

**IN THE HIGH COURT OF TANZANIA  
AT BUKOBA**

**CRIMINAL APPEAL NO. 37/2005**

*(Criminal Case No. 279/2001 at Bukoba District Court)*

**RAJABU JUMA =====APPELLANT**

**VERSUS**

**THE REPUBLIC =====RESPONDENT**

**JUDGMENT**

**Mussa, J;**

In the District Court of Bukoba, the appellant along with three others were arraigned for two counts of armed robbery contrary to sections 285 and 286 of the penal code, chapter 16 of the laws. The co-accused persons were Khalid Amri @ Kidole, Hansbert Gosbert @ Mganda and Henrico Kato, respectively the first, second and fourth accused at the trial. The particulars in the two counts alleged that on the first day of November, 2001 at Ishozi parish, the appellant and his co-accused robbed Reverend Fathers Adelitus Kamugisha and Nestory Kajuna an assortment of properties at gun point.

During the trial, the evidence was haphazardly recorded but from what I could discern it was, at least, commonplace that on the alleged date and place the two Reverend Fathers had armed bandits for visitors who roughed them up and made away with several of their personal properties. The way it appears, the victims did not identify any of the perpetrators and the case for the prosecution was wholly sought to be sustained on the basis of several items retrieved by the police to which the Reverend Fathers laid ownership claims.

As to where, how and when the items in question were retrieved, six witnesses furnished the trial court with details. These were, namely, Assistant Inspector Cremini Mushi (Pw2), C7925 detective corporal Nyamwelu (Pw4), Merikiory (Pw5), D8719 detective constable Nyange (Pw6), Assistant Inspector Beatus (Pw7) and Mustafa Uredi (PW8). It was said that upon information derived of a whistleblower, the police were led to the Rwamishenye residence of a certain Titus Mutashobya from where a camera alleged to have been stolen from the Parish was retrieved. Titus who was said to have since died, implicated the appellant the co-accused persons and; led the police up to a Kashai residence intent upon assisting the police arrest those implicated. At the residence, the fourth accused was found sleeping in the living room and said he was a guest of the second accused. Upon the second accused being awakened, a

search was conducted and the police took a radio cassette recorder, a mobile phone handset, a sewing machine and a calculator all of which were suspected to be feloniously obtained. Next, the police were led to the residence of the first accused where they took a radio cassette recorder and; finally, at the residence of the appellant, five clocks, wrist watches, a Yuasa battery and two torches were taken.

It was part of the case for the prosecution as related to by Pw3 and Pw4 that at the police station, Reverend father Adeltus Kamugisha (Pw1) identified the radio cassette recorder, mobile phone handset and the calculator retrieved from the residence of the second accused as his properties. A table clock retrieved from the residence of the appellant was identified by Reverend father Nestory Kajuna (Pw2) to be his. In court, Pw1 said he identified the mobile phone by its PIN number which he was not led to disclose. He identified the radio cassette recorder by a special mark "AK" that was under its handle but as to the other properties he did not disclose any distinctive marks. The other witness Pw2, that is, did not disclose any distinctive marks on the table clock which he identified.

I should now disclose what I consider were, unfortunately, the most unsatisfactory features in the proceedings below. Midway in the course of the hearing, more specifically, on the 28<sup>th</sup> March, 2003,

the accused persons were indicated in the coram to be present and the prosecutor was allowed to proceed with the evidence of Pw4. In the course of the witnesses' testimony, one notes that he actually stated that the first accused had died which is complimented by the fact that there is no entry on the cross-examination column reserved for the first accused at the foot of the witnesses' testimony. Rather paradoxically, despite this indication by Pw4 the proceedings were proceeded on without the trial Magistrate bothering to enquire into the allegation as to whether or not the first accused had died. In fact, elsewhere in the record of the file, there is a copy of a death certificate indicating that the first accused died on the 29<sup>th</sup> December, 2002 which the Magistrate never referred. This was not the only unfortunate feature of the case.

On the 1<sup>st</sup> December, 2003 when Pw6 was called in to testify the accused were, again, indicated on the coram to be present, supposedly, including the one who had died. Surprisingly, the fourth accused was not indicated to having participated in the cross-examination and not even a column was reserved for him which is indicative that he was not present. The same was the case with respect of the second accused in the proceedings held on the 22<sup>nd</sup> December, 2003. What is even more intriguing is the fact that, in

the latter proceedings, a cautioned statement of the first accused, the dead man, that is, was tendered and admitted as exhibit P.9!

It is otherwise inferable that in the proceedings that were to follow, the fourth accused had disappeared but the trial court made no note of it; not even indicating that it was proceeding in his absence. Thus, at the close of the case for the prosecution, it was only the second accused and the appellant who were called to make their defence. In effect they both refuted the prosecution accusations and protested innocence.

On the evidence, the trial Magistrate found insufficient material to implicate the second accused. The trial Magistrate went so far as making a finding with respect to the fourth accused whom he also found not guilty and acquitted. It should be recalled that the trial against the fourth accused was not proceeded on in absentia in accordance with the obtainable procedure. As regards the appellant the trial Magistrate found the prosecution to have proved its case against him. He was convicted and sentenced to a term of thirty years imprisonment. But, rather, astonishingly, the trial Magistrate even had the audacity to convict, without sentencing, the first accused; the man who had long died!

The appellant is aggrieved and seeks to impugn the decision

of the trial court upon a petition comprised of ten grounds which, at the hearing, he wholly adopted. For the respondent Republic Mr. Vitalis declined to support the conviction on account that the table clock, the only item incriminating on the appellant, was not distinctively identified by Pw2.

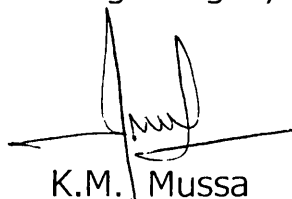
Before I express my concluded view on the appeal, I should register my profound disapproval in the manner in which these proceedings were conducted. If ever there was, to my knowledge, a trial conducted in the most unsatisfactory manner, then this is one such trial. The learned trial Principal District Magistrate (I.N.B. Bashemela) conducted the proceedings in the most irresponsible manner with instances of recording the accused as present while some were absent; reluctance to acknowledge the death of an accused person; proceeding against an absent accused person without indication; admitting hearsay evidence in the form of a cautioned statement of a dead person and; above all, convicting a dead person! The foregoing are quite apart from the fact, already mentioned, that the evidence was haphazardly recorded. It took quite some time to appreciate what the witnesses were saying during the trial and; indeed, determining this appeal was, to me, a painstaking exercise.

I should here clearly express that the record of proceedings is a solemn judicial document to which a presiding officer has a duty to ensure that it always constitutes a bona fide reflection of what transpires in a proceedings just as the presiding officer is expected of a faithful and dispassionate approach. Casual or, rather, unfaithful attitudes should find no refuge in a judicial mind.

That said and, back to the point of contention, I will entirely subscribe to the submissions of learned state attorney. To begin with, having found the evidence with regard to identification of stolen property insufficient to implicate the second accused it is difficult to see why the trial Magistrate took a different view as against the appellant. Quite significantly, Pw2 did not show any distinctive marks on the table clock which was the only item touching on the appellant. In the circumstances, it is unsafe to allow the conviction against the appellant to stand. In the result, this appeal succeeds in consequence of which the conviction is quashed and the sentence is set aside. The appellant is to be released from custody forthwith unless held there for some other lawful cause.

Finally, I feel I am bound by a kind of a moral obligation to extend, in revision, the order of quashing the conviction in favour of the other convict, namely, Khalid Amri @ Kidole. His death to which

the trial court was reluctant to acknowledge is borne by a copy of the death certificate of which I take judicial notice. The proceedings against him had long abated and, to make the record straight, the conviction derived of proceedings illegally proceeded against him is quashed as well.



K.M. Mussa

**JUDGE**

13/11/2007

26/11/2007

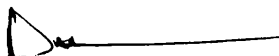
Coram: D.E. Mrango, DR.

Appellant: Present in person

Respondent: Mr. Kweka – State Attorney: Present

B/C: Jane Kasenene

**Court:** Judgment delivered today the 26<sup>th</sup> day of November, 2007  
in presence of the Appellant in person and Mr. Kweka  
State Attorney for the Republic.



D.E. Mrango

**DISTRICT REGISTRAR**

26/11/2007

**AT BUKOBA**

26/11/2007