IN THE HIGH COURT OF TANZANIA

AT DODOMA.

(PC) CRIMINAL APPEAL NO 7 OF 2009

(Originating from Singida District Court Criminal Appeal NO. 29 of 2006, Original Criminal Case NO. 151 of 2006 of Singida Urban Primary Court)

1. SHABAN YUSUPH
2. MRISHO HAMISI } **..... APPELLANTS**

VERSUS

JONAS MANYALU.....RESPONDENT

JUDGMENT

24/2/2010 & 19/4/2010

KWARIKO, J:

The two appellants herein were originally jointly and together charged with the offence of Robbery with Violence contrary to section 285 and 286 of the Penal Code Cap. 16 Vol. 1 of the laws Revised Edition 2002. However, at the end of the trial the Court found that it was the offence of Shop Breaking contrary to section 296 (1) of the Penal Code which was proved against the appellants. They were thus accordingly convicted and sentenced to five (5) years imprisonment each and an order of compensation to the complainant of the stolen property was made.

As it turned out to be it was the 1st appellant SHABAN YUSUF only who had appealed against the trial Court's decision before the first appellate Court. Unfortunately, the first appellate Court found that the trial Court erred in facts to find that it was the offence of shop breaking that was proved against the appellants. Instead the first appellate Court's Magistrate found that the offence of Armed Robbery contrary to section 287A of the Penal code was proved and thus the two appellants were convicted and sentence enhanced to thirty (30) years imprisonment. They were accordingly served with the new development.

This time, the two appellants were not satisfied with the decision of the first appellate Court and hence they filed this appeal. The facts of the case that led to this appeal at the trial court can be recapitulated as follows: That at around 7.00 pm on 23/2/2006 one JONAS MNYALU (PW1) and the complainant in this case was in his home with his wife MWANAMINI YOHANA, PW3 when they heard the 1st appellant who was their neighbour calling PW1's name outside. Before the two could comprehend what was going on the 1st appellant who was in the company of the 2nd appellant broke the house door by cutting it with machete and axe and entered inside where also PW1 was keeping a shop.

Thus PW1 escaped through the window and ran away while raising alarms.PW3 also ran away while raising alarms and people gathered at the scene and they apprehended the appellants and severely beat them. When PW1 and PW3 returned to their home later

on they found the appellants under arrest with the stolen shop items at their side and they were being beaten by the mob. PW2 BAFO TUMAINI BILINDI was the ten cells in the area came at the scene and found the appellants at PW1's yard with two small bundles at their side. He was informed that the appellants had been found stealing from PW1's house and he found an axe and machete at the scene. He also found people beating the appellants where he stopped them and asked them to send them to the village office. He did not see what was in the bundles. Neither the axe nor the machete was tendered in Court as exhibits.

From the village office the appellants were sent to Police Station where NO. D 5531 CPL. JULIUS, PW4 received them in bad condition since they were badly beaten. He took them to the dispensary and later to Court. Twelve (12) small oil lamps (Koroboi), five bottles of body oil and two (2) pairs of sandals were admitted as Exhibit PA collectively.

In their defence the appellants denied the allegations and testified that the complainant had found his mother in the company of the 2nd appellant as they were lovers and since he was not pleased with that relationship he assaulted him (the 2nd appellant) with a club on the head until he fell down. When he regained consciousness he woke up and went to the 1st appellant's home where he was being hosted and told him what had happened. That the two went to report the matter to their ten cells leader and people gathered to see what was happening. When PW1 appeared he told the group that the

appellants had invaded him and stolen some properties. And when the appellants denied the allegations and asked for PW's mother to be summoned to verify their story the complainant insisted that they were thieves and people started beating them until PW2 came and rescued them. Since they were not found with any stolen property the people reasoned out and took Exhibit PA so as to implicate them and sent them to village officer and then to Police Station.

For the foregoing evidence the trial Court found the appellants guilty of the stated offence and accordingly were convicted and sentenced. Like wise the first appellate Court reversed the trial court's findings on the basis of the stated evidence.

Before this Court each appellant filed his several grounds of appeal which were consolidated during the hearing of this appeal. I went through the grounds of appeal and found that the two are complaining that the prosecution case at the trial court did not prove any of the offences they had been convicted of and the district court wrongly believed the prosecution evidence.

During the hearing of the appeal the respondent did not appear since efforts to trace him for service at his home place proved futile. The Resident Magistrate In charge of Singida wrote a letter to inform this court that when the summons was sent to the respondent, it was returned by the village Executive officer and it was reported that the respondent had relocated from his last known village and had sold all his properties there. He was nowhere to be traced. The Court

therefore granted an order to proceed with hearing in the respondent's absence considering that the appellants were in prison and to keep the appeal pending indefinitely is contrary to fair justice.

The appellants prayed the Court to consider their grounds of appeal and allow their appeal.

I have gone through the trial Court's record and found that the evidence against the appellants was in two folds. Firstly, there is the evidence of PW1 and PW3 which was to the effect that t hey heard the 1st appellant calling PW1's name before the door was broken. And that PW1 escaped through the window and also PW3 ran away while both of them raising alarms to attract people's attention. These two witnesses did not say that they had any opportunity to see and identify visually who the assailants were. Also PW1 and PW3 were not there when the appellants were allegedly apprehended by the mob. Hence they did not have time to show to the mob who their identified thugs were.

For the foregoing, I find that the alleged voice identification was not strong enough against the appellants since this kind of identification is not reliable because of the case with which it can be disguised, (***see JAMES CHILONJI VR, Criminal Appeal NO. 101 of 2003***, Court of Appeal of Tanzania Mbeya, Registry - (not aware if reported).

If these two witnesses could not have reliably identified the 1st appellant through his voice, I don't see how they could have identified the 2nd appellant who was only a visitor in the village. Thus the two witnesses did not identify the appellants at the scene during the alleged night invasion.

Secondly, the Prosecution evidence also says that the appellants were found and apprehended by the people who came to answer the complainants' alarms and were in possession of exhibit PA. I have not seen any evidence from the alleged people who apprehended the appellants since even PW2 a ten cells leader's evidence was that he found the appellants already under arrest and were being beaten by mob before he stopped them. The people who arrested the appellants ought to have testified to prove that they were found near the scene and in possession of PW1's stolen items. There was no such evidence from the prosecution and there was no any explanation given why the alleged witnesses were not called to testify. For this omission I have drawn an inference adverse to the prosecution, (***See AZIZ ABDALLAH VR [1991] TLR 71***).

Therefore, I find that this whole thing was a family affair which was not proved beyond reasonable doubt. PW1 did not even prove that Exhibit PA was his property.

For the foregoing, I found that the evidence by the prosecution did not prove either of the offences the trial and first appellate courts convicted the appellants with. Since the prosecution evidence was

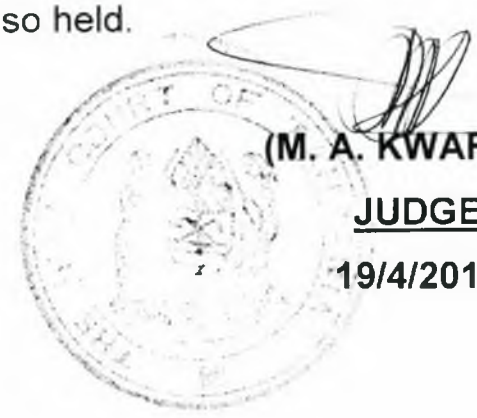
doubtful the trial court and the first appellate court ought to have believed the appellants defence. But unfortunately the appellants' respective defenses were not considered by the two lower courts and this contravened the United Republic of Tanzania Constitution and principles of natural justice which provide that a person should be accorded a fair and just trial.

Had these two courts below considered the prosecution evidence and accorded weight to the defence case, they could have come out with a different verdict against the appellants.

The combined effect of the foregoing shows that the prosecution case at the trial and the enhancement findings of the first appellate court did not prove any offences against the appellants beyond reasonable doubts. I therefore allow their appeal and quash the convictions in the respective offences in the two courts below and set aside the sentence they have each been serving of thirty (30) years imprisonment.

The appellants are ordered to be set at liberty unless their continued incarceration is in respect of other lawful causes.

It is so held.



(M. A. KWARIKO)

JUDGE

19/4/2010

AT DODOMA

19/4/2010

1st Appellant – Present.

2nd Appellant – Present.

Respondent – Absent.

c/c – Ms Komba.