IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 153 OF 2005

(Originating from CR. CASE NO. 337/2001 In the RM's Court of DSM at Kinondoni)

ALEX JOHN KAJUMULO..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

Date of last Order – 15/12/2008

Date of Judgment – 9/3/2009

JUDGMENT

SHAIDI, J.

This is an appeal by one Alex John Kajumulo against conviction for Armed Robbery by the Kivukoni Court of Resident Magistrate. As usual with these kind

of convictions a sentence of 30 years was handed to him which is the statutory minimum.

In this petition of appeal mistakenly titled "memorandum of appeal" The appellant has raised two grounds for consideration by this Court. Firstly the appellant faults the trial Magistrate for refusing to disqualify himself after he had asked him to do so. That instead he heard the case to finality and convicted him. Secondly the appellant takes issues with the trial court for preceding to convict him without first giving him an opportunity to present his defence. To lend more ammunition to his stance he has quoted the case of ***Hasim Mohamed Mfaume Vs Republic (1978) HCD 272***.

Before me the appellant in person did not have much to add to what is contained in his petition of appeal except the fact that the gun that was produced by the prosecution was so produced after he had objected to its production. He also complained that he was given a copy of judgement while in custody.

Mr. Mauggo the learned State Attorney for the Republic on the other had was in no doubts that the appellants conviction was proper under the circumstances of this case. He was of the view that the learned Resident Magistrate acted quite properly in refusing to defer to the appellants request to disqualify himself. He quoted the case of ***Republic Vs Seif Sharrif Hamad (1992) TLR 227*** to buttress his stance. In that case this is what the court said:-

> (i) *Whether or not the presiding Magistrate should disqualify from hearing a case on the ground of bias requires an objective appraisal of the materials before the court, and to say that a party has subjective (albeit firm) apprehension of bias is not of itself sufficient to warrant, or require the disqualification of the magistrate.*

(ii) The duty of the Magistrate to disqualify himself for proper reasons is matched by an equal duty not disqualify himself save for proper reasons, and parties not to be encouraged to believe that by an application for the disqualification of a magistrate, they can have their case heard by a Magistrate thought to be more likely to decide a case in their favour.

Lastly the learned State Attorney maintained that the appellant was given the opportunity to give his defence but he choose to decline to advance any defence on his behalf. It is then that the court proceeded under Section 231(3) of the Criminal Procedure Act.

He urged the court to uphold the appellants conviction and dismiss this appeal.

I have studied the proceedings of this case as well as the judgement though with difficulties due to innumerable number of mistakes appearing on the record and sometimes failure to understand in clear terms what exactly the recording Magistrate was trying to project. It is true that after the appellant was called to defend himself he instead called an the Magistrate to disqualify himself. The reason advanced by the appellant was that the Magistrate had admitted a cautioned statement which he (appellant) had retracted.

Later upon being called again to defend himself he declined that invitation. The trial Magistrate therefore proceeded to evaluate the evidence and on being satisfied with the prosecution evidence against the appellant, duly convicted him as charged.

In my view the learned Magistrate acted properly and was within the law in all that he did. The Magistrate could and should have disqualified himself it the appellant had advanced proper reasons. No such reasons were given. The only complaint thrown at the Magistrate was that he had admitted a cautioned statement made by the appellant which he had retracted. I find nothing untoward for the Magistrate to do what he did.

The cautioned statement was tendered by the last prosecution witness and thereafter the case for the prosecution was closed. Instead of the appellant launching his defence, he asked the magistrate to disqualify himself. Apparently this tactic was aimed at defeating justice in this case and the Magistrate acted properly to defeat this move.

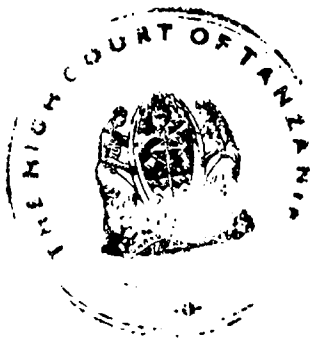
Lastly records are loud and clear that the accused was availed with the opportunity to defend himself but elected to remain silent. This cause of action is apparently allowed by the law but the court is entitled to draw an adverse inference against an accused person in terms of section 231 (3) of the Criminal Procedure Act.

I therefore find the two grounds of appeal advanced by the appellant to be devoid of any merit and herely dismiss both of them.

There are other issues in this case prominent amongst them being the issue of identification the suspect. Even though this was not raised I have considered it and I am satisfied that in this case the appellant was properly identified by both PW1 and PW2. The circumstances under which he was identified give assurance and exclude the possibility of any mistaken identification. I think this far is enough.

Looking at the evidence in its totality I am persuaded that the appellant was properly convicted of the offence of Armed Robbery.

I therefore dismiss this appeal in its entirely. The sentence was the statutory minimum and is therefore not a day too long.



G.P. Shaidi

JUDGE

9/1/2009

Judgement delivered this 9th day of February, 2009 before Mauggo State Attorney for Respondent and the appellant who is present in person.

G.P. Shaidi

Judgement delivered

G.P. Shaidi

JUDGE

9/2/2009