IN THE HIGH COURT OF TANZANIA
AT BUKOBA

CONSOLIDATED (HC) CRIMINAL APPEALS NOS. 33 OF 2002 AND 69 OF 2007

(Arising from Criminal Case No. 258/2001 at Biharamulo District Court)

1. JAMADA MAULID)
2. YAHAYA MUSSA) .....APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

15/10/2007 & 12/02/2008

Mussa, J;

In the District Court of Biharamulo, the appellants were arraigned for armed robbery contrary to sections 285 and 286 of the penal code, chapter 16 of the laws. The particulars alleged that on the 27th day of September, 2002 at Nyangwe/Kalenge village, within Biharamulo District, the

appellants, jointly and together, did steal a sum of shs.30,800/=, the property of a certain Paulo Alexander. It was further alleged that immediately before and after such stealing, the appellants used actual violence in order to obtain and retain the stolen cash. Upon full enquiry, the appellants were found guilty, convicted and sentenced to respective terms of thirty years imprisonment. The factual setting unfolding from the trial was free of any controversy.

The case for the prosecution was derived of three witnesses from whom it was commonplace that on the alleged date and place, around 1:00pm or so, the said Paulo Alexander (PW1) had the second appellant for a visitor. The latter was well known to the witness as he frequented the dwelling and; on that particular occasion, the second appellant had gone there to sell tobacco. Paulo informed the second appellant that he had no money to which the latter was obliged to barter his tobacco with maize following which a deal was, accordingly, sealed whereupon the second appellant bartered the tobacco in exchange for 3½ tins of

maize. Paulo could, however, deliver only two tins of maize and, ostensibly, the remainder 1½ thereupon became owing to the second appellant.

A good deal later, in the aftermath of the midnight of that same day, that is, around 2.00am or so, Paulo and his wife, namely, Editha, again, had visitors only, this time, the latter were unwelcome bandits. The two some intruders had smashed their entry into the dwelling house by the use of a huge stone. The two bandits were armed and were wielding torch-lights from which both Paulo and Editha were, allegedly, aided to identify the culprits. As it turned out, both claimed that the intruders were none other than the appellants and that while the first appellant had a club, the second appellant was armed with a machete.

It was part of the case for the prosecution that upon entry and, as was expected, the appellants demanded money but; theirs was a specific demand for they had wanted to be given a sum of shs.300,000/=. The appellants

were also violent for, it was said, the second appellant, in particular, aimed his ware at Paulos' neck but, somehow, the machete instead landed on the latters left arm. The blow was, however, sufficient enough to fell Paulo to the ground and as he was being further roughed up, Editha surrendered an initial sum of shs.30,000/= to the bandits. Dissatisfied, the intruders demanded for some more following which Editha added a sum of shs.800/= to their loot to which; the bandits were still discontented. Next, the second appellant instructed the first appellant to go fetch a gun from outside the dwelling but; it seems, such was just a scare tactic to which Paulo insisted there was no more money lest the intruders would wish to take all his belongings. Resignedly, the culprits had both Paulo and Editha physically bound and gagged and off they went but; only after pulling down some grass, apparently, from the roof of the dwelling house and placing it at the entrance door with a scare that they would set the dwelling ablaze lest their victims calmed down. Somehow, Paulo and his wife untied themselves and made it to their next door neighbour called Marco where they ventilated the ordeal.

To this version as told by the prosecution witnesses, both appellants completely disassociate to protest innocence. The first appellant claimed that he was attending a public gathering on the 29th day of September, 2001 when, suddenly, he was confronted and restrained by police officers and later arraigned for this offence he knows nothing about. The second appellant was arrested much later, that is, on the 11th day of November, 2001 and to him also, the prosecution accusations were, day dreams.

As hinted above, on the whole of the evidence, the learned trial Magistrate was inclined to accept the version as told by the prosecution and the matter was adjudged to the extent indicated. The appellants are aggrieved and lock horns with the decision below upon their respective petitions. The petitions were filed separately but, at the hearing, I had them consolidated but the appellants retained their order of naming as was during the trial.

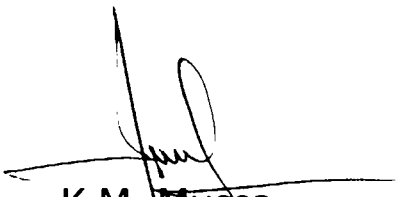
At the hearing, both appellants adopted their respective petitions and echoed their grievances that the

evidence of visual identification fell short and that their entire incrimination was a fabrication. Mr. Kameya, the learned state attorney for the respondent Republic, would rather have it that the evidence of visual identification was watertight much as both Paulo and Editha were familiar to the appellants. I need not recite each and every detail of the appellants' respective petitions for I take the position that this matter turns on a very narrow issue pertaining to sufficiency of the evidence of visual identification.

That said, I should express at once that torch-lights wielded by intruding culprits are barely an effective means of visual identification much as, often times, they tend to, rather, dazzle and impair the victims' vision than assist him/her to correctly identify the culprit. In this regard, the Court of Appeal decision of ***Mohamed Musero V.R. [1993] TLR 290*** is directly in point. Thus, in this present case, it cannot be said with certainty that the prevailing conditions at the scene were favourable to a correct identification. The mere fact that the appellants were

familiar to the identifying witnesses is, to me, irrelevant much as there was, here, the possibility and room for mistaken identity.

That would suffice to determine the appeal in favour of the appellants and I need not belabour more than is necessary to dispose of the matter. The appeal is, accordingly, allowed the result of which the appellants should be released from custody forthwith unless held there for some other lawful cause. It is so ordered.



K.M. Mussa
JUDGE
18/01/2008

Date: 12/2/2008
Coram: D.E. Mrango – DR.
Applicant: Both Present
Respondent: Mr.Ndjike – S/A - Present
B/C: Agnes

Court: Judgment delivered today the 12th day of February 2008 in presence of the appellants in persons and in presence of Mr. Ndjike – S/A for the Republic.

D.E. Mrango – DR
12/02/2008

AT BUKOBA
12/02/2008