IN THE HIGH OF TANZANIA

AT DODOMA

DC CRIMINAL APPEAL NO. 5 OF 2010
(ORIGINAL CRIMINAL CASE NO. 99 OF 2005 OF DISTRICT COURT OF DODOMA AT DODOMA BEFORE M.G. MZUNA ESQ, PRM)

1. KASSANA SHABANI
2. RAJABU HUSSEIN } **..... APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

27/10/2010 & 03/12/2010

JUDGEMENT

HON. MADAM, SHANGALI, J.

The first appellant **KASSANA SHABANI**, and the second appellant **RAJABU HUSSEIN** were jointly and together charged with the offence of armed Robbery contrary to sections 285 and 286 of the Penal Code, Cap 20, before the Dodoma District Court. At the end of the trial the appellants were found guilty, convicted and sentenced to thirty years imprisonment and twelve strokes of the cane each.

Being dissatisfied with that decision they have filed this appeal intending to challenge the trial District Court decision. The prosecution evidence leading to the appellants conviction may be briefly stated as follows:

It happened that on 9th March, 2005 at about 11.00 a.m, PW3, Pendo d/o Joseph was outside their house washing utensils. Then two young men said to be the appellants appeared and exchanged greetings with her. The men asked for drinking water. PW3 went inside the house and brought some drinking water for them. The appellants imbibed the water but suddenly changed hostile, strangled her by the neck and threatened her with a domestic knife picked from her own utensils. To be specific, PW3 stated that it was the first appellant who strangled her while the second appellant rushed to the house and picked one Sony Video deck. Then the appellants ran away. PW3 raised alarm and several neighbours responded to the alarm including PW5 Elizabeth Mduma. It is on the evidence of PW3 that on seeing people who responded to the alarm chasing them, the second appellant threw away the video deck and attempted to hide in a nearby Police Station toilet room, where he was arrested by PW1.

PW1, Detective Coplo Kigocha testified to the effect that on the material date he was on his way to Nkuhungu Secondary School. Suddenly he saw, people chasing a person while shouting thief! thief! The person who happened to be the second appellant was holding a bag. Then he threw away the bag which had another bag inside containing video deck. That, to avoid the chase and the mob justice the second appellant entered into a nearby neighbour's toilet. PW1 entered in the said toilet and fished out the second appellant. PW1 took the second appellant to the police station.

PW5, Elizabeth Mduma who was the PW3's neighbour testified how she heard an alarm from the house of PW3 she went to the house of PW3. On reaching there she saw a young man holding a black deck running from the house of PW3. She joined the shouts. Then the said Youngman who is the second appellant decided to throw away the deck. PW5 picked it up.

PW4, PC Saidi was the police officer who interrogated the second appellant after his arrest. PW4 testified to the effect that in his interrogation the second appellant confessed to have committed the offence in collaboration with the first appellant Kassana Shabani who managed to escape. He claimed that while at the police station he (PW4) saw a young

man near the police station looking suspicious. PW4 who was in civilian dress decided to approach and question the youngman. The Youngman responded that he was there waiting for somebody. PW4 decided to arrest him and took him to the police station where the young man was identified by the second appellant as the first appellant Kassana Shabani.

In his sworn defence the first appellant categorically denied to have committed any offence. He stated that on the material date he was going to Nkuhungu area from TANROAD Officers where he was working. Then he stopped after hearing shouts from people. In no time, one man approached him and arrested him. The man introduced himself as a police officer and was PW4 in this case. The man took him to the Police Station where he found PW3 and PW5. The second appellant was already in the lock-up. The first appellant claimed that he was later charged with the second appellant who was unfamiliar to him.

The second appellant also gave a sworn defence in which he totally denied to have committed the offence. He testified to the effect that on the material date and time he was on his way to Nkuhungu area where he was working as masonry. That, while on his way he experienced abdominal pains and went to a nearby Nkuhungu police post toilet to relieve

himself. While inside the toilet PW1 entered (in civilian clothes) and introduced himself as a police officer. The second appellant claimed that PW1 questioned him as to who permitted him to use the police toilet. The second appellant explained to him how he experienced abdominal pain and decided to relieve himself in the toilets. PW1 was not convinced. The second appellant claimed that he was arrested by PW1 and taken to the police station where he found PW3 and PW5. He claimed that at the police station PW3 was holding a video deck and both PW3 and PW5 informed PW1 that he was the very person who stole the video deck from their house. Eventually he was charged along with the first appellant.

In this appeal each appellant filed his petition of appeal containing several complaints aImed to convince this court that their conviction was wrongly reached by the trial District Court.

Their complaints covers the area of lack of proper identification; presence of obvious contradiction and inconsistence in the prosecution evidence, suspicion, discrepancies and implausibilities on the prosecution witnesses testimonies. The appellants prayed that their

appeal be allowed, conviction quashed and sentences set aside.

At the hearing of this appeal the appellants appeared in person and unrepresented. Mr. Kahangwa, Learned Senior State Attorney appeared for the respondent/Republic.

In his submission, Mr. Kahangwa declined to support the conviction against the first appellant on the premise that his grounds of appeal has merits. On the other side Mr. Kahangwa reluctantly supported the conviction against the second appellant. He argued that there was no sufficient and credible evidence to warrant a conviction against the first appellant because the trial court relied on uncorroborated evidence of a co-accused. He further stated that the first appellant was not properly identified because PW3 and PW5 failed to give proper description of the bandits immediately after the incident.

Mr. Kahangwa contended that what was available before the trial court was a dock identification by PW3 and PW5 which was not supported by identification parade. Mr. Kahangwa cited the case of **Mussa Elias and Others Vs. Rep (1993)** (unreported).

On the second appellant, Mr. Kahangwa submitted that although it appears that there is strong prosecution evidence against him, the issue of identification raises a lot of doubts. Mr. Kahangwa argued that there is no evidence to show that PW3 and PW5 managed to identify the bandits at the scene of crime but surprisingly they were able to identify them at the Police Station and in the dock. He contended that even the description on the bandits mode of attire given by PW3 and PW5 in court was contradictory. In the course of his submission Mr. Kahangwa changed his position completely and declined even to support the conviction against the second appellant. He stated that despite of the identification set backs there is a lot of contradictions and inconsistencies in the prosecution evidence. He submitted that PW3 and PW5 testified that they saw the second appellant dropping the video deck when he was being chased by people but PW1, the Police Officer testified that he saw the second appellant dropping a bag which had another bag inside. Mr. Kahangwa also observed that, the owner of the alleged video deck was not called to testify and identify it before the trial court.

I entirely agree with Mr. Kahangwa's position of not supporting the conviction against both the appellants. The whole prosecution evidence available in the trial courts record

of proceedings is unrepearable weak and incapable to warrant any conviction. The issue of identification was not properly attended. PW3 and PW5 testified before the trial court that it

was their first time to see the appellants. However, no description of the bandits were given by PW3 and PW5 to the police or anybody immediately after the incident or prior to their testimonies before the trial court. The two witnesses ought to have given a detailed description of the appellants to the persons to whom they first reported about the robbery before they had a chance of seeing the appellants after they were arrested; the description would have been on appearance, colour, mode of attire, height or any peculiar mark of identity as was stated in the case of **Bushiri Amiri Vs R (1992) TLR 65**. PW3 and PW5's dock identification of the appellants raises more question than answers. The position of the law is that dock identification have evidential value only where there has been an identification parade.

I am also in agreement with the Learned Senior State Attorney that the first appellants conviction was wrongly based on the evidence of co-accused. That evidence should have been treated with caution and, as a matter of prudence, requires corroboration.

The available contradicting pieces of prosecution evidence as pointed out by Mr. Kahangwa and the appellants in their petition of appeal renders the credibility of the prosecution witnesses questionable. In fact the evidence of PW1, PW3, PW4 and PW5 make an interesting reading because of inconsistences and implausibilities. There is no evidence to show that they were in the actual chase against the appellants, yet they pretend to have witnessed the chase against the appellants and how the second appellant dropped the video deck. If the appellants were being chased by a group of people, who were they? At least one person who actually chased the appellants and saw the second appellant dropping the video deck, and entering and hiding in the toilet should have come forward and testify. According to the evidence of PW3 and PW5, the later arrived at the scene in response to the alarm raised by the former at the time when the bandits had already stolen the video deck and took to their heels; but PW5 adduced evidence as if she was together with PW3 and was able to witness how the bandits stole and dropped the deck while on the run. PW5 claimed that she was the one who picked the deck and took it to police station but PW1 stated that it was PW3 who brought the deck at police station. Does this mean PW1, the police officer who claimed to have seen the second appellant dropping the bag

and eventually arrested him in the toilet took him to the police station without the alleged dropped bag?

Furthermore, if there was a group of people chasing the second appellant, what prohibited them from fishing him from the toilet and instead one person went to tip PW1 to save the second appellant from a mob justice.

Even the alleged caution statement Exhibit PII made by the second appellant is not without riddles. Having denounced it or retracted it was the duty of the prosecution to prove that it was voluntarily made by the second appellant. The onus of proving the voluntary nature of such a confession is placed by the law on the prosecution. No proper inquiry was made by the trial court to establish its voluntariness. In addition the alleged caution statement contradicts with the prosecution evidence in several aspects.

Again, the way the first appellant was arrested outside police station by PW4 raises eyebrows. Even if the circumstances under which the first appellant was found raised some suspicion, the stance of law is that suspicion alone, however strong it may be, cannot be the basis to found a conviction. There must be cogent evidence to book the appellant.

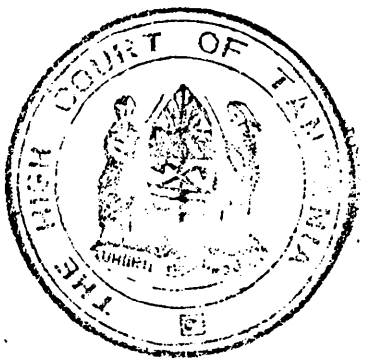
In my considered opinion, the prosecution evidence in this case was exaggerated and embroided in the detriment of the appellants. This situation was also graduated by the fact that nothing seriously was considered in the trial court's judgement in regard to their defence evidence apart from narrating what they said. Their defence was not analyzed, assessed nor evaluated vis-a-vis the prosecution evidence.

In his long defence the second appellant managed to challenge the prosecution evidence by showing the weaknesses in the mode of identification employed and how he was wrongly identified. The second appellant also revealed the contradictions and incosistences apparent in the prosecution witnesses testimonies, including his total denial of the alleged caution statement. He wondered that if he did confess as alleged, what prohibited PW2 from taking him before the justice of peace. It is unfortunate that all complaints raised by the appellants in their defences were not considered and thus silently dismissed by the trial court.

In the event, and for the reasons stated above, the case against the appellants was not proved beyond all reasonable

doubts. The appeal is therefore allowed, conviction against them is hereby quashed and sentences set aside.

I order for their immediate release from custody unless held on another different and lawful reason.



M.S. SHANGALI

JUDGE

3/12/2010

Judgement delivered todate 3rd December, 2010 in the presence of Ms. Shio, Learned State Attorney for the respondent/Republic and the presence of the appellants in person.

M.S. SHANGALI

JUDGE

3/12/2010