

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

**(CORAM: MUNUO, J.A., MASSATI, J.A And MANDIA, J.A.)**

**CRIMINAL APPEAL NO. 34 OF 2010**

**ABUBAKARI ISSA @ MNYAMBO ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the Decision of the High Court of Tanzania,  
at Bukoba)**

**(Lyimo, J.)**

**dated the 24<sup>th</sup> day of February, 2010  
in  
Criminal Appeal No. 114 of 2009**

**JUDGMENT OF THE COURT**

23<sup>rd</sup> & 28<sup>th</sup> November, 2011

**MUNUO, J.A.:**

The appellant, Abubakari Issa @ Mnyambo is challenging the decision in Criminal Appeal No. 114 of 2010 in the High Court of Tanzania at Bukoba, before Lyimo, J. which arose from the conviction and sentence in Economic Crime Case No. 9 of 1996 in the District Court of Bukoba within Kagera Region. In the trial court four accused persons including the appellant who was the fourth accused, were jointly and together charged

*CONFESSOR OF 10  
S-33(2) TCH  
CANNOT BE BUST  
OR CONVICTION  
BY ACCUSED  
PERSON*

with one count of unlawful possession of arms and ammunition c/s 23 of the Arms and Ammunition Ordinance Cap. 223 R.E. 2002 read together with paragraph 20 of the 1<sup>st</sup> Schedule to the Economic and Organized Crime Control Act, No. 13 of 1984 as amended by Act No. 10 of 1989 and Act No. 3 of 1992.

The prosecution alleged in Count 1 that on the 30<sup>th</sup> March, 1996 at about 12.30 hrs. at Mwanzo Mugumu Area within Bukoba District in Kagera Region, the five accused persons were jointly and together found in unlawful possession of one fire arm make submachine gun and 13 rounds of ammunition without a licence or permit.

In counts 2 to 9 the appellant and his co-accused were jointly and together charged with the offences of armed robbery c/s 285 and 286 of the Penal Code in that they seized at gunpoint various amounts of cash from different complainants in a highway robbery on the 28<sup>th</sup> March, 1996. In count 8 the appellant and his co-accused were charged with armed robbery c/s 285 and 286 of the Penal Code in that on the said 28<sup>th</sup> March, 1996 at Kyakakela Area within Bukoba District in Kagera Region, the

appellant seized at gunpoint, motor vehicle registration number TZN 516 landrover valued at Tsh 6,000,000/=, the property of Abdallah Ahmed Msakanjia and at the time of stealing, before and after, used actual violence by firing bullets in order to obtain and retain the seized property.

The cash the appellants and his co-accused obtained at gunpoint ranged from sh 901,500/= the property of Mathias s/o Zachwa in count 2; sh 700,000/=, the property of one Nuru Kazimushara in count 3, sh 870,000/= the property of Abdu Dauda in count 4; sh 410,000/= the property of Masomi Dauda count 5; sh 200,000/= the property of Haji Haruna Ahmed in count 6; and sh 80,000/= the property of one Samson Kahwa in count 7 and sh 50,000/= the property of Peter Bitamale in count 9. The prosecution alleged that the appellant and his co-accused shot two bullets in order to obtain and retain the stolen cash and motor vehicle.

The appellant categorically denied the charge.

The facts are not complicated. On the morning of the 28<sup>th</sup> March, 1996 at about 8.00 a.m. one Abdallah Ahmed Msakanjia was driving his

motor vehicle TZH 516 land rover station wagon. The seven complainants in counts 2 to 9 were passengers in his vehicle. He was the driver of the said land rover, the subject of count 8, heading to Bukoba town.

When the land rover reached a place called Mwanzo Mgumu at Kyakekela, an armed bandit emerged from the bush and shot into the air ordering the land rover to stop. One bandit was armed with a gun, two others had a machete and another a stick. The bandits ordered the passengers in the land rover to disembark leaving all their properties in the vehicle. The bandits seized the cash and escaped in the land rover leaving the victims stranded. Thereafter, the complainants reported the matter at Kyaka police in Bukoba District. Investigations commenced. The land rover was recovered at Kashasha along Kiziba Road within Bukoba District a few hours later.

From the evidence on record, Accd no. 1 and 2 were arrested on the same day. The 3<sup>rd</sup> Accused was arrested at his place of work at Kagondo on the afternoon. The 4<sup>th</sup> Accused was arrested on the 30<sup>th</sup> March, 1996 at about 4.00 a.m. The appellant, Accused no. 4 at the trial was, from his

defence on oath, arrested on the 30<sup>th</sup> March, 1996 and locked up at Bukoba police station from the 30<sup>th</sup> March to the 9<sup>th</sup> April 1996 when he appeared in court to answer the present charges.

Three of the four co-accused were convicted with the offences of being in unlawful possession of ammunition and a firearm and armed robbery. Of the four co-accused, Accd no 1 Renatus Renard was acquitted whereas the present appellant and his co-accused namely accused nos. 2 and 3 were convicted on the respective counts. Having lost the appeal in the High Court, the appellant lodged this second appeal to challenge the conviction as well as the 15 years imprisonment sentence for being in unlawful possession of a firearm and ammunition, and in addition to suffer two strokes of the cane corporal punishment in count 1. The appellant was sentenced to 30 years imprisonment on the respective eight counts of armed robbery. The sentences were ordered to run concurrently. The convicts were also ordered to pay compensation for the unrecovered properties after serving their terms of imprisonment.

The appellant filed four grounds of appeal namely that:-

- 1. The learned judge failed to properly determine the appeal after being influenced by the decision of Luanda, J. as he then was, in another appeal involving another co-accused.*
- 2. That the prosecution witnesses did not identify him;*
- 3. The learned judge erred in evaluating the evidence on record; and*
- 4. The guilt of the appellant was not proved at the required standard in criminal cases.*

The appellant was unrepresented. He appeared in person for the hearing and adopted his grounds of appeal.

The respondent Republic was represented by Mr. Edgar Luoga, learned Senior State Attorney who did not support the conviction and sentences imposed on the appellant for three reasons.

Mr. Luoga submitted that the identification of the appellant was doubtful. The gangsters ambushed the land rover, fired bullets into the air and ordered the passengers to disembark and lie face downwards. The passengers complied to save their lives. In those terrifying circumstances and lying face downwards, identifying the bandits would be difficult, the learned Senior State Attorney, observed. He submitted that from the evidence on record, the complainants did not know the bandits before so there were possibilities of mistaken identity given the unfavourable and difficult conditions of lying face downwards as ordered by the bandits.

Mr. Luoga also impeached a cautioned statement, Exhibit P19 in which the 2<sup>nd</sup> Accd, Emmanuel Rutha, had implicated the appellant on the ground that under the provisions of section 33 (2) of the Law of Evidence Act, Cap. 6 R.E. 2002, a confession of a co-accused can only support a conviction of another co-accused if it is corroborated. In this case, there is no evidence of corroboration, the learned Senior State Attorney pointed out.

Furthermore, the learned Senior State Attorney observed that the appellant was not a party to the co-bandits who led to the discovery of the submachine gun which had been used to execute the highway robbery on material afternoon. In short, the Republic found no cogent evidence on record for connecting the appellant with the charged offences. Hence, the learned Senior State Attorney urged us to allow the appeal.

PW1 deposed that the appellant (Accd no 4) was armed with a gun which he pointed at the land rover ordering the said land rover to stop. PW1 stated that the 4<sup>th</sup> appellant wore a greyish coat and a cap but he could not remember the colour of the trousers the appellant wore. In this case no police identification parade was conducted to test whether the said PW1 and, or the other victims of the robbery could identify the appellant. Such identification parade was necessary to exclude possibilities of innocent mistaken identity. We note that the firing of the bullets was abrupt and shocking to the victims who were ordered by the gangsters to disembark from the land rover and lie face downwards, on their chests. Under those unfavourable and terrifying conditions, we do not consider it



safe to hold that the appellant's purported identification by the victims of the robbery was without doubts.

Next, is the incriminating cautioned statement, Exhibit P19. The said cautioned statement was recorded from Accused no. 2 Emmanuel Rutha who is not a party to this appeal. Suffice it to say, a confession by a co-accused would support a conviction if it is corroborated by other independent evidence. In his cautioned statement, Exhibit P19, Rutha implicated the appellant by stating in Kiswahili:-

*"Jibu: Ndio nimeshiriki tukio, nimevunja kiosk Kanazi na kuiba tukishirikiana na Abubakari Issa, Msukuma..."*

*Meaning:*

*"Answer: Yes, I was involved in the incident. I broke a kiosk at Kanazi and we participated in the incident with Abubakari, Issa, a Sukuma....."*

As accused no 2 Emmanuel Rutha is not a party to this appeal, we shall not get entangled in the procedures invoked in obtaining the said caution statement. However, we are mindful of the provisions of section 33 (2) of the Law of Evidence Act, Cap. 6 R.E. 2002 which states verbatim;

*"33 (2) notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused."*

In the absence of corroborating evidence, the appellant cannot be convicted on the sole incriminating cautioned statement recorded by Accused no 2 Emmanuel Rutha.

In view of above, the Senior State Attorney rightly declined to support the conviction of the appellant. We accordingly quash the conviction and set aside the sentences imposed on him. We order that the appellant be set free forthwith if he is not held for other lawful cause. The appeal is hereby allowed.


DATED at MWANZA this 25<sup>th</sup> day of November, 2011

E. N. MUNUO  
**JUSTICE OF APPEAL**

S. A. MASSATI  
**JUSTICE OF APPEAL**

W. S. MANDIA  
**JUSTICE OF APPEAL**

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

  
P. W. BAMPIKYA  
**SENIOR DEPUTY REGISTRAR**  
**COURT OF APPEAL**

