IN THE HIGH COURT OF TANZANIA

AT DODOMA

DC CRIMINAL APPEAL NO. 27 OF 2009

(ORIGINATING FROM CRIMINAL CASE NO. 244 OF 2007 AT THE DISTRICT COURT OF MPWAPWA SITTING AT MPWAPWA)

DARES CHARLES ----------------------- APPELLANT

VERSUS

THE REPUBLIC ----------------------- RESPONDENT

JUDGMENT

30th NOV. 2009 & 17th FEB. 2010

S . S. MWANGESI J.

The Appellant in the matter at hand was charged with the offence of armed robbery contrary to section 285 and 286 of the Penal Code Cap. 16 Vol. 1 of the Laws Revised as amended by Act no. 10 of 1989 and Act no. 4 of 2004. It was the case for the prosecution that, on the 21st day of June, 2007 at about midnight hours, at Rudi village within the District of Mpwapwa in Dodoma Region, the accused did steal cash Tshs. 100,000 the property of one Naomi d/o Waziri and immediately before and after such stealing,

he did threaten the said Naomi Waziri by using a machete in order to obtain and retain the said property.

After the charge had been denied by the accused person, the prosecution did summon four witnesses to establish the guilt of the accused person. Upon hearing those witnesses, the trial Magistrate was satisfied beyond doubt that the guilt of the accused person had been established. He did thus convict the accused person who herein after will be referred to as the appellant and sentenced him to the mandatory statutory sentence of going to jail for a period of thirty years. The appellant is challenging such findings of the trial court in this appeal.

In his memorandum of appeal, the appellant has enumerated about seven grounds of appeal. However, on observing them closely, one will find that they all talk about four main issues that is to say, first, that the learned trial Magistrate did fail to comply with the mandatory requirements under the provisions of section 312 (2) of the Criminal Procedure Act. Secondly, that the learned trial Magistrate did misdirect himself to base his conviction on the evidence of people from the same family. Thirdly, that the learned trial Magistrate did err to find conviction on the evidence of identification that was insufficient. And fourthly, that the evidence of

defence was completely not considered by the learned trial Magistrate in his judgment.

During the hearing of the appeal, the appellant who did appear in person, had nothing to add to what is contained in his memorandum of appeal. The respondent – Republic on the other hand was represented by Mr. Katuli learned State Attorney. The same did support the ground by the appellant that, all the three witnesses, that is Pw1 Naomi Waziri, Pw2 Martin Msagule and Pw3 George Mugulila, claimed to have identified the appellant by use of the light of a torch. All of them however, were not elaborate as regards the intensity of the said light plus the distance from where they were to where the appellant was. It was the view of the learned State Attorney that their explanations ought to have removed all possibilities of mistaken identity a requirement that was mandatory as insisted in the decisions of **Waziri Amani Vs Republic** [1980] TLR 250, **Shiku Salehe Vs Republic** [1987] TLR 193 as well as **Raymond Francis Vs Republic** [1994] TLR 100. Under the circumstances, the learned State Attorney did not support conviction.

The issue for this court to determine, is as to whether the evidence adduced at the trial court did justify conviction. As stated by the appellant and supported by the learned State Attorney, the

circumstances leading to the appellant being identified by Pw1 and Pw2 using the torch which was being held by Pw1 was not made to be clear. In the first Pw1 did state to have been rebuked by the assailants and warned not to go on directing her torch to them. It was not elaborated as to whether she defied such an order or not. And at a later time, the torch is said to have been snatched from Pw1 by the assailant. Regarding Pw3, the same was never at the scene of the incident. Although he claimed to have met with three people while moving to the camp of Pw1 after an alarm had been raised, even if he could have properly identified those people, it could not have been stated affirmatively that those people were nobody else other than those who had assaulted Pw1. All in all, the available doubts as regards such identification, has to benefit the appellant.

It has also been complained by the appellant that there was failure to comply to the mandatory requirements under the provisions of section 312 (2) of the Criminal Procedure Act by the learned trial Magistrate. The requirement under the said section is that, in case of conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which the accused person is convicted and the punishment to which is sentenced. Indeed on checking at the judgment at hand, it cannot

be said that the section has been complied with. The same therefore means that the complaint by the appellant is sound.

Regarding the defence of alibi that was raised by the appellant, indeed the appellant in his defence did state that at the material time of the commission of the offence at issue, he was at Malolo where he had sent his sick wife. Such contention by the appellant was supported by the testimony of his father one Charles Ruhusa. In his judgment, the learned trial Magistrate did state that the appellant was supposed to bring evidence to satisfactorily establish that he did travel to the said Malolo village and further produce a letter or any document from the authorities from the area he claimed to have been to establish so. It is the view of this court that in so doing, the learned trial Magistrate demanded more than what is needed when such defence is raised. What the appellant had done was enough, and it was upon the prosecution to disprove those contentions by the appellant and his witness.

And as regards the ground that his defence evidence was not considered in the judgment by the learned trial Magistrate, much as the records reveal, the said defence evidence was considered and in the ultimate, the learned trial Magistrate did come out with findings that it was not worthy changing his stand which he had

already taken from what got testified by the prosecution witnesses. So the problem here was not because he did not consider the evidence but rather the verdict he made.

On the bases of what has been discussed above, this court finds that there is merit in the appeal by the appellant. The decision of the trial court is therefore quashed and the sentence imposed by the same is hereby set aside. The appellant is thus to be set at liberty forthwith unless lawfully detained for any other good cause.

Order accordingly.

(S. S. MWANGESI)

JUDGE

17 – 02 - 2010