

IN THE HIGH COURT OF TANZANIA
AT IRINGA

APPELLATE JURISDICTION
(Iringa Registry)

DC CRIMINAL APPEAL NO. 33 OF 2012
(Original Criminal Case No. 119 of 2011 of the
District court of Njombe District at Njombe
Before J.K.S. Hassan – S.R.M.)

1. COSTANTINO S/O MGAYA
2. JOSEPH S/O MWINUKA
3. ONESMO S/O CHAULA
4. GEORGE S/O JOHN MAHUWI

} APPELLANTS

VERSUS

THE REPUBLIC RESPONDENT

1/8/2014 & 5/9/2014

JUDGEMENT

MADAM SHANGALI, J.

The appellants in this appeal namely COSTANTINO S/O MGAYA (*1st Appellant*), JOSEPH S/O MWINUKA (*2nd Appellant*), ONESMO S/O CHAULA (*3rd Appellant*), GEORGE JOHN S/O MAHUWI (*4th Appellant*) together with one JOHN S/O PAULO GAMA @ PETER were jointly and together charged

before Njombe District Court with one count of Conspiracy to Commit an Offence c/s 384 of the Penal Code, Cap. 16 and four counts of Armed Robbery c/s 287 A of the Penal Code, Cap. 16. At the end of the trial the appellants were found guilty and convicted on both counts but JOHN S/O PAULO GAMA @ PETER who was the 5th accused was acquitted. On the first count the appellants were sentenced to serve 5 years term of imprisonment each while on the four counts of Armed Robbery they were each sentenced to serve 30 years of imprisonment.

Dissatisfied with that decision the appellants have filed this appeal. Initially each appellant opted to file his own appeal but following the application from the learned State Attorney on 22/7/2013 this court ordered for the consolidation of the appeals hence this (DC) Consolidated Criminal Appeal No. 33/2012.

There are several facts established by the prosecution evidence and not controverted or disputed by the defence side. To start with is the fact that this is a highway hijack case where several motor vehicles were hijacked by a good number of bandits equipped with machetes, clubs, axes and iron bars. They robbed the drivers, conductors and passengers while threatening to kill them.

According to the evidence of PW.5 Mikidadi Abasi who

was the driver of a motor vehicle Registration No. T 618 AVK which operates between Njombe - Bulongwa - Makete route, on 10/5/2011 at about 21 hours he was driving the said motor vehicle. When he reached at Usalule Village area close to the bridge he saw a certain motor vehicle Land cruiser parked in front with the lights off. That he decided to stop his motor vehicle but suddenly a man holding a touch approached him at the window and ordered him to switch off his car and lights. PW5 realized that they were hijacked and there and then he saw other 4 bandits equipped with clubs and pangas invading the motor vehicle while ordering all passengers to alight from the motor vehicle. The bandits started to search the passengers while directing them not to stare at their faces. The bandits stole the passengers belongings including PW.5's Nokia phone worth 170,000/= and cash T.Shs.40,000/= which were fished from his pocket.

Having searched and stole from him and other passengers the bandits ordered the passengers to re-board the motor vehicle and remain inside. PW.5 claimed to have identified 2nd appellant (*2nd accused*) who had a fresh wound on his face. PW.6 Joseph Kakwaya, was a conductor in the motor vehicle Registration No. T 618 AVK. He testified to the same effect that having been hijacked and ordered to switch off the car and lights he saw about 9 armed bandits who boarded the motor vehicle and started to search and steal from passengers. That in that incident he was able to identify the

1st appellant (*1st accused*) through the torch light of another bandit who happened to torch him.

PW.1 Menradi Nziku, the Chairman of the Mganda Village Security Committee testified to the effect that on 10/05/2011 at about 23,00 hours he was informed by one Samwel Chaula about the incident. He rushed to the scene of crime and met several victims who were robbed. He summoned several village militiamen including Huruma Msigala (*PW.2*) and Geoffrey Chaula (*PW.3*). They started a manhunt to search for the bandits and stolen items. In their search at about 5.45 hours they met the 2nd accused (*2nd appellant*) coming from the bush. They started to interrogate him. The 2nd accused told them that he was coming from Kipengere Village. He failed to produce an identity card. They searched him and found him with an identity card/voting card of George John, 4th accused (*4th appellant*). In further questioning the 2nd accused told the searching party that George John is his physical brother. The 4th accused was later arrested by the Usalule Village Executive Officer following the PW.1's instructions. It is in the evidence of PW.1 that the 2nd accused was taken to the Village Office where he was further interrogated and confessed to have committed the alleged offences in collaboration with 8 others persons whose names were duly listed and submitted to the police station.

The evidence of PW.1 also reveal that the second accused

was able to lead the searching party to the bush where he showed several stolen items stolen from the passengers. The items included sugar in a bottle, one Lutende, two trousers and one Jacket which were identified by the victims. PW.2 and PW.3 testified on how they were called to accompany PW.1 and started to search for the bandits only to see the 2nd accused coming from the bush and arrested him. In short they both supported the testimony of PW.1.

The other portion of prosecution evidence is that of PW.4, Ass/Insp. Cosmas, the police officer who conducted the identification parade. The parade was conducted on 14/5/2011 at about 12.28 hours at Njombe Police Station. It contained nine (9) people randomly chosen and there were four (4) identification witnesses namely Mikidadi Abasi (PW.5), Joseph Kakwaya (PW.6), Deo Mbilinyi and Asifiwe Sanga. In the parade each accused person was being identified at a time by one witness. According to the testimony of PW.4, the 1st accused (*1st appellant*) was identified by all identifying witnesses. The 2nd accused (*2nd appellant*) was identified by all identifying witnesses and the 3rd accused (*3rd appellant*) was equally identified by all witnesses. The 4th accused (*4th appellant*) was identified by only one identifying witness namely Asifiwe Sanga. The other identifying witnesses failed to identify him.

In his testimony PW.5 Mikidadi Abasi stated that he did

not identify 3rd accused and 4th accused in the identification parade. He identified only 1st accused and the 2nd accused. PW.6 testified to the effect that it was his first time to see the 3rd accused (*3rd appellant*) and therefore he never identified both 3rd accused and 4th accused. According to the trial District Court's record of proceedings there was a serious confusion on the way PW.6 was adducing his evidence and responding to the cross-examination questions. He ended up confessing to the court that it was his first time to appear in court and to give false evidence.

Be as it may, there was evidence of PW.8 Isaya Mbwilo, who testified to the effect that he was one of the people called to attend the identification parade by the police and that during the identification parade the accused persons namely Onesmo Chaula and George Mahuvi were duly identified by the witnesses. When this witness was asked to point out the said identified accused persons at the dock, the witness pointed at 1st accused Constantino Mgya and 2nd accused Joseph Mwinuka. PW.8 was not able to state who exactly identified the alleged suspects during the identification parade. PW.9, Simeni Joseph was another independent person fetched by the police to participate in the identification parade. He claimed that doing the identification parade all accused persons from No. 1 – 4 were identified by the victims of the offence with the exception of the 5th accused person. PW.10, Benson Lulambo was another independent person

picked by the police to participate in the identification parade. This witness claimed that it was only the 2nd accused who was identified in the parade. He admitted that before the trial District Court the 2nd accused was looking different from the day of conducting identification parade. He did not elaborate.

The other important evidence is that of PW.7 D/Cpl. Timothy. He recorded the cautioned statement of the 2nd accused person on 12/5/2011. The cautioned statement was admitted after a trial within trial and marked exhibit P.2. PW.11, D/Sgt. Stanslaus was the investigator of the case. He testified to the effect that on 11/5/2011 at 10.00 a.m. the 2nd accused and 4th accused were questioned and mentioned their 8 collaborators. Bearing on information from the said two accused persons the rest of the accused persons were arrested and charged. PW.7 also recorded the cautioned statement (*Exhibit P.7*) of the 4th accused on 12/5/2011 who confessed to have participated in the commission of the alleged offences.

In their sworn defences the accused persons categorically denied to have committed the alleged offences. The first accused (*DW.1*) stated that he was unceremoniously arrested by a police officer called Salehe on 11/5/2011 while walking along Matawe Road. That he was whisked to the police station where he was joined in the alleged charges. He challenged the whole prosecution evidence and claimed that there was no evidence to connect him with the commission of the alleged

offences. The 2nd accused person (DW.2) claimed that on 11/5/2011 while at Mganda Village heading to Kipengere Village at around 6.00 hours he was put under arrested by a group of 7 people who questioned him about the robbery incident and started to torture him. He denied any involvement in the alleged robbery incident but those people refused to believe him. As a result they took him to the Police Station where he was equally interrogated and tortured. That on 14/5/2011 an identification parade was conducted and was wrongly identified by some prosecution witnesses who claimed that he had a scar on his face while his face has no scar. He insisted that the evidence against him was fabrication and lies.

The 3rd accused person (DW.3) stated that he was arrested at his home on 11/5/2011 at 23 hours while sleeping. The police searched his house while accusing him for committing robbery offences. That he was taken to the police station where an identification parade was conducted and wrongly identified by one witness. He complained that there was no sufficient prosecution evidence to connect him with the commission of the alleged offences.

The 4th accused person (DW.4) testified to the effect that he was arrested by militiamen on 11/5/2011 at Usalule Village on allegation that he was a suspect in the alleged highway robbery incident. That he was taken to the police

station where he was intensely questioned, tortured in order to admit and show the stolen items. That he totally denied the allegations and refused to sign the documents prepared by the police. Then he was subjected to the identification parade where he was surprised to be touched by three people. He categorically denied to have committed the alleged offences and stated that there was no sufficient evidence against him.

In brief, that was the prosecution evidence and defence story which resulted to the conviction of the appellants on both first count of Conspiracy and four counts of armed robbery. As I have pointed out above each appellant came out with a good number of grounds of appeals but having perused all of them I am certain that all can conveniently be condensed to one major ground of appeal namely whether the trial Magistrate erred in law and fact in holding that the prosecution discharged its burden of proof beyond reasonable doubts against the appellants.

In the hearing of this appeal the 1st, 2nd and 3rd appellants appeared in person and fended for themselves while the 4th appellant was represented by Mr. Mponda, learned advocate. Ms. Maziku, learned State Attorney appeared for the respondent/Republic.

Both 1st, 2nd and 3rd appellants gave a short but critical oral submission in support of their appeals. They categorically