found in the house, several items were also recovered and these were said to have been the property of the complainant stolen during the robbery. The suspects were then arrested and taken to the Police Station at Buguruni. There they were charged with the offence in this case. Later they were taken to court and as seen, the court convicted them as charged.

In their defences appellants Hiari Abdallah and Seleman Khatibu elected to give evidence on oath from the witness stand. Appellant Ally Ramadhani elected to remain silent. The first appellant, Hiari Abdallah, testified that on the night of the robbery charged in this case he had attended a dance at Kigongo Bar. The music there he said was being played by Marquis Jazz Band. He said at around midnight he set out to return home. He said when he reached home his mother would not open the door for him so he decided to go to his friend, Seleman Hatibu.

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He said there he found the other appellants and as they were asleep they were awakened by the Police. He said they were then arrested and taken to the Police Station where they were charged with robbery with violence. He denied involvement in the robbery.

As for the second appellant Selemani Khatibu, he testified that on 17.7.90 he visited a friend at Vingunguti, Buguruni. He was he said, with Hamis Salum, the third accused at the trial. He said at a round 10.45 they both returned to the place where they were later awakened by noises of the Meizi! Mwizi!! and they were then arrested by the Police. He denied that he was involved in the robbery charged in this case.

The learned trial magistrate accepted the evidence led or adduced by the prosecution and on the basis of it he, as seen, convicted the appellants. In this appeal the appellants impugn the decision of the magistrate. In particular they contend that there was no or correct identification of them as the robbers. They have referred the court to MOHAMED Vs. REX (1942) GEACA 72 and contend that the identification by PW.2 was completely unreliable and ought not to have been acted on by the trial court.

I am of the view myself that if the conviction had rested only on the evidence of PW.2, the appellants would indeed have been having genuine complaints against the judgment of the trial court. But if (the conviction) was not based on that evidence alone. It was based on the foot-prints that led from the scene of the robbery up to where the appellants were found and apprehended. Also it was based on the evidence that they were found with the stolen items soon after the robbery. This evidence, taken together proved, in my viewing the guilty of the appellants beyond all reasonable doubt. The trial court was justified therefore in convicting them and their appeals to this court are completely meritless. They are hereby dismissed in their entirety.

L.A.A. KYANDO

JUDGE

CERTIFIED TRUE COPY OF THE
ORIGINAL.

DAR ES SALAAM.
29/12/05.

Appellants - all present.
for Respo/Republic - Mr Chindoni

F.S. MSHOTE
DISTRICT REGISTRAR