IN THE HIGH COURT OF TANZANIA

AT DODOMA

(DC) CRIMINAL APPEAL NUMBER 39 OF 2010

(ORIGINATING FROM CRIMINAL CASE NUMBER 05 OF 2004 OF THE DISTRICT COURT OF SINGIDA AT SINGIDA.)

MSENGI SAMWEL ---------- APPELLANT

VERSUS

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

JUDGMENT

20 – 06 – 2011

&

22 – 08 – 2011

S. S. MWANGESI J.:

The appellant herein was the second accused at the Resident Magistrates Court of Singida where he stood jointly charged with one Adamu Iddi on the offence of armed robbery contrary to section 285 and 286 of the Penal Code, Cap 16 Volume 1 of the Laws Revised. It was the case for the prosecution that, on the 19th day of March 2004 at about 0100 hours at Mbelekese village within the District of Iramba in the Region of Singida, the duo did jointly and together steal one sewing machine make Butterfly, one bicycle make Shexing, one radio make

Panasonic three band, three pairs of shoes, twenty two (22) dresses of choir uniform, four trousers, four skirts, one coat, three shirts, one blouse, one bed sheet, one bard zoo, cash TZs. 350,000/=, one pair of shorts, five hot pots, five sets of plates, twelve cups, one dozen of spanners and three bags all total valued at TZs. 1,104,000/= the property of one Emanuel Issa and, immediately before and/or immediately after the time of such stealing, they did threaten the said Emanuel Issa by using fire arm in order to obtain and/or in order to retain the said stolen properties.

After the charge had been denied by both accused, the prosecution did summon six witnesses to establish the guilt of both accused. And upon evaluating the evidence that had been placed before him after the accused had completed to give their defences, the learned trial Magistrate who presided over the matter was of the view that, the case had been sufficiently established against the appellant. The same was thus accordingly convicted to the charged offence while his colleague was acquitted and set at liberty.

Following the conviction to the charged offence, the appellant was sentenced by the trial Court to go to jail for a period of thirty (30) years. The conviction and the sentence imposed did aggrieve the appellant who has decided to challenge it before this Court. In his petition of appeal, the appellant has raised a number of grounds which however, hinge mainly on two. The first ground is to the effect that there was no ample evidence tendered in Court to establish that he had been at the scene of the incident on the fateful date.

He has argued that, it was from the fact that the culprits of the incident of the fateful date had not been identified at the scene of the incident, that the pursuers for the culprits after the incident of robbery had to follow the footprints. According to him, if the culprits could have been identified as the prosecution witnesses tried to put it, then the names of those culprits could have been given to the pursuers, who instead of following the foot prints, they would have directly gone to the homes of those named ones.

In his second ground of appeal, the appellant has complained that the learned trial Magistrate who handled his case, did fail to consider his defence evidence as it does not feature anywhere in the judgment. It has been the view of the appellant that, if his evidence could have been seriously considered, he could not have been convicted to the charged offence. It was his defence that on the fateful date, he was just a mere carrier of the luggage which was later discovered to be among the robbed ones and that the owner of the same, did flee away after seeing the pursuers on the material night. On those bases, the appellant has requested this Court to find that there was no justification for him to be held liable in the case at hand, and as a result his appeal be allowed.

During the hearing of this appeal, the respondent was represented by Ms Haonga who did not support the conviction that was entered to the appellant by the trial Court. It has been the contention of the learned State Attorney that, the

evidence of identification that was relied upon by the trial Court to found conviction to the appellant was not sufficient. The testimony by PW1 who happened to be the victim of the incident to the effect that he did identify the appellant with the assistance of light from the torch, the evidence that did find some corroboration from the testimony of PW4, was not that much reliable in the light of the decisions in the cases of **Nuhu Slemani Vs Republic** [1984] TLR 93 and **Mohamed Mselo Vs Republic** [1993] TLR 290.

Furthermore, the learned State Attorney has contended that, even the identification of the stolen properties alleged to have been found with the appellant, was not properly made. According to PW1, the appellant and the first accused were arrested with the stolen items that included a bicycle and a sewing machine and others. However, there were no any peculiar marks that had been given to differentiate those items with others. And since the identification of the stolen properties was not properly made, the doctrine of recent possession was wrongly invoked under the circumstances. This Court has been referred to the decision in the case of **Ally Bakari and Another Vs Republic** [1992] TLR 10. To that end, this Court has been asked to allow the appeal by the appellant.

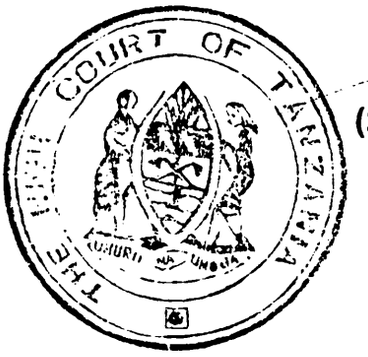
The question which is before this Court for determination in the light of what has been submitted above, is as to whether there is any merit in the appeal by the appellant. Upon going through the evidence tendered by PW1 and PW2 regarding their contention that they did properly identify the appellant, I am far from being convinced that, there was any strong evidence to suggest so. As

submitted by the learned State Attorney, what these two witnesses did tell the Court could not safely be relied upon.

After all, the practicability of the contention by PW1 that, the light that assisted him to identify the appellants did come from the torch which the appellant and his colleague had been holding is almost impossible. It is not easy for the one holding a torch, to be identified with the use of the light from his torch unless he points the torch to himself. Unfortunately, such situation was never revealed to the Court to have been so.

Be that as it may, the evidence that was relied upon by the trial Court to found conviction to the appellant in the case at hand did fall short of justifying conviction as held by the same. Such finding of the trial Court is therefore quashed, and the sentence that got imposed to the appellant is hereby set aside. It is ordered that the appellant be set at liberty forthwith unless lawfully held for any other justifiable cause.

Order accordingly.



(S. S. MWANGESI)

JUDGE

22 – 08 - 2011