

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA**

APPELLATE JURISDICTION

HIGH COURT CRIMINAL APPEAL NO. 104 OF 2007

*(Original Criminal Case No. 354 of 2002 of the District Court of GEITA
District at GEITA. Before E. M. SABUKA Senior District Magistrate)*

JOHN JOSEPH @ PIMBI**APPELLANT**
(Original Accused)

Versus

THE REPUBLIC**RESPONDENT**
(Original Prosecutor)

JUDGMENT

G. K. RWAKIBARILA. J

The appellant **JOHN s/o JOSEPH @ PIMBI's** major ground of appeal after his conviction in Geita Criminal Case No. 354 of 2002 was ground No. 1 in his memorandum of appeal where he contended that: "*The learned trial magistrate had lost sight for failure to hold a Preliminary Hearing prior to the commencement of prosecution's case as statutorily entailed in Section 192 of the Criminal Procedure Act, Cap. 16; R.E 2002.*" On top of that, the Learn State Attorney Mr. Mwita who appeared for the prosecution put it that he didn't support the appellant's conviction. Due to grounds which, for convenience purposes, need to be dealt with later, ostensibly after resolving this ground No. 1 in the memorandum of appeal, it shall be

resolved whether the learned State Attorney properly opposed the appellant's conviction.

The appellant raised that ground No.1 and the other four after his conviction of armed robbery c/s 286 (2) of the **Penal Code, Cap. 16, Vol.1** of the laws as amended by **Act No. 10 of 1989**, Column 59 (1) of the First Schedule and sentenced to thirty years imprisonment.

It transpired from what the prosecution established in the trial court that between Geita township and Lwenge village in Geita District within Mwanza Region there is a remote area with bush and forest vegetation known as **Kemuhanga**. PW¹ TABU s/o MKONGUMO was in Geita township until 17/08/2006 in the evening when he started to ride his Avon Make bicycle with Frame No. 079605 towards his domicile village of Lwenge. In course of that ride, he arrived at the remote **Kemuhanga** forest area at around 07:30 PM and found three men there who stopped him and demanded money from him. Upon his failure to give any money to them, they forcefully seized his bicycle. He hurriedly run back to Geita where he slept until 18/08/2002 in the morning when he traveled by using other means to Lwenge village and reported this matter there at the ward office. PW² MAGUNGULI s/o SHIGI was at that office when PW¹ was lodging his complaint.

Later on the same 18/08/2002 day when PW¹ was traveling to Geita, he spotted the person of appellant pushing a bicycle from a certain site at Kamuhanga forest and drew suspicion on the latter's moves. Then PW² arrested appellant and escorted him to the nearby Kasamwa ward office in order to facilitate PW¹ to see whether he could identify that bicycle. In fact when PW¹ arrived at that office later on that day, he duly identified that bicycle through its Frame No. 07903 and welding repairs at its carrier. On the basis of that background, PW³ C 9895 CPL LAURNT who investigated on this case re-arrested appellant and later preferred this charge against appellant.

In his defence appellant contended that he is the one who was robbed of his T.shs 9,000/= by people who arrested him at the Kemuhanga forest. He put it that his assailants there manipulated and formulated lies against him to an extent of implicating him in allegations of committing the offence of armed robbery.

Appellant reiterated in his memorandum of appeal what he stated in his defence. And today he had an additional advantage of support from the learned State Attorney Mr. Mwita who did not support the conviction and on top of that, made alot of remarks to highlight what he opined to be discrepancies in the prosecution's case.

It is conducive at this juncture to resolve appellant's ground No. 1. The learned state attorney is commended for the efforts he made to draw to the attention of this court the relevant precedent on the matter of failure to conduct the preliminary hearing in criminal proceeds. In fact the Court of Appeal of Tanzania in a number of cases like **Kulwa s/o Makwajape and 3 others Vr R, Criminal Appeal No. 35 of 2005** (Mwanza Registry, Unreported) held, **inter alia**, (per Lubuva,JA) that:

"It is therefore apparent that in a case where no preliminary hearing is conducted, then the provisions of Section 192 of the Act do not come into play. In that situation, where it is shown that failure to hold preliminary hearing did not result to a miscarriage of justice or caused delay in the trial or extra cost to the appellant, the proceedings are not vitiated." (at pg.8 – pg 9)

In the material matter, it transpired how the trial of appellant persisted for a modest reasonable time, he suffered no extra costs and there was no miscarriage of justice. His ground No. 1 is therefore rejected as it was similarly held in the unreported cases decided by the same court of **Juma Lyamwiwe Vs Republic, Criminal Appeal No. 42 of 2001;** **Mkombozi Rashid Nassoro Vs Republic, Crminal Appeal No.**

**59 of 2003 and Joseph Munene & Another Vs Republic,
Criminal Appeal No. 109 of 2002.**

In the other four grounds of appeal, the appellant raised what he deemed to be discrepancies in the prosecution's case. Even the learned State Attorney Mr. Mwitwa solicited this court this afternoon to believe the existence of such discrepancies. Such discrepancies were like situations where prosecution witnesses hardly stuck to a single date when they referred to 17/08/2002 and 18/08/2002 interchangeably. Another is when PW¹ reported the incident on the next day at Lwenge, instead of reporting it elsewhere like Geita immediately. Another discrepancy is said to be the recovery of sticks and traditional instruments several hours after the incident at the **locus in quo**. Yet another so called discrepancy is to mix up names of places along the Geita to Lwenge route.

It is my considered view that the whole incident in this matter took place in a society of people who are largely staying in remote areas. They are depicted, for instance, in situations where witnesses were recorded referring to the bicycle as a "***daladala***". To most of Tanzanians who are no longer dwellers of remote areas, a "***daladala***" is a mini bus!

The trial magistrate who tried this case had an additional advantage of assessing the demeanour of the witness and he believed them. The discrepancies which were made by the said

witnesses who on the face of the proceedings reside in remote areas are, to my view, a display of truth. It appears to me that they were not assembled and coached on how and what to testify. They were testifying freely without any external influence. It was proper for them to use different names when they were referring to places along that route which had no geographical beacon dichotomy.

For what has been exposed above, it was conclusively established that PW¹'s bicycle "***daladala***" an avon make with Frame No. 079605 was robbed from him on material evening but hardly twelve hours afterwards found in possession of appellant pushing it from the bush. PW² is the one who witnessed appellant pushing that bicycle at that stage and the trial court correctly believed both PW¹ (who was robbed) and PW² (who witnessed appellant pushing it from the forest).

The aforesaid create an irresistible conclusion that the appellant's grounds of appeal and the learned State Attorney's failure to support the conviction are rejected. So that the appeal is rejected and the sentence of thirty years imprisonment is confirmed.

Sgd: G. K. Rwakibarila
JUDGE
25/07/2008

Judgment has been read at Mwanza this 25th day of July, 2008 and right to appeal to the Court of Appeal of Tanzania has been explained thoroughly to both appellant and Mr. Mwita for the Republic.



**AT MWANZA
25TH JULY, 2008**

**G. K. RWAKIBARILA
JUDGE**