IN THE HIGH COURT OF TANZANIA
AT BUKOBA

APPELLATE JURISDICTION
(Bukoba Registry)

H/C CONSOLIDATED CRIMINAL APPEALS NOS. 32/2005, 54/2006, AND 55/2006

(Arising from Karagwe District Court Criminal Case No. 77/2003 at Kayanga)(Before: M. Paulo. Esq. DM)

JORAM LABAN .....1ST APPELLANT
VALENCE FIDEL .....2ND APPELLANT
VENANT LUDOVICK .....3RD APPELLANT

JUDGMENT

23/10/2006 & 23/20/2006

MUSSA, J.

In the District Court of Karagwe, the appellants along with six others were arraigned for armed robbery contrary to sections 285 and 286 of the Penal Code, chapter 16 of the Laws. The particulars alleged that on the 1st day of April, 2003 at Kishao village, within the District of Karagwe the appellants, jointly and together, stole 10 shirts, 10 trousers, 5 suits, 1 pair of shoes, one radio, 2 bags containing groundnuts, 2 handbags and hand saws. It was further alleged that the items were valued at a total sum of Shs:483,000/= and that immediately before such stealing, the appellants

used actual violence to the person of one John Kalenzi in order to obtain the said items.

To support its case against the appellants, the prosecution called six witnesses from whose version it was commonplace that the victim of the robbery, namely, John Kalenzi Bibangamba (PW1) was an elderly peasant resident of Kishao village. The case for the prosecution was that on the alleged date and place, around 1.00a.m, several bandits broke into the house of PW1 and woke him from his sleep. The gangsters immediately descended upon PW1 assaulting him with a machete and tying him with a rope. The evidence of PW1 was further to the effect that he shouted an alarm which was attended to by his grandchildren, namely, Deus, Peter and Kalikawe but the bandits won the day taking the items and making a bolt for it. It was finally PW1's claim that the intruders flashed torchlights around the premises from whose aid he was able to identify the first appellant, that is, the fourth accused below, who was known to him as a fellow villager and from whom he even enquired as to why he was set upon killing him.

The other occupants of the besieged residence, namely, Deus Daud (PW3) and Peterson Salvatory (PW5) said they were also tied by ropes and prevented from assisting PW1, incidentally, their grandfather. Both PW3 and PW5 laid claims to having identified two among the gangsters, that is, the 1st appellant and Omary Bahati, the 1st accused below, who did not appeal. They too knew the named assailants as fellow villages and allegedly were also aided by torchlights flashed by the intruders to identify them.

It was, further, part of the prosecution version as told by Zabron Justinian (PW4) that around 9.00p.m. on the fateful day, the witness stumbled upon a group of six or seven persons armed with a machete and clubs as the latter was returning home from Kishao Lukajange centre. It was said that the 1st accused below and the 1st appellant were among the armed group which immediately put PW4 under restraint and ordered him to accompany the group. According to PW4, the group proceeded to the residence of PW1 in the dead of the night whereupon a big stone was used the break open the door to the residence and the armed group entered therein. The witness (PW4) said he remained outside, ironically though, whilst the armed group were collecting items from inside the house. A good deal later, the armed group took the items taken from PW1's residence to the house of the 1st accused. It was said that PW4 was there and then discharged but told not to disclose what he had just seen lest he would be terminated. To this, PW4 said he complied as he did not even tell the tale to his father.

The prosecution produced further evidence to the effect that in the immediate aftermath of the incident, Jonas John (PW2) who is the victims' son, was informed by PW3 and PW5 that the 1st accused below and the 1st appellant were part of the group that perpetrated the armed robbery. The witness (PW2) said he brought the named culprits to the attention of the police and, thereafter a manhunt was launched. Beyond this point, the prosecution evidence was not as articulate and, it is not clear as to what steps, if any, the police took. But PW2 otherwise stated that on an

undisclosed date, while in the company of traditional vigilantes (sungusungu), namely, Alphonce, Simon and others; they arrested the 1st, 2nd and 3rd accused persons below as well as the 1st appellant, apparently, on separate occasions.

It was also part of of the prosecution version as told by PW2 that on the 13th day of May, 2003 whilst PW1 was still admitted in hospital and recovering from the assault, there was another attempt to rob from the latters' residence. The witness (PW2) did not articulate on the time of the incident but testified to the effect that he was at the residence when the bandits were at it again in an incident from which he identified the 3rd appellant. It was said that PW2 did in fact stab the back of one of the gangsters using his spear and; in an apparent charged moment, there were sandals left behind which were, according to PW2, identified to belong to the 3rd appellant who was the sixth accused below.

Next, without elaborating with whom he was; PW2 proceeded to arrest the 3rd appellant. It was the case for the prosecution that the 3rd appellant was found with one of the bags and a small radio allegedly stolen on the earlier incident. The 3rd appellant was said to have a wound on his back which satisfied PW2 that he must have been the gangster he had assailed. It was further the testimony of PW2 to the effect that, upon being asked, the 3rd appellant admitted to have participated in both the 1st April and the 13th May incidents.

The 3rd appellant is, next, said to have mentioned the 2nd appellant, the 5th accused below, as his counterpart whereupon; PW2 and whomsoever he was with approached the house of 2nd appellant. They were refused entry and upon breaking into it, they found the 2nd appellant therein in the company of the 7th and 8th accused below. At the 2nd appellants' residence another hand bag, teacups, table mates and 2 handsaw handlers allegedly stolen from the residence of PW1 were retrieved. Also found was a spear which PW2 identified as the one with which he stabbed one of the 13th May bandits. The 2nd appellant was asked as to where were the rest of the stolen items to which he pronounced that the radio cassette recorder had been sold to one Byamungu.

The searching party was, next, allegedly led by the 2nd appellant to the residence of Byamungu from where a radio cassette recorder was retrieved. Incidentally, Byamungu Mathayo testified as PW6 and told the trial court that the radio was sold to him by the 2nd and 3rd appellants on the 15th day of April, 2003. The witness (PW6) further testified that the 2nd and 3rd appellants had initially offered the radio at a sale price of a sum of Shs:25,000/= but the parties, were agreed to a sum of Shs:13,000/= to which PW6 paid a down payment of a sum of Shs:10,000/=; took possession of it and undertook to make good the remainder sum. The 2nd and 3rd appellants did not make it back till when traditional vigilantes came to take the radio in the company of the 2nd appellant. From this witness it, rather, comes to light that PW2 still had the services of the traditional vigilantes.

In his testimony, PW2 also stated that the 2nd appellant also told them another radio had been sold to the 9th accused below. PW2 did not elaborate as to whether the radio in reference was related to the robbery incident but, rather, testified that the 9th accused below indicated to them that the radio was sold to him by the 2nd appellant and he, in turn, sold it to a third person. PW2 said the 9th accused below brought the radio upon being compelled. The court was not told by whomsoever and neither was the identity of the third party disclosed. Also in his testimony, was the claim that the appellant led them to where he had sold the handsaws stolen from the scene of the robbery and the same were said to be retrieved. Again, PW2 gave no details as from whom the same were recovered.

To conclude his evidence, PW2 produced as evidence the handsaws, its handles and the radio found in possession of the 9th accused below. Meanwhile, PW6 produced as evidence the other radio he was found with and; at some stage in the proceedings, PW2 was recalled to produce a suit case, one cup, one sufuria, two jerry canes which he alleged were found at the home of the 2nd appellant. The witness (PW2) confessedly would not assign special marks to any of the produced items.

To this version as told by the prosecution witnesses the 1st appellants' defence was one in which he completely disassociated himself with the alleged incident. His sworn evidence was to the effect that he was arrested on the 4th of April, 2003 for no cause at all. He said he was a neighbour and relative of PW1 and was surprised that the prosecution

witnesses did not implicate him the same night if what they were alleging was true.

The second appellant for his part said that he was not arrested at his home as seemed to be the prosecution version. Rather, he was arrested on the 14th day of May, 2003 by three traditional vigilantes whilst on his way home from his working place. The second appellant said that nothing of significant was found upon his house being searched but the searching party seized his own brief case. The second appellant otherwise denied involvement in the radio transaction as testified to by PW6 and that he led to the discovery of stolen properties.

The third appellant testified to the effect that he was arrested on the 15th day of May, 2003 and a search on him revealed nothing but his own small radio was seized. While conceding that he had a scar on his back, the third appellant however, said that the same is old and not caused by a spear stab as was alleged by PW2. He claimed that up until when they were jointly arraigned; he did not know the 2nd appellant and the 7th and 8th accused below from whose room the spear was allegedly retrieved. As to the radio transaction with PW6 he also denied involvement.

On the totality of the evidence, the learned trial Magistrate found the prosecution case short of establishing guilt with respect to the 2nd, 3rd, 7th, 8th and 9th accused persons who were, accordingly, acquitted. The trial court was, otherwise, impressed by the prosecution evidence implicating the 1st accused and the three appellants who were,

respectively, the 4th, 5th and 6th accused persons in the proceedings below. The appellants along with the 1st accused below were, in the result, found guilty, convicted and sentenced to respective terms of 30 years imprisonment.

Dissatisfied, the appellants preferred respective appeals which were consolidated into one. The points of which they complain are set out in their respective petitions and when the matter came before me, the appellants, unrepresented, adopted their respective petitions without more.

Admittedly, the petitions are lengthy and verbose but; to begin with, the main point of grievance raised by the first appellant and worth my consideration is in his criticism of the trial courts' reliance on incredible witnesses and insufficient evidence of visual identification. The first appellant contends that the incident occurred on the 1st day of April, 2003 and he was arrested on the 4th day of April, 2003 which in itself indicates that the claims of his being identified at the scene, were a belated fabrication.

The first and second appellant have common grounds of grievance in that they both discount the trial court reliance on the evidence of PW6 with respect to the radio transaction. They also both somewhat complain that the property they were allegedly found in possession was not clearly identified as stolen property. The third appellant also discounts what appears to be the claim by PW2 that he confessed to the crime and led the investigation team to the second appellant.

From the other end, Mr. Kweka, the learned state attorney for the respondent Republic, supported the conviction against the first appellant. Counsel urges that the identification by PW1, PW3 and PW5 through the aid of torchlights; the fact that the appellant was well known to the identifying witnesses and; that the witnesses kept the appellant under observation for a considerable length of time; were factors sufficient enough to justify the conviction against the first appellant.

As regards the second and third appellants, learned state attorney declined to support the conviction on the ground that the properties allegedly found in their possession were not identified by distinguished special marks to justify the claim that they were properties stolen from the scene of the incident. I propose to first consider the culpability or otherwise of the first appellant.

The prosecution evidence tending against the first appellant is twofold. First, is the claim as testified by PW1, PW3 and PW5 that he was seen in active perpetration of the crime at the scene and; second, is the contention by PW3 that he was part of the armed group that held him (PW3) in captivity moments before the robbery and later seen breaking into the residence of PW1.

Dealing with the first strand of the prosecution evidence, the same are, in effect, claims of visual identification of an accused person at night. It is elementary that in order to justify a conviction solely on evidence of visual identification, such evidence must be watertight. That being so, in

any case in which there is a question as to the identity of the accused, the court must be satisfied that the conditions prevailing at the scene were favourable for a correct and unmistaken identification.

That said, there are, here, some unsatisfactory elements relating to the evidence of visual identification of the first appellant. First, the incident took place at night and the only source of light were the torch lights flashed by the culprits. It is pure common sense that a flashed torch light, rather, tends to dazzle and momentarily impair one's eye sight than aids him to see and appreciate what was going on. Second for one thing, at 1a.m; the identifying witnesses must have been suddenly awaked from deep sleep. For another, the events were taking place in rapid succession and a confused atmosphere with a door broken; the witnesses tied and bound and; an outrageous assault on PW1 that left him unconscious. Third, there were no details from the prosecution as to the date of the arrest of the first appellant and; if the date offered by the first appellant is anything to go by, it becomes, rather, incredible as to why he was arrested three days later, if at all, he was a neighbour and identified at the scene. To this, the prosecution did not entirely furnish an explanation.

The point I am about to underscore is that not only were the circumstances prevailing at the scene far from favourable but; that the case for the prosecution was also fraught with very serious and unexplained inadequacies. To this end, with respect to the views taken by the trial court and the learned state attorney, a mistaken, or even a belated fabricated identity, cannot be discounted.

The other strand of evidence tending against the first appellant elicits yet another disquieting feature of the proceedings. It was grounded on the testimony of PW4 whom the trial Magistrate relied upon and, apparently, sympathetically referred to him as the victim of a hijack. This is the person who was throughout in the company of the culprits. He was witness to the breaking of the robbed premises; he said he was under restraint and yet did not take the opportunity to disassociate when his alleged captors were busy collecting PW1's properties inside the house and; eventually, when all dust was clear, he still held the truth in captivity, apparently, up until when he testified.

Speaking from the standpoint of the culprits, it is most unlikely that they would have taken the risk, for no apparent reason, to expose their nefarious undertaking to a dare-devil of the like of PW4. The incident occurred on the eve of the famous fools' day but it does not seem to me that the armed group took PW4 on a fools' day errand.

On the contrary, being a person who was throughout in the company of the culprits and who did not disassociate despite the chance; it may as well be that PW4 had complicity in the undertaking and was set upon minimising his own participation as far as he could; falsely if need be. He was, so to speak, an unpleasant person whose tale ought to have been approached with warning, caution and reserve. It is necessary then, to ascertain if there is any reliable evidence showing circumstances which go to confirm the evidence of the witness Zabron as to the identity of the first appellant on that particular night.

Unfortunately, apart from the deficient and inadequate evidence of visual identification by PW1, PW3 and PW5, there is not a shred of factual or circumstantial evidence to confirm PW4's version. In the end result, I am satisfied that there is merit in the appeal filed by the first appellant. I will now turn to consider the culpability or otherwise of the other appellants.

To begin with, the second and third appellants are implicated by the evidence of PW2 who testified to the effect that upon his arrest, the third appellant admitted to have participated in the robbery and named the second appellant as his counterpart. It is significant to recapitulate that PW2 did not articulate with whom he was at the time of the arrest but from the evidence of the third appellant himself, it is safe and realistic to assume that PW2 had the company of traditional vigilantes.

While I do not wish to impute common trend, it is notorious that in their true colours the so-called ***sungusungu*** are notorious for their rough stance and one would have expected, indeed, it was in the best interests of the prosecution to bring to light the prevailing circumstances under which the alleged oral confession was made to dispel the possibility that it was so made involuntarily. The onus of proving that any confession made by an accused person was voluntary lies with the prosecution and; it is not insignificant to remark that the ***sungusungu*** who enjoy the same powers of arrest as those enjoyed by a police constable are, in effect, persons in authority. (See Peoples Militia Act, 111 (R.E. 2002). To this end, in the absence of evidence detailing the prevailing circumstances under which

the oral confession was made, I am satisfied that the claim by PW2 that the third appellant confessed to the crime cannot be safely accepted.

The third appellant was also implicated for being in possession of a handbag and a small radio both of which were traced to the fools' day robbery. As regards the second appellant, the allegation was that a search in his house retrieved another hand bag, tea cups, table mates, 2 handsaw handles, a suit case, one sufuria and 2 jerry canes all of which were again traced to the incident.

According to PW2, upon being pressures to reveal the whereabouts of the other items, the second appellant led them to PW6 where a radio cassette recorder was retrieved; to the ninth accused below where they found another radio and; finally, to an undisclosed location where the handsaws were recovered.

The learned trial Magistrate was satisfied that the items were found in possession of the second and third appellants and, apparently, invoking the doctrine of recent possession, found them guilty of robbery.

Granted that upon a charge of robbery, if it is proved that a few days afterwards an accused person was found in possession of items stolen from the robbery incident to which he fails to give a reasonable account; the doctrine of recent possession may be invoked against such an accused person. I should, however, be quick to add that for a proper application of the doctrine, it is a pre-requisite that the items in possession of the

accused must not only have reference to the items mentioned in the charge sheet, but must also be conclusively identified to be the one stolen from the robbery incident. In other words, it must shown that the items were indicated to have been stolen in the charge sheet and, above all, there must be cogent proof that the stolen item possessed by the accused person is the one that was stolen during the commission of the robbery. To this, I should further clearly express that it is the prosecution who assume the burden for such proof and; even in the event the accused does not claim to be the owner of the item in question, such course would not relieve the prosecution of that obligation.

That said in the presence case, while the charge sheet alleges, for instance, that one radio was stolen from the incident, the prosecution brought evidence to prove that three radios were recovered and it rather becomes difficult to determine which of the three was stolen property. Again, evidence was adduced to establish that some other items, that is, table mates, two handsaw handles, a suit case, one sufuria and two jerry canes were recovered from the house of the second appellant and identified to have been stolen from the robbery incident. The irony is that none of the items were mentioned in the charge sheet.

To crown it all, apart from the bare assertion that they were stolen property, the prosecution witnesses could not assign special or distinguished marks on any of the items tendered. That being so, it was not established by cogent evidence that the items allegedly possessed by the second and third appellants were the ones stolen from the scene of the robbery.

To this end, the respective appeals have merits and are, hereby, allowed. The appellants' conviction is quashed and the sentences are set aside with an order that the appellants be released from custody forthwith unless otherwise detained for some other lawful cause.

The first accused below, namely, Omari Bahati was convicted on evidence of visual identification to which I have expressed my doubts on its sufficiency. In exercise of my powers of supervision I will as well reverse the finding below, quash his conviction and set aside the sentence meted against him. He too should be set at liberty unless held in custody for some other lawful cause. Order accordingly.

K.M. Mussa
JUDGE
19/10/2006

23/10/2006
Coram: K.M. Mussa, J.
For the Republic: Mr. Vitalis
For the Accused: All present

Judgment delivered in Chambers in the presence of the Parties.

K.M. Mussa
JUDGE
23/10/2006

AT BUKOBA
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