

**IN THE HIGH COURT OF TANZANIA**  
**AT DODOMA**

**(DC) CRIMINAL APPEAL NO. 61 c/f 62 OF 2004**  
**(Originating from Kondoa District Court**  
**Criminal Case No. 146 of 2003)**

<b>1. MBEHO NGWEMBE</b> <b>2. MATONYA DUKA @ GANGOSHA</b> <b>3. GAITAN ADAM MAGANGA .....</b>	}	<b>APPELLANTS</b>
<b>Versus</b>		
<b><u>THE REPUBLIC .....</u></b>		
<b><u>RESPONDENT</u></b>		

**JUDGMENT**

**01/9/2010 & 13/10/2010.**

**KWARIKO, J:**

The appellants herein and two others had been jointly and together arraigned before the trial court with 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.

The lower court's record shows that the 1<sup>st</sup> and 2<sup>nd</sup> appellants pleaded guilty to the charge, they were convicted and sentenced to thirty (30) years imprisonment each with corporal punishment of twelve (12) strokes of a cane each.

The record further shows that the other two accused persons, fourth and fifth were discharged under section 98 (a) of the Criminal Procedure Act, Cap. 20 Vol. 1 of the Laws, Revised Edition 2002. The third appellant herein who earlier pleaded guilty and changed later was tried and at the end of the day he was found guilty of the offence, convicted and sentenced to thirty (30) years imprisonment with corporal punishment of twelve (12) strokes of a cane.

Both the three appellants were aggrieved with their respective conviction and sentence and thus they filed this appeal each with his grounds of appeal which have been consolidated and heard together.

The facts of the case by the prosecution both after the 1<sup>st</sup> and 2<sup>nd</sup> appellant had pleaded guilty to the charge and during the trial of the 3<sup>rd</sup> appellant can briefly be recapitulated as follows:

On the early hours of 10/6/2003 at about 01.00 am one HAMISI KUDIGI, PW1, who was the complainant in this case was awoken from sleep by noise of his door breaking. He got out of his bed and his torch in hand where he met five thugs who had entered his house. The thugs were armed with machetes and he identified them to be the three appellants herein together with Mwaka Ngwere and Ngaa Ntima who were not arrested.

PW1 testified that the 1<sup>st</sup> appellant was his nephew and had put on a white shirt and black trouser and was armed with a bill-hook. The 2<sup>nd</sup> appellant had put on a blue short and red shirt and carried a stick while the 3<sup>rd</sup> appellant was wearing a light blue bed sheet and carried a long knife (sime); PW1 also explained the other thugs' outfit.

The thugs demanded money from PW1 and when he resisted they cut him in different parts of the body until he showed them Shs. 350,000/=. He was then escorted by the 3<sup>rd</sup> appellant to the bush and dumped there about 70 metres from his house. Thus, the torch and moonlight outside helped him to identify the thugs who were all his neighbours. The thugs thus ransacked his house and stole some properties, including Radio, a bicycle, motor vehicle battery, one pair of khanga, one bed sheet and a pair of rubber shoes.

After the thugs had left PW1 raised alarms and his neighbors including YOHANA NGILASI, PW2 and MARKO NGUDUSI, PW3 answered the same. PW1 mentioned the identities of the thugs to his neighbours. Information of the robbery was sent to the police and PW1 was sent to hospital for treatment.

A search of the thugs ensued where the then 4<sup>th</sup> and 5<sup>th</sup> accused were found in possession of stolen Radio speakers and a pair of khanga and upon inquiry they revealed that the property was

given to them by the five thugs. The 4<sup>th</sup> accused was the wife of the 1<sup>st</sup> appellant. The 1<sup>st</sup> appellant was thus arrested while fleeing while the 2<sup>nd</sup> and 3<sup>rd</sup> appellant were arrested in a different date at Tinai village. They were both sent to the police where they confessed the allegations and their Caution Statements were written. The three appellants had also their Extra Judicial Statements taken after they confessed.

The Prosecution tendered a pair of khanga, pair of rubber shoes and one red bed sheet and were admitted as exhibit PE1 collectively; PW1's PF3 - Exhibit PE3, the 2<sup>nd</sup> appellant's Caution Statement and Extra Judicial Statement - exhibit PE4 collectively; the 1<sup>st</sup> appellant's Extra Judicial Statement and Caution Statement exhibit PE5 collectively and Radio Speakers as exhibit PE6. The 3<sup>rd</sup> appellant's Extra Judicial Statement was admitted as exhibit PE7.

In his defence the 3<sup>rd</sup> appellant did not have much to say, he testified that he was arrested on 12/2/2003 in connection with the present allegations. That, the 2<sup>nd</sup> appellant who was arrested first had mentioned him and thus he did not commit the offence. During cross-examination he stated that he gave his extra judicial statement voluntarily before a Primary Court Magistrate one Augustino Tesha, (PW4).

In their respective petitions of appeal the 1<sup>st</sup> and 2<sup>nd</sup> appellants raised several grounds of appeal where they essentially complain about the following four things;

1. That, their respective pleas of guilty were not an unequivocal ones.
2. That, the prosecution case against them was not proved beyond reasonable doubts.
3. That, they were forced and tortured by the Police to sign their Caution Statements and Extra Judicial Statements.
4. That, the trial Magistrate erred in law by failing to explain to them the effect of a plea of guilty to the charge.

Whereas, the third appellant's grounds of appeal essentially complained that the prosecution case against him was not proved beyond reasonable doubts and that PW1 did not satisfactorily identify the stolen property allegedly found in his possession.

During the hearing of this appeal all appellants did not add anything of importance and they only implored the court to consider their grounds of appeal and allow the same. On the other hand the respondent, Republic was represented by Mr Nchimbi learned State Attorney who resisted the appellants' appeal. He gave reasons for his stance in supporting the trial court's conviction and sentence against the appellants.

The issue to be decided by this court in this appeal is whether the appellants' appeal has merits. In deciding this issue, I will start with the 1<sup>st</sup> and 2<sup>nd</sup> appellants' case.

Firstly, the 1<sup>st</sup> and 2<sup>nd</sup> appellants complained that their respective pleas of guilty were unequivocal ones and that the police had harassed them and their families. As rightly submitted by Mr Nchimbi learned State Attorney, this complaint is an afterthought. The record of the trial court shows that when these appellants were first arraigned before the trial Court on 19/6/2003 they pleaded guilty to the charge. However, on that date the prosecution was not ready to give facts of the case and then the matter was adjourned to 20/6/2003 where also the prosecution was not really to give facts of the case. The case was further adjourned to 25/6/2003 and 14/7/2003 and on 17/7/2003 when the charge was reminded to the appellants the two maintained their pleas of guilty. Hence the prosecution adduced facts of the case in their respect.

Various exhibits as earlier enumerated were tendered and the appellants did not object to them. They did not also object to their respective confessions contained in the Caution Statements and Extra Judicial Statements. Consequently, the 1<sup>st</sup> and 2<sup>nd</sup> appellants were asked by the court whether they were admitting the facts of the case. Each responded by admitting the facts of the case

without any qualification. Thus, the trial court found each one guilty and accordingly convicted them. Even in their mitigating factors the 1<sup>st</sup> and 2<sup>nd</sup> appellants indicated that they were first offenders. They were thus sentenced as earlier stated.

If there were any threats from the police surely the appellants must have pleaded not guilty to the charge when they got to the court. And if there was any inducement on their part they must have changed the pleas when the case was adjourned on 19/6/2003. They had all the time to think about their pleas before 17/7/2003 when they were finally convicted and sentenced.

It is provided under section 228 (2) of the Criminal Procedure Act, Cap. 20 Vol. 1 of the Laws Revised Edition 2002 (the Act) thus;

***"If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words he uses and the magistrate shall convict him and pass sentence upon or make an order against him, unless there appears to be sufficient cause to the contrary".***

Thus, in this case the trial Magistrate could do no more than what he did and in conformity with the cited law. Not only the appellants admitted the charge but when the facts of the case were given they admitted the same. They also did not object their detailed Caution Statements and Extra Judicial Statements. Surely, their pleas of guilty were unequivocal ones and it is only an afterthought that they now complain about the same.

Secondly, the 1<sup>st</sup> and 2<sup>nd</sup> appellants complained that the prosecution case against them was not proved beyond reasonable doubt. I agree with Mr Nchimbi that the issue of proof could not arise here since the appellants themselves admitted the truth of the charge, facts of the case and their respective confessions. All these things proved the charge against them. If the appellants had reservations about their guilty they must have pleaded not guilty so that evidence from both sides could be led to prove the prosecution case against them. Thus, this complaint is baseless and it is hereby dismissed.

Thirdly, this court agrees with Mr Nchimbi that the 1<sup>st</sup> and 2<sup>nd</sup> appellants' complaint that they were forced by the police to sign their Caution Statements and Extra Judicial Statements is an afterthought and baseless. Had the police tortured and forced the appellants to sign these statements definitely they must have told the trial Magistrate the same and objected them when they were tendered in



court. They were given opportunity to comment about these statements but they did say that they had no any objection to them hence they were duly admitted in evidence. These confessions which were not objected further proved that the appellants committed the offence and that is why without hesitation they admitted the charge against them.

Lastly, the 1<sup>st</sup> and 2<sup>nd</sup> appellants complained that the trial Magistrate erred in law when he failed to explain to them the effect of a plea of guilty. I know no any provision of law which say that the Magistrate or Judge should explain to the accused person the effect of pleading guilty to the charge. The cited provision of the law is the one which caters in respect of an accused who pleads guilty to the charge, and the trial Magistrate sufficiently and correctly applied it in this case. As submitted by Mr Nchimbi the 2<sup>nd</sup> appellant cited an Indian case whose copy was not annexed for easy of reference. However, even if the copy of this authority was annexed, I think our statute herein above cited is rich and it provided everything in respect of the provision of law herein above cited.

Consequently, I find that the 1<sup>st</sup> and 2<sup>nd</sup> appellants were properly convicted on their own an unequivocal pleas of guilty and they should not be heard to complain now. They were thus barred by the law to appeal since they had pleaded guilty to the charge unless

they appealed only on the legality or severity of sentence which is not the case here. Section 360 (1) of the Act provides thus;

***"No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by a subordinate court except as to the extent or legality of the sentence".***

Even if the 1<sup>st</sup> and 2<sup>nd</sup> appellants have appealed against the sentence only they would not succeed since it is the legal one provided and was meted out by the trial court. Therefore, the 1<sup>st</sup> and second appellants' appeal is devoid of merits and it is hereby dismissed.

As for the 3<sup>rd</sup> appellant, he complained that the case against him was not proved beyond reasonable doubt. He essentially contended that PW1's evidence was not corroborated by the evidence of PW2, PW3 and PW4.

During the hearing of the appeal, Mr Nchimbi supported the conviction against the third appellant though he contended that his defence was not considered by the trial Magistrate in his judgment. Mr Nchimbi did not end there and he submitted that though it was an error on the part of the trial Magistrate by not considering the

defence case but he implored this court, being the first appellate court, to consider the defence evidence and come out with its own conclusion.

I went through the trial court's judgment and found that the third appellant's defence was not considered. However, due to the nature of the case against the third appellant which I will shortly show hereunder, this court being a first appellate court will consider his defence in line with the prosecution evidence and come out with own conclusion.

Firstly, the third appellant complained that the complainant's evidence (PW1) was not corroborated by the evidence of PW2, PW3 and PW4. The question to be asked here is whether the evidence by PW1 needed corroboration and if the other witnesses really did not corroborate the same. In his evidence PW1 explained how the thugs had broken the door and that they stayed with him for a considerable time while demanding money. That, he had a torch which helped him to identify the five thugs including he 3<sup>rd</sup> appellant. PW1 explained the thugs' outfit and also said that it was the 3<sup>rd</sup> appellant who escorted him outside his house about 70 metres away and all this time there was moonlight which helped him to properly again observe him.

That, the third appellant was his neighbour hence made easy for identification. In his defence the third appellant did not talk anything about the conditions for identification and this court finds as rightly submitted by Mr Nchimbi that, the evidence by PW1 on this issue was water tight and it met the criterion outlined in the celebrated case of **WAZIRI AMANI VR [1980] TLR 250.**


Not only the foregoing, but also PW1 mentioned the third appellant and other thugs to the people who visited the scene after the thugs had left and this is what PW2 and PW3 had testified. Therefore, it is not true that PW1's evidence was not corroborated by PW2 and PW3.

Further, PW4's evidence corroborated PW1's evidence in that he received the third appellant's confession and he wrote an Extra Judicial Statement which was tendered in court as exhibit. The third appellant did not object to this exhibit and in his defence he said during cross-examination that he gave his Extra Judicial Statement voluntarily. Now, what else could one need to prove the charge? Actually, the charge was proved against the third appellant and the complaint that it was his co-accused who mentioned him is baseless since his confession had corroborated PW1's evidence against him. His co-accused's evidence against him also was corroborated by his own confession and PW1's evidence.


However, the other evidence against the 3<sup>rd</sup> appellant is in relation to a stolen property allegedly found in his possession. I went through the trial courts' record and found that the bed sheet allegedly found in possession of the third appellant was tendered in court at the time the case against the 1<sup>st</sup> and 2<sup>nd</sup> appellant was heard. Thus, the third appellant was not given opportunity to comment about the same and thus this evidence was not good against him and it is thus expunged in his respect.

Otherwise, this court finds that the case against the third appellant was proved beyond reasonable doubt and his defence did not raise any doubt on the prosecution case. I therefore uphold the trial court's decision and dismiss the third appellant's appeal.

Order accordingly.

  
**(M. A. KWARIKO)**  
**JUDGE**  
**13/10/2010**

**Court** – Rights of Appeal fully explained.

  
**(M. A. KWARIKO)**  
**JUDGE**  
**13/10/2010**

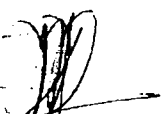
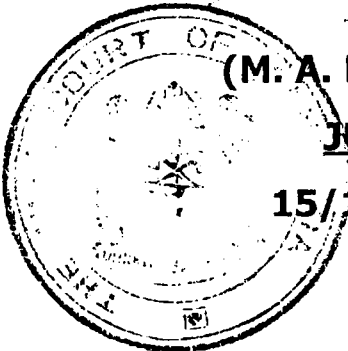
**AT DODOMA**

13/10/2010

**Appellants:** All Present

**For Respondent:** Ms Magesa, State Attorney.

**C/c:** Ms E. Komba.

  
 (M. A. KWARIKO)  
**JUDGE**  
**15/10/2010**