IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO.119 OF 2005

(Originating from Resident Magistrate Court of Kivukoni/Kinondoni Criminal Case No.1367 of 2004)

1. **KURWA S/O KIMWAGA**
2. **ATHUMAN S/O ALLY** } **. . . . . APPELLANT**
3. **RASHID S/O HAMIS**
4. **TWALIBU SHABANI**

VERSUS

THE REPUBLIC . . . . . RESPONDENT

Date of last order - 10/4/2006
Date of Judgment - 13/4/2006

J U D G M E N T

MLAY, J.:

The four appellants were jointly charged and convicted of the offence of Armed Robbery, Contrary to Sections 285 and 286 of the Penal Code, and sentenced to 30 years imprisonment, each. Being aggrieved by the conviction and sentence, they have through their advocate Juris Consults Law Chamber, appealed to this court, on the following grounds:

1. *That the trial court having been presided over by an incompetent Magistrate, the proceedings there are null and void.*

2. *That the sentence imposed by the trial Court is excessive and therefore illegal.*

3. *That the trial court erred in law and in fact in holding that the prosecution side proved its case beyond reasonable doubts on at the required standard, against the appellants.*

4. *That the trial Magistrate erred in law and fact in shifting the legal burden of proof from the prosecution side to the Defence side.*

5. *That the trial court erred in law and in fact in deviating from the rules of procedure of administering criminal justice.*

6. *That the trial Magistrate erred in law and in the fact in failing to find that there was no sufficient evidence to support the offence the appellants were charged with.*

With leave of this court, counsels for both the appellants and the Republic filed written submissions on this appeal. Although the petition of appeal sets out six grounds of appeal, the appellant's advocate submitted only on three grounds, namely, the 1st, 3rd and 4th grounds. The appellants therefore are deemed to have abandoned the remaining 2nd, 5th and 6th grounds. The Republic on the other hand, wrote submissions only on the first ground of appeal. I will therefore deal with the 1st, 3rd and 4th grounds of appeal and in the order in which the appellants advocate has argued them.

The first ground of appeal is that ***"the trial court having been presided over by an incompetent Magistrate proceedings and judgment thereof are null and void".***

This ground of appeal is based on the fact that the record of the trial court bears the title: "THE RM's COURT OF DSM AT KINONDONI/KIVUKONI CR. No.1367/2004," while the trial was presided over by SHONGA (SDM). The appellants counsel submitted that ***"the case having been instituted in the Resident***

Magistrates Court then in terms of Section 6 of the Magistrates Courts Act No. 2 of 1984, the trial Magistrate, the Honourable W. Shonga being a Senior District Magistrate could not constitute that court." The learned advocate quoted the provisions of section 6 (1) (c) of the Magistrate's Courts Act, which states:

> *"Subject to the provisions of Section 7, a Magistrate's Court shall be duly constituted when held by a single Magistrate, being:-*
>
> *(a) .....*
>
> *(b) .....*
>
> *(c) in the case of – Court of Resident Magistrate, a Resident Magistrate."*

The learned counsel contended that since the case was instituted in the Resident Magistrates Court, the Senior District Magistrates Court, who tried and disposed of the case could not constitute the court. The advocate went on to refer the number of authorities, including the case of WILLIAM RAJABU MALLYA AND 2 OTHERS VERSUS REPUBLIC 1991 TLR 83, to show that such proceedings are a nullity. He also cited the case of SALIM MUHSIN VERSUS SALIM BIN MOHAMED 1950 17 EACA 128 (11), to persuade this court not to order a retrial in the event of finding that the proceedings were null and void.

As I stated earlier the Republic only submitted on this ground and in effect, supported the appellants advocate on the submission that the proceedings are null and void.

Although both counsels have devoted both time and energy on this ground and made well argued submissions, I am of the settled view that the first ground of appeal is misconceived and has no merit at all. There is only one court of the Resident Magistrate for Dar es Salaam, which is the Court of the Resident Magistrate of Dar es Salaam at Kisutu. There is no Court of the Resident Magistrate of Kinondoni at Kivukoni. It does not exist. What exists is the District Court of Kinondoni which had in the past sat at Kivukoni and later moved to Kinondoni. The mere fact that an ignorant or even irresponsible clerk or Magistrate wrote in the Court record that it was the Resident Magistrates Court of Dar es Salaam at Kinondoni/Kivukoni or in the Resident Magistrate's Court of Kinondoni at Kivukoni; does not make the District Court of Kinondoni a Court of the Resident Magistrate. As I am satisfied that the proceedings were instituted to the District Court of Kinondoni at Kivukoni, and there being no Court of Resident Magistrate of Dar es Salaam at Kinondoni; the proceedings in Criminal Case No. 1367 of 2004 which were presided over by SHONGA, Senior Resident Magistrate, were presided over by a competent Magistrate in a properly constituted District Court. The first ground of appeal is therefore dismissed.

The third ground of appeal alleges "***that the trial Magistrate erred in law and in fact in holding that the prosecution proved its case beyond all reasonable doubts or at the required standard, against the appellants".*** On this ground the appellants' advocate submitted that the prosecutions case against the appellant depended on the identification of the appellants at the scene of crime, by PW 2, PW 3 and PW 4. In a nutshell, the learned advocate submitted that the circumstances of identification were not favourable as the incident took place at night and the lights were out and the robbers had put on masks. He cited the case of REPUBLIC VERSUS WAZIRI AMANI (1980) TLR 250 on the principles of visual identification and also the case of GEORGO MAVUNJILA VERSUS MAKOA MOHAMED PC CRIMINAL APPEAL NO. 11 OF 1992 (High Court of Tanzania (Dodoma Registry) (Unreported), to the effect that evidence of identification has to be absolutely water tight to be acted upon.

Having read the judgment of the trial Court I am entirely in agreement with the learned advocate that there was insufficient evidence to ground the conviction. The uncontroverted evidence is that the robbery took place at night when the prosecution witnesses PW 2, PW 3 and PW 4 were asleep. They heard the house being broken into and the lights outside being broken. They all testified that it was dark and that the persons who entered the house had

their faces covered by masks. In these circumstances there was no opportunity for visual identification. What the witnesses had for identification are the nicknames which they said they heard being called out by the robbers, "KISIKIO, KISAUTI, "ZACHARIA" and "SONI". Not one of the prosecution witnesses identified any of the appellants by voice and there was no evidence called by the prosecution to prove that any of the appellants was commonly known as "KISIKIO" or KISAUTI or "ZACHARIA" or "SONI".

When assessing the prosecution's evidence to establish whether it proves the offence against the appellants, the trial Magistrate stated at page 4 of the judgment:

> *"On deciding this case this Court had the following question. Whether all the accused person had committed the offence charged. This Court when looking all the prosecution side witnesses find that* ***there is likely hood that*** *the 1st, 2nd, 3rd and 5th accused to commit the offence charged.*
>
> *On the following grounds, the accused were identified by PW 2, PW and PW 4 by names because on that fateful night they used to call one another their nick names*

KISIKIO, Kisauti, Shingo feni, Soni and Zacharia. On looking the physical appearance of DW 2 (2nd accused) who has a mark on his ear on the (left ear) (sikio lake limekatwa) this court is convinced that he is the same Kisikio who did commit the offence together with 1st accused Kisauti 3rd and 4th accused on that fateful night on 30/7/2004.

Also their defence is very weak so as to prove their innocence..."

The trial Magistrate appears to have based the conviction on the "likelihood" that the appellants admitted the offence and the "likelihood" deceived for the fact that the appellants were heard calling each other by their nicknames and that one of the appellants had has left ear cut which convinced the trial Court that that person was "Kisikio."

The standard of proof in criminal cases is proof beyond reasonable doubt. Mere "likelihood" that the appellant committed the offence falls far short of proof beyond reasonable doubt. In the absence of evidence that the accused who had his ear cut was the one called Kisikio, it was wrong for the trial Magistrate to conclude

that that accused was "Kisikio" and by association, the other accused were involved with Kisikio in the committing of the robbery. In the final analysis the evidence of identification based on the nick names which the prosecution witnesses heard was of the weakest kind to ground the conviction. I would therefore allow the appeal on the third ground of appeal.

The fourth and last ground of appeal is that the trial Magistrate shifted the burden of proof to the appellants. This ground is based on the trial Magistrates statement in the judgment that:

> *"Also their defence is why weak as to prove their innocence ..."*

I entirely agree with the appellant's Counsel that this amounts to shifting the burden of proof to the appellants to prove their innocence. The accused do not have the burden of proving their innocence. It is upon the prosecution to prove their guilt beyond reasonable doubt. I would therefore also allow the appeal on the 4th ground of appeal.

As the counsel did not submit on the remaining grounds, I do not need to consider them as they are deemed to have been abandoned.

In the final analysis the appeal is allowed, the conviction is quashed and the sentence imposed is set aside. The appellants are to be released from custody with immediate effect, unless they are otherwise lawfully held.

(J.I. MLAY)

JUDGE

Delivered in the presence of Miss Lushagara State Attorney and Mr Mtakyamirwa advocate, this 13th day of April, 2006.

(J.I. MLAY)

JUDGE

13/4/2006