

IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

HIGH COURT CRIMINAL APPEAL NO.57 OF 1975

(Cf. Misc. Cr. C. 80/75)

(Original Criminal Case No. 498 of 1973 of the District
Court of Kigoma - Before S. J. Kanyama, Resident Magistrate)

HASSAN ABDALLAH .. APPELLANT

(Original Accused)

versus

THE REPUBLIC RESPONDENT

(Original Prosecutor)

CHARGE: 1st count: Robbery with violence c/s 285 and 286 of the
Penal Code Cap.16 Vol.I of the Laws.

3rd & 2nd count: Robbery, c/s 285 and 286 of the Penal Code
Cap. 16 Vol.I of the Laws.

J U D G M E N T

SISYA, AG. J.

The appellant was convicted by the District Court, Kigoma,
on three counts of Robbery and was sentenced to seven and a half
years imprisonment on each count; sentences to run concurrently.
He is now appealing.

Evidence was led at the trial that on the evening of 21/6/73
at about 8.00 p.m. one Emmanuel (P.W.2) and one Cornel s/o Tresfori
(P.W.3) entered a shop at Mwanga to buy a box of matches.

According to Emmanuel (P.W.2) who, incidentally, is the complainant
in count two, thereafter he and his companion, Cornel, started to
walk away. The said Cornel was behind him. At once he, Emmanuel,
heard a person say "Mshenzi". When he turned back he saw Cornel
lying on the ground and the appellant was holding him i.e. Cornel,
by the neck. On seeing this Emmanuel went back to separate them.

The appellant, however, kicked him, i.e. Emmanuel, and he fell down.

At that stage a group of people came. Emmanuel got up and hit the
appellant in retaliation. The said group of people then turned
on him, i.e. Emmanuel, and began to assault him; they fell him
to the ground and pressed him. Cornel came to his aid and thereafter
the two of them, i.e. Emmanuel and Cornel, ran towards one
Kinyongoli's pombe club while being pursued by the appellant and
the group of people. The appellant and the group caught up with
Emmanuel and his companion and fell them down at the door of the

...../2 pombe club.

pombe club. A woman who did not give evidence at the trial them pleaded with the assailants to spare Emmanuel and his companion. It seems they listened whereupon Emmanuel got up and entered the club. He found another fight there which did not involve him. Thereafter, Emmanuel left, apparently, on his way home. It was at that time when he discovered that his shs.70/= were missing from his pockets.

According to Cornel (P.W.3), the complainant in court one he and Emmanuel found the appellant in the shop where they had gone to buy a box of matches and they left him there. After Cornel and his companion had walked for about sixteen paces the appellant followed them and stood besides him, i.e. Cornel. The appellant asked him where he was going and before he answered the appellant hit him with his head on the mouth and he fell down. He, the appellant, then held his, i.e. Cornel's shirt, at the back. On seeing this Emmanuel came to his aid but the appellant, however started to run. Emmanuel got hold of him. Cornel got up and went to assist his companion, Emmanuel. However, when he arrived at the scene he saw the appellant and five other persons whom he could not identify attacking Emmanuel who was lying down. He, Cornel, then picked up a stick and assaulted one of the assailants with it. The appellant and the others then ran away. Emmanuel got up and the two of them, i.e. Cornel and Emmanuel, ran towards Kinyongoli's bar. The assailants, however, ran after them and got hold of him, i.e. Cornel. They lifted him and threw him down. One Edward Kalikenya came to his aid. The assailants then turned to him, i.e. Edward, They knocked Edward down and took away his watch. Cornel got up and ran into the bar where he met Emmanuel. Thereafter, on the advice of Emmanuel the two of them went to the Police Station.

P.W.4, Edward Belyinda, testified that on 21/6/73 at 8.00 p.m while he was outside Kinyongoli's bar he saw two persons coming from the direction of a shop: One was in front of the other. At once the person who was behind caught the one who was in front around the neck as if he was whispering to him. The person who was in front then fell down. According to Edward he saw the two persons clearly because the place at the scene was well lit by street lights. Eventually the attacker left his victim helpless on the ground. Later the victim got up and picked up a stick with which he assaulted the attacker on the shoulder and stomach. According to Edward the attacker was the appellant. Thereafter,

...../3 the appellant

the appellant got hold of the victim and pulled him inside the bar. After that the appellant turned to Edward and knocked his hand against a wall. Another person came and assisted the appellant in knocking his, Edward's, hand against a wall. Other persons came and rebuked the appellant for attacking Edward. By then the appellant and his companion had already taken away a wrist watch from Edward. They then desisted from attacking Edward. The mother of the appellant promised to recover the wrist watch for Edward but this was never done.

On 25/6/73 the appellant was arrested and subsequently charged.

In his defence at the trial the appellant said that on the material evening while he was in a shop at Mwanga two persons, one of them carrying a gourd containing pombe, came and bought some cigarettes. Thereafter, one of them pushed him. The appellant asked him why he pushed him whereupon the said ^{person} abused him by calling him "mpumbavu" and other nasty words. After that the said person challenged the appellant to a fight. The appellant left the shop and went outside. He was followed by the challenger who then hit him hard with a fist. The appellant felt pain and assaulted the challenger in retaliation. The challenger's companion then came and joined forces in felling the appellant to the ground. The appellant managed to get up and took to his heels. He ran to his house but he was followed by his attackers who continued to assault him with sticks. Some elders, eventually, came to his aid.

The appellant expressed a desire to call witnesses on his behalf but for some unknown reasons he was not accorded any opportunity to do so by the trial court.

In his judgment the learned trial magistrate found that there was cogent evidence against the appellant on all three counts and proceeded to convict him.

In his lengthy petition of appeal the appellant dwells on the contradictions in the Prosecution evidence and concludes that there was no sufficient evidence on which to base convictions on all the three counts. He also complains that the trial magistrate refused to entertain his application for defence witnesses.

Indeed looking at the Prosecution evidence as a whole which I am entitled to do according to law it can be observed that there are some material conflicts which the learned trial magistrate does not appear to have considered. Indeed there is no dispute, as the trial magistrate himself also found, that there was a fight involving the appellant on one hand and Emmanuel (P.W.2) and Cornel (P.W.3) on the other hand on the material evening. However, there is not even a scintilla of evidence to show that the appellant is the person who took away the money from the pockets of Emmanuel and Cornel. As a

matter of fact when cross examined by the appellant Emmanuel is recorded to have said and I quote, "I cannot tell who took the money." Further, at no stage in their testimony did Emmanuel or Cornel allege that they felt someone, let alone the appellant, search their pockets where the money was. On the evidence on record chances are that the money, if at all there was really any in the complainant's pockets, fell off in the course of the fracas whereby those involved kept on assaulting and felling one another to the ground. On my evaluation of the evidence it seems to me that what happened on the material evening was a free for all fight. The actual cause of it is not known but I think I will not be overstepping the bounds of propriety to suggest that "pombe drinking" must have played a role as a catalyst to it.

Turning to count three the complainant, Edward, testified that the appellant and his companion turned to him snatched his wrist watch and knocked his hand against the wall inside the bar. Emmanuel (P.W.3), however, said that Edward was knocked down and had his watch taken away from him outside the bar when he, Edward, came to his, i.e. Emmanuel's rescue. This contradiction notwithstanding, none of these two witnesses, Emmanuel and Edward, specifically said that the wrist watch was snatched or taken away by the appellant. This is important because it was not established that the others who joined in the fight were sharing a common intention with the appellant.

All in all I am inclined to the view that the evidence adduced before the trial court was not sufficient to establish the charges as laid. This appeal, therefore, succeeds. In the event the convictions which are not supported by the learned state attorney are quashed and the sentences are set aside. The appellant should be set at liberty unless he is otherwise held on other lawful charges. It is ordered accordingly,

Delivered in open court at Tabora this 27th November, 1975.

E. D. SISYA,
AG. JUDGE.