

**IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA**

(CORAM: RAMADHANI, C.J.; MUNUO, J.A; And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 124 OF 2005

BETWEEN

HAMIMU HAMISI TOTORO @ ZUNGU.....APPELLANT

A N D

THE REPUBLIC.....RESPONDENT

**(An Appeal from the Decision of the High Court of Tanzania,
a t M t w a r a)
(Lukelelwa, J.)
dated the 17th day of June, 2005
i n
Criminal Appeal No. 21 of 2003**

JUDGMENT OF THE COURT

11 & 19 November, 2009

RAMADHANI, C. J.:

The appellant, Hamimu Hamisi Totoro @ Zungu, was one of five accused persons before the District Court of Newala. Three of them were acquitted but the appellant, who was the second accused person, and Mohamedi Bakari

Ngozi, the first accused person, were convicted of robbery with violence and each was sentenced to imprisonment for thirty years.

While Rashidi Hamisi (PW 1) was away on 9/11/2001 at about 07.00 hours his house was broken into by five thugs. His two wives, Salima Manyeleto (PW 2) and Mwajuma Mohamedi (PW 3), were in the house when some money and items of property were robbed. The wives claimed that they identified the first accused person and the appellant being among the robbers.

PWs 2 and 3 reported the matter to Juma Mfaume (PW 4), the Village Vice Chairman, who informed the Mahuta Police Post. D/Sgt Balthazary (PW 6) arrested the first accused person who took them to the house of the appellant but did not find him at home. The first accused person then took the police to the house of one Daudi where the fifth accused person was arrested while the appellant and two other accused persons escaped. However, on 30/01/2002 they were arrested by D/Cpl Juma Mpuya (PW 7) who took their cautioned statements and tendered them in court as exhibits. The statement of the appellant was admitted as Exh. P 4.

The learned District Magistrate being satisfied with the identification by PWs 2 and 3 and the cautioned statements acquitted the rest but convicted the first accused person and the appellant. Both appealed to the High Court and LUKELELWA, J. faulted the District Court in accepting the evidence of PWs 2 and 3. He said:

As a first appellate court I'm enjoined to review the evidence given at the trial. Having done so, I find that the appellants were not properly identified at the scene of incident by PW 2 and PW 3. PW 2 claims to have identified the

appellants by the aid of moonlight filtering through the roof of her house. That is a very unreliable source of light taking the medium which it travelled before reaching the terrified eyes of PW 2. On the other hand PW 3 made the identification by the aid of torchlight which was shone into her frightened eyes as she hid herself into a house of an old woman. The evidences of PW 2 and PW 3 needed corroboration before they could be acted upon.

The learned judge found no corroboration with respect to the first accused person so he allowed his appeal but he dismissed the appeal of the appellant because of his confession in the cautioned statement, Exh. P 4. This is an appeal from that judgment.

First of all, we have to point out that there was no question of corroborative evidence. It was either PWs 2 and 3 were reliable or not. The learned judge misdirected himself there.

The appellant appeared in person while the respondent/Republic had Ms. Evita Mushi, learned State Attorney. The appellant had a memorandum of appeal containing seven grounds and from the dock he added two other grounds challenging the admissibility of Exh. P 4. He pointed out that the trial District Magistrate did not give him an opportunity to object to the admission of Exh. P 4 and so, he argued, its admission was improper. Secondly, he submitted, the trial court did not satisfy itself on whether or not the statement was freely given. He referred us to Emmanuel Joseph © Gigi Marwa Mwita v. R. Criminal Appeal No. 57 of 2002 (CAT unreported) which lays out the procedure to be followed in handling such statements.

Ms. Mushi did not support the conviction and the sentence. She agreed with the appellant's two additional grounds and pointed out that Exh. P 4 is a certified true copy of the original and that no reason was given to show why certified copies should be admitted.

We agree with both the appellant and Ms. Mushi. There were grave omissions in the admission of Exh. P 4. The relevant portion of the proceedings admitting the cautioned statements goes as follows:

PW 7

..._All the accused persons did sign on the respective caution statements. These are the caution statements of the accused persons in the dock. I pray that I submit them be accepted as exhibits (sic).

COURT:

The 3 caution statements for Hamimu s/o Hamisi Totoro, Mohamedi s/o Abdallah Swalehe Likalala and Hashimu Selemani Polo @ Maduka are accepted and marked as exh. P4, P5 and P6 respectively as tendered before this court.

It is obvious that the provisions of section 27(2) of the Evidence Act [Cap 6 R. E. 2002] were not observed. That sub-section provides:

(2) The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution.

That was not done and, as properly pointed out by the appellant, it could never have been done since the appellant was not asked whether or not he objected to its admission.

Again Ms. Mushi correctly pointed out that Exh. P 4 is a certified copy, that is, in the language of the Evidence Act, it is secondary evidence while it had to be primary evidence according to section 66:

Documents must be proved by primary evidence except as otherwise provided in this Act.

It could and can never be ascertained whether Exh. P 4 was one of the excepted documents since no reason was assigned to its submission.

Exh. P 4 should never have been admitted. We, therefore, expunge it. In that case there is absolutely no evidence on which to find a conviction of the appellant. We, therefore, allow his appeal, quash the conviction and set aside the sentence of imprisonment for thirty years. The appellant is to be released immediately unless his continued incarceration is lawful.

DATED in MTWARA, this 19th day of November, 2009.

A. S. L. RAMADHANI
CHIEF JUSTICE

I certify that this is a true copy of the original.

(KITUSI)
SENIOR DEPUTY- REGISTRAR