IN THE HIGH COURT OF TANZANIA

AT MOSHI

(DC) CRIMINAL APPEAL NO.66 OF 2006

(C/F CRIMINAL CASE NO.298 OF 2005 IN THE DISTRICT OF HAI A HAI)

DEOGRATIUS LOSIKA & ANOTHER.....APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

HON. S.E. MUGASHA, J

In this consolidated appeal, the appellants were charged and convicted for armed Robbery c/s 287A of the Penal Code, Cap.16 of the laws of Tanzania. The particulars of the offence are that, on 2nd December, 2004 at about 00.00hrs at Kilingi Village, Hai District within Kilimanjaro Region, and the appellants jointly and together did steal one motorcycle. Reg.No.STH 9861, make Yamaha DT 125 valued at Tshs.3,000,000/= the property of the Ministry of Agricultural and immediately before or after stealing the motorcycle, did fire a pistol to one Sabdiel Fundisha in order to obtain or retain that motorcycle.

The Appellants did not plead guilty to the charge. The trial Magistrate relying on the adduced evidence which is available on record convicted the appellants and sentenced them to imprisonment for a term of thirty years.

The Appellants aggrieved with conviction and sentence have appealed to this Court raising five grounds which could conveniently be summarised into failure by the prosecution to prove a charge against the appellants in the absence of sufficient evidence to that effect.

The Appellants appeared in person and the Respondent was represented by Mr. Rwegerela, learned State Counsel.

The State Counsel did support the appeal, arguing that the appellants were not properly identified at the scene of crime, evidence availed by the prosecution was contradictory and thirdly that Preliminary Hearing was not conducted in terms of section 192(3) of the Criminal Procedure Act, Cap.20.

The grounds of appeal and the submission by the State Counsel raise two pertinent issues namely,

(1) Whether the prosecution paraded sufficient evidence to prove a charge against the appellants beyond any shadow of doubt.

(2) Whether the trial was flawed with a procedural irregularity which vitiated the trial.

The testimony of PW1, PW2, PW3, PW4, PW5 and PW6 is relevant in establishing as to whether the appellants were properly identified. In that regard it is pertinent to reevaluate their testimony.

According to PW1, who was at the scene of crime, he states to have seen the appellants inside the house whereby the 1st appellant held the motorbike and the 2nd appellant who switched on the motorbike in a bid to take the same. In another instance PW1 states to have run into the house for hiding after the third bandit fired a bullet and the appellants managed to take the motorbike. Thus, trend of the testimony of PW1 shows that, he saw the appellants inside the house but later changed to have been outside the house because after the bullet shot PW1 testified to have ran inside the house.

On the question of identification although PW1 testified to have identified the appellants, PW.1 fell short to state as to how he managed to

identify the appellants in the absence any sort of light in the house where PW1 earlier alleged to have found the appellants.

PW2 stated to have been with PW1 at the scene of crime. PW2 testified that she saw the appellants outside the house after peeping through the window and saw both of them pulling the motorbike. When PW2 was cross-examined by the 1st appellant PW2 stated that there was no electricity but she identified the 1st appellant with the assistance of the torch. However, PW2 did not state as to who was holding that torch. When PW2 was cross-examined by the 2nd appellant, now stated that it is the 2nd appellant who was pulling the motorbike and at the same time PW2 also testified that it is the 2nd appellant who fired a bullet. Thus, PW2 departed from her original story that she saw both appellants pulling a motorbike. Moreover, the testimony of PW2 also contradicts with the testimony of PW1 as to where the appellants were during the incident. While PW1 testified to have seen them inside the house, PW2 testified to have seen the appellants outside the house. Moreover, while PW1 testified that it is the third bandit who fired a bullet, PW2 testified that it is the 2nd appellant who fired a bullet shot. One cannot with certainty determine as to who took the motorbike, which fired a bullet shot and whether the appellants on the fateful day were inside or outside the house. The aforesaid shortfall notwithstanding, PW1 and PW2 who testified to have identified the appellants did not state as to how they

managed to do so it being that the offence was committed at night in the dark where conditions were not favourable for easy identification of the appellants. The testimony of PW2 that the first appellant was her student at Sanya Juu is not corroborated by PW1 whose is also watered down by PW3 and PW4 who all testified that PW1 did not identify the bandits.

PW5 DCpl Leandri NOC. 7044 stated that the appellants were mentioned to him by the complainant, and the stolen property was not found in the possession of the appellants.

PW6 testified that he met the 1st appellant in remand home and the 1st appellant directed PW6 to sell the motorbike in order to generate money to assist the appellants in the criminal case. PW6 decided to report the matter to the Police. However, the testimony of PW6 was watered down by PW1 who testified to have had a grudge with PW6 while they were in prison because PW6 stole the underpants of the 1st appellant and the matter to prison authorities whereby PW6 was punished. Evidence of DW1 is supported by DW2. Moreover the defence testimony was not challenged by the prosecution.

With the aforesaid evidence, it is apparent that the appellants were not properly identified at the scene of crime let alone the contradicting

testimony of PW1 and PW2 who all claimed to have been at the scene of crime. In Rashid Ally vs R (1987) TLR n.97 it was inter alia held:

> *"Description, and the terms of those descriptions on identification of the accused are matters of highest importance of which evidence ought always to be given."*

Moreover, the appellants were not found in possession of the stolen properly as testified by PW5. Furthermore, the DW1 & DW2availed strong defence of existence of a grudge as between PW6 and the 1st appellant and that is why PW6 decided to give false evidence. This cast a shadow of doubt on the prosecution case thus shifting burden to the prosecution which not did challenge the defence testimony.

Apparently in the trial case the trial Magistrate did not consider the defence testimony which was entirely not correct as he was required to consider and evaluate the entire evidence before arriving at a just and fair conclusion. In the case of Hussein Iddi & another Vs R (1986) TLR.166 it was held that

> *"It was a serious misdirection on the part of the judge to deal with the prosecution evidence on its own and arrive at a conclusion that it was true and credible without considering defence evidence".*

It is also evident that the trial which is a subject of this appeal was flawed with procedural irregularities. Firstly, preliminary hearing was not conducted at all thus contravening section 192(3) of the Criminal Procedure Code, 1985. This vitiated the trial as one cannot with certainty tell as to whether the appellants did understand nature of charges against them in order to prepare for the necessary defence. Another anomaly pertains to Motor Vehicle registration card and the Ignition Key of the alleged stolen Motorbike which were tendered as exhibits but not admitted as such by the Magistrate. That piece of evidence not before the trial Court and the trial Magistrate faulted in relying on such evidence to convict the appellants.

In the circumstances, notwithstanding the procedural irregularities, evidence paraded by the prosecution did not prove a charge against the appellants. In the upshot of the aforesaid the appeal is meritorious and I uphold the same quash conviction and sentence and order the appellants to be released forthwith.

S. E. MUGASHA

JUDGE

15/10/2007

Judgment delivered in the presence of Mr. Rwegerela, State Attorney and the appellants.

S. E. MUGASHA

JUDGE

15/10/2007