

IN THE HIGH COURT OF TANZANIA

AT DODOMA

(EXTENDED JURISDICTION)

PRM. CRIMINAL APPEAL NO. 7 OF 2012

(DC) CRIMINAL APPEAL NO. 117 OF 2010

*(ORIGINAL CRIMINAL CASE NO. 6 OF 2009 OF THE DISTRICT COURT OF
MPWAPWA DISTRICT AT MPWAPWA)*

MAJUTO LUNGWA & 2 OTHERS.....APPELLANTS

VERSUS

THE REPUBLICRESPONDENT

22/2/2012 & 10/4/2012

J U D G M E N T

R.I. RUTATINISIBWA- PRM –EXT. JURISDICTION:

Three appellants, namely, **MAJUTO LUNGWA**, **YEREDU MNADI** and **JUMA NJOLE**, while before Mpwapwa District court, were charged and convicted with Armed Robbery c/s. 287 A of the penal code cap. 16 of the laws as amended by act no. 4/2004. Each one at the end of full trial was sent to jail to serve a scheduled term of 30 years and the corporal punishment to follow.

• The appellants were not contented, hence the instant appeal was registered. Different memorandum of appeal were lodged, though same in semantics and context. They challenge the decision of the trial court for poor identification, for wrong admission of the confession statements, and lack of consistency. The Respondent/Republic was legally and industriously represented by Ms. Haonga, learned state attorney. She made a common stand with the appellants and attacked the decision of the trial court.

The brief story worth of narrating is as follows;

On 6th January, 2009 at about 21.00hrs, Rehema Mkasanga (PW1) was at home and in the house of her parents. She heard a knock at the door, she opened. That she met the 1st appellant. That the 1st appellant commanded her to stop PW1 assessed the situation and decided to run out side. There outside she met the 2nd and 3rd appellants. She proceeded to run while shouting seeking for help from neighbours. PW1 said that she identified the 1st appellant through the influence of lamp light. Behind her the thugs she met stolen and dashed off with property. The thugs, also fired the bullet to clear the air.

The stolen property included satellite receiver, one radio cassette sony, one radio make rising, one brief case, two mobile phones and various clothes. The property of John Mkasanga.

When the appeal came for hearing the three appellants who are laypersons found them selves with nothing to add. The spead work was left to the learned counsel one Ms. Haonga.

On the issue of poor identification to the appellant, the state attorney said that PW1 did not explain where was the location of the lump which shed light. That PW1 did not give details about the appellants how she saw them and identified them. She also noted that from the evidence of PW1 it is not easy to know if at all PW1 knew the appellants before or not. She cited the cases of **Waziri Amani V. R. (1980) TLR. 250**, and **Abdul Farija and Timoth Sichura V. R. Cr. App. No. 99/2008 TCA (Unreported)**, that once the evidence is based on visual identification the court should not act on such evidence unless all the possibilities of doubt are eliminated.

I carefully perused the proceedings and the judgment of the trial court. The only witness who posed as eye one was PW1. she was invided at night. The lamp was on. PW1 did not clarify which type of lump was there. She said that there was enough

light. I agree with Ms. Haonga that there was a need of explaining type of light and the location of the lamp because it was movable and could have been at any place in the house.

PW1 said that when she went out she took on heels while shouting for help. It is not clear at what time did she pay attention to identify the people she met outside the house.

That being the case the evidence on identification left much to be desired.

There were grounds which challenged the procedure followed by the trial court to admit the cautioned statements. Ms Haonga argued that the appellants denied the cautioned statements. That having been done the trial court had to conduct an inquiry to find out if at all the cautioned statement was taken and taken freely.

She cited the case of **Twaha Ally and 5 others Vs. R. Cr. App. No. 78 of 2004.**

I had an opportunity to scan the cited authority and the proceedings of the trial court. In the judgment of the trial magistrate he said that the confession was repudiated. Once the cautioned statement is repudiated the trial court has to stop and conduct an inquiry or the trial within the trial. In the instant case that was not done. The trial court went astray and was wrong when admitted the cautioned statements.

The learned counsel argued that the properties were not properly identified by PW1 and PW2. She also said that the procedure followed to search the house of the 1st appellant was not proper. That no receipt was issued and tendered to prove that the search was done. She cited section 38 (3) of Cap. 20 to strengthen her stances.

I am in full support of Ms. Haonga, that no receipt was tendered to prove that the search was done and the property seized from the house of the 1st appellant.

On the question of identification to property, the charge sheet read that the owner of the stolen property was John Mkasanga. For the reasons not disclosed the owner of the property was not

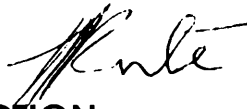
summoned as a witness. It is my position that the owner of the property is better placed to identify his property.

Since that was not done, it can not be seen that the stolen property was identified.

From the fore said reasons I proceed to quash the conviction and set aside the sentences. Each appellant be released forthwith, unless held on other lawful cause.

Appeal allowed.

(R.I. RUTTA)



PRM. EXT. JURISDICTION

10/4/2012

PRINCIPAL RESIDENT MAGISTRATE
(EXTENDED JURISDICTION)
RESIDENT MAGISTRATE COURT DUNDUMA

Delivered in the presence of Appellants and Ms. Mbunda State Attorney for the Respondent.

Right of Appeal explained.

(R.I.RUTTA)

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PRM. EXT. JURISDICTION

10/4/2012

PRINCIPAL RESIDENT MAGISTRATE
(EXTENDED JURISDICTION)
RESIDENT MAGISTRATE COURT DODOMA

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