

IN THE HIGH COURT OF TANZANIA
AT DODOMA

DC CRIMINAL APPEAL NO. 99 OF 2008
(ORIGINAL KONDOA DISTRICT COURT AT KONDOA
CRIMINAL CASE NO. 333 OF 2006
BEFORE: J.P. MTUIY, DISTRICT MAGISTRATE)

1. MOSI MADODOLO 2. PELA MATONYA	} APPELLANTS
Versus		
THE REPUBLIC RESPONDENT		

4/10/2010 & 29/10/2010

JUDGEMENT

HON. MADAM, SHANGALI, J.

The appellants **MOSI MADODOLO** who shall be referred to as the first appellant and **PELA MATONYA** who shall be referred to as the second appellant were arraigned before Kondoa District Court charged with the offence of Robbery with Violence Contrary to section 285 and 286 of the Penal Code, Cap 16. At the end of the trial both the appellants were found guilty, convicted and sentenced to a jail term of thirty (30) years each. Aggrieved by the

conviction and sentence, they have now appealed to this court protesting their innocence.

The background of this matter and the summary of evidence upon which the appellants were convicted and sentenced are as follows:

In the dead night of 4/10/2006 at about 1.00 a.m. PW1 Michael Diones was asleep in his house. Suddenly he was awoken by unusual barking of his dogs. He peeped outside through the window. By using his torch light he saw two people equipped with a panga and sticks outside. PW1 went out. The two people started to attack him with the sticks and tied him with ropes while demanding money from him. The bandits managed to steal his TShs.70,000/=, bundle of assorted clothes and 53 head of cattle. They all disappeared to the bush with the loot. PW1 raised alarm, shouting for help and several neighbours including PW2 and PW3 responded.

In the same night intensive search was conducted by Sungusungu warriors. According to the evidence of PW1, after three days, 50 head of cattle were recovered but others were already slaughtered by the bandits. It was

PW1's evidence that he found the first appellant at Kwamtoro police Station and identified him.

PW2, Exvery Fidelis testified that in the early morning hours of 4/20/2006 he heard an alarm from the homestead of PW1 and quickly responded. Having verified that PW1 was robbed and injured he joined the Sungusungu warriors for the search by tracing the cattle hoof marks through Sanzawa Village and Bambubambu river. That, when they reached at Konkoma village they saw one person with a big head of cattle. The person took to his heels leaving behind some cooked cow meat and the head of cattle. The search team identified the 51 head of cattle the property of PW1. During cross-examination PW2 admitted that he saw both appellants for the first time before the trial court.

PW3, Lazaro Bruno, also a neighbour to the PW1, stated how he responded to the alarm which was followed by a search for the stolen cattle and properties. In his testimony he claimed that during the search they reached at Sanzawa village and suddenly they found some people including the second appellant in the bush with a head of cattle. The alleged people were also roasting and eating cow meat. PW3 claimed that on seeing them, the second appellant and his colleagues run away leaving the 50 head

of cattle behind. PW3 further claimed that on tracing the cattle hoof marks they discovered that they were from the second appellant's kraal within the same area. That, in that kraal they found one calf. PW3 stated that at that time the second appellant was not at his house. As a result the search party decided to arrest and interrogate his wife who stated that the cattle were brought at the kraal by some people who requested her to accommodate them for a while.

In his sworn defence, the first appellant categorically denied to have committed the offence. He testified to the effect that on 12/10/2006 he was at his house and suddenly he saw a mob of people heading to his house. The people put him under arrest, tied him with ropes and marched him to the police station. The first appellant complained that he was accused for robbery with violence and eventually charged along with the second appellant whom he met at the police station.

The second appellant also gave a sworn defence. He totally denied to have committed any offence. He stated that it was on 30/10/2006 at about 09.00 a.m. when he was invaded in his house by sungusungu and village leaders. He was taken to police station and eventually charged with the first appellant.

As I have indicated above the trial District magistrate was impressed by the prosecution evidence and convicted the appellants as charged. In this appeal each appellant filed his petition of appeal containing a litany of complaints intending to show that they were wrongly convicted. Their complaints are based on lack of proper identification, suspicion, contradictions in the prosecution evidence, falsehood, discrepancies and implausibilities. They also condemned the trial District magistrate for failure to analyse and evaluate the entire evidence properly and failure to consider the defence case. They seriously argued that the case was not proved beyond all reasonable doubt. Are they not correct?

In the hearing of this appeal the appellants appeared in person and unrepresented. Mr. Ntwina, learned Senior State Attorney appeared for the Respondent/^{Republic} Respondent.

Mr. Ntwina learned Senior State Attorney straight and without any reservation declined to support the decision of the trial District Magistrate. So do I. In his submission he wondered as to why the trial District Magistrate decided to convict and sentence the appellants on such weak and unsatisfactory prosecution evidence.

Mr. Ntwina submitted that the only evidence attempting to connect the appellants with the alleged offence is that of PW1 which raises more questions than answers. He submitted that the identification of the appellants by PW1 was done in unfavourable conditions and there is no reliable evidence that PW1 identified any of the bandits in that night. PW1 claimed that he identified the appellant by peeping through the window and by using a torch light and later he clarified by saying there was moonlight without further explanation. Mr. Ntwina submitted that the evidence of PW2 and PW3 was contradictory in the sense that PW2 claimed that 50 head of cattle were found in the second appellants kraal while PW3 claimed that 51 head of cattle returned home alone without a herdsman. That PW2 contradicted himself when he later claimed that the head of cattle were found at Konkonza village and later in the second appellant's kraal.

Mr. Ntwina submitted that despite of the serious contradiction in the testimonies of the prosecution witnesses, there is no prosecution evidence to show how the appellants were arrested and who arrested them. He argued that PW2 claimed that the second appellant run away from his house but there is no evidence to prove that allegation.

Both PW2 and PW3 stated that they saw the appellants for the first time in court but yet were able to identify them.

The learned Senior State Attorney submitted that the appellants were charged with the offence of robbery with violence but they were convicted and sentenced under the offence of armed robbery without any explanation from the trial District Magistrate. Mr. Ntwina urged this court to allow the appeal and set the appellants free.

Mr. Ntwina has said it all. The case was full of faults and foulds. The appellants' complaints are genuine and sound. The case against the appellants was not proved beyond all reasonable doubts as required in law. The appellants were not seen and identified to be the very bandits who committed the offence. The case was not investigated by any police officer and the only evidence to show how the appellants were arrested is that of the defence side. The prosecution evidence is fully contaminated with exaggerations, lies, contradiction, discrepancies, suspicion and implausibility. The trial District Court never considered the defence evidence and no reasons were given. The homestead and kraal of the second appellant was invaded and searched by Sungusungu warriors in his absence and

without independent witness. The alleged wife of the second appellant who was found with the head of cattle or a calf and then arrested and taken to police station was not charged nor called as a witness. During the preliminary hearing the prosecution boasted to summon seven (7) witnesses and produce 52 head of cattle as exhibit. However, they ended up with only three (3) unreliable witnesses and no exhibit was produced and admitted by the trial court. Even PW1's alleged PF3 was not admitted by the trial court as exhibit. As a result there is no sufficient evidence to proof that PW1 was actually injured to the extent he would wish the court to believe.

One more aspect which shows that the trial District Magistrate had gloves in his hands against the appellants is the fact that he convicted them with the offence of Armed Robbery while they were charged with the offence of Robbery with Violence. There was no evidence to establish that firearms or dangerous weapons were used in this case. Therefore the trial District Magistrate was wrong to convict the appellants on the offence of armed robbery.

For the foregoing reasons, I found it very unsafe to uphold the conviction of the appellants. I therefore allow

this appeal in its entirety. The conviction of the appellants and their sentences of thirty (30) years imprisonment together with the corporal punishment of twelve (12) strokes of the cane are hereby quashed and set aside.

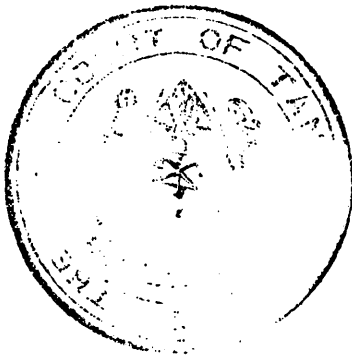
The appellants should be set at liberty forthwith unless otherwise detained for another lawful cause.


M.S. SHANGALI

JUDGE

29/10/2010

Judgement delivered todate 29th October, 2010 in the present of Ms. Shio, learned State Attorney for the Respondent/Republic and the appellants present in person.




M.S. SHANGALI

JUDGE

29/10/2010