IN THE HIGH COURT OF TANZANIA
AT TANGA

CRIMINAL APPEAL NO. 7B OF 20107
(Originating from District Court of Tanga
Criminal Case No. 402 of 2007)

JOHN HAMISI KAMBARAGE .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 5/11/10
Date of judgment: 13/12/10

Mussa, J;

This appeal originates from Criminal case No.392 of 2007; instituted in the District court of Tanga. The appellant was arraigned there for armed robbery, contrary to section 287 A of the penal code, chapter 16 of the laws. The particulars alleged that on the 31st October, 2006; at street No.4, Tanga City; the appellant stole an assortment of mobile handsets, pre-paid vouchers and sim cards, totally valued at shs.7,800,000/=; property of a certain Abdul Manasi. The accusation was further that immediately before and after such stealing; the appellant threatened one Saidi Athumani with a gun so as to obtain and retain the properties stolen. The appellant denied the accusation, following which two prosecution witnesses were featured in support thereof. In reply, the appellant was occasioned to refute each and every accusation, albeit, briefly. Yet, at the conclusion of the enquiry, he was convicted and sentenced to thirty years imprisonment. It is the verdict to which he is, presently, at odds; upon a petition comprised of seven points of grievance. Ahead of a consideration and determination of the grounds of appeal, I should, first and foremost, reflect on the factual background.

To express at the very outset, the evidence in support of the prosecution accusation was hardly adequate. As already hinted, the claim was about the

appellant stealing from a mobile phone shop at gun point and; yet, the security guard who was, allegedly, threatened was no show; not featuring any-how during the trial. Neither were the details of the breakage any clear; much as, those who testified merely related to what they were told in the aftermath. Thus, detective constable Maiga (PW1), for instance, came by the detail upon being phoned by fellow police officers, as it were, not called as witnesses. Much worse, one of the joint proprietors of the shop, namely, Lilian Abdul (PW2), became seized of the occurrence only upon being told by unnamed police officers and a certain relative called Malta; again, not called as a witness. To this end, there was not a spec of evidence making specific reference of identification of the appellant at the alleged scene of the crime.

Nonetheless, there was, some evidence tending towards the appellant's implication on account of properties found at his residence. According to the detective constable, around 6.00am, on the morrow of the occurrence and; up on suspicion, he and fellow officers raided the appellant residence to conduct a search. The appellant was not home but; his daughter, namely, Amina Iddi, was. Thereafter, it was said, a search was conducted in the presence and seing of some neighbours and the chairperson of the locality. The telling was further to the effect that inside an appellant room, were retrieved a cellular phone handset, charger and a headphone; that is from one of the appellants' trousers pocket. Advancing further into the daughter's room, the raiding party came by Vodacom vouchers, 104 in number; three vodacom chips/sim cards and one Zantel chip/sim card. These items were adduced into evidence (PE 1 & 2) to form part of the prosecution evidence. Constable Maiga frantically informed the trial court of Aminas' telling that the items were brought to the residence by the appellant. Again, ironically though, Amina was not featured as a witness. What is more and; much worse, apart from Lillian's' sweeping allegation that the adduced items *"were all in my shop, and they were stolen on the material night;"* nothing came about in the nature of identifying the items by their district marks

or serial numbers. With several ends of its version left untied; the prosecution, nonetheless, rested its case.

No wonder, when called to give his own account, the appellant refuted each and every allegation. The security guard, he said, whom was threatened at gun point was not brought into testimony; just as whoever witnessed the alleged search at his residence. The appellant, relentlessly, refuted the prosecution insinuation that he had a daughter by the name of Amina Iddi whom, after all, was also not called into testimony. In a nutshell, the appellant dismissed the entire prosecution accusation as a frame up. He consistently repeats the claim in his petition of which he fully adopted at the hearing before me. Apparently, he is not alone at it; much as, Miss Masue for Republic just as well declined to support the conviction. To her, the search result were suspect; not being accompanied by a certification of seizure and; above all, none of he seized items were sufficiently related to those stolen. Having heard the dissatisfaction voice form either side; particularly on the crucial subject of sufficiency of evidence of identification of the retrieved items; I cannot agree more. Needless to have to refer to any specific authority; where, as here, the culpability of the person accused is being sought through a doctrine of recent possession; as a matter of law and logic, it is essential that the retrieved items must have reference to those stolen so that it is beyond question that the found items are the very ones stolen at the commission. Quite obviously, in the matter at hand the prosecution evidence falls short and; the one and only option available is to quash the conviction. As I do so, I also set aside the sentence with the resultant order for the immediate release of the appellant from custody unless; of course, should there be some lawful cause to hold him. Order accordingly.

K.M. MUSA, J;
10/12/2010

Coram: Mussa, J;

Appellant: Present

Respondent: Ms. Msalangi

Judgment pronounced in the presence of the parties.

K.M. MUSSA, J;
13/12/2010