

**IN THE HIGH COURT OF TANZANIA**

**AT TANGA**

**PC. CRIMINAL APPEAL NO.2 OF 2010**

*[Originating from Korogwe D/C CR.APP.21/2009*

*ORG. CR.C.36/2009 Mombo Pr.Court]*

**KIWALO NYARI.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**Date of last order: 4/10/2010**

**Date of Judgment: 12/11/2010**

**JUDGMENT**

**Teemba, J;**

This is a second appeal originating from Mombo Primary Court In Criminal Case No.36 of 2009. The appellant Kiwalo s/o Nyari was charged with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code, Cap.16 R.E. 2002. It was alleged that on 14<sup>th</sup> February 2009 at 02.00hrs at Mkumbara Magira Mombo ni Korogwe District and Tanga region, the appellant committed the offence of stealing shs.450,000/= from Omari s/o Adam. It was further alleged that immediately before such stealing, the appellant attacked the complainant using a club, fist and by kicking him in order to obtain the stolen money. The appellant was convicted by the Primary Court and sentenced to 15 years imprisonment. The appellant was aggrieved by both conviction and sentence. He appealed unsuccessfully to the District Court of Korogwe, hence this second appeal to this court.

The appellant appeared in person whereas the respondent Republic was represented by Mr. Marandu, learned State Attorney. The appellant preferred five grounds of appeal which were consolidated by the Respondent into only two main grounds of appeal. The first, third and fifth grounds are on identification whereas grounds two and four are on the availability of evidence to ground conviction.

During the hearing of this appeal, the appellant adopted his grounds of appeal and had nothing more. Mr. Marandu, learned State Attorney supported the appeal on two main reasons.

First he submitted that the evidence on visual identification was very weak.

Second, the evidence adduced in court was weak to support the offence. Before I consider the grounds of appeal, let me explore the facts/evidence on record.

The complainant, Omari s/o Adam PW.1, testified that it was at 2.00am, when the door was broken and three people including the appellant entered into the room where he was sleeping in. They attacked him but he managed to escape but they chased and got him before he could go far. That the appellant and his companion beat him up. He also testified that the appellant took away shs.450,000/= from his trousers pocket and then they went on to kick him. That, PW.1 fell unconscious and he found himself in a hospital where he was admitted for one and a

half weeks. PW.2, Agnes d/o Wilson testified that the bandits assaulted PW.1 and then took him to the Village Executive officer alleging that PW.1 was a thief. It was also her testimony that PW.1 told her that the appellant had stolen shs.450,000/= from him. PW.2 told the trial court that she identified the appellant by the aid of the moonlight. She added that she raised alarm and after the incident, she went to report the matter to the Village Executive officer. While she was still narrating the incident to the Village Executive officer, the appellant and his companion took the complainant there. This evidence was corroborated by Agnes w/o Makwaya (PW.3) who was living in the same house where this incident took place. This witness added that she knew the appellant and the other two people in his company as they are all residents of the same area – Mkumbara.

Evelyn Zayumba, PW.4, was the Village Executive officer of Magila Mkumbara. She narrated to the trial court that the appellant went to her home at midnight on the date of the alleged incident. The appellant was asking for a letter to go to police because Hassan, who was in his company, was wounded by Bibi Kaunde. The record reveals further that, the appellant was accompanied by Hassan and the complainant. It appears from record that the complainant was accused of interfering with the love relationship between Agness (PW.2) and Hassan. PW.4 wrote a reference letter and gave it to the appellant who took Hassan to police for

purposes of obtaining a PF.3 for treatment. Likewise, PW.4 referred the complainant to police on the following morning.

In his defence, the appellant denied to have committed any offence. He testified that he was asleep when Hassan went to knock at his door requesting him to escort him to the Village Executive officer. The appellant confirmed that Hassan was wounded and was bleeding. The appellant further testified that they went back to the place of Agnes (PW.2) in order to arrest the complainant and Agnes, who were allegedly assaulted Hassan. That, the complainant was arrested on the same night and they took him to the Village Executive officer. That, Hassan was given a letter to report the incident at police. Again, another person named as Abdallah was asked to take Hassan to police and then to hospital. The appellant returned to his home and he was arrested on the following afternoon.

The trial court was satisfied that the prosecution case was proved beyond doubt. The same was upheld by the learned Resident magistrate on appeal to the District Court.

As hinted above, the Republic supports this appeal. Having gone through the evidence on record and the decisions of the two courts below, I agree with the parties that this appeal has merit. I will start with the second main ground of appeal – that there was no sufficient evidence to support conviction. The evidence reveals that the complainant went to

report the incident to the Village Executive officer (PW.4) on the same night. There is nowhere he mentioned to PW.4 that he was robbed. The question of stolen money was never mentioned to PW.4. In her testimony in court, PW.4 did not say anything in respect of robbery or stolen money. It is doubtful, if at all, the complainant was robbed as alleged in this case. PW.2 was recorded, when narrating to court, that PW.1 told her that the appellant had stolen the money in his trousers' pocket. This is a hearsay and she did not see that action. There is a lot of contradictions in the evidence.

First, PW.1 testified that he was attacked by the bandits and fell unconscious only to recover at hospital where he was admitted. This is contradictory to another piece of evidence that, he was walking when he arrived at the place of PW.4.

Second, it is not normal for someone so serious as alleged by PW.1, to remain in the house of PW.4 for the whole night without being taken to police and/or hospital whereas Hassan was sent to police and/or hospital on the same night.

In respect of identification of the culprit, Mr. Marandu submitted that the elements of proper identification as pointed out in the case of **Waziri Amani V.R. [1980] T.L.R. 250** were not proved. The elements include *"the time the witness had the accused under observation; the*

*distance at which he observed him; the condition in which such observation occurred..."*

These conditions were not proved by evidence as correctly pointed out by the Republic. However, I am of views that, the instant appeal has different facts and the question of proper identification was not at issue.

First, the appellant was a resident in the village and was a neighbour of PW.2 and PW.3.


Second, there is no dispute that the appellant went to the place of PW.2 to arrest the complainant following the report/complaints that PW.1, PW.2 and PW.3 had assaulted Hassan. Although Hassan was not a witness at trial, but PW.4 appears to be a neutral person in this case, and she saw Hassan who was wounded and bleeding when PW.1 was taken to her place.

Another issue in this appeal is the credibility of witnesses who gave evidence in court. Apart from PW.4, the rest were in the same house – scene of the alleged crime. From the evidence given by PW.4, it comes out clearly that Hassan was wounded in the same house but PW.1, PW.2 and PW.3 did not mention this in their testimonies. In the case of **Paulo Tarayi V. Republic**, Criminal Appeal No.216 of 1994 (unreported) the Court of Appeal observed:

*"We wish to say at the outset that it is, of course, not the law that whenever relatives testify on an event they should not be believed unless there is also evidence of a non-relative corroborating their story. While the possibility that relatives may choose to team up and untruthfully promote a version of events must be born in mind, the evidence of each must be considered on merit, as should also the totality of the story told by them. The veracity of their story must be considered and gauged judiciously, just like the evidence of non-relatives. **It may be necessary, in given circumstances for a trial judge or magistrate to indicate his awareness of the possibility of relatives having a common interest to promote and serve,** but that is not to say a conviction based on such evidence can not hold unless there is supporting evidence by a non-relative." (emphasis mine).*

It is on record that PW.1 had a child with PW.2, thus, they were related and had an interest to serve. Again PW.3, the owner of the house, was also alleged to have assaulted Hassan (when he came to interfere with the relations between PW.1 and PW.2). It is my considered view, that all these three witnesses had their interests to serve and could easily team up and untruthfully promoted the allegations against the appellant. Their credibility is therefore questionable.

In the upshot and for reasons, given, I agree with the learned State Attorney that, the appeal has merit. The appeal is therefore allowed. The conviction is quashed and sentence set aside. The appellant should be released from prison forthwith unless otherwise lawfully held.

  
**R.A. TEEMBA, J.**  
**12/11/2010**

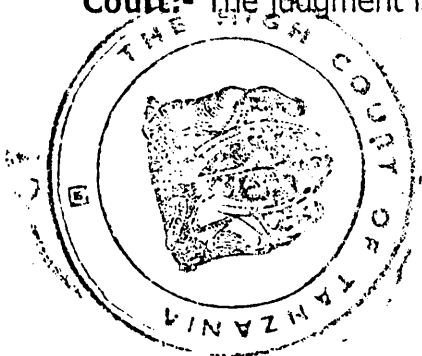
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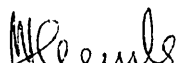
Coram: R.A. Teemba, J;

Appellant – present

Respondent – Miss Mdegela – SA

**Court:** The judgment is delivered in the presence of both parties.



  
**R.A. TEEMBA, J.**  
**12/11/2010**