

IN THE HIGH COURT OF TANZANIA

MTWARA DISTRICT REGISTRY

AT MTWARA

CRIMINAL APPEAL NO 15 OF 2022

(Originating from Criminal Case No 38 of 2021 in the Lindi District Court at Lindi)

ISSA SALUM NGOLOMBWE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

22/8/2022 & 17/10/2022

LALTAIKA, J.

The appellant herein **ISSA SALUM NGOLOMBWE** was arraigned in the District Court of Lindi at Lindi charged with the offence of Gang Robbery contrary to section 285(2) and 287C of the Penal Code Cap 16 RE 2019.

It was alleged by the prosecution that on the 5th day of May 2021 at Njenga Kiwawa Village within the District and Region of Lindi the appellant did steal a motor cycle with registration number MC 651 BPE make SAN LG valued at Tanzanian Shillings One Million Nine Hundred Thousands (1,900,000), a Mobile Phone Make ITEL and Cash Money Tanzania Shillings Ten Thousand Five Hundred (TZS 10,500/=) the property of ABDALLAH BAKARI @MGOJI immediately before or after stealing did use actual violence to acquire the said property.

When the accused was arraigned in court on 14/06/2021 he pleaded not guilty. Consequently, the matter had to go for a full trial. Having been convinced that the prosecution had proven its case beyond reasonable doubt, the Court convicted the appellant as charged and sentenced him to serve a term of thirty 30 years in prison with six strokes of cane.

Aggrieved, the appellant lodged a petition of appeal containing five points. Later he filed one additional ground of appeal. For reasons that will become obvious, I choose not to reproduce the grounds of appeal.

When the appeal was called on for hearing on 22.8.2022 the appellant appeared in person, unrepresented. The respondent Republic, on the other hand, was represented by Mr. Enosh Kigoryo, State Attorney.

The appellant, not being learned in law, had nothing substantial to add to the grounds of appeal. Nevertheless, he pleaded with the court to consider both his original grounds as they appear in the petition of appeal as well as the additional ground. That paved way to the learned counsel for the respondent Republic to take the floor.

Mr. Kigoryo announced that he was supporting the appeal. He averred that having gone through the proceedings and grounds of appeal; he is convinced that the additional ground of appeal that the charge sheet is defective could determine the merits of the appeal.

It is Mr. Kigoryo's submission that the appellant was charged **with Gang Robbery c/s 285(2) and 287C of the Penal Code Cap 16 RE 2019**. However, reasoned the learned State Attorney, the particulars of the offence are to the effect that only the appellant had committed the offence.

Mr. Kigoryo insisted that the section cited namely 285(2) provides that the offence must be committed by more than one person for it to be called Gang Robbery. To this end, the learned State Attorney agrees with the appellant that since the particulars do not support the offence, the charge is defective.

It is Mr. Kigoryo's submission further that there was yet another defect which was not as obvious as the first one. The learned State Attorney pointed out that such a defect is lack of mention of the essential element of the offence. Expounding his point, Mr. Kigoryo pointed out that it is not shown [on the charge sheet] as to whom the violence was directed. The learned counsel emphasized that only the victim whose property was stolen is mentioned.

It is Mr. Kigoryo's submission that a charge which does not mention to whom the violence was directed was defective and cannot be cured by section 388 of the Criminal Procedure Act Cap 20 RE 2019. To buttress his point, the learned counsel referred this court to the case of **Masumbuko Mhoja and Another v. R.** Criminal Appeal No 435 of 2017 CAT, Shinyanga. The learned counsel emphasized that the decision of the Apex Court had just been delivered a week before that is 10th August 2022, to be exact.

Exhibiting his unwavering zeal to keep abreast with decisions of the Apex Court, Mr. Kigoryo submitted that he was alive to the fact that in another case of **Peter Marco @John v. Republic** Criminal Appeal No 258 of 2017 CAT, Tabora (unreported) delivered only one day after the previous one that is the 11th August 2022 to be exact, the Apex Court differed from

the previous decision by stating that defectiveness on failure to mention a person who the violence was directed was curable under section 388 by evidence on record.

It is Mr. Kigoryo's considered view that since the instant matter is marred by two defects as explained the defectiveness could not be cured under section 388 of the CPA.

Mr. Kigoryo is of the humble opinion that this court takes cognizance of the principle that in case of a conflict between two principles of the Apex Court, the recent one overrides. The learned counsel emphasized that such a principle was established in the case of **Arcopar (O.M) SA v. Harbert Marwa** and Family Investment Company Ltd and Others Civil Applications No 94 of 2013 CAT at Dar.

The learned counsel concluded his submission by a prayer that the appeal be allowed, and he believed that such a ground could dispose of the matter in its entirety.

In rejoinder, the appellant clarified that his full name is **Issa Salum Abdallah**. He emphasized that he did not know the name Ngolombwe. It was given to him in Lindi he just heard it when the charge was read over to him.

The appellant believes that the police were looking for someone called Ngolombwe and having failed to locate him, they arrested and charged him unfairly. To support his contention, the appellant stated that he was born in 1995 at Chikundi Village in Ruangwa District where he has lived throughout his life. He added that although he had never been to school at

all, he was conducting small scale business particularly roasting casava “kuchoma mihogo” to make a living and believes that he is a “cool” and peaceful person.

It is the appellant’s submission that when he was arrested, in the night of 5th June 2021 he had prepared a garden for growing vegetables. We are human beings. He was surprised to be charged with the offence, but no statement was taken. The appellant concluded his submission by a prayer that this court sets him free. He promised that he would join an adult education program to learn how to read and write.

I have dispassionately considered submissions by both sides. I have to say that arraigning a person in court under a fictitious name is regrettable indeed. I have also learnt that the appellant although unschooled, possesses natural intelligence and has been articulate in pointing out to this court some rather obvious signs of diligence on the side of the prosecution. I am not going to join the speculation that the real Ngolombwe is at large. Nevertheless, I cannot help but wonder; what is the purpose of establishment of the National Identification Authority (NIDA) bearing true identities of Tanzanians?

I have also come across unnecessary use of the @ “also known as- AKA” designation. Sometimes the AKA symbol comes between names of the accused. An accused who customarily uses three names such as John Joel Mosses appears in the court records as John Joel @Mosses. It does not take much thought to realize that this is a misuse of the acronym and designation.

The AKA is used to specify a particular person's aliases or nicknames. One's family name is neither his alias nor his nickname.

The importance of getting one's name correctly cannot be overemphasized. A Business Article by Joyce E.A. Russel "The Power of Using a Name" The Washington Post January 12, 2014, sums it up as follows:

"A person's name is the greatest connection to their own identity and individuality. Some might say it is the most important word in the world to that person. It is the one way to easily get someone's attention. It is a sign of courtesy and a way of recognizing them."

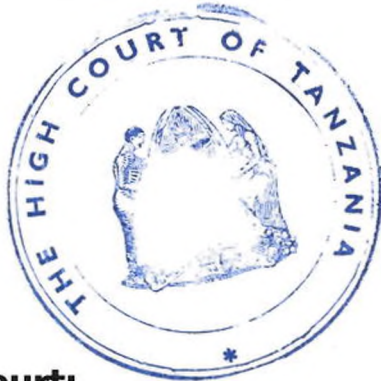
It is expected that, now that our country has embraced modern digital identification tools, our investigative and prosecutorial machinery will go an extra mile to ensure that accused persons are properly identified.

This brings me to the ground of appeal raised by the appellant specifically on disparity between the offence of Gang Robbery and statement of the offence. I agree with the learned State Attorney that although the appellant was charged with Gang Robbery, he is the only one convicted and charged.

The word Gang is defined by the ***Oxford English Dictionary (Online Edition)*** as: "an organized group of criminals" The Cambridge Dictionary (Online) provides a more expansive definition "a group of criminals or of people, esp. young men and women, who spend time together and cause trouble." The key word here is a group. Just as no tree can be a forest no individual can be a group or gang all by him/herself.

In the upshot, I allow this appeal. I quash the conviction and set aside the sentence of 30 years imprisonment term. I hereby order that be **ISSA SALUM NGOLOMBWE** released out of jail forthwith unless he is being held for another lawful cause.

It is so ordered



E. I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E. I. Laltaika", written over the printed name.

JUDGE
17.10.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 5th day of October, 2022 in the presence of Mr. Enosh Kigoryo, learned State Attorney and the appellant who have appeared in person and unrepresented.



E. I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E. I. Laltaika", written over the printed name.

JUDGE
17.10.2022

Court *

The right to appeal to the Court of Appeal fully explained.



E. I. LALTAIKA

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JUDGE
17.10.2022