

IN THE HIGH COURT OF TANZANIA

(MWANZA REGISTRY)

AT MWANZA

APPELLATE JURISDICTION

HIGH COURT CONSOLIDATED CRIMINAL APPEALS NOS.280 AND 281 OF 2016

*(Original Criminal Case No. 76 of 2015 of the Musoma District Court at Musoma
before Hon. R.B. Maganga Esq. (Senior District Magistrate - SDM)*

1. GEORGE MWAJA

2. MAGAMBO BENESTA

} **APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

Last Order Date: 26/02/2018

Reasons for Judgment Date: 06/04/2018

REASONS FOR JUDGMENT

MAKARAMBA, J.:

On the **26th day of February, 2018** when this appeal came for hearing, **M/s Gisela Alex**, learned State Attorney for the Republic Respondent having made her reply submissions, I allowed the appeal, acquitted the Appellants on the three counts on which they stood charged, set aside both the sentence of 90 years and the compensation of Tshs.500,000/= to the victim of the offence, and ordered for their immediate release from prison and to be set at liberty forthwith unless they were being held for some other lawful reasons. Having made such orders, I reserved the reasons for the decision. These are the reasons.

The two Appellants, **George s/o Mwaja** and **Magambo s/o Benesta** were arraigned before the Musoma District Court on three counts of armed robbery contrary to section 287A of the Penal Code, Cap.16 R.E. 2002. At the close of the hearing, the trial Court sentenced the Appellants to **30 years in prison** on each count and the sentences were to run consecutively, meaning that the Appellants were to spend **90 years in prison**. The Appellants being aggrieved by the decision each appealed against it before this Court on seven counts which essentially revolve around identification evidence. The two appeals namely, **HC Criminal Appeal No. 280 of 2016** and **HC Criminal Appeal No. 281 of 2016** were consolidated and heard together.

On the date of the hearing of the appeal, M/s Gisela Alex learned State Attorney for the Republic/Respondent prayed that since the two separately filed appeals arose from the same original **Criminal Case No. 76 of 2015** before the Musoma District Court, where the two Appellants stood jointly charged with armed robbery and were each convicted and sentenced to a jail term of **30 years** and to compensate the victims **Tshs. 500,000/=**, the two appeals be consolidated and heard together. This Court granted the prayer and accordingly consolidated the two appeals were consolidated and heard together as **HC Consolidated Appeals Nos.280 and 281**. The two appeals having being so consolidated, the Appellants prayed that the grounds of appeal as stated in their respective separate Petitions of Appeal be adopted as forming part of their submissions in chief, which prayer this Court duly granted and thereby invited M/s Gisela Alex, learned State Attorney to make a reply. Initially in her reply submissions M/s Gisela

Alex had supported the conviction but not the sentence. However, in the course of her submissions she elected to support even the appeal.

As per the testimony of **MwajumaMahindi, PW1**, on the day of the event at **3.00 am** while asleep at home her and her daughter, **PW2**, were invaded by the two accused persons. They knocked on the door of **PW1** to open it for them and upon opening the door that is when **PW1** saw the two accused persons, and with the aid of light she recognized them. They threatened her with a *panga* to give them money. They took **Tshs. 200,000/=** and a **TECNO** Mobile phone, the property of **PW1**. **PW1** stated further that, she managed to recognize one of the accused, **MagamboBenesta** who was donning a **Maasai** robe (*shuka*). He was their neighbor. **PW1** also managed to recognize the other accused person, **George Mwaja** who was the son of one **Pili Kichaa**, also their neighbor.

In her testimony, **PW2** who is the daughter of **PW1**, stated that, on the eventful day while asleep in her room she woke up to torch light and saw the door to her room open. **PW2** stated further that one of the accused started beating her up using a *panga* and ordered her to give him money. **PW2** stated further that she took some money **Tshs.11,000/=** from underneath her mattress and gave it to the accused. Then the accused ordered **PW2** to take them to the room of **Zuwena Charles, PW3**; and started threatening her using their *pangas* demanding to be given money. They also managed to get some **Tshs.8,000/=** from **Zuwena** who also recognized one of the accused, **Magambo** with whom she claims that they had been in a six-month love relationship from June to December, 2014. **PW3** stated that in the heat of exchange of words, the accused ordered **Zuwena** to give them money

lest they will rape her to which **Zuwena** allegedly told them that she was HIV positive, so they left. **PW1** state that the event was reported at the Musoma Police Station where she was issued with a **PF3** for treatment. The PF3 of PW1 was admitted in evidence as **Exhibit P1**, showing the wounds PW1 had sustained in the hands of the accused which according to the PF3 were caused by a "blunt object."

PW4, a Police Officer with number D6020, DtSsgt Charles in his testimony before the trial Court stated that, they arrested the 2nd accused **Magambo** on **21.09.2015** at **Nyakato** and the 1st accused on **06.08.2015** at **Musoma** area along **Karume Street** following PW1 having seen him at the Police Station where PW1 had gone to make a follow up on her case. When PW saw the 1st accused at the Police Station she alerted the Police who immediately took him in. Apparently the 1st accused had been taken in in connection with another incidence. It is only then PW1 informed the Police that the 1st accused was also responsible for the armed robbery incident at her place and that is how the 1st accused got to be arrested by the Police and charged with the offence of armed robbery.

On the evidence on record, it seems very clearly that on the eventful day, there were about three crime scenes. The first crime scene was at the place of PW1 and PW2, the second one was at the home of PW3. The trial Court seems to have relied heavily on the identification evidence of a single witness, PW1, which in my considered view was highly unreliable. This was due to the circumstances surrounding the alleged identification of the two accused persons by PW1 and PW2. They witnesses claim that they were able to identify the two accused persons with the aid of the light from a torch which is alleged that the accused

were holding. It does not need any stretch of imagination to realize that a torch claimed to have been held by the accused to beam their victims with, could also assist the person being beamed at to be able to identify the one beaming at them, and particularly given that the time of the alleged incident was at 3.00 am which by common knowledge being at Musomait was still dark. The obtaining conditions at the crime scene could not therefore be said to have enabled unmistakable identification. The alleged identification of the accused by PW1 and PW2 is therefore highly circumspect. The learned trial magistrate should have warned himself of the danger of relying on such an unreliable testimony to found a conviction in such a serious crime.

Furthermore as to the place of **PW3, Mariam Charles**, she did not say that she identified either of the two accused persons. At the third crime scene, the only claim by the victim, Zuwena, is that she had been in a love relationship with one of the accused person, Magambo for six months. There is no credible evidence that she also identified him at the crime scene on the eventful day. The evidence of identification having been that unreliable, the trial Court ought to have found that the prosecution had failed to prove its case against the accused beyond reasonable doubt and thus to find in favour of the accused.

Much as this appeal succeeded and the only thing remaining was the reasons for the decision, I find it trite to comment albeit very briefly on the manner and the way in which the sentence which was imposed on the accused was to run. The learned trial Magistrate having convicted the accused on the three counts imposed a sentence of 30 years on each accused persons in respect of each count and ordered the sentence to run consecutively, which was to have seen each accused

person spending 90 years in jail. I must say that this was rather unfortunate and it went contrary to the established and known general principles regarding the imposition of sentence in such circumstances, which principles are clearly stipulated in the *Penal Code, Cap.16 R.E. 2002* and the *Criminal Procedure Act, Cap.20 R.E. 2002*. I do not want to believe that these principles escaped the mind of such a senior trial Magistrate.

It is for the above reasons, I allowed the appeal, quashed and set aside the Judgment, conviction and sentence against the two appellants by the Musoma District Court in **Criminal Case No. 76 of 2015** before Hon. R.B. Maganga (SDM), and the compensation order of Tshs. 500,000/= to the victim being set off, and the two Appellants being set at liberty forthwith unless they were being held for some other lawful reasons. The reasons are as they have been given herein above. It is so ordered.

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R.V. MAKARAMBA

JUDGE

06/04/2018