

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

**CRIMINAL APPEAL NO. 102 OF 2012
ORIGINAL CRIMINAL CASE NO. 2481 OF 2009
IN THE DISTRICT COURT OF KINONDONI
AT KINONDONI**

**MAULID JUMA BAKARI @ DAMU MBAYA
FIKIRI JOSEPH PANTALEO**

V

APPELLANTS

REPUBLIC.....RESPONDENT

JUDGMENT

Shangwa. J

The Appellants Maulid Juma Bakari @ Damumbaya and Fikiri Joseph Pantaleo hereinafter to be referred to as 1st and 2nd Appellants were charged in the District Court of Kinondoni with the offence of Armed Robbery C/S 287 A of the Penal Code Cap 16 R.E 2002. Each of them was convicted and sentenced to 30 years imprisonment. They were not satisfied with both conviction and sentence. They

decided to appeal to this Court. Their appeal is based on eight grounds in which they complain that the trial Magistrate wrongly believed that they were identified at the identification parades conducted by P.W. 6 and P.W. 7 whereas the parades were not properly done. That they were convicted of the offence charged on uncorroborated evidence, and that whereas the 2nd Appellant retracted his caution statement tendered by P.W.4 as exhibit P3, the trial Magistrate did not conduct any inquiry to determine its validity.

During the hearing of this appeal, the 1st Appellant submitted that the identification parade was conducted without following the procedure. That if P.W.1 and P.W. 2 knew him earlier before conducting the identification parade what was the use of conducting the parade. That the charge was cooked against him. That even the

investigation officer and the person who is alleged to have been found with a car which is alleged to have been used in the Commission of the offence were not called by the prosecution to testify on its behalf.

The 2nd Appellant submitted that P.W.1 did not tell the trial Court as to whether or not he was able to identify him or even that he knew him earlier before the incident, and that the evidence of P.W.1, P.W. 2 and P.W 7 is contradictory with regard to the date when the identification parade was conducted in that P.W.7 said that it was conducted on 19th February, 2009 and P.W.1 and P.W.2 said that it was conducted on 19th January, 2009.

In reply, Miss Derek, State Attorney for Respondent Stated that she supports the appeal. She gave three reasons as to why she supports the appeal. First, that

both Appellants were not properly identified at the identification parades. She said that whereas P.W.2 told the trial Court that he did not see the 1st Appellant at the scene of crime, he identified him at the identification Parade, and that whereas P.W.1 told the trial Court that he identified the 2nd Appellant at the scene of crime, he did not say so at the Police Station. Second, that the 2nd Appellant's confessional statement was wrongly admitted by the trial Magistrate because when it was tendered in evidence, he objected on grounds that he did not confess voluntarily and gave reasons as to why he did not confess voluntarily but that the trial Magistrate ignored them as she did not make any inquiry to determine the voluntariness of his confession. Third, that the prosecution's Case was not proved beyond reasonable doubt.

I have gone through the entire proceedings of the trial Court composed of the testimonies of (7) seven witnesses who testified on behalf of the prosecution, and the documentary exhibits that were tendered by the prosecution namely the identification parade Registers i.e exhibit P.1, P2, P6 & P 9 and the caution statement of the 2nd Appellant (exhibit P3) and the defence made by each Appellant. After doing so, I have come to a different conclusion from the one reached by the learned State Attorney, Miss Derek that the prosecution did not prove its case beyond reasonable doubt. In actual fact, the prosecution did prove its case against the Appellants beyond reasonable doubt that they were involved in the commission of the offence charged namely Armed Robbery. So important is the evidence of P.W1 Peter William, P.W1 Barnabas Joseph, P.W 4 D 5181 D/CP 1 Alphonse, P.W 6

Ass Insp Gilbert Kalanje and P.W. 7 Asp Rawia and the documentary exhibits tendered by P.W 4, P.W 6 and P.W7.

P.W.1 told the trial Court that on 3rd December, 2008, the 2nd Appellant went to his Jewel's shop at Livingstone Street Kariakoo and introduced himself as Athuman Edward and told him that he is a business man from Zanzibar and that he needed Tanzanite and that he was going to Dubai to look for a market and that when he comes back, he will need a big amount for export to Dubai. That in the middle of January, 2009, he telephoned him and informed him that he has a big order from Dubai and that he asked him to prepare 200 carats of Tanzanite for him. That on 20th January, 2009, he informed him that the order was ready. That on 28th January, 2009, he went to his shop and he showed him 173 carats. That he agreed to buy them at TZ shs 43 Million and that thereafter he left

and promised to come back with the money on 30th January, 2009. That on 30th January, 2009 at 9.00 a .m, he went to his shop and asked him to go with the Tanzanite to Simmik at Kunduchi for weighing them and certifying them before buying them. That he accepted to go with him with 173 carats of Tanzanite to Kunduchi Southern and Eastern Mineral centre. That on the way to Kunduchi, he went with Barnabas Joseph (P.W. 2) together with another person. That they boarded a Nissan Saloon car with Reg. No. T 864 AWB which was being driven by the 2nd Appellant with whom the 1st Appellant went with at his shop. That at Summik Kunduchi, they met one Lilian Mushi a geologist working with Southern and Eastern Mineral centre who measured the Tanzanite. That Lilian Mushi (P.W 5) issued the certificate after measuring the Tanzanite and receiving Tz 175,000/= from 1st Appellant for her service. That thereafter, they boarded the Nissan

Saloon car and that after about 500 metres, the 2nd Appellant Stopped the car's engine and that after stopping the car three people invaded them. That one of them had a pistol. That they took the bag with Tanzanite and handed it over to the 2nd Appellant. That they took his wallet which had some money, mobile phone make Nokia and his spectacles. That thereafter both the 1st Appellant and 2nd Appellant together with three people who invaded them left them at the scene of crime and disappeared with the Tanzanite and other properties which they stole from P.W.1 and P.W.2. That they reported the matter at Kawe Police Station. That the police made investigations and arrested the Appellants together with other 3 suspects who were acquitted by the trial Court for lack of sufficient evidence. That later, he was called by the police at staki shari Police station from where he identified the 2nd Appellant and the 1st Appellant.

A similar testimony was given before the trial Court by P.W.2 who was together with P.W1 and the Appellants from Kariakoo to Kunduchi and at the time of the incident when they were on their way back to Kariakoo.

In my view, the testimony of both P.W. 1 and P.W2 do show for sure that both Appellants conspired with 3 others to steal P.W.1's Tanzanite at all costs. The Appellants and three others who invaded P.W.1 and P.W.2 and robbed P.W. 1's Tanzanite and other properties belonging to both P.W. 1 and P.W.2 appear to be very big criminals. It appears that the robbery incident was well planned by them. When the 1st Appellant went to P.W.1's shop, he introduced himself as Athuman Mohamed from Zanzibar and pretended that he is a Tanzanite buyer and exporter to Dubai whereas his name is Maulidi Juma Bakari @ Damumbaya and a robber. The Appellants and three

others operated as a gang and used a pistol to threaten P.W.1 and P.W2 in order to steal their Tanzanite and other properties valued at more than 45 Million Tanzanian shillings. They have attempted to argue that they were convicted of the offence charged on evidence of an identification parade which they allege to have unprocedurally been conducted. The 2nd Appellant went further in his argument by saying that he was convicted of the offence charged on a retracted confessional statement taken by P.W4 D 5181 D/CP/ Alphonse without conducting any inquiry as to whether or not he made it voluntarily.

In my opinion, the Appellants arguments are unfounded. Whereas the 1st Appellant was identified by one Edward Chuwa out of (12) twelve people at an identification parade well conducted by P.W6 Ass Insp. Gilbert Kalanje,

the 2nd Appellant was identified by one Peter Chuwa out of (10) ten people at an identification parade well conducted by P.W.7 Asp Rawia. Both Edward and Peter saw the Appellants in broad day light earlier before the parade when they went to P.W.1's shop at Kariakoo and when they went to Kunduchi for obtaining a certificate of the 173 carats of Tanzanite which they robbed from P.W.1 and P.W.2. Although the trial Magistrate did not make an inquiry to find out as to whether or not the 2nd Appellant made the confessional statement tendered by the prosecution's witness as exhibit P3 voluntarily, she was satisfied that he did so voluntarily. At any rate, even if the said statement is excluded from the rest of the evidence which led to his conviction, the rest of the evidence on record is sufficient to base a conviction against him. So he was properly convicted of the offence charged.

For these reasons, I dismiss the Appellants' appeal against both conviction and sentence. In other words, I dismiss their appeal in its entirety.



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A. Shangwa J

JUDGE

20/11/2013

Delivered in open Court this 20th day of November, 2013 in the presence of the Appellants and in the presence of Mr. Damas Mwangange, State Attorney.

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A. Shangwa J

JUDGE

20/11/2013