

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF MWANZA
AT MWANZA

HIGH COURT CRIMINAL APPEAL No. 39 OF 2012

[Original Tarime District Court Criminal Case No 1 of 2010]

WINGO NASHON.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MKBIMA, J.

This appeal centres on two issues of identification. The first is identification of the appellant as one of the persons who stormed into the house of the complainant and steal there from various items including a bicycle Avon make and the second identification is in respect of stolen properties.

The appellant Wingo Nashon was charged in the District Court of Tarime with the offence of ***Armed Robbery c/s 287 A of the Penal Code [Cap 16 Vol. 1 of the Laws]***. It was alleged that on 18th August 2009 at about 20.00 hours at Kyariko Village within the District of Rorya in Mara Region the appellant did steal one bicycle make Avon, with serial No 444234 worth T.shs 100,000/=, one mattress 6' X 5' worth Tshs 125,000/= various type of clothes worth T.shs 250,000/= and Cash money T.shs 300,000/= Total valued at T.shs 775,000/= the property of one Raymond Osuta and immediately before and after such stealing he did assault the complainant with a machete and clubs in order to obtain the said properties.

The appellant pleaded not guilty to the charge. However, subsequently he was convicted as charged and he was sentenced to a statutory minimum imprisonment of thirty years. This appeal is therefore against the conviction.

As stated earlier, the appellant's grounds of appeal are in the main to the effect that the circumstances when the offence is alleged to have been committed were such that he could not have been properly identified and the complainant didn't identify the properties seized from his home as his stolen properties.

A brief history of what took place on the day of the incident will perhaps enable us appreciate the circumstances under which the offence is alleged to have been committed. On 18th August 2009 at about 20.00 hours the complainant Raymond Osuta was taking his dinner at his home when two persons invaded his house and make away with his cash T.shs 300,000/= and one Avon make bicycle. The complainant raised alarm but when his neighbours who stay at about ten metres away came, they found the robbers had already left.

Such then were the circumstances surrounding the commission of the offence and the identification of the appellant.

In his evidence before the trial court the complainant said that he was invaded by the appellant and his relatives (he didn't mention their names) who cut him by using a machete before demanded money. He said that immediately after the incident that appellant left for Kenya. He spotted him on 20th October 2009 and tipped the police who arrested him.

Detective Constable Haji (PW3) of Shirati Police Station testified that on 18th August 2009 at about 21.00hours the complainant reported to the police station that his house had been invaded by thieves and who have stolen various items including a mattress and Avon bicycle. He informed him that he identified the appellant as one of his assailants.

The learned State Attorney for the Republic, Ms Mwamini declined to support the conviction. She said that on the evidence

on record there was nothing to establish that the appellant was properly identified.

Regarding the recovered Avon bicycle, the learned State Attorney was of the view that it was not enough for the complainant to identify his stolen bicycle by its make Avon. She said that before the bicycle could be shown to its owner there must be some description given to the police regarding special marks etc before the recovered bicycle is shown to the witness. This was not done in this case.

On my part I would outright agree with the learned State Attorney that in the present case the prosecution didn't prove its case beyond reasonable doubt.

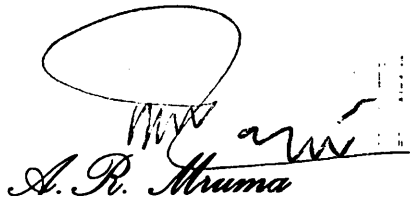
The law regarding identification of the accused person by witnesses is now settled. There is more than ample authority for the proposition that in order to justify a conviction solely on the evidence of identification such evidence must be water tight [See

R v Eria Sebwao (1960) EA 174. It is equally settled that in any case in which there is a question of identification of the accused, the fact of having been given descriptions and the terms of that description are matters of highest importance of which evidence ought always to be given. [See ***Rashid Ally V R (1987) TLR 98 at pg 99***].

The apparent strange feature of this case is the absence of business-like care concerning the way it was prosecuted and/or tried. The complainant didn't identify the bicycle and the mattress. The appellant didn't object for their production as he claimed to be his own properties. In a Kenyan Case of ***Smith Vs R (1987) KLR 428***, the High Court of Kenya held that the trial court ought always to insist on the details of identification and descriptions of the stolen items which were given before the recovery of the items.

In the case at hand it is not only that those details and descriptions were not given, but as stated hereinabove, the items were not shown to the complainant when they were produced in evidence.

Consequently it follows that the case was not proved beyond reasonable doubt. I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant shall be released from prison unless lawfully held for any other cause.



A. R. Muma

JUDGE

At Mwanza

10th October, 2012