IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUBUVA, J.A., MROSO, J.A., And MSOFFE, J.A.)

CRIMINAL APPEAL NO. 73 OF 2002

MT. 60330 PTE NASSORO MOHAMED ALLY ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Bubeshi, J.)

dated the 4th day of October, 2000
in
HC. Criminal Appeal No. 111 of 1999

JUDGMENT OF THE COURT

23 June & 3 July 2006

MSOFFE, J.A.:

In the District Court of Ilala at Kisutu the appellant was convicted of robbery with violence contrary to sections 285 and 286 of the Penal Code and sentenced to a term of imprisonment for fifteen years. He appealed to the High Court of Tanzania at Dar-es-Salaam. The High Court (Bubeshi, J.) dismissed the appeal against conviction and substituted the sentence with thirty years imprisonment in line with the Written Laws (Miscellaneous Amendments) Act No. 10 of 1989. Dissatisfied, this second appeal has been preferred.

The case for the prosecution was that on 3/5/1996 at about 9.30 a.m. the complainant, PW2 Khairuhisa Janmohamed, opened her shop, “Lamps and Shades”, situated along Samora Avenue in Dar-es-Salaam. Immediately thereafter, a group of people, one of whom was dressed in

army uniform, ordered her to lie down while pointing a pistol to her head. She was ordered to bring money, and she was also threatened with a knife which was pressed on her body. In the process, the bandits stole a cash box, her purse containing Shs. 200,000/=, her spectacles and an assortment of other items. She raised an alarm and a mob of people quickly responded. The angry mob beat to death one of the bandits who was dressed in army uniform. Upon a search being conducted, the appellant was seen hiding and holding a toy pistol in the nearby offices of the Intenational Motor Mart Co. Ltd. (hereinafter to be referred to as the company).

At the trial, the prosecution case was based on the evidence of PW1 D2345 Cpl. Oscar, PW2, PW3 Kesimeli Sondye, and PW4 Yusuph Mbwana. PW3 was with PW2 on the date and time of incident. Therefore, his evidence was similar to that of PW2. PW4, a vehicle wholesale Manager working with the company testified that he saw the appellant hiding in the company offices. PW1 arrested the appellant in the said offices. The trial Resident Magistrate was satisfied that the appellant had been properly identified, he convicted him.

On first appeal, the learned judge analysed and evaluated the crucial evidence on the identification of the appellant. She was concerned with the issue whether the evidence on the identity of the appellant was watertight.

Dealing with the above aspect of the evidence, the learned judge was settled that the appellant was not identified at the scene.

However, she was of the view that there were other pieces of evidence connecting the appellant with the offence. This is how she reasoned and concluded on the point:-

> " .... What tends to connect the appellant with the offence is that he was the same person who took refuge at PW4's shop. He was dressed in army uniform and upon search he was found to possess a toy gun. There was also the evidence of PW1 D2345 D/Cpl. Oscar. He was one of the policemen who arrested the appellant and he was found in possession of a toy pistol. PW3 Kesindi Sondye also testified that the one dressed in army uniform had a pistol. The dead bandit was later identified to be an army man but there was no evidence that he was dressed in army uniform. Only the appellant was so dressed. It follows that although PW2 did not identify the appellant, the circumstantial evidence immediately after he left PW2's shop, sufficiently connect him with the commission of the offence."

Mr. Lloyd Nchunga, learned advocate, filed a memorandum of appeal containing three grounds on behalf of the appellant. The learned advocate also filed a written statement under rule 67 of the Court Rules in support of the appeal. At the hearing of the appeal Mr. Nchunga did not appear. The appellant submitted that the appeal

could be determined on the basis of the memorandum of appeal and the statement filed by his advocate.

For the respondent Republic, Ms. Msafiri, learned State Attorney, appeared. She did not support the conviction. She submitted that the evidence on record upon a proper analysis was such that it was not watertight. She was of the strong view that no positive evidence of identification of the appellant was forthcoming in the case. In this regard, she contended, no witness identified the appellant at the scene of incident. At best, she went on to say, the appellant was arrested simply because he was dressed in army uniform and holding a toy pistol on that day. The evidence, taken as a whole, was not enough to ground a conviction, she concluded.

We wish to start with a brief examination of the evidence of PW2 and PW3. It is not disputed that these witnesses did not know the appellant before the incident. Furthermore, these witnesses did not identify the appellant at the scene and time of the incident. Also, PW2 and PW3 did not testify to have seen the appellant walking or running away from the scene to the nearby offices of the company.

We now wish to examine, again briefly, the evidence of PW1 and PW4. At best, the evidence of PW1 was that he arrested the appellant, without more. Likewise, the evidence of PW4 was simply that he saw the appellant in the company offices after the incident.

In short, upon a careful examination of the evidence on record we

are, with respect, unable to agree with the judge on first appeal that the case against the appellant was established beyond reasonable doubt. As stated above, the appellant was not identified at the scene of incident. In similar vein, no witness testified to have seen him walking away or escaping from the scene to company offices. The fact that he was seen in the company offices was not strong evidence to establish conclusively that he was connected with the offence in question. He might have been there on a purely innocent motive! Indeed, his defence that he was there solely for his own safety after a group of civilians wanted to attack him was probably true in the circumstances. Apparently this line of defence was not contradicted by the prosecution side.

For the above reasons, we are in agreement with Ms. Msafiri that the case against the appellant was not proved beyond reasonable doubt. The case against him was based on suspicion. Suspicion, however grave, is not a basis for a conviction in a criminal trial. The appellant ought to have been given the benefit of doubt and acquitted.

Accordingly, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be released forthwith unless otherwise lawfully held.

DATED at DAR ES SALAAM this 28th day of June, 2006.

D.Z. LUBUVA
JUSTICE OF APPEAL

J.A. MROSO
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

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

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR

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HC. Criminal Appeal No. 111 of 1999
Between
The Republic ……
Prosecutor
Versus
MT. 60330 PTE Nassoro Mohamed Ally ……
Accused

In Court this 28th day of June, 2006

Before: The Honourable Mr. Justice D.Z. Lubuva, Justice of Appeal
The Honourable Mr. Justice J.A. Mroso, Justice of Appeal
And The Honourable Mr. Justice J.H. Msoffe, Justice of Appeal

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THIS APPEAL coming for hearing on 23rd day of June, 2006 in the presence of the appellant AND UPON HEARING Mr. Llyod Nchunga, Counsel for the appellant and Ms. Msafiri, State Attorney for the Respondent/Republic when it was ordered that the appeal do stand for judgment;

AND UPON the same coming for judgment this day:-

IT IS ORDERED that the appeal be and is hereby allowed. The conviction is quashed and sentence set aside. The appellant is to be released forthwith unless otherwise lawfully held.

GIVEN under my hand and the Seal of the Court this 28th day of June, 2006.

(S.A.N. WAMBURA)
SENIOR DEPUTY REGISTRAR

Extracted on 28th June, 2006.