IN THE HIGH COURT OF TANZANIA

AT DODOMA

(DC) CRIMINAL APPEAL NO. 43 OF 2010

(Originating from Manyoni District, Criminal Case No.168 of 2009)

1. JABIR RAMADHAN
2. MERINO SILLA ..... **APPELLANTS**
3. SHABANI MABWAI

VERSUS

THE REPUBLIC ..... RESPONDENT

J U D G M E N T

01/6/2011 & 13/7/2011.

KWARIKO, J:

The three appellants herein had been arraigned before the District Court of Manyoni with the offence of Armed Robbery contrary to section 287A of the Penal Code Cap. 16 Vol. 1 of the Laws, Revised Edition 2002 as amended by Act No. 4 of 2004. It was alleged by the prosecution that the three had on the 21st May 2009 at 6.00 am at Lusilile village within Manyoni District in Singida Region stole mobile phone make Indian NOKIA valued at Tshs. 70,000/= the property of **ISSA S/O LUGUTA** and did cut him with a machete in his head and hands in order to obtain and retain the said property. The three had denied the charge hence their trial.

The facts of the case at the trial can be summarized as hereunder. On the material date the complainant ISSA S/O LUGUTA (PW1) was travelling from Bahi area to Nzega in his Motor vehicle make Scania lorry with registration No. T 976 AWF with its trailer No. T 346 AWK which was driven by one BURE s/o MAYENGA and there was a porter one JORAM S/O MATONDO (PW2) and in the Motor vehicle there were 600 bags of Cement.

When the car reached at the material place the driver saw some people dropping from the trailer and stopped the car and went to see what was going on. He was accompanied by PW2 and they found bags of cement dropped on the ground. When they started collecting the bags some people started throwing stones towards them and PW1 also alighted from the car and then he met four people armed with machetes and they cut him in the hands and head. These were identified as the appellants herein and another who was not arrested. PW2 and the driver went around the motor vehicle and cried for help and when the appellants saw people coming they run away. PW1 then was helped to the police where information was filed and was then sent to hospital.

From there the Police patrolled with PW2 in the neighbourhood where at one house four boys were found and the 2nd and third appellants were identified by PW2 among them hence were arrested. PW2 also saw the 1st appellant later and pointed him to the police who was accordingly arrested.

At the police the appellants were interrogated when the 2nd appellant admitted to have seen his co-appellants armed with machetes around the time of the incident while the 3rd appellant admitted these allegations and mentioned his co-appellants as his accomplices. The three were thus sent to court where the third and first appellants' Caution Statements were admitted in Court as exhibits P1 and P2 respectively.

In his defence the second appellant denied these allegations and said that he was arrested at 09.00 am on 21/5/2009 at his home and upon searching nothing was found. The police beat him and was forced to sign a document unknown to him. The third appellant also denied the allegations and testified that he was at home on 21/5/2009 whereas he was arrested on 30/6/2009. The appellants discredited the prosecution evidence as being weak and that the identification of the thugs at the scene was not watertight.

The trial court found at the close of the case for both sides that the prosecution case was proved beyond reasonable doubts against the appellants. That the identification of the thugs at 6.00 am could not have been mistaken and the 2nd appellant was arrested only few hours after the incident. That, the 3rd appellant was identified among his colleagues during the arrest and the 2nd appellant mentioned the co-appellants that he saw them with bush knives and that the statement was given voluntarily. All the appellants were thus found guilty convicted

and sentenced to thirty (30) years imprisonment each and an order of compensation to the complainant at a tune of Tshs.50,000/= each.

The three appellants were aggrieved with the trial court's decision hence filed this appeal each with his grounds of appeal which are similar in each word. They both in effect complained about the following points;

1. That, their respective defence evidence was not considered by the trial court.

2. That, the trial court erred when it considered the evidence against them together without analysing their respective alleged involvement in the incident.

3. That, the trial court's judgment contravened the provision of section 312 (2) of the Criminal Procedure Act, Cap. 20. Revised Edition 2002.

4. That, the evidence in respect of their identification was not water right.

5. That, there was no proof that the complainant had been assaulted and injured by offensive weapons (bush knives) as there was not any PF3 to that effect.

6. That, the trial court erred in law when it relied on a repudiated confession.

When this appeal was called for hearing the appellants only prayed the court to consider and allow their grounds of appeal; whereas the respondent Republic was represented by Mr. Wambali learned State Attorney who did not support the trial Court's decision and he gave his reasons for that. These reasons would be referred in the course of this decision. I will now deal with the appellants' complaints in seriatim as follows:

Firstly, the appellants complained that their defence evidence was not considered. Mr Wambali learned State Attorney did not specifically respond to this complaint. However, I have considered this complaint by going through the trial court's judgment and I found that the same is baseless since the magistrate very well considered the defence evidence in his own style. I would like to point out that each magistrate or judge has his/her own style of writing judgment and this one is its own kind of judgment since what matters is its contents in compliance with the law. This judgment considered the defence evidence especially at page seven (7) of the typed version.

The second complaint was not also responded to by the learned State Attorney but I am of the considered opinion that the

trial magistrate considered each one appellant's evidence and how the prosecution case touched each of them separately. He did not heap them together when he decided the case thus the complaint is baseless and it is hereby dismissed.

In the third complaint I agree with Mr. Wambali learned State Attorney that the trial magistrate's judgment complied with the provision of section 312 (2) of the Criminal Procedure Act since the same contained all the ingredients as provided in this law. This judgment contained points for determination, the decision thereon and the reasons for the decision, it was dated and signed accordingly. The complaint is thus baseless and it is hereby dismissed.

Also the appellants complained that the evidence in relation to identification was not water tight against them. I agree with both parties that identification of thugs at the scene was a crucial matter and the same was not proved by the prosecution witnesses. Firstly, the witnesses did not prove that there was any light at the scene since at the material time it was still dark. This is so because while PW1 and PW2 testified that the time was 6.00 am, PW4 said that he received a call from OC-CID of Manyoni at 5.00 am who informed him that there had occurred an armed robbery at Lusilile village. Then if by 5.00 am information of this incident had reached the Police then the material time might have been before 5.00 am and which is definitely a night tight time and dark. After all 6.00 am is a night time as provided in the Penal Code (see section 5).

Therefore, if it was dark when the incident happened the witnesses ought to have told the court how they were able to identify the thugs. The witnesses did not give any descriptive marks of the thugs and especially when they first reported to the police even before a manhunt had started (***See BUSHIR AMIR VR [1992] TLR 65***).

I therefore agree with the parties that an identification parade was necessary in this case since the witnesses did not know the thugs before. Instead the police conducted an identification parade of its own kind when they took the witnesses to the appellants' home where they were pointed out among their colleagues or relatives. Therefore, this exercise could not have brought about a justified outcome and I agree that the complainants did not identify any thug at the scene. PW1 said in his statement at the police (Exhibit D1) that he marked one thug with a gap between his teeth (pengo) and could identify him if he saw him but when he testified he did not point any of the appellants to be the person he had described in his statement. This complaint is thus upheld.

I also agree with both parties that the complainant did not prove that he was injured with machetes and or knives since he did not tender a PF3 to prove the same. This meant that the offence of Armed Robbery was not proved in this case since the use of any offensive weapon is its necessary ingredient. Therefore, it was not necessary to tender a sketch plan of the scene as the appellants have

argued but the PF3 or any medical report to prove that PW1 was injured by a weapon during the robbery. This complaint is thus upheld.

Lastly, I agree with the appellants that since the 2nd and 3rd appellants had repudiated their confessions during the trial the court ought to have conducted an inquiry to determine their voluntariness. Instead the trial magistrate simply admitted these statements even after the 2nd and 3rd appellants had repudiated them. These statements were heavily relied upon by the magistrate in his judgment when he found that the third appellant confessed and mentioned his co-appellants as his accomplices in the crime and that the 2nd appellant had mentioned to have seen others with machetes. Therefore these statements were not good evidence and they are hereby expunged from the record.

For the foregoing, I find that the prosecution case was not proved beyond reasonable doubts against the appellants and I hereby allow this appeal and quash the conviction, set aside the sentence and an order of compensation.

The appellants are thus ordered to be set at liberty unless otherwise lawfully held. Order accordingly.

(M. A. KWARIKO)

JUDGE

13/7/2011

AT DODOMA

13/7/2011

Appellants: All Present

For Respondent: Ms Haonga State Attorney

c/c: MS Komba.

(M. A. KWARIKO)

JUDGE

13/7/2011