IN THE HIGH COURT OF TANZANIA

AT IRINGA

[APPELLATE JURISDICTION]

(DC) Criminal Appeal No. 21 of 2006

Original Criminal Case No. 273 of 1998

of the District Court of Njombe District

At Njombe

[Mtaki Esq., DM]

LESSA MSIGWA ..... APPELLANT

Vs

REPUBLIC ..... RESPONDENT

JUDGMENT

WEREMA, J.

The appellant, Lessa Msigwa and another person known as Bartazar Mbangala were charged in the District Court of Njombe District at Njombe for the offence of armed robbery contrary to sections 285 read together with section 286 of the Penal Code. The particulars of the offence are indicated in the charge sheet. It was alleged that jointly did on 21st of May 1998 during night time at Mwembetogwa Makambako within the District of Njombe did steal cash Shs.80,000; two radio cassettes; one radio National Band valued at Shs.55,000 and another radio of Sony make valued

I am, like the honourable assessors, settled in my mind that the accused killed the deceased, his father, with a requisite malice aforethought. I do find the accused, SHIDA MWINUKA, guilty of Murder as charged.

SENTENCE

The offence of Murder has only one punishment under the law of the land. My hands are tied to the requirement of the law which I must uphold. I do sentence the accused SHIDA MWINUKA, to death. I direct that the accused shall suffer death by hanging until he shall die.

F.M Werema

JUDGE

4/4/2007

Right of Appeal explained by Section 323 of the Criminal Procedure Act, (Cap. 20 R.E. 2002).

F. M. Werema

JUDGE

4/4/2007

at Shs 130,000. All items valued at Shs 265,000. These were the property of one Gerumana w/o Lutego and immediately before such stealing did use actual violence by using a pistol to the said Gerumana Lutego in order to obtain the said property.

Both accused persons denied the charge. They were convicted with what is called in the judgment as criminal robbery with violence c/s 285 and 286 on the basis described by the Magistrate that there were no evidence that a weapon was used. That notwithstanding, the appellant was convicted and sentenced to serve a term of 15 years imprisonment. The other accused was not sentenced and the judgment does not show why he was not sentenced. The judgment also show that the appellant was sentenced summarily to serve a one year imprisonment term for contempt for rebuking the magistrate that "*Mheshimiwa Hakimu hii kesi umenionea* "which statement was taken by the Magistrate to be contempt of Court.

The appellant has appealed to this Court attacking both conviction and sentence. He appeared before the Court and amplified the grounds of appeal complaining bitterly that the whole case against him was a frame up and that his conviction and sentence were illegal. His substantive grounds are that:

1. that the Magistrate erred in law and fact by convicting the appellant while the alleged stolen property was found with one Laban who admitted before the Court that the radio was left there by the first accused who is(sic) tenant;
2. that the learned magistrate directed himself by convicting the appellant based on facts which were insufficient;

3. that the learned trial Magistrate erred in law and facts because in his judgment he had written that he had proved the case against the accused(persons) but there is no where the 1st accused was also sentenced to serve 15 years imprisonment
4. that the trial magistrate misdirected himself while he admits that the accused person has been found guilty with the offence of robbery with violence, the committal warrant shows that the appellant is serving a sentence of 15 years for the offence of armed robbery c/s 285 and 286 of the Penal Code
5. that the whole case against the appellant was not proved beyond reasonable doubt and that the way it was processed was contrary to the provisions of the Criminal Procedure Act, 1985
6. Finally the appellant moved the court to allow the appeal, quash the conviction and set aside the sentence.

Mr Mmbando, the learned State Attorney who appeared for the Republic did not support both the conviction and sentence. He submitted that the onus of proving a criminal case is on the prosecution and that the standard of proof that is enjoined by law is proof beyond reasonable doubt. According to Counsel, this was not the case. He noted that the learned Magistrate noted the prosecution doubts at page 3 of his judgment, on the last but one paragraph where he stated and I will quote verbatim:

"with light of the above evidence of the prosecution case is in doubt for the second accused, one Lessa Msigwa has a lot of contradiction with the fact that PW.3 was the one found with the said radio but there is no any shown evidence to the contrary to support the PW.3 did received (sic) one radio a stolen property ... (sic)

I, with respect, agree with the Learned State Attorney on the well established principles of criminal law jurisprudence that the onus of proof in criminal charges are always on the prosecution and proof should not be a conjecture, but proof beyond reasonable doubt. The accused person has no obligation to prove his innocence but merely to raise reasonable doubts. **Laban Ngindo** who testified as PW.3 had failed to show that the appellant was his tenant. The appellant denied to have ever been his tenant and the prosecution did not establish that fact by either calling a ten cell leader or any other person of authority to establish it. When the appellant was asked why PW.3 should lie about his tenancy, he was quick to say that he does not know but retorted that it was part of the scheme to frame him as he had some vendetta with one police officer. But the point here is that the learned trial Magistrate did not believe the testimony of PW.3. The Learned Magistrate relied on the Cautioned Statement of the 1st accused which implicated the appellant on the basis that it was made voluntarily by the First accused. If that evidence is acceptable, it means the two were accomplices. An accomplice is a competent witness against an accused person by virtue of

section 142 of the **Evidence Act, [Cap 6 R.E. 2002]**. The person whose evidence was the basis of the conviction of the appellant was neither convicted nor sentenced. The Judgment does not show what became of him but he is not in jail. That notwithstanding, this is also a ground of the appeal by the appellant.

I have gone through the proceedings with some difficulties on the flow of evidence. It is difficult to follow thee proceedings intelligently. The credibility of the cautioned statement cannot be left intact. The procedure which was followed to test its veracity or voluntariness is tainted. On page 10 of the proceedings the statement was tendered by **PW.4 C 5281 SSgt Jalala** and was admitted in evidence before a trial within a trial was conducted. It is not difficult to discern from the proceedings that such an inquiry was insufficient. The first accused had said he made that statement under duress. The answer by PW.4 to the second accused on page 10 of the proceedings at the last paragraph implies that it is possible some force was used. Even at page 12 of the proceedings, PW.4 a police officer who must be aware of the provisions of sections 50-57 of the Criminal Procedure Act, Cap 20 is suspected to have replied to the Court that **"the accused duty was to produce statement ... by force".** Use of force to obtain a confession is illegal. It is a crime. It is unconstitutional by virtue of Article 13 (6) of the Constitution of United Republic of Tanzania. The inquiry in a mini-trial fall short of ascertaining whether the cautioned statement was voluntarily or involuntarily made. This is the only evidence that implicates the appellant. Whereas in law as

I have stated above the evidence of an accomplice is admissible, in the circumstances of this case where the appellant is denying that he ever knew the first accused it will be a travesty of justice to rely on the cautioned statement of the first accused to convict him. This ground of appeal therefore succeeds.

The learned magistrate did convict the appellant on an offence he called armed robbery and relied on the evidence of identification of PW1. First, PW1 had testified that her assailants were armed with a gun and a machete. She did not say how she did identify the appellant. She did not mentioned whether she knew the appellant before or even indicate her attire. There is no doubt that PW1 was under distress at that night. In such a situation and under such unfavourable conditions, the prosecution ought to have led a watertight evidence of identification. I hold that this was not done and the accused must benefit from the doubts. As to the magistrate's innovation of the offence of armed robbery, I think, because he cited the appropriate sections of the Penal Code, he must have meant robbery with violence. I need not go further.

The Learned Magistrate also convicted the appellant for contempt of Court and sentenced him to twelve months imprisonment. I do not appreciate why a judicial officer should become so sanctimonious to convict a person who has already been convicted for another offence. Judicial officers should maintain their composure and more so when under pressure. Any person who feels that he or she has been unfairly convicted is likely to express his or her frustration. This was the case before

the trial Magistrate and could have restrained himself. Assuming that there were grounds to convict the appellant for contempt, the sentence that appears to have been meted out is illegal. Under section 114 which is the enabling section of the Penal Code, the punishment is a six months imprisonment or a fine of five hundred shillings. The latter being an optional sentience would have been the most appropriate for a first offender.

This appeal must prevail. It therefore allowed. Both convictions of the appellant first on the main trial and second on contempt proceedings are quashed and all sentences for each conviction thereof are hereby set aside.

I thus acquit the accused as convicted and order his immediate release from custody unless he is held there for any other lawful cause.

Frederick M. Werema

JUDGE

19 APRIL 2007

Coram: Werema, J.

Mr. Mmbando for the Respondent

Appellant present in custody

Charles: CC

Judgment read in Kiswahili.

Frederick M. Werema

JUDGE

19 APRIL 2007