IN THE HIGH COURT OF TANZANIA

AT TABORA.

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 23 OF 2008

ORIGINAL CRIMINAL CASE NO. 213 OF 2006

OF THE DISTRICT COURT OF NZEGA

AT NZEGA

BEFORE: A. H. MWILAPWA,Esq; RESIDENT MAGISTRATE

NYANGE S/O MATONGO @ NYERERE.....APPELLANT
(Original Accused)

VERSUS

THE REPUBLIC.....RESPONDENT
(Original Prosecutor)

JUDGMENT

Date of last order 5/10/2009

Date of Judgment 4/11/2009

WAMBALI, J.

The appellant, Nyange s/o Matongo @ Nyerere together with one Mtakazambi s/o Samson @ Nkwabi s/o Dickson (deceased) and Hamisi s/o Mashim were charged at the District Court of Nzega with the offence of armed robbery contrary to section (287A) of the Penal Code Cap. 16 R. E. 2002. It was laid in the charge before the trial Court that on the 17th day of November, 2006 at 1.00 hours at Ishiki village within Nzega, Tabora Region, accused persons jointly and

together stole various properties all valued Tshs. 220,000/= the property of one Clement s/o Bahati and immediately thereafter stealing did use a bush knife and club to him in order to retain the said property.

It is on record of the proceeding when the case was for preliminary hearing that the 2nd accused Mtakazambi s/o Samson @ Nkwabi s/o Dickson had died without stating the actual date of death. It was only reported by the Public prosecutor on that day that **"the matters for PH the 2nd accused died the records are in economic case No. 2/2006".** The trial magistrate recorded thus:

> *"Court: The Case against 2nd accused is abetted u/s 224 CPA.*
> *A.H. MWILAPWA – RM*
> *19//11/2007."*

In view of that state of affairs, the trial proceeded with the first accused (appellant) and third accused one Hamis s/o Mashim. At the conclusion of the trial the learned Resident Magistrate of the District Court convicted the appellant and acquitted the 3rd accused. Upon conviction, the appellant was sentenced to 30 years in jail. It is against conviction and sentence imposed by the District Court that the appellant appeals to this court. The petition of appeal of the appellant is loaded with almost ten (10) grounds of appeal although during the hearing some of the grounds were argued together as

they are related. The appellant during the hearing appeared in person and requested the Court to adopt what he stated in the petition of appeal. He however respondent briefly to the reply to the grounds of appeal as submitted by Mr. Ahmed Seif-learned State Attorney who appeared for the Respondent/ Republic and supported conviction and sentence of the appellant by the District Court.

In his submission on ground 3 in which the appellant attacks the finding of the trial Court in so far as the credibility of PW.1 PW.2 and PW.4, Mr. Ahmad Seif learned State Attorney stated that the duty of assessing the credibility of the witnesses is the domain of the trial Court that had the advantage of seeing them and assessing their demeonour. He therefore submitted that the appellate Court can not interfere with the assessment of the credibility of the trial Court. In support of his submission he referred the Court to the decision of the Court of Appeal in Rashid Kaniki V.R. Criminal Appeal No. 116/1993 (At Arusha – Unreported). He concluded his submission on this ground by stating that the trial District Court based on the record was right in its assessment of the credibility of the witnesses and therefore arrived at a correct finding and that the High Court can not interfere with that discretion.

Submitting on grounds 4 and 5 of the petition in which the appellant disputes the issue of his identification, Mr. Ahmed Seif learned State Attorney stated that the evidence of PW.1 is very clear that she identified the appellant who was in a close range in the

room in which the appellant had a torch and his co accused also had torch which was directed inside and therefore easy to identify him as the light illuminated inside the room which enabled her identify him. He stated further that the issue of mistaken identity could not arise as PW.1 stated in her evidence that she knew the appellant before the incidence. Therefore although it was in the night she managed to identify him. Mr. Ahmed Seif submitted that all the conditions set out by the Court of Appeal in the Case of Waziri Amani V.R. (1980) TLR 252 were met having regard to the evidence on record. He therefore requested the Court not to interfere with the finding of the trial Court on the issue of identification of the appellant as the evidence is watertight.

In ground number 6 the appellant faulted the trial magistrate finding based on the evidence of the prosecution which required corroboration especially that of PW.1 being single witness and the fact that the circumstances were unfavourable for identification. He referred in his petition on this ground the case of Africa Mwambogo versus R. (1984) TLR 240 in which the matter of corroboration in unfavourable condition was emphasized. The learned State Attorney in his submission stated that the evidence of PW.1 was sufficiently corroborated by PW.2, PW.3 who was the secretary of sungusungu and PW.4 who was the Chairman of Igwambeshi Village. He further submitted that indeed the appellant confessed before PW.3 and PW.4 to have committed the offence of robbery and went to the extent of showing them where the local gun was hidden. He referred the

Court to the case of Peter Mfalamagoha V.R., Criminal Appeal No. 11/1979 Dar es Salaam Registry (unreported) in which the Court of Appeal was satisfied that "the confession of the appellant relating to discovery of the dead body and knife was correctly and properly admitted in evidence by the trial Court." Mr. Ahmed Seif therefore simply distinguished the case of Mwambogo (supra) referred by the appellant in that it could not apply in the circumstances of the case against the appellant as corroboration was sufficient. He therefore submitted that the ground is baseless and should be rejected.

Finally in ground number 7 in which the appellant insisted of the need for the prosecution to have arranged identification parade, Mr. Ahmed Seif learned State Attorney submitted that it was not important for holding identification parade since the appellant who was well known to PW.1 was properly identified at the scene of the crime. He insisted that the circumstances of the case in which the appellant was known before by PW.1 there was no need of conducting identification parade. In support of his submission, he referred the Court to the case of Hassan Kanyenyera and others V.R. (1992) T.L.R. 100 in which the Court insisted on the position and came to a finding that in the circumstances of that case identification parade was superfolous. He therefore urged the Court to reject this ground and sustain the conviction and sentence. It is noted that the complaint in ground 8 that the magistrate erred in believing the evidence of PW.1 that she knew the appellant before and that he was identified by a torch light is more less covered by ground seven

above. In ground number 9 the appellant complains that it was wrong to convict him in such serious offence while no any stolen goods were cought from the appellant. Unfortunately, the learned State Attorney did not address himself on this matter, but the record and judgment is clear that nothing alleged to have been stolen on that particular day were recovered in the hands of the accused.

In response to the submission by the learned State Attorney the appellant objected to the fact that he was known before by PW.1 as claimed in the evidence and repeated during the hearing of the appeal. He stated that if PW.1 knew him before why did it take long time before he was arrested on 21/11/2006 at his home while the crime is alleged to have been committed on 17/11/2006. He stated that if he was really known to PW.1 he could have been arrested earlier than that as the witnesses stated that they reported the matter of his involvement on the same day of the incidence. The appellant further wondered the assertion in the evidence of PW.1 and PW.2 that they were invaded by him on that particular day. He wondered how could one person invade two houses at the same time and both PW.1 and PW.2 identify him. He also refuted the fact that he took PW.1 to the house of PW.2 on that particular day of the invasion.

The appellant finally submitted that he was not arrested with the gun as he just found it in court during the hearing of the case and that he questioned about it but there were no enough

explanation. The appellant therefore prayed that as the prosecution failed to prove its case beyond reasonable doubt, the appeal be allowed, conviction quashed and sentence set aside.

From the foregoing there is no dispute that the borne of contention by the appellant in this case is that the prosecution did not prove its case beyond reasonable doubts in so far as the issue of credibility of witnesses, corroboration of the evidence adduced at the trial and his identification. Both sides have ably submitted on each issue raised above.

On my part, I am in agreement with the learned State Attorney Mr. Ahmed Seif that the matter of credibility of witnesses is the domain of the trial court and the appellate court can not interfere as demonstrated in the decision he referred to me and many others decided by the Court of Appeal. However with due respect I am of the view that that notwithstanding, it is also accepted that the appellate court like the High Court can upon being convinced that the trial court in evaluating the evidence adduced at the trial arrived or came to a wrong conclusion, can embark on evaluation of evidence and come to its own conclusion. That can be done especially if there is apparent contradiction in the evidence and that the trial Court did not address itself to some very crucial issues raised in the trial which could lead to the just decision of the case. For this stand see the decision of the Court of Appeal in Kulwa Kabizi, Paulo Sindano Balele and Sulemani Mlela V. Republic (1994) TLR 210.

I am therefore of the respectful opinion that this is a particular such case in which on appellate court can go upon evaluating the evidence tendered in court and arrive at its conclusion as I will show hereunder.

In his judgment, the learned Resident Magistrate who presided over the District Court outlined four issues for his decision as follows;

a) Whether the accused were known by the victim before the event.
b) Whether the accused were properly identified by the victim.
c) Whether the 3rd accused was implicate by the 1st accused, and;
d) Whether the accused invaded the victim at material date and time.

It is noted that upon evaluation of the evidence by the prosecution and defence, the learned resident magistrate found that the third accused, Hamis s/o Mashim not to have been involved in any way in the commission of the offence and acquitted him accordingly. The learned resident magistrate convicted the appellant (1st accused) after being satisfied that all issues raised were answered in the affirmative.

It is my considered opinion that the evidence by the prosecution taken together had some gaps and contradictions which

had to be resolved before coming to the conclusion which the learned resident magistrate arrived at.

Firstly, on the issue of whether the appellant was know to the victims before, PW.1 stated that she knew the appellant when she used to stay at Isanzu. Unfortunately PW.1 did not state clearly at what time she lived at Isanzu and how long she knew the appellant and to what extent. Her testimony in court was as follows: "I came to know him at Isanzu when I was staying there at membe" (page 6 of the record of proceedings). That was during examination in chief. When she was cross-examined by the appellant (1st accused) she stated " I knew you before the event". The testimony of PW.2 Clement Bahati, the son of PW.1 during examination in Chief concerning the issue of knowing the appellant was as follows: "I know the 1st accused he resides at Ipumbuli..I knew them before event." On cross examination by the 1st accused (appellant) PW.2 stated; "I know you even before the event. Your village is not for from my village. You reside at Ipumbuli; you were arrested by Mduta, Magembe Ng'ondelie."

The two prosecution witnesses (PW.1 and PW.2) who are mother and son described their knowledge of the appellant in different ways. It must be remembered that the same prosecution witnesses testified firmly both in examination in chief and cross examination that they knew both the 1st accused (appellant) and 3rd accused. The learned Magistrate however found that the third

accused was not known to PW.1 and PW.2 since he was satisfied that the third accused lived at Nyasa Nzega while the witnesses had alleged that he lived at Isanzu. PW.3 also stated that the 3rd accused lived at Isanzu.

The learned Resident Magistrate in his decision on this issue stated that;

> ***"If PW.1, PW.2 and PW.3 knew that DW.2 was a resident of Isanzu then the republic would have called his ten cell leader to prove the same. In absence of that evidence then it can not be said that DW.2 was a resident of Isanzu."***

It is my respectful opinion that since there was different explanation of how PW.1 and PW.2 (who are mother and son) knew the appellant before, the same argument could have been used to elicit more evidence to see whether PW.1 and PW2 knew the appellant before. The matter of PW.1 and PW.2 knowing the appellant or not will come clear in the issue of identification.

On the issue of identification, PW.1 testified that she identified the appellant and the third accused (DW.2) at the scene of the crime that night and that he informed the people including (PW.3 and PW.4) who came after the alarm had been raised that he identified the appellant and the third accused (DW.2). The same testimony was stated with PW.2. PW.1 evidence on this matter was as follows;

"I told the gathered people that I had been invaded by bandits and only two bandits I had identified. So I told the commander of sungusungu called Zaire Shija, V.E.O Samwel Mbale, and Kalele Mshola Chairman of the Village. So they started to look the two accused..."

And PW.2 testimony on this matter was; "We made alarm the neighbour came. I told the leader of sungusungu and the Chairman of the Village that we had been invaded by the accuseds."

On the other hand the evidence of PW.3 in examination in chief on this matter was recorded thus;

"PW.1 said that he (sic) identified two accused the 1st accused and the 3rd accused. So I sent sungusungu to go for looking them."

When he was cross examined by the 1st accused (appellant) PW.3 stated;

"PW.*1 said that he identified you. We were five of us when PW.1 told us. He told us at the camera because we suspected you could run away. You were arrested next day. Two people arrested you.*

It was after 4 days when you were brought at the scene.....the second accused tried to run so was beaten."

When the same PW.3 was cross examined by the 3rd accused he stated;

"PW.1 said that he (sic) identified you. I looked you at Isanzu in vain but your co accused said that you were at town in your saloon. The 1st accused was arrested on 21/11/2006 and he named you on 22/11/2006 that you were in town."

This is not the end of the matter on this issue. The evidence of PW.4 is as follows;

" I know the accuseds on dock since the fateful date that 17/11/2006 I heard alarm at 2.00 hours so I went there only to find the door broken I saw Pw.1 who told me that he (sic) had been invaded but she never identified them.....so we made follow up in vain and came back to scene of crime. PW.1 told us in camera that he identified 1st accused, and 3rd accused; she said that they were residing at Ipumbuii and Isanzu respectively. We sent militia to arrest them.

They were Juma and Kaseja militias they arrested the 1st accused he was interrogated at my office he was identified by PW.1."

From the foregoing pieces of evidence adduced by PW.1 PW.2 PW.3 and PW.4 it is clear to me that there some contradiction as to whether the appellant and other accused were named to have been identified on that particular day. The evidence of PW.3 and PW.4 do not show that the appellant was named by PW.1 and PW.2 on the same day. It can be inferred from the testimony of both Pw.3 and PW.4 that PW.1 told them later in camera about having identified the appellant. It seems the appellant was arrested first and then PW.1 informed PW.3 and PW.4. This is so because it is not clear why PW.4 should have said when cross examined that PW.1 told them in camera because they were afraid that the appellant could run away if he was not there when PW.1 told them. This statement could not have been said if PW.1 really told PW.4 and others immediately after the commission of the crime as by that time bandits had left and only neighbours and others were there. Moreover if the appellant was identified the same night and his village was well known to be near to the victims village as testified by PW.1 and PW.2 how did it take almost four day (17/11/2006 – 21/11/2006) for the appellant to be arrested at his home in Ipumbuli? Unfortunately some of the prosecution witnesses who were named by PW.1 PW.2 and PW.4 to have been present during the incidence and after the incidence did not testify to give more light on the matter. These are Veronica

Jembe, the wife of PW.2 whom they were together in the house when bandits invaded and tied them on the bed. She was among the list of witnesses but she never testified. Others are militiamen who arrested the 1st accused (appellant) and went to trace the gun and the V.E.O. Unfortunately too it is not on record when the 2nd accused (deceased) was arrested. The evidence of the appellant in his defence indicates to have seen the 2nd accused (deceased) when he was brought before the sungusungu commander when he was interrogated. His evidence is as follows! (DW.1);

> ***"...I refuted so they brought me to Ishiki before many people who were the sungusungu. I saw the 2nd accused who died he was beaten up. I was interrogated but I refuted the offence."***

Indeed, the evidence of all prosecution witness is not clear on the distance between the house of PW.1 and PW.2 who both claimed to have identified the appellant at the same time.

In view of the above demonstrated contradiction and doubts, it can not, in my view, be said that PW.1 and PW2 knew the appellant before and they did identify him at the scene of the crime bearing in mind that it was night time and that it was torch light which helped them to identify the appellant.

The circumstances surrounding the matter do not in view suggest that the accused persons including the appellant knew each other although it is on record that it is the appellant who implicated the 2nd and 3rd accused person. The learned Resident Magistrate however came to a finding that the appellant did not implicate the 3rd accused because he denied to do so in his defence. But going by the record it is clear that the appellant might have named others because of torture he had sustained. The learned Resident Magistrate was right to reject the statement which were tendered in court allegedly to have been made by the appellant and the deceased.

That being the case it could not have been possible for the learned Resident Magistrate to have come to a finding that the appellant had acknowledged before PW.3 and PW4 to have participated in the commission of the offence while he must have been under threat by sungusungu. Indeed the learned Resident Magistrate came to a finding that sungusungu tortured the 2nd accused to the extent of causing death. It is on record that when the 2nd accused was tortured the appellant was present. It would be therefore surprising not to expect the appellant to be tortured by the same sungusungu as he was the one who allegedly implicated in the offence the 2nd and 3rd accused. The appellant himself testified in his defence to have been tortured by sungusungu and it was from sungusungu that he was taken to the police where he failed to write

the statement as the had sustained some injuries which necessitated to be given PF.3 which confirmed the complaint.

Indeed at page 8 of the record the learned Resident Magistrate is recorded to have observed thus:

> ***"So the court does not know why the 2nd accused was severely wounded in his leg in the presence of DW.1 who also has castigated the member of sungusungu who assaulted him. In my view, that situation rendered DW.1 to name anyone as his co-accused to serve the torture inflicted on the deceased. PW.4 being village Chairman never reported to the police post that the second accused (deceased) was beaten up by the members of sungusungu who found him guilty before this court prove otherwise."***

It is therefore not expected, after the learned Resident Magistrate had come to that finding to go on believing the evidence of the prosecution while at some time he had earlier on rejected the statement in which appellant and the 2nd accused (deceased) were alleged to have confessed to commit the offence.

In view of the circumstances which surrounded the case it would not be safe, in my view, to come to the conclusion that the

appellant was properly identified at the scene of the crime and therefore he participated in the commission of the offence.

As to the issue whether the appellant invaded the victims on 17/11/2006 in view of what I have demonstrated above the answer in not in the affirmative.

This also brings me to the issue whether the gun was used during the invasion. I must state that the evidence on this matter varies. Indeed it is noted that in the charge sheet, it was not indicated categorically that the bandits had gun. The charge sheet is very clear on this: "...***immediately after such stealing did use a bush knife and club to him in order to retain the said property.***" The evidence by PW.1 is to the affect that the appellant had gun. She testified further an cross examination that " ***many people went to the 2nd accused to look for gun you were in the office sitting.***" When re-examined by the public prosecutor she stated ***"The 1st accused said that the gun was with 2nd accused."***

PW.2 in his evidence did not show that when the accused invaded him he had a gun. What he stated is as follows;

"The 1st accused said that they used gobore/gun and bush knife in the banditry activities. The 1st accused said that the gun was at the 2nd accused's house. The second

accused said that the gun was at his house" similarly PW.1 in her testimony earlier stated that; ***" 1st accused told the V.E.O that they use the gun to threaten the victims and was at the house of 2nd accused."*** Later on she stated that's ***"The gun was traced at the 2nd accused house"*** PW.3 also in his testimony stated that during interrogation the 1st accused (appellant) said that they used the gun, bush knife and club to sustain stealing and that it was the appellant who lead them to trace the said gun near the 2nd accused house. PW.4 in his testimony in this matter stated;

"The 1st accused led us to where they hide the gun. They were together with the 2nd accused they shown us the bush where gun was kept." He insisted the same in cross examination.

Thereafter he tendered the gun in court and was admitted as exhibit P.1.

As can be seen from the evidence among the prosecution witnesses there contradictions. Apart from the fact that it was not mentioned in the charge sheet, while PW.1 was categorical that the appellant remained in the office while many others went to trace the gun at the 2nd accused who also went, PW.4 is recorded to have testified that they went together with the appellant. Indeed while PW.1 and PW.2 stated that the gun was at the 2nd accused house, PW.3 and PW.4 stated that the gun was traced in the bush rear the 2nd accused house. Unfortunately although it is on record that two

militiamen went to trace the gun as I explained earlier, they were not called as witnesses to clear the doubt surrounding the discovery of the gun. Indeed in view of the circumstances it is not clear whether the gun belonged to the appellant or 2nd accused (deceased). It is observed that these doubts had to be resolved by court before coming to the conclusion it arrived at.

I must observe that the importance of proving the offence as alleged in the charge sheet hardly need to be overemphasized. It is clear in my view that the prosecution, with such doubt, that I have demonstrated, left unresolved, failed to prove the case beyond reasonable doubt against the appellant.

Finally, I am of the respectful opinion that this appeal must succeed. Accordingly appeal is allowed, conviction quashed and sentence set aside. The appellant is to be released from custody forthwith unless otherwise lawfully held. It is so ordered.

F.L.K. WAMBALI

JUDGE

4/11/2009

Judgment delivered in the presence of the appellant in person and in the presence of Mr. Ahmed Seif State Attorney for the Respondent.

F.L.K. WAMBALI

JUDGE

4/11/2009

Right of Appeal explained.

F.L.K. WAMBALI

JUDGE

4/11/2009