IN THE HIGH COURT OF TANZANIA

AT TABORA.

APPELLATE JURISDICTION

(Tabora Registry)

CRIMINAL APPEAL NO. 68 OF 2008

ORIGINAL CRIMINAL CASE NO. 38 OF 2005

OF THE DISTRICT COURT OF KASULU DISTRICT

AT KASULU

BEFORE: N.B. KURWIJIRA, Esq; RESIDENT MAGISTRATE

IBRAHIM S/O KADUMBUYE.....APPELLANT

(Original Accused)

VERSUS

THE REPUBLIC.....RESPONDENT

(Original Prosecutor)

JUDGMENT

29th Sept.08 & 17th Nov.08

MUJULIZI, J.

The Appellants, (1st) **IBRAHIM KADUMBUYE**, and (2nd) **FRANCIS S/O KALIMABENE** were charged before the District Court of Kasulu as 1st and 2nd accused together with one **EUSTACHIUS S/O HUNGU @ BURUSA**, on one count of Armed Robbery c/ss 285 and 286 of the Penal Code, Cap.16 R.E. 2002.

At the end of the trial the Court acquitted the 3rd accused **EUSTACHIUS S/O HUNGU @ BURUSA** on grounds that he had proved his alibi that he could not have been at the scene of the crime as testified by PW.1 **DONALD S/O SHODO** and PW.III **RAHEL D/O SAMWELI**, the two complainants and only eye witnesses to the alleged robbery. However, it found the appellants guilty. In relation to the 1st Appellant, because both prosecution witnesses PW.1 and PW.II, reside in the same village and that

"*P.W.III A/Inspector Faustine said that when the 1st accused was arrested at his home he was met hiding in his maize shamba. This shows that he was hiding in order to avoid to be arrested.*" In relation to the 2nd Appellant because he failed to prove his alibi.

Consequently the two appellants were sentenced to thirty years imprisonment.

Dissatisfied, they preferred this appeal. Each filed a separate appeal, which were consolidated, and heard together.

The 1st Appellant filed three grounds of appeal:-

"2. *That, the learned trial district magistrate erred on point of law in believing the evidence of PW.4 police officer*

who alleged that the accused (appellant) he was hidden in his maize plantation, this piece of evidence does not corroborated by any independent witness....

3. *That, the learned trial magistrate erred on point of law in convicting the appellant while knowing that, the identification parade which was conducted was illegally conducted because, no description was given at the earliest opportunity after the incident occurred:* ***JOSEPH SHAGEMBE V. REP (1982) TLR 147.***

4. *That, having regard to the totality of the evidence on record and circumstances of the case the appellant's guilt had not been proved beyond reasonable doubt!"*

The 2nd Appellant challenged the conviction or two major grounds:-

2) *That the learned trial district magistrate wrongly rejected his defense of alibi for which notice had been given;* ***RASHID ALLY V. REP.(1987) T.L.R. 97.***

3) *That the conviction was wrongly based on mere suspicious:* ***ABDALLAH BIN WENDO AND ANOTHER V.REP. (1953) 20 EACA -@ pages 166 and 170, and HAKIMU V. REP. (1984) TLR 20.***

4) *That no stolen property was found in his possession.*

Miss Moka, learned State Attorney, for the Respondent Republic supported the conviction.

Before arguing her grounds she alerted the Court to the defect in the charge under which the Appellants were charged.

At all material times, section 285 and 286 of the Penal Code had since been amended to remove reference to armed robbery. Armed Robbery is an offence created by section 287A of the Penal Code.

However, she submitted that; the said defect did not unduly prejudice the accused persons as the offence was in substance the same. As such, she urged such defect was remediable under section 388 of the Criminal Procedure Act, Cap. 20 R.E. 2002.

I agree.

Arguing in support of the conviction, she submitted that the identification parade was not material since the two identification witnesses new the accused from before and the crime had been committed in broad day light. At 6.00 pm in Kasulu there was still sufficient light, and that they were first named at the Police station which lead to their arrest. In the circumstances all elements of mistaken identify were discounted: **WAZIRI AMAN V.R (1980) TLR 250; R.V. ALI (1971) HCD – No. 306.**

She concluded that PW.2 had identified the clothes they were putting on (page-5 typed proceedings).

With much respect to the learned State Attorney, I find her argument rather unfortunate. Although the cited decisions were apt and correct, the facts do not entirely fit in.

The issues for determination in this appeal is whether the prosecution proved its case beyond reasonable doubt.

As already observed at the beginning of my judgment, the two identifying witnesses had positively claimed to have identified the 3rd accused as the person who was armed and had fired several rounds. However, the trial Court established

that the said accused was not at the scene of the crime. In the circumstances, chances of mistaken identity were not discounted.

But further, no single witness apart from the police was brought to testify that the two identification witnesses had named the accused to them.

This as submitted by the appellants rendered the evidence of identification suspect.

Indeed in the absence of proof that there was an armed robbery-no weapons nor cartridges were recovered from the scene, convicting on such shaky evidence on such serious an offence was reckless. But even more, both identification witnesses testified that they had scampered –scared, PW.1 had ran away to the bush and, or hidden in the bathroom - PW.III.

For an event which is said to have taken place in broad day light, it is inconceivable that the appellants who were residents of the same village would have dared to carry out such crime in full view.

This, ought to have alerted the trial Court to the need to take the 1st appellant's defence into consideration. It did not: **JOSEPH MAKUNE V.R. (1986) TLR. 44.**

Had the trial Court taken the defence case in its totality it would have found that it had raised reasonable doubt on the credibility of the prosecution case.

The 2nd appellant is correct on the cited authorities that mere suspicion can not sustain a conviction: In **LUBINZA SELEHE V.REP – Criminal Appeal No. 211 of 1994 – CAT @ MWANZA**, (Their Lordships in Appeal said:

> *"...it is a well established principle of Criminal law that suspicions, however strong can not be the basis for conviction: there must be a substratum of other evidence which connects the accused appellant with the offence charged."*

The trial magistrate's reasoning that the accused was "hiding and therefore was guilty" was mere conjecture.

On the 2nd Appellant's ground that his defence of alibi was wrongly rejected. While conceding to the authority cited- **RASHID ALLY V. REP. (1987) TLR 97**, the learned State Attorney

distinguished the facts saying that DW.6 and DW.7 Samwel Kibongo and Justus Kitange testified as to 06-10/02/2005 while the incident took place on 08/02/2005 and that he had been positively identified.

Once again I disagree with this argument about positive identification. Secondly, the 2nd appellants position was that it was not possible given the distance between Murufiti where he was, and Titye the village were the alleged crime took place. Therefore, he had managed to establish his alibi on the balanced of probabilities. Since notice had been given thereof, it was upon the prosecution to discount, by evidence the said alibi. They did not attempt to do so.

Finally, the learned State Attorney submitted that under the amended section 287A of the Penal Code the maximum sentence is life. That I should therefore enhance the same.

I allow the appeal. The prosecution's case was very sketchy as to put the entire judgment of the trial Court to be wanting in material particulars. The accused were not accorded a fair trial.

I have had considerable difficulties in following what was recorded as evidence. The judgment does not state the points

for determination and the reasons for determination. This violated the mandatory provision of section 312 of the Criminal Procedure Act – Cap. 20. R.E. 2002.

Consequently, I quash the convictions of the two Appellants of the charged offence of Armed robbery c/s 287 A of the Penal Code Cap. 16 R.E. 2002. I substitute it with an order of acquittal on the charged offence.

The sentences are also set aside.

The Appellants are set at liberty.

They should therefore be released forthwith unless they are held on other custodial orders.

Order accordingly.

A.K. MUJULIZI

JUDGE

17/11/2008.

Judgment delivered in the presence of the 1st Appellant. The 2nd Appellant being hospitalized was absent. Miss Sekule for the Respondent Republic.

Right of appeal explained.

A.K. MUJULIZI

JUDGE

17/11/2008