IN THE HIGH COURT OF TANZANIA

AT TABORA.

APPELLATE JURISDICTION

(Tabora Registry)

CRIMINAL APPEAL NO. 75 OF 2007

ORIGINAL CRIMINAL CASE NO. 383 OF 2002

OF THE DISTRICT COURT OF TABORA DISTRICT

AT TABORA

BEFORE: P.M. NKOMBE, Esq.; DISTRICT MAGISTRATE

MIKIDADI s/o MOHAMED @ HUSSEIN.....APPELLANT

(Original Accused)

VERSUS

THE REPUBLIC.....RESPONDENT

(Original Prosecutor)

JUDGMENT

29th Aug.07 & 11th Nov.07

MUJULIZI, J.

The Appellant, Mikidadi s/o Mohamed @ Hussein was arraigned before the District Court of Tabora, together with 4 other accused persons on 4 counts of Armed Robbery c/ss 285 and 286 of the Penal Code Cap. 16 ("Vol.I of the laws read together with laws Miscellaneous Ammended Act No. 6 of 1994 at the schedule") sic.

It was alleged at the trial; that the appellant together with the four others, who were subsequently acquitted; had on the 24th day of October, 2002 between 2.00 hrs, 03.30 hrs jointly and together in Ipuli Area within Tabora Municipality stolen various items from 4 different houses and that either before, or immediately after, such stealing had used a gun and a machete (panga) to cut the owners of the stolen properties.

At the close of the prosecution case, the trial magistrate ruled that the 4th and 5th accused had no case to answer, and proceeded to dismiss the charges against them, and acquitted them under section 230 of the Criminal Procedure Act (Cap.20 R.E. 2002), but ruled that the 1st, 2nd and 3rd accused had a case to answer.

However, at the end of the trial, the 1st and 3rd accused were also acquitted on all four counts.

The 2nd accused, who is the Appellant herein, was not that lucky. He was convicted on the 1st and 2nd counts, for which he earned himself a 30 years jail term on each count, the sentence running concurrently.

The Appeal is against both conviction and sentence.

The Appellant, who was sentenced on 10/7/2003, could not have his appeal into the register until 11/05/2007 following grant of extension of time by this court (Hon. Mziray, J.) on 2/5/2007.

Before proceeding further, though, I need to comment on the form of the appeal as lodged in this case. It is commenced by way of a document titled "MEMORANDUM OF APPEAL." This is common to most of the appeals lodged in the Tabora District Registry of this Court. We have repeatedly reminded the Registry as well as the Prison Officers of the clear provisions of section 362 of the Criminal Procedure Act (Cap.20 R.E.2002) which provides;

> ***"362.- (1) Every appeal shall be made in the form of a petition in writing presented by the appellant or his advocate, and every petition shall, unless the High Court otherwise directs, be accompanied by a copy of the proceedings, judgment or order appealed against.***
>
> 2) ***The Petition shall contain particulars of the matters of law or of fact in regard to which the subordinate court appealed from is alleged to have erred.***"

Although the Act does not prescribe nor define the "form" or the "petition," it is my considered opinion that appeals commenced under the Act should be titled "PETITIONS" and be in "form of a petition"

In fit cases; we have on several occasions struck out the appeals, instructing the parties to refile the same in conformity with the law, and have directed, the Registrar and Registry Officers not to admit the appeals commenced otherwise.

However, in the interest of justice, recognizing the dire constraints faced by prisoners, who are in most cases unrepresented, and as the case herein the appeal coming for hearing belatedly, we have proceeded to hear the appeal.

I was satisfied that in this case the appeal is in form, substantially a petition, although wrongly headed as a memorandum, and it merits hearing in the interest of justice.

Now coming back to the appeal. The Appellant has raised a total of seven (7) grounds. However only two in my opinion merit reproduction and consideration for purpose of determining this appeal.

In ground three, he stated: ***the learned trial magistrate totally erred on point of law and fact by basing his conviction on Exhibit P.3- while the said bicycle was not found in possession of the appellant.***

In ground four; that the learned trial magistrate erred in law and in fact in believing the testimony of P.W.5 without corroborative evidence on the alleged issue of having conducted a search leading

to the recovery of Exhibit P.3, and that the court erred in law in admitting into evidence the statement alleged to have been made by one Mwamvua Mrisho, whom it was alleged could not be traced in order to give direct evidence.

Lastly, that the evidence of identification was weak and could not sustain a conviction in the circumstances of the case.

The Appellant who was present at the hearing did not argue further.

The Respondent Republic was represented by Mr. Mokiwa learned State Attorney.

Supporting the conviction. The learned State Attorney argued that;

The Appellant was identified at the scene of the crime by P.W.2 Mtipula Malenga, who had testified that there was moonlight on the fateful night, which enabled him to identify his assailants.

Further, that P.W.2 was able to identify three of the accused persons-1st, 2nd (Appellant) and 3rd.

Finally that, as the Appellant was found in possession of the bicycle –Exh.P.3 which was identified by P.W.2 with frame No.VS/1860-8, then he was properly convicted under the doctrine of recent possession.

We will recall that the Appellant was convicted on two counts; the 1st and 2nd. It will be helpful to revisit both counts.

In the 1st count it was alleged that the accused were jointly and together ***"charged on the 24th day of October, 2002 at about 02.00 hrs at Ipuli Mortain within the Municipality, District and Region of Tabora, did steal cash Money Tshs. 200,000/-, two Bags and one brief case all total valued at Tshs. 500,000/- properties of DESSE s/o KWIHELA and before such stealing did use a gun and panga to cut them in order to obtain the said properties***"

In the 2nd count it was alleged that; ***"the accused are jointly and together charged on 24th day of October,2002 at about 02.30 hrs at Ipuli Kazima Road within the Municipality District and Region of Tabora did steal cash money Tshs.70,000/= one Bicycle make Phoenix, two bags. All total valued at Tshs. 200,000/-. The Properties of MTIPULA s/o MALENGE and before such stealing did use a short gun and panga to cut them in order to obtain the said properties."***

In convicting the Appellant, the learned trial Magistrate reasoned as follows; (page (7) on identification).

"***I therefore find that the said accused were not clearly identified by the said witnesses.***"

It should be noted that this analysis included the Appellant (2nd accused).

Then the Court proceeded (at the same page)

"The 2nd accused was arrested in the house of one Hussein Mussa in the presence of a female person. This person is described by the 2nd accused, as a girl aged about 20 years. He said that he did not know her name and her relationship with the said Hussein Mussa. She is described by P.W.5 as the wife of the said Hussein Mussa. She was not found to attend and testify in this case. In her statement which has been admitted as her evidence she said that she is the wife of the said Hussein Mussa who is also the elder brother of the 2nd accused. She said that the 2nd accused was in possession of Exhibit P.3 which was met (sic) and seized in the said house. There was a dispute in the said statement whether the correct date written is 26/10/2002 or 26/11/2002. The statement was recorded on 8/11/2002 and therefore the said witness one Mwamvita d/o Mrisho could have not (sic) mentioned a future date. The 2nd accused himself admits that he was arrested in the said house on 26/10/2002 therefore the correct date as corrected by P.W.4 is 26/10/2002. Exhibit P.3 was identified by P.W.2 as among the items robbed from him on 24/10/2002 at about 2.00 am. It was recovered on 26/10/2002 at about 8.30 pm. In invoking the doctrine of recent possession I find that the 2nd accused is the one

who stole It. It was stolen after the house was broken into, hence he ought to have been charged with the offence of Burglary c/s 294 (1) of the Penal Code on the 1st count but he is lucky he was not done so before stealing there were shots of bullets released from a firearm. Immediately before the time of stealing P.W.2 was cut with a bush knife on his body as shown in Exhibit P.2. Therefore the offence which was committed was armed robbery.

It was at the same time and place P.W.1 was robbed of his property and immediately before the stealing he was cut with a bush knife on his body as shown in Exhibit P.1. I therefore find that the 2nd accused is among the bandits who committed the offences on the first and second counts. What the witnesses said in criminal case No. 397/2002 is what they said in this case."

It is clear to me that there was a serious misdirection on the part of the learned trial Magistrate in relation to the two counts. Although according to P.W.1 his residence is a few paces away from that of P.W.2, and that the robbery took place at the same time in the two houses, the charge sheet treated the two houses as being separated and the robberies to have taken place at different times.

Without amending the charges, the learned Magistrate erred in law in concluding that the two incidents were committed by the same

people, especially after discarding the evidence of identification, and that of the cautioned statement.

In my judgment therefore, the trial magistrate overstretched in using the doctrine of recent possession to convict the Appellant on the first count. The prosecution did not lay foundation to lead to the conclusion that the two incidents were one and the same transaction.

I therefore have no hesitation in reversing the finding of the trial court on the 1st count. I therefore quash the conviction and substitute it with an acquittal on the first count of armed robbery c/s 285 and 286 of the Penal Code (Cap.16 R.E. 2002).

I now revert to the second count.

In view of the clear finding of the learned trial Magistrate on the issue of identification, I have failed, with respect to comprehend the learned State Attorney's argument that P.W.2 identified the accused. This argument is neither here nor there. In the same vein the Appellant's challenge of the findings of the trial court on that issue are clearly based on misconstruction of the judgment of the trial court.

This leaves us with the evidence of the accused being found in possession of the bicycle, "Exh.P.3". It is alleged that the same was identified by P.W.2: was that so?

The witness said:

"When the suspects were arrested and taken to the police station I was summoned to identify them at the identification parade I was then informed that my bicycle was recovered from the 2nd accused at Ipuli village. Here is the said bicycle and there are the said marks I have mention and its frame number vs/1860-8 (seen). I tender in court as exhibit."

It is not established on the evidence on record that the witness had rendered a detailed description of the bicycle before he saw it at the police station.

It is an established rule of evidence that in identification of exhibits, a witness is not supposed to see the intended exhibits before he gives evidence in court: **NASSORO MOHAMED V.R.(1967) HCD CASE No. 440.**

In my judgment, "Exh.P.3" was not conclusively identified.

Finally was the bicycle "Exh. P.3" found in possession of the appellant?

It is the duty of the prosecution to prove its case on the standard of; beyond reasonable doubt.

The evidence of P.W.5 in relation to the alleged search without warrant ought to have been treated with caution. There was an attempt to corroborate his testimony with the statement of one Mwamvita d/o Mrisho, but with much respect to the learned trial Magistrate, this statement was not properly admitted into evidence. It was not established prior to its admission on the balance of probabilities that the witness was otherwise untraceable as alleged.

It is now an established principle of law that the provisions of section 34B (2) are cumulative and all the paragraphs (a) to (f) have to be satisfied. Hence, to admit the statement the trial court ought to have satisfied itself that, it was reasonably impracticable to call the said Mwamvita; that the statement was signed by [illegible] have contained a declaration of the person who read it to the effect that it was read.

In this case the statement was said to have been made by P.W.9 but it was produced by P.W.5 who did not make it. It claims to be made by one **MWANAMVUA D/O MRISHO BUT IT WAS SIGNED BY MWAMVUA MRISHO.**

When cross examined by the Appellant, P.W.5 stated:

> ***"I think you convinced the witness to abscond in order to avoid to give evidence for your favour. I arrested you at the home of this witness who is the wife of your***

brother. We arrested you during the night and we did not have time to go and summon a Ten House Cell leader when this witness told us that one of the bicycles was yours. We had no search order because we were together with an Assistant Inspector of Police one Philip. After all the said time did not need search order as it was beyond 6.00 pm..."

It is clear that it was not even proved that the bicycle which was produced in court was the one actually taken from Mwamvua's residence.

In the circumstances, the evidence raised a reasonable doubt as to render any conviction based solely on it to be unsafe.

I therefore quash the conviction on the second count and substitute it with an order of acquittal; on the charged offence of armed robbery c/ss 285 and 286 of the Penal (Code Cap.16 R.E. 2002).

Consequently the sentences are also set aside.

The appeal succeeds; the Appellant should be set at liberty.

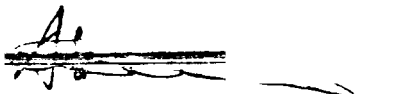
He should be released immediately unless he is held for other lawful custodial orders.

A.K. MUJULIZI

JUDGE

21/11/2007

Judgment delivered in the presence of the Appellant and Miss Wakuru learned State Attorney, for the Republic.



A.K. MUJULIZI

JUDGE

21/11/2007

ORDER

The Appellant to furnish his address of service, residence before his release.

A.K. MUJULIZI

JUDGE

21/11/2007