

IN THE HIGH COURT OF TANZANIA
AT DODOMA

DC CRIMINAL APPEAL NO 60 & 61 OF 2016

**(Original Criminal Case No. 122 of 2015 of the District Court of
Manyoni District at Manyoni)**

HASSAN HAMISI NASSORO	1st APPELLANT
WAZIRI MOHAMED SUKWA	2nd APPELLANT

VERSUS

THE REPUBLIC	RESPONDENT
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JUDGMENT

16/11/2016 & 15/12/2016

SEHEL, J.

The above named appellants were jointly and together charged at the District Court of Manyoni at Manyoni with an offence of armed robbery contrary to Sections 287A of the Penal Code, Cap. 16. They were both found guilty and convicted as charged. They were sentenced to serve a jail of thirty (30) years imprisonment.

The facts of the case that led to the conviction and sentence of the appellants can be canvassed in the following:

On 16th day of May, 2015 at 2100Hrs police officers received information that there was motorcycle accident at Itigi road whereby the motorist was arrested by the people and taken to Itigi police station. On 18th May, 2015 the suspect who was supposed to report at the police, did not appear hence the police officers went to his house at Tamburareli. The police found his wife . They searched the house and managed to find solar panel with no explanation so it was taken to police station. On 19th May, 2015 the police officers went back again but they found that the suspect and his family shifted to Mgandu-Itagata village. The police officers, according to E. 7229 D/Sgt George (PW3) went to Mgandu but the person who caused the accident was not there so the present appellants were arrested.

PW3 also told the trial Court that it was the 1st appellant who told the police that they (appellants) have gun, hidden at the bush and it was the 1st appellant who showed the police a place where it was hidden together with a radio. PW3 further said these recovered items are the ones that they were stolen on 27th March, 2015 at 0200Hrs at the house of Monica Jonas (PW1), the complainant.

PW1 gave her story as to what transpired on 27th day of March, 2015. She said at around 2000Hrs two people arrived in the motorcycle and they asked for a matchbox and the puncture solution. She went inside the kiosk and the two people followed her behind, they then ordered her to sit down, pointed a gun at her and

they also had a Panga with them. They asked for money, they beat her and was also cut with a panga on her near ear. She gave them Tshs. 500,000/= and they took a solar panel, radio, its battery and five charging mobile phones. PW1 said she identified her assailants through a light bulb and they were also close to her. Leah Jonas (PW2) who was with PW1 on that night testified to the effect that on 27th day of March, 2015 she was at home with PW1 thereafter two people arrived in a motorcycle who were looking for puncture solution and matchbox. She said PW1 opened the kiosk, when PW1 went inside and the two men went inside. They held PW1 under restrain so PW2 ran to her neighbours when she returned the two men had left and PW1 was locked inside the kiosk. PW2 told the trial Court that she was able to identify the men through the use of solar power lamp that was burning at the door. It is on these evidences that the appellants were found guilty and convicted by the trial Court.

Aggrieved by both conviction and sentence, they both singly preferred their appeal to this Court. The first appellant's appeal is DC Criminal Case No. 60 of 2016 and that of the second appellant is DC Criminal Appeal No. 61 of 2016. Since both appeals originate from a single judgment of the trial Court and since they were both assigned to me I decided to consolidate the two appeals so that they can be adjudicated effectively and expeditiously.



At the hearing, appellants appeared in person while the respondent was represented by Mr. Sarara, learned State Attorney. The appellants adopted their grounds of appeal and invited the respondent to respond to them. Mr. Sarara did not support the appeal by arguing that the case was proved beyond reasonable doubt. Mr. Sarara ruled out the issue of alibi raised by the 2nd appellant by submitting that the issue was never raised at the trial Court hence it cannot be raised at the appellate stage. On the complaint that Tshs. 500,000/= was not tendered as exhibit, he submitted that since the said amount was nowhere to be found then it was not possible to tender it as exhibit. Regarding exhibits being tendered by PW1 and not the police, Mr. Sarara replied that the argument has no basis since the proceedings show that it was the police, E. 7229 D/Sgt George (PW3) who tendered the exhibits as it appears at page 10 of the proceedings. Mr. Sarara further argued that the stolen items radio (Exh. P2) and solar panel (Exh. P3) were recovered from the 1st appellant who showed them to PW3 and a search warrant was tendered before the trial Court as Exhibit P1. Mr. Sarara further submitted that the appellants were identified by PW1 and PW2 as there was a light from solar panel. He also argued appellants could not be arrested in time as they disappeared immediately after committing the crime.

I entirely agree with Mr. Sarara that it was not possible to tender Tshs. 500,000/= as it was not yet recovered and that the

witness who tendered the exhibits was PW3 and not PW1. However, I do differ with his argument that the case was proved beyond reasonable doubt against the appellants. The visual identification of PW1 and PW2 cannot be held that it was absolutely water tight since the intensity of the light was not stated by the identified witnesses. The need to state the intensity of the light illuminated was underscored by the Court of Appeal in the case of **Issa Mgara @ Shuka v. R.**, Criminal Appeal No. 37 of 2005 (unreported). It said:-

"It is not enough to say that there was light at the scene of crime, hence the overriding need to give sufficient details on the source of light and its intensity."

Not only that, the record is silent as to the intensity of the light but the chain of custody of the recovered items was not clearly described especially taking into account the manner in which the stolen items are said to have been recovered. It is on record that when the police went to Mgandu, the suspects were not there but they managed to arrest the present appellants. Further it is claimed by PW3 that the 1st appellant confessed and even showed them where they hid the stolen items. Unfortunately, the confession statement was tendered as exhibit at the trial court. Failure by the prosecution to tender material evidence in its possession, then an adverse inferences has to be drawn and it should be in benefit of the appellants. If it is true that the 1st appellant confessed and he is the one who showed them the stolen items then why was his

confession statement not tendered. The alleged caution statement is one of the relevant factor in trailing the stolen items. Its non-production raised doubt on how the alleged stolen items were recovered. Under the circumstances the possibility of these stolen items to have been planted there by the police to fix the appellants cannot be ruled out, especially bearing in mind that the police, according to PW3, did not find the suspect and instead arrested the present appellants. It is therefore not proved beyond reasonable doubt that the appellants were found in possession of the recently stolen properties in order to connect them with the crime that occurred on 27th day of March, 2015 at Mtwika – Mgambo in Damwelu village within Manyoni District.

Since the prosecution case was not proved to the standard required, I find the appeals by the appellants having merit. I quash the conviction, set aside the sentence and order for their immediate release from prison, unless they are held for other lawful purpose. It is ordered.

DATED at Dodoma this 15th day of December, 2016.

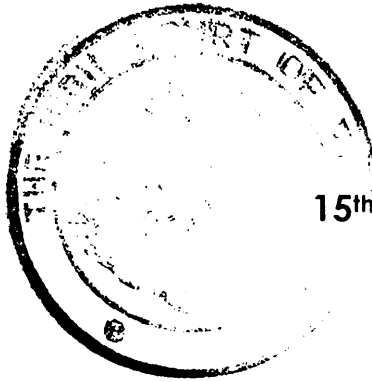
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B.M.A Sehel

JUDGE

Judgment delivered in open Court at Dodoma under my hand and seal of the court, this 15th day of December, 2016 in the presence of

the appellants and Ms. Taji, learned State Attorney representing the Republic/Respondent. Right of appeal is fully explained.



B.M.A Sehel

JUDGE

15th December, 2016.