

IN THE HIGH COURT OF TANZANIA  
AT IRINGA

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APPELLATE JURISDICTION  
(Iringa Registry)

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(DC) CRIMINAL APPEAL NO. 7 OF 2010  
(Originating from Criminal Case No. 10 of 2007  
of the District Court of Iringa District  
at Iringa  
Before: S. Kulita R.M.)

1. CHRISTOPHER KABWA } ..... APPELLANTS  
2. IDD KIYEYEU }

VERSUS

THE REPUBLIC ..... RESPONDENT

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**JUDGMENT**

UZIA, J.

The appellants, Christopher Kabwa and Idd Kiyeyeu were charged with the offence of armed robbery in the District Court of Iringa at Iringa where they were found guilty, convicted and sentenced to thirty years imprisonment. Dissatisfied they have preferred this appeal to this court against both conviction and sentence.

It was alleged during trial that, on 1<sup>st</sup> August, 2007 about 19.00 hours at Lutheran Street within Mufindi District in Iringa Region the appellants stole TShs.80,000/=, two mobile phone make N93, Nokia valued at TShs.200,000/= and several other documents, all those items were in PW.1 custody. Immediately before and after that robbery incident the appellants threatened Joyce Makoga (PW.1) by using a Chinese Pistol.

PW.1 alleged that in the fateful night when entering in her compound, bandits attacked her and before alighting from that vehicle, they pointed at her with a pistol and demanded from her to give them the items which were in the vehicle. They managed to rob from her a pouch which contained the following items:

- (1) TShs.80,000/=;
- (2) Two Nokia mobile phones;
- (3) Four passport size photos,
- (4) CRDB Bank card;
- (5) Treatment card for Agakhan Hospital;
- (6) Driving license;
- (7) Voters card and
- (8) Two documents for MUCOBA Bank.

In the course of robbing her, she identified the appellants'

clothes and because the masks which they put on fell down during that incident and light from the electricity bulb helped her to identify them.

Ramadhan Madege testified for the prosecution during trial, that he heard a fracas happening at the sitting room and when he was moving from one of the rooms of the house going to the sitting room he saw her sister (PW.1) kneeling down after being ordered by the bandits. They ordered her to give them money at the point of the gun. He managed to identify the appellant by a help of electricity lamp which lit the house. He further informed the court that, at the beginning, the bandits wore masks, but after sometime masks fell off their faces. The bandits went away leaving her behind.

No. E 7400 Detective Corporal Adam, recalled to have been instructed by his boss to go to the appellants' house. After a short while the In-Charge of the District Police, arrived at that house and the search began.

PW.3 witnessed the search. At the beginning they saw a

certain item resembling a hammer, further to that, a Chinese made pistol was recovered, a pouch which was stolen was found in the toilet. When the pouch was opened, they found a driving license, Bank Cards, Photographs (Passport size) identity cards and several other documents. All those were the items of PW.1.

According to PW.3, one policeman climbed with the 2<sup>nd</sup> accused where they found a pistol and the pouch was found in the toilet. A police identification parade was conducted and the appellants were identified.

In his defence, Christopher Kabwa (DW.1) denied to have robbed PW.1, that was arrested while doing daily duties at Innocent Njau's timber selling point. He was there buying timber for his daily business. Policemen arrested him and sent him to the 2<sup>nd</sup> accused residence where the 2<sup>nd</sup> accused was also arrested. PW.3 entered into the house together with the 2<sup>nd</sup> accused and PW.5. According to DW.1, nobody climbed to the roof of the house. He further alleged that two identification parades were conducted on the 8<sup>th</sup> August, 2007 and 9<sup>th</sup> August, 2007. He was also shown a pistol which he saw it for the first

time. He denied to have been found with the alleged stolen items.

Likewise DW.2 denied to have robbed PW.1. He was just arrested at his residence situated at Changarawe. He was charged with armed robbery, the offence which he did not commit. That the alleged victim (PW.1) narrated before the court that, only two mobile phones were robbed from her but in her testimony in court she alleged that some other things including her pouch were stolen. At the police station, PW.1 stated that she did not identify DW.2 but during trial she testified to have identified him.

On the strength of the prosecutions evidence and that of the defence side, the court convicted the appellants.

Mr. Mkwata, learned counsel for the first appellant raised the following grounds:-

1. (a) The trial magistrate erred in law when he convicted the appellant with the offence charged on the basis of

time. He denied to have been found with the alleged stolen items.

Likewise DW.2 denied to have robbed PW.1. He was just arrested at his residence situated at Changarawe. He was charged with armed robbery, the offence which he did not commit. That the alleged victim (PW.1) narrated before the court that, only two mobile phones were robbed from her but in her testimony in court she alleged that some other things including her pouch were stolen. At the police station, PW.1 stated that she did not identify DW.2 but during trial she testified to have identified him.

On the strength of the prosecutions evidence and that of the defence side, the court convicted the appellants.

Mr. Mkwata, learned counsel for the first appellant raised the following grounds:-

1. (a) The trial magistrate erred in law when he convicted the appellant with the offence charged on the basis of

the evidence of identification given by PW.1 and PW.2 which however was highly incredible.

- (b) The trial magistrate erred in law when he failed to hold that the identification parade was improperly conducted and therefore that it had no evidential value.
2. The trial magistrate's finding of guilty against the appellant was based on the trial magistrate's speculations.
  3. The trial magistrate erred in law when he failed to evaluate the evidence and resolve the contradictions found in the prosecution evidence in favour of the appellant.
  4. The trial magistrate erred in law when he on 12<sup>th</sup> February, 2009 denied the appellant his right of legal representation and an opportunity to cross-examine PW.5.

The second appellant filed to this court several grounds of appeal by summarising them the following ground emerge:

1. That the learned trial magistrate erred in law in convicting the 2<sup>nd</sup> appellant in the absence of watertight evidence against him.

Arguing for the 1<sup>st</sup> appellant, Mr. Mkwata orally submitted that PW.1's and PW.2's statements were recorded by the policeman one day after the incident. In both statements tendered as Exhibit D.2 and D.3, they denied to have identified the alleged bandits. It was surprising to see that PW.1 and PW.2 testifying in court that they identified the accused appellants. That was a contradiction going to the root of the case. He invited the Court to see the decision of **Kibwana Salehe V. R.** (1968) HCD 391. In addition to that, the identification parade was improperly conducted. In order to strengthen his argument he also cited the case of **Moses Charles Deo V. R.** (1987) TLR 134. Apart from that the rules found in the Police General Orders were not complied. **Godfrey Richard V. R. (CAT) Criminal Appeal No. 365 of 2008, at Page 21** was cited in support.

Mr. Mkwata also faulted the procedure used to tender Exhibit P.10 (pistol). PW.1 tendered it and failed to explain whether the alleged pistol was the one which was found in the



appellants' house. It was not clear how she identified it let alone being in her possession.

PW.1 tendered Exhibits P.1 to P.9. Those Exhibits were not mentioned in the charge sheet, and if they were not mentioned no one can ignore the fact that they were an afterthought. During trial, two pistols were produced one of them was produced by PW.1 and PW.5 produced another one. It was not known which one was used in the incident of robbery.

PW.3's evidence was also tainted with problems because during trial he alleged that policemen inspected him before climbing to the roof of the 2<sup>nd</sup> appellant to witness search. PW.5 found the alleged pistol in that roof. His statement in court contradicted his statement made at the Police Station in which he denied to have inspected. More worse his statement contradicted the testimony of PW.4.

Mr. Mkwata further submitted that, the 1<sup>st</sup> appellants' right to representation was denied by the trial magistrate and by that the court violated Section 310 of the CPA, Cap. 20 R.E. 2002.

The second appellant adopted the grounds of appeal and had nothing in addition.

The learned State Attorney, Mr. Mgavilenzi supported the appeal and briefly he supported the arguments raised by Mr. Mkwata, learned advocate.

On identification, Mr. Mgavilenzi was in all fours with Mr. Mkwata learned advocate, that, the appellants were not identified. In support of his argument, he cited the case of **James Chilonji V.R.** (CAT) 101/2003, Mbeya Registry (unreported) and **Waziri Amani V. Republic** (1980) TLR. 250. On identification parade, he contended that it was done without enough preparation. According to Police General Orders, the appellants were supposed to be informed their rights before the exercise of identifying the alleged bandits. That was not done.

According to him, the pistols alleged to have used in the incident were tendered before the court. PW.1 tendered only one pistol. That was contrary logic because the one who retrieved it was the one who should have tendered it as Exhibit. Mr.

Mgavilenzi further contended that, the trial court erred in law by denying the appellant his right of representation.

There is no doubt that, the appellants are serving a sentence of 30 years, and are not satisfied with the conviction and sentence.

The evidence adduced during trial and the submission of the learned defence counsel and the State Attorney give rise to the following issues:-

- (1) Whether identification was watertight.
- (2) Whether the contradiction in the testimony of the prosecution witnesses during trial went to the root of the case.
- (3) Whether the Court denied the 1<sup>st</sup> appellant the right to be represented and what is the effect legally.
- (4) Whether the offence of armed robbery was proved beyond doubt.

On the issue of identification especially visual identification it is now a trite law as it was decided in the case of **Waziri**

**Amani V. Republic** (1980) TLR. 250, that Courts should not act on visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is watertight.

In this case PW.1 and PW.2 had while recording their statements to the police denied categorically to have identified the bandits. However, when they testified in court, they claimed to have identified the appellant. This, clearly raises doubt as whether they really identified the appellants. I think if they so did they would have certainly mentioned it at the time of recording their statements.

Again while PW.3 had testified to the effect that he was searched by the policemen before climbing to the roof of 2<sup>nd</sup> appellant's house, in his statement to the police he said he was not inspected. But PW.4 also contradicted his statement on this. The trial magistrate was supposed to resolve the contradictions and inconsistencies before convicting the appellants. The Court of Appeal in the case of **Mohamd Said Matula V. R.** (1995) TLR 3 held:-

*"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court had to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."*

Having perused the trial court record I found the contradictions went to root of the case because PW.3 was not inspected before climbing to the roof with PW.5. It was after that the alleged pistol was found in the roof of the appellant's house. Later on another pistol was tendered by PW.5. There is no witness who testified where it was recovered.

I am also given to understand from the proceedings of the trial court that, the 1<sup>st</sup> appellant was denied the right to be represented contrary to section 310 of the Criminal Procedure Act, Cap. 20 R.E. 2002 which provides as follows:-

*"Any person accused before any criminal court, other than a Primary Court, may of right be defended by an*

*advocate of the High Court subject to the provisions of any written law relating to the provision of professional services by advocate."*

As I said before, the appellant was from the beginning represented by Mr. Onesmo, learned counsel. However, when the matter was scheduled for hearing, Mr. Onesmo was not present for the reason unknown by the 1<sup>st</sup> appellant and the court. The prosecution prayed to the court to proceed with the hearing. The court continued hearing the case in the absence of the 1<sup>st</sup> appellant's counsel. The 1<sup>st</sup> appellant made all efforts to explain to the court the predicament but the court ignored. The 1<sup>st</sup> appellant was not also given an opportunity to cross-examine the prosecution witnesses. To my view, the prosecution turned into persecution because, the right of representation is a legal right which is central in criminal prosecution.

The accused persons' conviction is watered down by the way the trial was conducted in the trial court and the charge which had no necessary details to make it a charge sheet which the appellants were called upon to plead.

I therefore find all merits in these appeals, consequently the same are allowed and appellants' convictions are quashed and acquit them. They should be released forthwith unless otherwise held lawfully in connection with other matters.

L. M. K. UZIA

JUDGE

25.10.2010

I certify that this is the true copy of original Judgment.



*Malipol*  
DISTRICT REGISTRAR  
HIGH COURT OF TANZANIA  
IRINGA