IN THE HIGH COURT OF TANZANIA

AT DODOMA

(DC) CRIMINAL APPEAL NO. 57 OF 2009

(Original Criminal Case No.49 of 2009 of the District Court of Manyoni at Manyoni)

KILIANI JOHN @ WACHUPA ..... APPELLANT

VERSUS

THE REPBULIC ..... RESPONDENT

JUDGMENT

16/7/2010 & 23/8/2010.

KWARIKO, J:

The appellant herein and two others HASSAN OMARY and WILLIAM MOSHI who were the second and third accused respectively were jointly and together arraigned before the District court of Manyoni for the offence of Armed Robbery contrary to section 285 and 286 of the Penal Code Cap. 16. Vol. 1 of the Laws, Revised Edition 2002 as amended by Act No. 4 of 2004. They had denied the charge and at the end of the trial the appellant was convicted of the afore said offence and sentenced to thirty (30) years imprisonment and an order of compensation of unrecovered property. The second and third accused were both convicted of an offence of Receiving Stolen Property contrary to section 311 of the Penal Code Cap. 16 Vol. 1 of the Laws, Revised

Edition 2002 and they were each sentenced to three years imprisonment.

On being dissatisfied with both the conviction and sentence the appellant brought this appeal. The facts of the case at the trial from the prosecution can be recounted as follows:

One MICHAEL KIPOMA, PW1 had been a salesman in the shop owned by his elder brother JOSEPH KIPOMA, PW2 at Majengo area, Itigi village in Manyoni District. On 10/2/1009 at about 3.00 am whilst PW1 was sleeping in the house where the shop was kept some people knocked his door and he woke-up as he though it was his neighbour who had probably a problem. He opened the door and immediately he was restrained by some thugs who were armed with a muzzle gun (Gobore). He was ordered to lie down and cover his face. He identified the person who was giving him orders and armed with the gun to be the appellant herein. The appellant covered his (PW1) face with a piece of cloth and later he found the shop items stolen by the thugs. PW1 testified that there was electric light in the shop. He immediately reported the incident to PW2 where he reported the same to police.

PW2 was given three policemen to follow-up his stolen property and the robbers. Footprints were followed from the scene and the same ended at the third accused's home. Upon searching the house various items were found in the third accused's house which PW2 identified to be his stolen property from the shop. The third accused had told the

police that he and the appellant were among the thugs. The appellan was found in his home in possession of a T-shirt which was identified as PW2's stolen property and also a pair of shoes whose prints were tracec from the scene to the third accused's home.

At the Police Station the appellant and the third accusec mentioned the 2nd accused to be their accomplice. When the 2nd accused's home was searched one hot pot and one jag was found anc the same were identified by PW2 as his stolen property. The 3rd accusec was interrogated by No. D 9785 D/Cpl JOSEPH, PW4 where he admitted that the appellant and 2nd accused had sent the stolen property to his home. His caution statement was prepared and it was admitted in court as exhibit P6.

Other exhibits admitted in court included assorted shop items,- Exhibit P1 collectively, A T-Shirt and a pair of shoes,- Exhibit PI collectively, Hot pot and a Plastic bag,- Exhibit PIII collectively, Hot pot jag and bottle of Chemicola,- Exhibit PIV collectively and search order,- Exhibit PV.

In his defence the appellant admitted that he was arrestec sometimes in February, 2009 and his T-shirt and shoes were confiscatec as stolen property while in fact they were his personal property. He discredited the prosecution evidence as being doubtful anc contradictory. He denied the allegations against him.

The 2nd accused also denied the allegations and testified that the alleged found stolen property were his personal property. The third accused testified that he returned home on 10/2/1009 at about 11. pm while at 3.00 am the appellant came there and informed him that he was coming from safari hence asked him to keep his clothes (Exhibit P1) for him. That, the appellant is a friend of his brother and he allowed him to keep the property there. The next day the police came and upon inquiry he revealed to them about the luggage the appellant had left there where the same was taken away before the appellant was arrested. The third accused also denied the allegations.

Thus, the trial court found against the appellant and the then co-accused as earlier stated.

In his petition of appeal the appellant raised two grounds of appeal only where he essentially challenged the prosecution evidence in respect of his alleged identification at the scene and secondly, the procedure of conducting a search which he said was contrary to section 38 (3) of the Criminal Procedure Act Cap. 20 Revised Edition 2002.

During the hearing of this appeal, the appellant did not add anything valuable as he only argued the court to consider his grounds of appeal and allow his appeal. Ms Seif learned State Attorney appeared and argued the appeal on behalf of the respondent, Republic. Ms Seif did not support the trial count's conviction and sentence against the appellant; she gave her reasons which some tallied with the appellant's

complaints in his grounds of appeal. This being the first appellate court, I will review the evidence on record and make own conclusion of facts.

Regarding the issue of identification, this court is in agreement with the parties that PW1 did not explain what was the intensity of light that helped him to identify the appellant among the thugs. PW1 only testified that there was electric light in the shop but did not specify what kind of electric light was there as fluorescent tubes or bulbs give varying intensity of light, (***See HATIBU MBARA VR Criminal Appeal NO. 202 of 2007, Court of Appeal of Tanzania at Dodoma, (Unreported***).

Also, PW1 did not mentioned where was the position of the electric light since he had said that soon after he had opened t he door the thugs restrained him and ordered him to lie down. Was he restrained in the shop room where he said the electric light was or was he restrained in the bed room or in the veranda? This question was not answered by the prosecution evidence.

Further, PW1 testified that soon after he was way-laid by the thugs he was ordered to lie down and cover his face where he complied. He was also covered his face by a piece of cloth. Thus, as to how PW1 could have been able to identify any thug in such situation, the trial court was not informed and did not discuss it in its decision.

The aforegone discussion clearly shows that PW1 did not identify any thug at the scene. This finding is fortified by the fact that after PW1

had informed PW2 about the robbery and the police were secured, they started following footprints from the scene which they said ended at the third accused's home. Had PW1 identified the appellant at the scene, he must have mentioned him to PW1 and to the police and then there could be no need to follow footprints from the scene. (**See REX V MOHAMED BIN ALUI [1942] EACA 72)**

Another evidence against the appellant which the trial court believed is that he was found in possession of stolen property i.e a T-shirt and a pair of shoes whose prints were traced from the scene to the third accused's home. Firstly, PW2 did not give any distinguishing marks of the said stolen property (T-shirt) alleged to have been found in possession of the appellant so that it could be proved that it was his rightful property. Ms seif cited the case of ***NASSORO S/O MOHAMED VR [1967] H.C.D No. 446*** in relation to identification of stolen property. It was held ***inter alia*** in that case that;

> ***"The proper procedure for identification of property in court is that the claimant should describe the item before it is shown to him, so that it can be clear to the court when the item is eventually tendered whether or not he was able to identify it"***

Therefore, the complainant (PW2) cannot be said to have claimed that the T-shirt was his property without describing it in detail not only

before the court but also before the police who searched the appellant and took it away.

Secondly, the prosecution did not prove that the footprints allegedly found from the scene to the third accused's house were the same as those on the appellant's shoe impression. Their patterns were not explained and the shoe impression was not tallied before the court with the said footprints on the ground. After all this evidence contradicted from the two prosecution witnesses; While PW2 testified that they followed footprints from the scene, PW3 testified that they followed bicycle prints from the scene. This shows that there was no any tracing either of the footprints or the bicycle prints from the scene and thus the witnesses were not credible.

Further, it was evidenced that the appellant was mentioned by the third accused as the one who brought Exhibit P1 to him. Firstly, Exhibit P1 was not proved to be the complainant's stolen property for the reasons I explained earlier that no distinguishing marks were given by PW2 to prove that it was his own property. Since the property were brand new ones there ought to be a corroborative evidence by PW2 to prove that the same was his own property.

Secondly, the evidence of the third accused against the appellant was that of an accomplice which ought to have been corroborated by an independent evidence in order for the same to be credible. (***See PASCAL KITIGWA VR [1994] TLR 65***). Since I have found all other

prosecution evidence against the appellant suspect, there is no any independent corroborative evidence in support of the third accused's evidence against the appellant. The trial court erred to act on the 3rd accused's evidence without corroboration.

I wonder why the trial court did not discover the obvious contradiction in the evidence of the third accused against the appellant. In his earlier statement before the police (Exhibit P6) the third accused first stated that he did not know who had brought the property (Exhibit P1) in his house as he was out when the same was brought. But in the blink of an eye the third accused stated that it was KILIANI JOHN (the appellant), HASSAN and BERNARD who brought the property in his house at 11.00 pm on 10/2/2009. And in his evidence before the court the third accused testified that he went to bed at 11.00 pm on 10/2/2009 and at 03.00 am the appellant came and informed him that he had come from safari and asked him to keep his clothes (Exhibit P1). That the appellant was his brother's friend.

Thus, the aforesaid evidence is the kind of evidence that the trial court believed against the appellant. And the third accused was made to go away just like that. He was the one who knew where he had got exhibit P1 from. He injustly implicated the appellant and the trial court unjustly believed him at the detriment of the appellant.

Lastly, the appellant complained about the search exercise in his house. It is true that the police did not comply with the law under

section 38 of the Criminal Procedure Act, (Supra) when they searched the appellant. There was no search warrant tendered in court to prove that the exercise was done in conformity with the cited law.

Consequently, I find that the prosecution case was not proved as required in law against the appellant, I therefore allow his appeal, quash the conviction and set aside the sentence and an order of compensation.

The appellant is ordered to be released from prison unless otherwise lawfully held.

I so hold.

(M. A. KWARIKO)

JUDGE

23/8/2010

AT DODOMA

23/8/2010

Appellant: Present.

For Respondent: Ms Seif State Attorney.

C/c: Ms Komba.

M. A. KWARIKO)

JUDGE

23/8/2010