IN THE HIGH COURT OF TANZANIA
AT TABORA.
APPELLATE JURISDICTION
(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 16 CF, 17 OF 2007
ORIGINAL CRIMINAL CASE NO. 15 OF 2002
OF THE DISTRICT COURT OF KASULU DISTRICT
AT KASULU

Before; N.B. KURWIJILA Esq.; SENIOR DISTRICT MAGISTRATE

1. **SIMON s/o KALIMUGWE)**
2. **ELIYA s/o KIDANGANGA) .....APPELLANT**
(Original Accused)

Versus

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

JUDGMENT

19th Feb, 07 & 30th April, 07

MUJULIZI, J

This is a consolidated appeal against conviction and sentence to serve a 30 years sentence, from the judgment of the Kasulu District Court, dated 19/5/2003.

The Appellants were arrested on 06/1/2002, and charged before the District Court on 11/01/2002 with the offence of ARMED ROBBERY c/ss 285 and 286 of the Penal Code Cap. 16

of the laws read together with section 5 of the Minimum Sentence Act, No. 1 of 1972 as amended by Act No. 10 of 1989.

It the particulars of offence it was alleged;

" That SIMON s/o KALIMUNGWE and ELIYA s/o KIDANGANYA are jointly and together charged on 6th day of January, 2002 at about 08.00 hrs at Nyakabanda within the Kasulu District in Kigoma Region did steal one Radio make Nation, valued at Tshs. 1500/= one pair of shoes valued at Tshs. 3,000/=, one pair of Kitenge valued at Tshs. 2,000/=, one disco watch valued at Tshs. 1500/=, one hen valued at Tshs. 800/= all total valued at Tshs. 25,400/= the properties of one YUSUPH s/o KASUNGA immediately before and after stealing such properties did threaten the said person with a gun in order to retain or obtain such properties,"

At the trial, the prosecution called a total of 4 witnesses. P.W.1, B 8358 S/Sgt. Saidi, testified that he received a report at 8.00 am on 06/01/2002 at Herushingo Police Post, that six (6) suspects had been seen entering the shambas at Harushingo. Further that following a complaint lodged by one YUSUPH KASUNGA, P.W.lV, he and one other police officer and members of the people's militia had conducted a search in the bush and

found a group of suspects in the bush and that they only managed to arrest the Appellants. He alleged further that the appellants were found with signs of having consumed meat as they had not yet washed their hands.

PW.ll one Salehe s/o Said testified that he was at the home of P.W.lVwhen he among saw six suspects around them a familiar person known by the name of Iddi. He run to the Police at Herushingo to report the incident. However, he did not identify the two Appellants as he was not the present at the time and scene of their arrest. His testimony therefore should be discounted, on the issue of arrest and identification.

P.W.lll Bruno Rugondamila on the other hand, testified that he knew the Appellants and that he had seen them on 05/1/2002 at 5.00 pm, being among a gang of six bandits armed with a gun when they had robbed him of cash Tshs. 18,050/= one Seiko wrist watch and that he had reported the incident to Nyarugusu Refugee Camp, out Post Police Station.

From his testimony it is clear that the incident subject of his testimony happened one day earlier before the one named in the

charge. He to was not present when the appellants were arrested the next day.

The testimony of PW.lV, the complainant named in the charge, was to the effect that on the morning of 06/1/2002 at around 8.00 am, he together with his two wives and five other people, saw five people one of then had a gun and another empty sacks, and then they took his two hens and the others entered inside his house and took some properties which he did not name save for a small plastic bucket. He then went to the police station where he identified the two appellants and the bucket.

That is all what he said.

The Appellants on oath testified that they were not arrested in the bush being together as testified by PW.1 the sole witness on this issue. But rather stated that each had been arrested separately and at different times and on different charges. That they had been joined at the Kasulu Police Station, when they were alleged to have been found in possession of a green bucket, which they saw for the first time at the Police Station.

In his short judgment after narrating the testimony as summarized above, the learned trial magistrate made the following short conclusion: P.4

"This Court has dismissed the defence of the 1st and 2nd accused as baseless and that the 1st and 2nd accuseds are real person among 5 (five). Three of them escaped un arrested who robbed P.W.lll and PW.lV using a SM Gun.

I convict the 1st and 2nd accused for the offence of Armed Robbery c/s 285 and 286 of the Penal Code Cap. 16 of the laws read together with section 5 of the minimum sentences Act No. 1/72 as amended by Act. No. 10/89 as charged accordingly."

Consequently both Appellants were sentenced to a 30 years jail term. They were dissatisfied. Hence this Appeal.

At the hearing of the Appeal, both appellants appeared but only adopted their respective Petitions of Appeal.

The Republic was ably represented by Mr. Mokiwa, learned State Attorney.

The Republic does not support the conviction.

I believe they are correct in taking that position. The Appeal must succeed.

Both Appellants as well as the learned State Attorney attacked the conviction on two major grounds.

The Appellants were not properly identified by the witnesses by describing them to the police when they first reported the matter, but rather, claimed to identify them only after seeing them. This was contrary to the principles laid down in several cases: JOSEPH SHAGEMBE V. REPUBLIC (1982) T.L.R. 147; ABDALLAH BIN WENDO AND ANOTHER V. REP. (1953) 20 EACA 166 page 170.

This ground must succeed.

It is trite law that in a case depending for its determination essentially on identification be it of a single witness or more than one witness, such evidence must be watertight even if it is the evidence of recognition:

In Abdullah Wendo V.R. (1953) 20 EACA 116, followed by the Court of Appeal of Tanzania in the celebrated case of WAZIRI

AMANI V.R. (1980) T.L.R. 250, the principle was laid down in the following terms;

"In a case involving evidence of visual identification no court should act on such evidence unless or possibilities of mistaken identify are eliminated and that the court is satisfied that the evidence before it absolutely watertight."

In BUSHIRI AMIRI V.R. (1992) T.L.R. 65, the two witnesses who testified against him had not given a detailed description of the Appellant before his arrest and before they had a chance of seeing him.

It was held that the two witnesses ought to have given a detailed description of the appellant to the person to whom they first reported about the theft before they had a chance of seeing the appellant after he was arrested; the description would be on say appearance, colour, height and any peculiar mark of identity.

That case is an all fours with the case before us. Worse still in this case the Court did not even care to evaluate the evidence before it. It simply chose to disbelieve the Defendants, but fell short of determining whether the evidence of the prosecution had

proved the Appellants' guilt on the charge beyond reasonable doubt. The Court failed to discharge this mandatory duty.

On the second ground it was argued that the alleged stolen items were not properly identified. This ground as well has merit.

In GEORGE NINGWE V.R. (1989) T.L.R. 10, it was held:

"Identification of stolen property by clour alone is the weakest sort of evidence and the accused ought not to have been convicted on such evidence."

In this case the witness P.W. IV, was shown the bucket at the police station whereby he said to have stated - that "this is my bucket stolen by the bandits and that it was green in colour"

There was no prior description.

On the above two grounds the conviction was improper. There was simply no evidence on which to base a conviction. The testimony of the arresting officer was very suspect. The charge differed from the facts. The complainant is said to have lost more than what he testified upon.

The District Magistrate did not even bother to evaluate and probate the evidence before him. He did not hand out a judgment. He did not give reasons for believing which evidence and why he dismissed the Appellants' evidence. That was improper and it lead to a manifest error of judgment occasioning an injustice.

The Appeal is allowed, Conviction set aside, substituted with acquittal. The Appellants should be released forthwith unless they are otherwise held for lawful orders.

A.K. MUJULIZI

JUDGE

30/4/2007

Judgment delivered in the presence of the Appellant and Mr. Lukosi for the Republic this 30th day of April, 2007.

A.K. MUJULIZI

JUDGE

30/4/2007.