

IN THE HIGH COURT OF TANZANIA
AT TABORA
APPELLANT JURISDICTION
(Tabora Registry)
[DC] CRIMINAL APPEAL NO. 69 OF 2012
CRIMINAL CASE NO. 84 OF 1998 OF THE DISTRICT
COURT OF MEATU.

BEFORE M. R. MLAWA PRINCIPAL DISTRICT
MAGISTRATE
MAGINA S/O JUMA APPELLANT
VERSUS
THE REPUBLICRESPONDENT

13th May 2013 - 27th May, 2013

J U D G M E N T

HON. S. B. LUKELELWA, J.

The appellant Magina Juma was on 21.06.1999 convicted by Meatu District Court at Mwanhuzi on a charge of Armed Robbery contrary to section 285 and 286, of the Penal Code and sentence to thirty years imprisonment and 12 strokes of the can.

The appellant was the second accused at the trial. PW1 Maria Charles of Lalata village in Meatu District is the wife of

PW3 Robbery Katebi. PW1 testified that on 06.09.98 at 3.00 a.m. was asleep at her home. The enter door of her house was broken and three people tot into the house. She identified two of the three men, one Solo, the first accused at the trial and Magina, the present appellant. PW1 said that the appellant had visited her shop in the morning. Her husband had gone to Mwanhuzi township.

The men beat her before she gave them shs. 400,000/= Later Solo raped her. PW1 testified that there was kerosene lantern burning when the bandits struck, but they put off the light when they left. A bicycle made Phoenix was stolen. PW2 Said Khamis Said is a Primary School teacher at Lata Primary School, who testified that on 06.09.1998 at 2.00 a.m. he heard noise at the hone of Mwalimu Katebi.

He went there and found his wife, PW1 crying bitterly. She told him that she had been robbed of shs.400.000/= and had been raped.

Further that the thieves made away with a bicycle make Avon, and two weighing machines.

PW2 testified that they took the victim to hospital. On the way they saw trail of three bicycles by the help of bright moonlight.

The group divided in two as they reached Mwamalole junction. After walking a few paces PW2 saw two people sitting down. He asked them whether they had seen some persons with bicycles. They agreed. PW2 called the other group and surrounded the two men. He interrogated the appellant who told him that he had come to the then first accused to take his photograph.

PW3 Robert Katebi testified that he left his home for Mwanhuzi on 5.9.98. He came back on 6/9/98 after receiving information that bandits had invaded his home. He visited Mwamalole dispensary where his wife was undergoing treatment, after an attack by bandits. PW3 testified that he knew Solo Sylvester, first accused. The appellant came from Mwabuzo village.

On 11/09/99 PW3 went to Semu river where some of the stolen properties were said to be hidden by the accused persons.

PW5 C. 9641 D.Cpl. Simon was the investigation officer of the case. He told the court that on 8/9/98 he was given a file on this case to investigate.

He took the accused persons from lock up. He interrogated them and they admitted to have stolen the properties and hidden

them at Semu river. As he had no means of transport he had to ask the sungusungu commanded who went there and discovered the bicycle.

The appellant told the court in defence that on 05/09/98 his father Juma Magoma sent him to his brother Chawalwa to collect fish.

His father had left his two wrist watches which were worth 600 fish. (perege). He set for the journey at 3.00 on a bicycle.

He reached at Mwamalole at 5.00 a.m. and knocked at the door of the first accused Solo to collect his photograph. Suddenly people conveying on him, saying "*ndio hao wakamate*", then accused number one ran into his house. He was beaten up.

Pw4 Juma Masona, father of the appellant told the court that he had sent the appellant to collect fish from his brother one Chawala. DW5 Kaswala John, was present when the appellant was instructed to go to collect fish.

In convicting the appellant the learned trial Primary District Magistrate found that the appellant has been positively identified by PW1 by the light of the kerosene lamp, and the confession from his co-accused; although retracing by the appellant could be acted

upon under section 33 of the Tanzania Evidence Act, and the authority in the case of R. Vs. Melanyi. (1971) HCD n. 398.

Mr. Mukandala learned State Attorney for the Respondent's republic declined to support both the conviction and sentence.

The learned State Attorney submitted that the conditions in which PW1 claimed to identify the appellant was not favourable as the light from a kerosene lantern whose intensity was not clarified cannot be relied upon.

Further PW1 did not mention the appellant, or anybody to the first persons who answered the alarm including PW2 a teacher who answered the alarm; and a neighbour of PW1 while the latter said that a phoenix bicycle was stolen from her house, the appellant was found in possession of Avon bicycle.

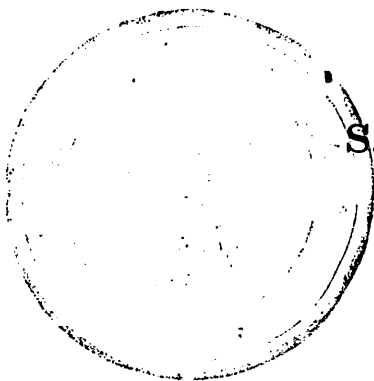
I have gone through the proceedings, it is clear that, had the learned trial Principal District Magistrate subjected the evidence to deep analysis he should have found that the prosecution evidence was extremely wanting. In addition to what the learned State Attorney had pointed out, the appellant who was arrested at 3. a.m. following an incident which occurred at 2. a.m. where did he get the time to go Semu river to hide the stolen properties.

According to the investigation PW5 C. 9641 D.cpl. Simon. It the Sungusungu Commander who went to Semu river, to unearth the stolen properties. The said Sungusungu Commander did not give evidence in Court.

I therefore quash the conviction of the appellant and set aside the sentence imposed on the appellant. It is ordered that the appellant be released forthwith from prison unless held therein on other lawful charges.

Appeal allowed.

Order accordingly.




S. B. LUKELELWA,

JUDGE.

27th May, 2013

Date: 27/05/2013

Coram: Hon. S. B. Lukelelwa, J.

Appellant: Present

Respondent: Mr. Ildephonce Mukandala State Attorney who is
Present

B/C Mary Mpululu

Order: Judgment delivered in Court this 27th May 2013.

Right of appeal explained.



S. B. LUKELELWA,

JUDGE.

27th May, 2013