

IN THE HIGH COURT OF TANANIA
AT DODOMA

(DC) CRIMINAL APPEAL NO. 88 OF 2007
ORIGINAL CRIMINAL CASE NO. 22 OF 2006
MPWAPWA DISTRICT COURT AT MPWAPWA

MICHAEL S/O NGADADA APPELLANT

Versus

THE REPUBLIC RESPONDENT

17/08/2009 & 25/09/2009

JUDGEMENT

HON. MADAM, SHANGALI, J.

Appellant going by the name of Michael s/o Ngadada was charged with one **HENRY S/O SUMISUMI**, with the offence of Robbery with Violence contrary to section 285 and 286 of the penal Code, Cap. 16.

During the trial **HENRY S/O SUMISUMI** who was the first accused decided to jump bail. The trial District Court opted to proceed with the case against him under the provisions of section 226 of the Criminal Procedure Act, 1985. At the end of the trial, both the accused persons were found guilty, convicted and sentenced to

serve thirty (30) years term of imprisonment. The sentence against **HENRY SUMISUMI** who was sentenced in absentia was ordered to commence on the date of his arrest. He is therefore not part of this appeal.

The facts giving rise to this matter are that on 4th February, 2006 at about 18.00 hours in the evening, PW1, George Magawa was on his way home Kwamshangaa village after selling his three head of cattle at Iloilo cattle market. He was in possession of TShs.600,000/= being the proceeds from the cattle sale. That, when he reached 200 paces from the cattle market place he met the appellant, who picked three stones and threw them at him. PW1 was injured on his forehead and fell down. The first accused appeared and both the appellant and first accused held him down and robbed him. PW1 managed to shout for help and several people from the market place including PW2 and PW3 responded for assistance. The two bandits managed to run away to the bush. That, while on the run the bandits dropped TShs.150,000/= at a short distance from the scene of crime which was part of his stolen money. According to PW1, he was able to identify the bandits and mention their names as first accused and the appellant who were present at the market place on the same day.

PW2, Richard Tangazo testified to the effect that on the material day he was at the Iloilo market. Suddenly he heard an alarm

being raised and quickly responded. That, when he reached at the scene he found PW1 lying on the ground crying for help and bleeding. At the sametime he saw two youths running away to the bush, whom he was able to identify as first accused Henry and the appellant Michael. PW2 claimed that he was the one who found and pick TShs.150,000/- which were dropped by the bandits.

PW3, John Bada, gave almost the same testimony as PW2. He claimed that he was at the same market place where he saw the first accused and appellant before the incidence. He claimed that when he heard the shouts he quickly responded to the scene where he found PW1 already assaulted. He testified that while on his way to the scene he met both accused running away from the scene of crime and that the second accused (appellant) was holding a stone. PW3 further stated that he witnessed TShs.150,000/= which were dropped by the bandits and that in the assistance of several people they managed to take PW1 to the village chairman together with recovered cash.

In his sworn defence the appellant stated that he is familiar with PW1 and that on the material date he was at the Iloilo cattle market where he went to sell his two goats. That about 5.00 p.m. he was approached by PW1 who was bleeding on his face and one Mabula who questioned him on whether he had seen two youths running away after assaulting PW1. He, the appellant denied to have

seen any youth. Then, the appellant joined PW1 and Mabula to the scene of crime where the later was able to pick TShs.150,000/= together with a pair of sandals. The appellant states that from there they escorted PW1 to his home. The appellant complained that he was shocked on the following morning when he heard rumours that he was a suspect in that incident. He decided to report at the village chairman who confirmed the rumours. The appellant claimed that he categorically denied to have been involved and was allowed to go home. On the third day the appellant was arrested by the militiamen and charged with the current offence.

In his memorandum of appeal to this court the appellant raised three main grounds of appeal. One, that the issue of visual identification was not properly addressed by the trial District Magistrate because there was no conducive atmosphere for proper identification; two, that the trial District magistrate failed to consider the defence evidence in terms of section 312 of the Criminal procedure Act, and three, there was no sufficient prosecution evidence to ground a conviction against him.

Mr. Wambali, learned State Attorney who appeared for the respondent/Republic challenged the appeal on one ground, that it was filed out of time. He stated that according to the court record the notice of appeal was filed on 10th April, 2007 while the judgement was delivered on 20th March, 2007.

The appellant responded to the effect that on 20th March, 2007 when he was pronounced a convict and placed under prison authority he intimated to his captors on his intention to appeal. That, on 21st March, 2007 he signed his notice of intention to appeal. He stated that he signed his notice on time and that if his notice of appeal was not filed in court in time by the prison authority, he should not be blamed. He prayed his appeal to be determined on merits.

I agree with the appellant. He signed his notice of appeal on 21st March, 2007 and in time while under captivity, and it was the duty of his captors to file it before the court in time. The appellant cannot be blamed or hold responsible for the negligence committed by his captors, the prison authority.

I am aware that, that would have been a good and sufficient reason for his application for extension of time to file his notice of appeal out of time. However, the circumstances of this appeal and indeed the position of the learned State Attorney on the filed grounds of appeal convinces me to exercise my revision powers, extend the time for filing the notice of appeal suo moto to the time when the relevant notice of appeal was filed and decide the appeal on merit. Let us see the position of the Learned State Attorney on the grounds of appeal.

In his ample submission, Mr. Wambali, Learned State Attorney declined to support the decision of the trial District magistrate. In other words he supported the complaints raised by the appellant in his memorandum of appeal.

On the issue of visual identification, the learned State Attorney submitted that the evidence on the record of proceedings indicate that the offence was committed at 18.00 hours in the evening and PW1 failed to disclose any detailed description on how he identified the appellant to be exact person he had been familiar with. He submitted that, the time of incident was further confused by the trial District magistrate who found that the offence was committed in the broad day light. Mr. Wambali argued that even PW2 and PW3 contradicted themselves on the issue of distance and manner of identification. He stated that it is not clear how they were able to identify the bandits who were running to the opposite direction towards the bush while they (PW2 and PW3) were emerging from the market place towards the scene of crime. The learned State Attorney stated that the evidence of PW1, PW2 and PW3 raises more question than answers.

On the second ground of appeal, Mr. Wambali conceded that the trial District Magistrate failed to consider the appellants defence and rejected it wholly without giving reasons. He further argued that if the appellant was really identified as claimed by prosecution

witnesses, why was he arrested after three days. The delay to arrest the appellant who was at the village required reasonable explanation.

Submitting on the third ground of appeal, Mr. Wambali conceded that there was no sufficient prosecution evidence to prove the case against the appellant beyond all reasonable doubts.

On my side, I have no reason whatsoever to differ with the Learned State Attorney and the appellant. One can not say with impunity that at 18.00 hours in the evening is "*broad-day light*" conducive for proper visual identification without further detailed descriptions. There must have been evidence to show whether there was enough light for proper identification. It appears that PW2 and PW3 were summoned merely to embellish PW1's story. They were not credible witnesses. These witnesses pretended to have met and identify the bandits who were running from the scene towards the bush while they (witnesses) were rushing to the scene from the market-place. Obvious, the bush is not in the market place and there was no reason for the appellant to run with stones in his hand after robbing PW1. Then PW1 claimed that he was robbed at a distance of 200 paces from the market place while PW2 claimed that it was 15 paces.

Despite of the identification hurdles and contradictions, the whole prosecution case is silent on how the appellant was arrested.

It is only the appellant who testified before the trial court how he was arrested by militiamen at his house. In such circumstances the version of the appellant should have been critically analysed and considered. Furthermore, the alleged PF3 issued to PW1 was not produced in court nor TShs.150,000/= claimed to have been found at the scene of crime.

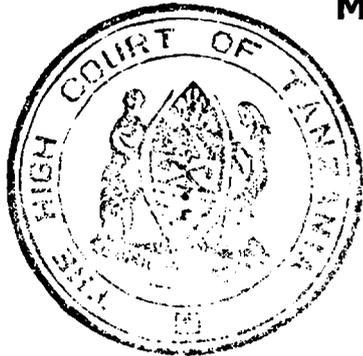
In general the prosecution case was erected on weak and unreliable evidence of PW1, PW2 and PW3. I commend the judicious position of the Learned State Attorney for refusing to support the decision of the trial District Magistrate.

This appeal is therefore allowed, conviction quashed and sentence of thirty (30) years imprisonment imposed against the appellant **MICHAEL S/O NGADADA** set aside.

The appellant is to be released from prison forthwith unless lawfully held on another matter.


M.S. SHANGALI
JUDGE
25/09/2009

Judgement delivered todate 25/09/22009 in the presence of Mr. Wambali, learned State Attorney representing the respondent/Republic and the appellant in person.




M.S. SHANGALI

JUDGE

25/09/2009