IN THE HIGH COURT OF TANZANIA
AT MWANZA

APPELLATE JURISDICTION

HIGH COURT CRIMINAL APPEAL NO. 166 OF 2004

(Original Cr. Case No. 1280 of 2002 of the Resident Magistrate Court of Mwanza at Mwanza Before: S.D.S. MSUYA, Resident Magistrate)

JERADI JOHN @ MITANGA.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

25/7/2005 & 15/8/2005

JUDGEMENT

R. M. RWEYEMAMU, Judge:

Jeradi s/o John @ Mitanga was charged with and convicted of armed robbery c/s 285 and 286 of the Penal Code. He was sentenced to 30 years imprisonment. Dissatisfied, he lodged four grounds of appeal and engaged counsel, to argue his appeal.

The facts before the trial magistrate Msuya .. were straight forward, save for difficulties created by the incomprehens.. e use of English in recording evidence and writing judgment. I am pointing out this fact not to discourage the magistrate in question; who I understand is new to the bench; rather, to alert him so that he improves, lest he becomes complacent and continues on - gaining experience doing the wrong thing. If it is any consolation in case of injured ego; I should point out that for most of us English is not our

first language; yet it is a necessary tool in this - our profession and trade; as such, continuous learning is an unavoidable imperative.

To make the reason for my concern obvious, I shall let the judgment speak for itself:

"***S.D.S. MSUYA – R.M.***

Accused person Jeradi s/o John @ Mitanga, Tribe Sukuma, Age 26 years, occupation Musilian, Religion Christian residence of Nyamanoro, Mwanza. Offences Sector and Law: Armed Robbery c/s 285 and 286 of the Penal Code Cap. 16 Vol. 1 of the Laws.

Particulars of offence: That Jeradi s/o John Mwitanga on the 2nd day of December, 2002, at about 03.00 hours at Pasiansi Railway Quarters Street at Ilemela District within City and Mwanza Region did steal Cash Tshs. 320,000/=, One Radio Cassette make Sony valued at Tshs. 60,000/=, One brief case valued at Tshs. 18,000/=, 3 Brauses valued at 12,000/= and 6 Gowns valued at Tshs. 48,000/= all total valued at 522,000/=. The properties of Leonce s/o Nkuba and or immediately before or immediately after such stealing did cut the said Leonce s/o Nkuba with a panga on his back bone in order to obtain or retain the stolen properties.

The prosecution side did open his case by calling the Pw1 Joas s/o Kabogo who come and testify that, on 21/12/2003, night hours. He was sleeping with his family then I heard some alarm raised up, outside the house. Soon after I saw some people who light off the light and break down the door and more than five people were invided the house, and they did steal Radio Panasonic "Mobile Phone" CMEN C.25 and clothes, and also Cash Money 37,000/=. I did manage to identified one accused before he break the house and the person whom I saw is the accused person who is before the court.

The Pw2, adduced the evidence that, on 2/12/2002, I was sleeping in my house and I heard some alarm outside then I turn off the light, and latter on the accused move out but they did not cause any harm to my house.

However, Pw3, come and testify that 2/12/2002 I was in Police Station and I did took the Caution Statement for the accused person and latter I was brought him to court.

Also the Pw[4] was to testify that, 2/12/2003 I was at home sleeping and soon after I did saw some people move out with torch but I did not identified any person during that night.

The other witness was Pw[5], who testify that 2/12/2002, midnight I was sleeping in my house with my wife and the door was broken down with Fatuma stone then they managed to get in the house and they ordered me to give them money if I will not they will kill me.

Pw[1], who testify before the court, it is not true at all. Because there was no evidence if there was light or not on the material day. Also he did not mention me in the Police Post.

However, Pw[2], inclined his evidence because he said he was pointed gun to him but that was not true, because he fail to substituent with his statement.

Pw[3], I denied his evidence because he come to testify what he has been told but not what he saw.

Pw[4], I did denied, because he did not identified me.

However the Pw[5] also I denied his evidence because he said that he identified me through the sign which I have, if there was no light how did he come to identified me.

So I denied his evidence.

After that evidence adduced by both side I find that the prosecution side has proved his case. I therefore find him guilty on the ground that

The offence was committed.

The accused person clearly identified by Pw[3], Pw[4] and Pw[5]

There was light.

There was prove that the accused was the one.

This being the clear evidence adduced by Pw[1], Pw[2], Pw[3], Pw[4] and Pw[5], I find that the Prosecution side has proved the case, beyond reasonable doubt for this accused person. I there fore find him guilty and convict as per charged.

Pros: No previous conviction.

Mitigation: I pray for leniency."

SENTENCE

The accused Jeradi s/o John @ Mitanga stand charged of armed robbery c/s 285 and 286 of the Penal Code Cap. 16 ammended by Act. No. 10/89 and 27/91.

After a full trial the accused is found guilty and convicted as charged. He is a first offender and mitigation is considered since the accused is found guilty and convicted of this offence. I sentence him for thirty (30) years imprisonment.

Sgd: S.D. Msuya
Resident Magistrate
25/3/2005
(Emphasis mine)

It is clear to the eye that from the above judgment, apart from the strange construction of sentences, it is impossible to; tell where summarization of evidence of both sides and its evaluation begins and ends; discern what conclusions are drawn, and why. My brother Lutakangwa J. encountered a similar problem in **Mohamed Donge v. R, HC Cr. App. 20/94** Tanga registry (unreported). In that case, before ordering a retrial on ground that "*the record of the lower court is incomprehensible, and or unintelligible because of poor English*", the Judge had this to say:

> " *The evidence as recorded in English language is so deplorably unintelligible such that it is impossible to discern from it what the witnesses testified to so as to be able to definitively determine this appeal either way. There is no way of separating the chaff from the grain and proceed to conclusively determine the appeal on the basis of the grain gathered there from."*

I have desisted from ordering a retrial in this case. Instead, I have struggled to comprehend the record, badly recorded as it is; and "*separate the chaff from the grain*" for two reasons. One, I believe I am able, particularly after being aided by both counsels'

submissions on appeal; to discern sufficient information to answer the key question in this appeal (that of identification), with reasonable certainty. Two, in view of the conclusion I have reached after reading the record and hearing counsels, I find it unfair to subject the appellant to a period of waiting for retrial due to mistakes which are not of his making.

That decided I turn to the facts. They are as follows: On 2/12/2002, a group of about seven armed bandits broke into and attacked the homes of Pw^1; Pw^2; and Pw^5, in Pasiansi locality of Mwanza municipality. They threatened the occupants, and stole from them money and several articles including clothing. Pw^4 a neighbour of Pw^1 and Pw^2 heard the fracas and later learned from them what had happened. The matter was reported to Pw^3, a police officer. The appellant was arrested thereafter.

I shall now proceed to quote from the proceedings, what each witness said <u>on the contested issue of identification.</u>

> *Pw^1 "But I saw the accused before they have stated to break the house" – it is the accused in court I did not know who was committing the offence"*
>
> *Pw^2 "I saw the accused who is present in court through moonlight "I did not mention the name of the people who commit the offence"*
>
> *Pw^3 "then I took the caution statement of the witnesses to what happening .....Then the accused was arrested."*

Pw^4 made no identification.

Pw^5"I managed to identify one person who was wearing masai style one person who is accused before the court he was having some marks on his face. The light was in my room, then through that light I did manage to identify accused person who is present in court, the distance from where I was helf effer(according to hand written record-haif meter). The exercise took 15 minutes. I was not knowing the accused before the scene".

The key question is this appeal is whether or not on the evidence of the prosecution witnesses, the appellant's identification was watertight as to ground conviction.

Counsel for the appellant Mr. Ezron submitted that; the appellant was not properly identified; the identification by Pw^1 and Pw^5 was done under unfavourable conditions. It lacked sufficiently detailed description to rule out mistaken identity; Pw^2's moonlight identification lacked concise description – also raising a possibility of mistaken identity. As for opportunity of identification by Pw^5 during interrogation, he argued that the time so spent was not indicated. In support of the arguments he cited the CA decision in **Afri M Vs R (1984) TLR 240.** He submitted further that the trial court ignored the defense, which is fatal as per rule in **Hussein Iddi & Another V R (1986) TLR p. 167.**

In response, the learned state attorney supported conviction. He submitted that; the appellant was clearly identified by Pw^5 and Pw^2; the latter had ample time during interrogation to identify the appellant and Pw^2"s identification was aided by moonlight. In respect of the defense story, he submitted that it only raised remote possibilities which under the rule in **Cr. App. No. 13/98 in Mwanza registry** (unreported) are insufficient to raise reasonable doubt.

I have considered counsels' submissions in light of the recorded evidence and judgment as quote above and note the following: **One**, the trial magistrate made no assessment of credibility based on evaluation of evidence. He gave no reasons for the decision, which "*requires a trial court to single out in the judgment the points for determination evaluate the evidence and make findings of fact there on.*" See **Jeremiah Shemweta V R** (1985) TLR 228. **Two,** the testimonies of Pw^1 and Pw^2 who identified the appellant "(*was) not coupled with necessary details particularly when conditions of identification (were) unifavourable and (they) did not know the accused before.*"See **Raymond Francis Vs R** (1994) TLR 100. As for another identifying witness Pw^5, his testimony is confusing, may be a factor arising from the bad recording. It is not clear whether the appellant was the identified assailant appellant with a maasai garb or with a mark on his face? He too, did not know the appellant before. **Three,** Pw^3, a police officer's testimony does not add much. Infact if he was the investigator or arresting officer, it leaves out vital information usually expected from such witnesses, namely; to provide the "*link between commission of the offence and the accused.*" – See Masanche J. in **Lucas Kahindi Vs R.** HC. Cr. Appeal No.

236/2003, Mwanza registry, (unreported). Further, his testimony that "I took cautioned statement" is confusing. It is not clear whether the 'cautioned statement' taken was that of the witness or the accused/appellant.

In view of the above itemized misgivings regarding the prosecution's case, I concur with the defense submission that the evidence of identification was not watertight; and therefore that the case against the appellant was not proved.

In the result, I find the appeal merited, quash the appellant's conviction and sentence and order that he be set free forthwith unless otherwise unlawfully held. "It is so ordered"

R.M. RWEYEMAMU
JUDGE
12/8/2006