

IN THE HIGH COURT OF TANZANIA
AT DODOMA

(DC) CRIMINAL APPEAL NO. 59 OF 2008
(ORIGINAL CRIMINAL CASE NO. 538 OF 2006 OF THE
DISTRICT COURT OF DODOMA DISTRICT AT DODOMA)

GABRIEL MATONYA @ LEGANGA APPELLANT
VERSUS
THE REPUBLIC RESPONDENT

17/9/2009 – 09/10/2009

JUDGEMENT

HON. M. S. SHANGALI, J.

The appellant **GABRIEL MATONYA @ LEGANGA** and two others namely (accused persons) **CHARLES MATONYA @ MTEMI** and **HAMISI SIMON @ MATONYA** were arrested charged and prosecuted on a charge of armed robbery contrary to section 287 (A) of the Penal Code, Cap 16 as amended by the Act No. 4 of 2004.

The above said two accused persons were discharged and acquitted under section 230 of the Criminal Procedure Act, 1985 when the trial Resident Magistrate was satisfied that there was no

sufficient prosecution evidence to connect them with the charge to the extent of requiring them to make defence.

At the end of full trial against the appellant the trial Resident Magistrate was satisfied with prosecution evidence and convicted the appellant as charged. The appellant was sentenced to suffer thirty years term of imprisonment. He was aggrieved by both conviction and sentence hence the present appeal.

The facts leading to the present appeal may be briefly stated as follows: In the midnight of 17th October, 2006 at about 00.00 hours, PW1, Nicholas Mpululu, his wife PW3, Lucy Mpululu and their step son PW4 Peter s/o Inea were sleeping in their house situated at Msalato area within Dodoma Municipality. Outside that house was a watchman PW2, Toji s/o Lechipia who was guarding PW1's kraal and other properties.

According to the testimony of PW2, he was attacked by a group of three people in that night who broke the kraal door and ordered him to remain silent and sit down. The bandit questioned him on the whereabouts of his employer (PW1), and PW2 replied that he was asleep inside the house. Then the two bandits went in the main house leaving the third bandit guarding him (PW2) outside. PW2 stated that he was able to identify the bandit who was left to guard him outside to be the appellant.

According to the testimony of PW1, his house was broken by three bandits and that the first one to enter in his house was the appellant (3rd accused) who was holding a three battery torch. PW1 claimed that he confronted the appellant who was also holding a panga but the appellant managed to cut him on his hand. His watchman PW2 was also injured on his hand, shoulder and head. His wife PW3 was busy shouting for help. It was the PW1s evidence that when the appellant entered in the house he was accompanied by one Nyekaa who took PW2s bicycle valued Tsh. 85,000/= . PW1 stated that he was able to identify the appellant due to the light illuminated from the appellant's torch and the fact that he was familiar with the appellant before the incident. He also claimed that on the morning of that material date at about 10.30 hrs, the appellant with other unknown people had passed behind his house.

The testimony of PW3 supported that of PW1 and insisted that she was able to identity the appellant due to the light from the torch being used by him (appellant). She also claimed that she was able to identity him from his voice because he is a familiar person. PW4, supported the same type of evidence that he was able to identity the appellant due to the light from the torch being used by the appellant.

In his sworn defence the appellant denied to have committed the offence. He stated that he was arrested at a pombe shop at Vyeyula area on 12th November 2006 and later charged with the alleged offence. In his defence he challenged the mode of identification used by the prosecution witnesses claiming that there

was no conducive atmosphere for proper identification and that is why he was mistakenly identified. The appellant pointed out contradictions in the evidence of prosecution witnesses in his bid to convince the trial Court that there was no sufficient and credible evidence to connect him with the offence. Nonetheless, the trial Resident Magistrate was satisfied with the prosecution evidence and convicted the appellant as shown above.

At the hearing of this appeal, the appellant appeared in person and unrepresented. The respondent/Republic was represented by Miss Mdulugu, learned State Attorney. The appellant did not have much to say, he simply requested the Court to consider his grounds of appeal shown in his memorandum of appeal. He prayed the Court to critically revisit the issue of identification because he never committed the offence.

Miss Mdulugu, learned State Attorney refused to support the decision of the trial Resident Magistrate. She submitted that the prosecution case was erected on very weak identification type of evidence. In other words, the learned State Attorney supported the grounds of appeal filed by the appellant.

In her critical examination of the prosecution evidence, Miss Mdulugu submitted that there was a lot of contradictions in that evidence. She pointed out that PW1 claimed that the appellant was the first bandit to enter in his house and he identified him when they were fighting each other; but PW2 stated categorically that he

identified the appellant because he was left outside guarding him and that it was the other two bandits who went inside to confront PW1. Furthermore, PW2 was not able to state how he managed to identify the appellant in the dark.

On the issue of identification, Miss Mdulugu submitted that by any standard of imagination there was no favourable condition for proper visual identification. She stated that it was not possible for the witnesses to identify the appellant by a mere torch light in the circumstances of this case. The learned State Attorney argued that if the torch was in the hands of the appellant and beamed towards the prosecution witnesses (PW1, PW3, PW4) how could they identify the person holding the torch who was behind the torch. PW4 claimed that he was able to identify the appellant when he was beaming on the wall, but the question is, if appellant was fighting PW1 with a panga why should he beam his torch on the wall. Miss Mdulugu observed that even the torch light veracity was not established. PW1 claimed it was a three battery torch but there is no evidence on how he knew that fact.

I agree with the learned State Attorney. In fact torch lights are not effective in identifying bandits. It ~~was~~ has been emphasized time without number that no court should act on evidence of visual identification unless all possibilities of mistaken identify are eliminated and the Court is fully satisfied that the evidence is water light. See **WAZIRI AMANI VS. R (1980) TLR 252(CAT)**

MOHAMED MUSERO V R(1993) TLR 290 (CAT) and REP VS. TINGA S/O KELELE (1974) TLR.

Equally important is the question of voice identification. In general voice identification is not a reliable means of identification unless there is other reliable evidence to corroborate – See ***NURU SELEMANI VS. REP (1984) TLR 93.***

Another issue which raises doubt on the prosecution evidence is the delay in the arrest of the appellant. In this case there is no disputed that the appellant and prosecution witnesses are all resident of Msalato area. There is no evidence to show that the appellant escaped from the area after the incident. If the appellant was identified in that fateful in night as the prosecution witnesses would wish this Court to believe, why was he (appellant) not reported at police and arrested immediately. The evidence indicate that the offence was committed on 17th October, 2006 and appellant arrested within the same area on 12th November, 2006. In fact he was joined in the charge sheet on 30th January, 2007. No explanation was given by prosecution to justify that delay of arresting a person who was identified as alleged.

The prosecution case was also weaken by the fact that no sufficient evidence was adduced to establish that PW1 and PW2 were actually wounded by the bandits. It appears that such a serious

incident was not reported and investigated by the police officers nor PF3 issued to the wounded witnesses.

From the foregoing this appeal is meritorious. It is therefore allowed. The conviction against the appellant is quashed. The sentence of thirty years imprisonment is set aside. I order that the appellant be set at liberty forthwith unless detained on any other lawful cause.

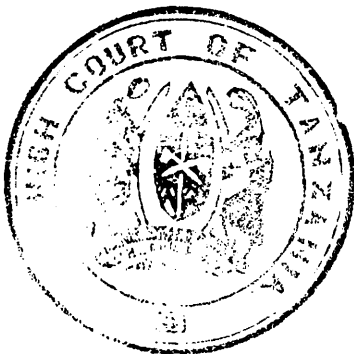


M. S. SHANGALI

JUDGE

9/10/2009

Judgement delivered todate 9th October, 2009 in the presence of Mr. Wambali, learned State Attorney representing the respondent/ Republic and the appellant in person.



M. S. SHANGALI

JUDGE

9/10/2009