IN THE HIGH COURT OF TANZANIA
AT MTWARA

PC. CRIMINAL APPEAL NO 13/2006

From Lindi District Court Cr. Appeal 20/2006; Original Mnacho Primary Court Cr. Case No. 65/2005

GODFREY LAURENT MKUNGU .....APPELLANT

VERSUS

MUSSA NGWELELE .....RESPONDENT

!4/6/2008 & 28/7/2008

Rweyemamu, J.,

Judgment

This is a second appeal. In Mnacho Primary Court (PC) Cr. Case No. 65/2005, the appellant **Godfrey Laurent Mkungu,** was charged with and convicted of robbery with violence c/s 283 & 286 of the Penal Code, he was and sentenced to 15 yrs imprisonment. Dissatisfied, he unsuccessfully appealed that decision in Lindi District Court (DC) Cr. Appeal 20/2006, hence this second appeal. This appeal proceeded *exparte* because although the respondent was aware of this appeal, having attended court on 20/3/2007, he failed to appear on all the other subsequent dates.

Let me first examine the evidence at trial in the PC: The complainant **SM 1,** testified that on **3/9/2005** he left Manokwe village and came to Chimbila B village, he could not find what he was looking for, went on to another village, then returned home past Chimbila B. On reaching a pub at Izaki he saw the appellant who was bought something from a lady food vendor then left. The complainant left and went to another spot, where he again saw the appellant-this time the appellant was with a friend (whom he knew as Mapengo-victor) who begged for money to buy cigarettes. He gave that person Shs 100/= and the appellant and his friend left. Again the appellant saw the two again in the market; he returned to Izaki and continued drinking.

SM 1 continued drinking with his friends until about 1.30 at night when he left for home. He had a bicycle with him. On the way, he went to answer a call of nature. As he returned and was about to ride it, he saw the appellant standing alone in the road. His friend was standing on the side of the road. The appellant hit him on the head, he fell. The appellant told his friend to come for the bicycle. They picked his bicycle and left him there. He then got up, met one *Rashid Nampite* and told him what happened. He then went to the village (not clear which village), then explained what happened and went for treatment. He did not see the appellant again until 26/8/2006 after he was arrested by the police in a

different village. He testified to have announced the mishap about his stolen bicycle in 25 villages in and Nachingwea district.

The second witness in the case (SM 2) was one *Shaban Ngitu* who testified that about 1.45 on **3/8/2005**, the complainant came close to tears and informed him that he had been beaten and his bicycle stolen. He let him rest a bit him took him to village office and hospital. He asked if he knew the assailant and SM 1 said he knew him by face only not name. Later after the appellant was arrested, he accompanied the complainant to the police where the complainant identified the appellant as his assailant.

In defense, the appellant denied the offence; claimed he was arrested in Nguchile village taken to the police in Ruangwa (then part of Lindi district) and later taken to court and charged. On that evidence the PC unanimously found the case proved.

The appellant appealed the decision in the DC where he submitted that; there was no evidence in the PC to prove that he committed the offence; that no exhibit was tendered in court, that the court denied him a chance to call his witnesses.

The DC was satisfied that the appellant's conviction by the PC was sound based on the evidence of SM 1; that the witness had

properly identified the appellant because conditions of identification were ideal. He had seen the appellant a number of times that day, talked with him, and the event took place at 7.30 at night when visibility was good. The DC found, and rightly so, that the appellant's allegation that, he was denied a chance to call his witnesses was disproved by the facts on the PC record of proceedings.

In this court the appellant repeats protestations of innocence and gives the same reasons in a repetitive manner that; there was no evidence that anything was stolen from the complainant, no exhibit were brought to prove the case; that he was arrested with nothing, no evidence that SM1 was robbed, and finally that he is innocent.

This being a second appeal, I am aware that in practice, concurrent findings of the two subordinate courts can not be readily interfered with unless "*there are mis directions or non directions on the evidence by the first appellate court...*" See **Director of Public Prosecution v. Jaffari Mfaume Kawawa** (1981) TLR

149, **Goodluck Kyando v. R** CAT Cr. Appeal 118/2003 (Mbeya) (unreported), **Jimmy Zacharia v.R** Cr. Appeal 69/2006 (Arusha) (unreported) among others.

On the facts, the key question at trial was whether the appellant was adequately identified by the complainant as his attacker. The issue for decision now is whether in deciding that question, there were mis -directions, non directions or misapprehension of evidence of such gravity as to amount to strong and compelling reasons as would justify interference by this court. I believe there were. First, the DC found identification to have been watertight because visibility at 7.30 at night was good. It is common knowledge that the sun sets early in this part of the country and by 7.30 at night, it is already very dark. The DC's decision on that issue was thus a clear a mis-apprehension of facts. Second, it was in evidence that the complainant had been drinking for sometime, in such a state he could have easily mistook the identity of his attackers, particularly because it was dark. This is not the same as saying that **SM 1** was not credible- all I am saying is, he could have made a honest but mistaken belief, . As noted by the CAT, "*A witness can honestly but mistakenly believe that he identified the offender. This can happen especially where the conditions obtaining are not favourable to correct and unmistaken identification*" **Richard Athanas v. R,** Cr. Appeal 115/2002 (DSM - (unreported)

Third, the fact that there was no evidence that the complainant made immediate disclosure of the identity of the appellant to anybody, increases doubts as to whether he actually identified the appellant. The fact that he saw them a number of times that day, may also explain why he might have mistaken his attacker for them, given he did not know the appellant well before. Although he testified that he made a disclosure to *Rashid Nampite* that person did not testify, the one who did was *Shaban Ngitu* (SM 2).

Further, I find it curious that no witness testified to have seen the complainant with the alleged bicycle in the village. In my opinion, such are material facts/circumstances which, had the DC addressed them, it would have found that conditions of identification were not ideal; that there were no facts to support identification like immediate disclosure of the appellant's identity; that the complainant might have made a honest but mistaken belief, and therefore concluded as I do that the appellant was convicted on insufficient evidence of identification.

For the reasons stated, I allow the appeal, quash the appellant's conviction and order his immediate release unless otherwise lawfully held.

R.M. Rweyemamu
Judge
28/7/2008