IN THE HIGH COURT OF TANZANIA

AT DODOMA

DC CRIMINAL APPEAL NO. 101 OF 2008

(ORIGINATING FROM CRIMINAL CASE NO. 144 OF 2004 AT THE DISTRICT COURT OF KONDOA SITTING AT KONDOA)

1. HAMISI MUSSA ----------1st APPELLANT
2. JUMA SELEMANI ---------- 2nd APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

18th Nov. 2009 & 11th DEC. 2009

Hon. S. S. MWANGESI, J.

Both appellants herein were charged at the District court of Kondoa with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code Cap 16 Vol. 1 of the Laws Revised as amended by Act No. 4 OF 2004, read together with section 5 of the

Minimum Sentence Act No. 1 of 1972 and section 12 of the Corporal Punishment Act Cap 17 as both amended by Act no. 10 of 1999.

The particulars of the case were to the effect that on the 22nd day of May, 2004 at about 2000 hours, at Kingale village within Kondoa District in Dodoma Region, the appellants did jointly and together steal cash Tshs. 3,000, one Land rover 109 Registration No. TZC 6001 station wagon valued at Tshs 1,500,000, 23 pairs of khanga valued at Tshs. 46,000, one wrist watch make Rado valued at Tshs. 7,000 and one outer of sportsman cigarettes valued at Tshs 7,000, the property of one Athumani Londisa and immediately before and after the time of such stealing, they did fire bullets into the air in order to obtain or retain the said property.

During the trial of the case, about nine witnesses were summoned to testify for the prosecution. The learned trial Magistrate upon considering the said evidence, was of the view that the guilt of both appellants had been proved beyond all reasonable doubts. Both appellants were thus found guilty as charged and each was sentenced to go to jail for a period of 30 years. Each of the appellants was further ordered to receive 15 strokes of the cane. The appellants are challenging the findings of the learned trial Magistrate and the sentences meted.

In their joint memorandum of appeal, the appellants have raised three grounds of appeal. In the first ground of appeal, the second appellant has castigated the learned trial Magistrate for having accepted the evidence of the police officers to the effect that his identity card was recovered in the motor vehicle that was found in the bush while the said identity card was found from his body when they searched him after his arrest while walking along the road. He has requested the court to hold that the alleged search that is said to had been made in the motor vehicle should not be taken as true because it was not done in his presence or in the presence of other independent witnesses.

On the nine packets of cigarettes that were found with the first appellant, it has been contended that the same were his. Some were for his own use while others were for business which he had been doing between Tanzania and Mozambique. He claimed to have had carried them because he had been taking a long time to be outside the country where he could not find such type of cigarettes. After all, the appellant has argued, that the said cigarettes had no any marks to indicate that they were the ones stolen from the broken shop.

Regarding the second ground of the appeal, it is the averment of the appellants that the evidence of identification that was relied by the learned trial Magistrate to convict them was weak and unfavourable, and that the Magistrate did fail to warn himself that it was not safe to rely on such evidence that was alleged to have been made by Pw 1 during night.

The appellants have asserted further that, the evidence adduced at the trial court that was relied upon by the learned trial Magistrate, did come from people who were of the same family. It has been their view that the trial Magistrate ought to have warned himself that, it was possible for those people to cook their evidence for the sake of protecting their own interests. Their opinion is that the said evidence ought to have been corroborated by some other independent evidence. And further that, the testimonies of Pw5 to Pw8 was just hearsay that ought to have been discarded by the court. On the foregoing grounds, both appellants have requested this court to find that the trial court did err to convict them, and that their appeal be allowed and they be set at liberty.

When the appeal came for hearing, both appellants who appeared in person, did tell the court that, they had nothing to add to what have been explained in their memorandum of appeal. The

respondent- Republic on the other side, was represented by Mr. Wambali learned State Attorney. In response to what has been submitted by the appellants, the learned State Attorney was of the view that there was ample evidence to establish that the appellants and in particular the second appellant were at the scene of the crime on the fateful night and that the identification card of the appellant and other items were dropped into the motor vehicle in the course of the squabbles ~~were~~ with the civilians who had responded to the alarm that had been raised.

As regards the identification, the opinion of Mr. Wambali has been to the effect that, there was ample light that assisted the victim of the robbery that is Pw1 as well as other witnesses to identify the assailants. And after all, the second appellant was well known to the complainant (victim) as he hailed from a nearby village. Under the circumstances, it is the view of Mr. Wambali that the circumstances in the case at issue were very favourable that cannot be compared with the circumstances that was discussed in the case of **Waziri Amani Vs Republic** [1980] TLR. 250.

On the ground that the evidence relied upon by the learned trial Magistrate did come from witnesses of the same family, the learned State Attorney has submitted to the effect that, there is no law that prohibits people from the same family to give evidence against an accused. What matters is the credibility of the evidence

tendered. Such position was clearly clarified by the Court of Appeal in the case of **Esio Nyomolelo and others Vs Republic** Criminal Appeal No. 49 of 1995 (CAT) Mbeya Registry (unreported). As such, it was his view that the grounds that have been raised by the appellants in their appeal is without any founded grounds. He has thus prayed the appeal to be dismissed in its entirety.

What stands for determination by this court in as far as this appeal is concerned, is as to whether there was ample evidence tendered at the trial court that justified conviction to both appellants as held by the trial court. In his judgment, the learned trial Magistrate did state that there was enough evidence from the lamp that was on at the time when the assailants who were about four marched into the shop of Pw1 while armed. Although the situation might had been horrifying, it was the view of the learned Magistrate that, because the assailants remained with the witness for some time demanding for money, the witness did reach the watershed mark and thereby, overcoming the situation, and hence having a perfect identification. In support of his opinion, he did cite the decision in the case of **Hassan J. Kenduyera and Others Vs Republic** [1992] TLR 100. This court is in agreement with the reasoning of the learned trial Magistrate in as far as the second appellant is concerned. This is from the fact that there was ample evidence to establish that the same was known to her before as they lived in nearby villages. For

the first appellant who was not known to her before, there are doubts that have to benefit him.

Regarding the ground that the evidence of cigarettes' found with the first appellant ought not to have been relied upon by the learned trial Magistrate in holding that it had any connection with the robbed ones, this court is convinced to hold that the said ground is plausible. This is from the fact that, there were no any peculiar marks that were given that could have distinguished the cigarettes robbed from the shop of Pw1 with other cigarettes like the ones found with the first appellant. Under the circumstances, this court is of the considered view that the trial court did err to rely on such evidence.

The other ground in the appeal did concern the testimony of relatives. It has been the averment of the appellants that the evidence of Pw1 and Pw3 were evidence of people who were from the same family. And that such evidence ought not to have been accepted by the learned trial Magistrate. This court is in concurrence with what got submitted by the learned State Attorney that such ground is untenable. What matters in evidence tendered in court is not who gives the evidence but the credibility of the evidence given. And the authority cited by Mr. Wambali of the case of Esio Nyomolelo (supra) amply claries on that thing.

And lastly, there was the complaint by the appellants as regards exhibit PE 2 that is the Identity Card of the second appellant. It has been the contention of the appellants that the same was recovered from the appellant's body when he got searched by policemen after being arrested. And that the same got planted in the Land rover by the same when they searched it. Since they were not involved in the said search of the Land rover, they have prayed the court to disregard the alleged recovery which was not true. The court was referred to the decision in the case of **Chali Kiama Vs Republic** [1979] TLR 33. Upon closely observing the evidence tendered at the trial court, this court has failed to find substance in the contention by the appellants. This is from the fact that, the identity card at issue was recovered in the Land rover by the civilians who had been following the said Land rover after it had been taken by the assailants (robbers). This time was before the policemen had been informed of the incident. This is in accordance to the testimonies of PW4 Shaaban Mohamed and Pw5 Athumani Hassan Rukumbisa both of which did participate to check in the Land rover after it had been pushed back to Pw 1's house from where it had been deserted by the robbers where it failed to move for need of fuel.

Furthermore, the appellants were not arrested by policemen, but by prison wardens who had been in the company of civilians. From such situation, the contention that the Identification Card of

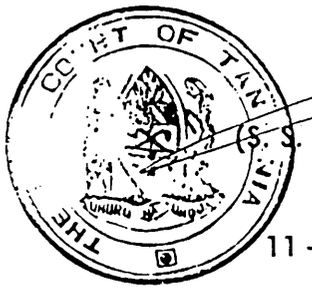
the second appellant was just planted in the Land rover that was also found to have other items that had been robbed from Pw1' shop, is unfounded. And the only necessary inference that remains is that, the owner of the ID, had been in the motor vehicle, which in turn squarely corroborates the identification that is claimed to have been made by Pw1, in the shop during the incident of robbery.

From the foregoing therefore, this court holds that the learned trial Magistrate was justified to hold that the second appellant had fully participated in the whole incident of the robbery of the material night, and that was guilty of the offence which he stood charged with. It is however the view of this court that, there was no justification to hold the first appellant culpable. To that end, the appeal by the first appellant is found to be meritorious and it succeeds, while on the other hand, the appeal by the second appellant is found to be wanting of merit. It is therefore dismissed. It is thus ordered that the first appellant be set at liberty forthwith unless lawfully held for any other good cause.

On the question of the sentence meted to the second appellant, the sentence of imprisonment for a term of thirty years awarded by the trial court, is the statutory minimum one in terms of section 287A of the Penal Code, as such this court has nothing to assist. And regarding the order for corporal punishment of fifteen strokes, although that order was within the mandate of the learned

trial Magistrate under section 8 (2) of the Corporal Punishment Act, this court is of the view that the number of strokes awarded, was a bit on the high side, the same is thus reduced to twelve. It is thus ordered that the appellant will receive twelve strokes.

Order accordingly.



(S. S. MWANGESI)

JUDGE

11 – 12 - 2009