IN THE HIGH COURT OF TANZANIA

AT DODOMA

DC CRIMINAL APPEAL NO. 135 OF 2008

(ORIGINAL CRIMINAL CASE NO.554 OF 2006 AT THE DISTRICT COURT OF DODOMA SITTING AT DODOMA)

1.NKWANGU NZALANG'OMBE ---------- 1st APPELLANT

2.MATHEO CHILUMBA ---------- 2nd APPELLANT

VERSUS

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

JUDGMENT

16 – 11 – 2009 & 07 – 12 – 2009

HON. S. S. MWANGESI J.

At the District court of Dodoma, Kepha Paulo, Matheo Chilumba and Nkwangu Nzalang'ombe stood jointly charged with the offence of armed robbery contrary to section 287A of the Penal Code Cap 16 Vol. 1 of the Laws Revised. The particulars of the offence was to the effect that on the 22nd day of September, 2006 at about 2100 hours at Bahi village within Dodoma Rural District and Region of Dodoma, the three did jointly and together steal twenty six cows valued at Tshs. 2,600,000 and different types of clothes valued at Tshs. 200,000 the property of one Nzile

Tanganyika and immediately before and after such stealing did use actual violence to the said Nzile Tanganyika to wit, they used firearm to threaten to kill him in order to obtain and retain the said properties. Five witnesses were summoned by the prosecution to establish the guilt of all accused persons. And the learned trial Principal Resident Magistrate who presided over the case, was convinced beyond reasonable doubts that the guilt of the last two had been sufficiently established, he did accordingly convict them and sentenced each to the mandatory jail sentence of thirty years plus the corporal punishment of twelve strokes of the cane. And on the other hand, the first accused person was acquitted and set free.

The current appeal by the second and third accused persons who herein after will be referred to as the first and second appellants respectively, is challenging such findings of the trial court. Each appellant's petition of appeal contains substantially three grounds of appeal wherein they castigate the learned trial Magistrate on two things namely; first that the learned trial Magistrate erred for convicting them basing on confession which had not been obtained voluntarily from them. Secondly that, the evidence that was tendered by the witnesses for the prosecution did not satisfactorily establish that they had really committed the offence which they stood charged with.

When the appeal came for hearing, both appellants did appear in person to argue their appeal. In addition to what is contained in the memorandum of the appeal the first appellant did tell the court that, the

exhibits that were alleged to have been recovered were never tendered in court as exhibit. And on his part, the second appellant did add that, the sentences that were given by the trial court were too severe. On the foregoing, they have asked the court to find merits in their appeal and that they be set at liberty.

The respondent – Republic in this appeal was represented by Mr. Wambali learned State Attorney. His response to what had been submitted by the appellants was to the effect that, on the question of identification, Pw 1 who was the victim of the incident of the material date, did tell the court that he failed to identify his assailants because they tied his face with clothes. Under the circumstances, the factors that led the appellants to be taken to court were not clear to the same. Furthermore, Mr. Wambali did tell the court that, there was contradiction between the testimony of Pw1 and Pw3 as regards the act of firing at the scene of the incident, that is while Pw1 never mentioned about such a thing, Pw3 did tell the court that there had been firing.

On the issue of the confession which was relied upon by the learned trial Magistrate in finding conviction to the appellants, the same was said to have been made to vigilantes (sungusungu), he was doubtful if such confession was legally sound. At any rate such evidence needed corroboration to give weight if the provisions of section 29 of the Law of Evidence Act was to be relied upon. The court was referred to the case of

Regina Karantini and Another Vs Republic Criminal Appeal No. 10 of 1988.(CAT) (unreported).

Apart from the anomalies noted in the evidence tendered in court, the learned State Attorney was of the view that there were some procedural irregularities. These included, Pw5 not being cross examined by some of the accused persons, Pw 1 and Pw2 not giving their evidence on oath or confirmation contrary to section 198 of the Criminal Procedure Act as well as the failure to tender in court as exhibit the three herds of cattle that were mentioned during the preliminary hearing.

On the basis of the pointed out anomalies, Mr. Wambali did decline to support the conviction.

The issue that stood for determination at the trial court as framed by the learned Principal Resident Magistrate was as to whether all the accused persons did commit the offence of armed robbery as charged. The issue for deliberation by this court is as to whether the evidence tendered at the trial court did justify conviction to the appellants. The view of the appellants and the respondent through the learned State Attorney as narrated above is that it did not.

When one reads the judgment of the learned trial Magistrate, will find that the same is in agreement with what the learned State Attorney has submitted regarding the shortfalls which the evidence of the prosecution had. He has shown that there was no witness who identified the thugs. He has also shown doubts at page seven, to the gun alleged to have been shown by the second appellant, if at all it was the one used to commit the offence. And that the only evidence that was available to assist the court was that of Pw4 and Pw5 both of which were vigilantes,that did concern the confessions claimed to had been made by the appellants to them. The learned trial Magistrate did rely on such confession although the appellants claimed to have been tortured, basing on section 29 of the Law of Evidence Act and the decision in the case of **Thadei Mlomo and Others Vs Republic** [1995] TLR 187. My understanding of the provision of section 27 as well as the holding in the case cited above is that the court can rely on such confession if the court believes it to be true, and that there is no proof of such torture.

It is the opinion of this court that the learned trial Magistrate did misdirect himself to apply the holding in Thadei's case to the matter at hand because the circumstances are different. In the matter at hand, even if it were to be believed that the appellant did indeed show the gun in the bush, there was however, no proof to the effect that the said gun was the one used to commit the robbery. Secondly, in the matter at hand, there was proof that there had been torture as evidenced by the scars that were seen by the court on the back of the second appellant. Under the circumstances,

it is the view of this court that the holding in the case of Thadei Mlomo was inapplicable to the case at hand.

It is also the view of this court that, the trial court ought to have warned itself that the alleged confession in the case at hand had been made to vigilantes who are not trained as policemen and who normally work in a mob. The danger of taking such confession without precaution was discussed by the Court of Appeal in the case of **Regina Karantini and Another Vs Republi_** Criminal Appeal No. 10 of 1988 (CAT) (unreported) cited by Mr. Wambali learned State Attorney, where the Court stated thus:

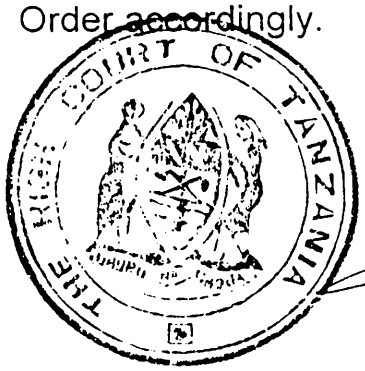
> ***"-----the confessions of the appellants were made in the presence of vigilantes (sungusungu). Although they are not policemen according to law, they have more coercive power than ordinary citizens and for that reason the presence of a big crowd of such vigilantes is not conducive to the making of a voluntary and truthful confession by a suspect. There must be corroborative evidence otherwise an appeal can succeed."***

In the light of above holding, it is obvious that some additional evidence from independent witness was important in the matter at hand to strengthen the evidence of confession made by the appellants to the vigilantes.

On the irregularities pointed out by Mr. Wambali, it is true that in the preliminary hearing it was indicated that there were herds of cattle that had been recovered when a follow up was being made after the robbery had been reported. However the same were never tendered as exhibit in court. That was a anomaly on the part of the prosecution. And as regards the anomaly that Pw1 and Pw2 did give their evidence without oath or affirmation, it would appear that the said anomaly was occasioned during the typing of the proceedings because the handwritten records reveal that the two who were pagans did affirm before giving their evidence. As such, the provisions of section 198 of the Criminal Procedure Act were not infringed.

That said, it is the view of this court that there was no justification for the trial court to reach at the findings it made. This court is thus in agreement with what got submitted by the learned State Attorney that the appeal lodged by the appellants has merit. The decision of the trial court is thus quashed and the sentences meted to them are set aside. They are both to be set at liberty forthwith unless legally held for any other sound cause.

Order accordingly.



(S. S. MWANGESI)

JUDGE

07 – 12 - 2009