IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO.36 OF 2002

(Originating from D/C Korogwe CR.C. No.150/2001)

1. **GODFREY PHILIPO MSUYA)**
2. **MWANKAI MTOI) ..... APPELLANTS**
3. **MASHAKA RAMADHANI)**

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

HON. M.S. SHANGALI, J:

In the District Court at Korogwe the 1st Appellant namely GODFREY PHILIPO MSUYA who was the 1st accused; the 2nd appellant MWAMKAI MBOI who was the 2nd accused and the 3rd appellant MASHAKA RAMADHANI who was the 4th accused were jointly and together with one YASIN MOHAMDED who was the 3rd accused charged with two counts.

On the first count they were charged with the offence of conspiracy to commit offence contrary to section 384 of the Penal Code; that on 18th day of April 2001

at about 13.00 hours at Manundu township within the District of Korogwe, did jointly and together conspire to commit an offence of Robbery. On the second count they were charged with the offence of robbery with violence c/s 285 and 286 of the Penal Code. That on 18th day of April, 2001 at 19.30 hours at Kwagunga village within the District of Korogwe they did steal one motor cycle make YAMAHA Reg .No.STH 9748 model DT 125 worth at shs.2,500,000/= the property of one Josiah s/o Shughuru and immediately before or after the time of such stealing used actual violence to the said Josiah Shughuru in order to obtain the stolen property.

The third accused person YASIN MOHAMED who was jointly charged with the appellants was found not guilty by the trial District Magistrate and acquitted on both two counts.

The trial District Magistrate was satisfied with the evidence of 5 (five) prosecution witnesses and convicted the three appellants on both counts. He sentenced them, each to serve five years imprisonment term on the first count of conspiracy and 20 (twenty) years imprisonment term on the second count of robbery with violence. The sentences were ordered to run concurrently.

The three appellants who shall be referred to in this appeal as the 1st, 2nd and 3rd appellants respectively were not satisfied with the decision of the District Court and consequently preferred this appeal.

Briefly, the prosecution case was as follows. On 18th April 2001 at about 19.30 hours PW.1, Josiah s/o Shughuru was driving his motor cycle Reg. No. STH 9748 Yamaha (Exbit P1) home and when he reached a swampy area along the road, he reduced the speed of his motor cycle. At that time the front lights of his cycle were on and as he was about to cross the swampy area, one youth ambushed him and hit him on his face with a club. PW.1 was able to identify the

youth to be the 2nd appellant. Then another youth appeared and grabbed the motor cycle from PW.1 and both bandits jumped on the motor cycle and drove away towards Korogwe town direction. PW.1 identified the second youth who grabbed the motor cycle as the 1st appellant. PW.1 was able to identify both the 1st and 2nd appellants through the motor cycle beam light and because they were both (appellants) guests of his fellow villager the 3rd appellant. It was the evidence of PW.1 that as the bandits vanished with the motor cycle he managed to stand up and raised alarm. Among the people who responded to the alarm was PW.2, Salehe Abdalla Ahmad who testified that as he was rushing towards the direction of the alarm using his bicycle he met the 3rd appellant coming from the direction of the alarm. That, when he reached at the scene he, PW.2 found PW.1 bleeding profusely on his left forehead side. Then the complainant (PW.1) informed PW.2 that he was ambushed, beaten and robbed his motor cycle by the guests of the 3rd appellant. It was the evidence of the PW.2 that he managed to organize two youths namely Juma Salim and Salim Hassan and together started to persue the bandits towards the road leading to Korogwe township by using his bicycle. As they approached Old Korogwe area they found two people pushing the motor cycle. According to the evidence of PW.2, he mananged to lit his torch to the faces of the two people and identified them to be the 1st and 2nd appellant who were the guests of the 3rd appellant at their village, Magunga. It was also in the evidence of PW.2 that, on seeing him both the 1st and 2nd appellant abandoned the motor cycle and run away. Then PW.2 and his colleagues picked the motor cycle to the police station where it was later identified as the one stolen from PW.1.

It was also the evidence of PW.2 that he was able to identify the club which was found at the scene of crime as the one belonging to the 3rd appellant because the 3rd appellant used to carry it at the back seat of his bicycle.

PW.3, Mwajuma Hamisi, the village Chairperson of Magunga Village testified to the effect that the 1st and 2nd appellants were the guests of the 3rd appellant. That was also supported by the evidence of PW.4 who received and invited the 1st and 2nd appellants to sleep in his house as the guests of the 3rd appellant from 15th to 18th April 2001. It was also in the evidence of PW.3 that on receiving the information about the commission of the crime from the PW.1 and PW.2, she cooperated with PW.5, Inspector Emmanuel, the police Officer who investigated the case and were managed to arrest the 3rd appellant. On interrogation by the police Officers and later in his defence before the court the 3rd appellant maintained that the 1st and 2nd appellants were his guests from 16th to 18th April 2001 and that the 1st appellant visited him in order to collect his house rent collected by him (3rd appellant) from the 1st appellant's house situated at Magunga. In otherwords, the 1st appellant have a house at Magunga entrusted to the 3rd appellant to collect rent on his behalf. It was the evidence of the 3rd appellant that when the 1st appellant arrived to collect his rent the 3rd appellant was unable to pay all the money (shs.50,000/)at once because he had used it. Therefore, he requested the 1st appellant and 2nd appellant to wait at the village for few days while looking for the money. According to the evidence, on 18th April 2001, the 3rd appellant was able to pay the money and the 1st and 2nd appellant left Magunga village at 6p.m back to Korogwe township.

It was the same 3rd appellant who informed the police that the 1st appellant could have been found in the house of Yasin Mohamed (3rd accused) because the 1st appellant informed him that while at Korogwe town he would stay at Yasin's house. Indeed, when the police went to Yasin's house they found the 1st appellant and arrested both of them (Yasin and 1st appellant). Later, the police proceed to the house of the 2nd appellant and arrest him.

All the appellants categorically denied to have committed the alleged offence and in their defences they called several witnesses to support their innocence.

The 1st appellant's evidence indicate that he resides at Arusha and on 16th April 2001 he arrived at Korogwe on his way to Magunga village to collect his house rent from the 3rd appellant who was taking care of his house; while at Korogwe he visited his friend the 2nd appellant and after informing him the gist of his safari, the 2nd appellant volunteered to accompany him by using his (2nd appellants) bicycle. That on reaching at the house of the 3rd appellant they were requested by him to wait for few days while looking for the money. That on 18th April 2001 they were able to get the money shs.50,000/ from the 3rd appellant and immediately at evening hours they left for Korogwe town using the 2nd appellants bicycle. The 1st appellant complained that later in the night he was arrested in the house of his host Yasin Mohamed, the 3rd accused. The 2nd appellant testified to the same effect that he accompanied the 1st appellant to Magunga village and later back to Korogwe using his bicycle. Their witnesses gave evidence to the same effect.

As I have shown above, the trial District Magistrate convicted them and sentenced them accordingly.

In their joint memorandum of appeal the appellants has filed nine (9) grounds of appeal which may conveniently be summarized to only two major grounds, namely: one, whether the bandits or culprits were satisfactorily identified as being the instant appellants and two, whether their convictions were justified and supported by concrete prosecution evidence.

Ms Wakulu Bernad, the Learned State Attorney, who appeared for the Republic/respondent submitted in support of the conviction against the appellants, but refrained to support the sentence on the second count arguing that the appellants should have been sentenced to 30 years imprisonment. The Learned State Attorney stated that the evidence showed that during the

commission of the offence dangerous weapon, a club was used. Such constitute armed robbery in terms of s.5 of the Minimum Sentence Act as amended by Act No. 10 of 1989. On conviction the Learned State Attorney submitted that both the appellants were correctly identified by the prosecution witnesses as the people who committed the alleged offence and that there was no need of identification parade. She stated that although the offence was committed in the night the 1st and 2nd appellants were known to PW.1 and PW.2 because they were at Magunga village for several days.

I am unable to agree with the Learned State Attorney for the following reasons. To start with PW.1, he testified that as he was driving his motor cycle with lights on he approached a swampy area along the road, he reduced speed and tried to manouver the area but suddenly he was attacked by the 2nd appellant who hit him on the forehead with a club. Then another youth 1st appellant appeared and grabbed the motor cycle and both drove away leaving him bleeding profusely. It is the evidence of PW.1 that he was able to identify the appellants through the motor cycle lights. The question is whether under such circumstances and conditions PW.1 could have identify his assailants to be the very two new commers in the village, the guests of the 3rd appellant. Was there an opportunity and convincing ability for PW.1 to correctly identify his assailants? PW.1 conceeded that it was dark and he was concentrating to cross the swampy area driving his motor cycle. Could he seriously be able to correctly identify all the people who ambushed him and stole his motor cycle. I am of the view that there was a reasonable possibility of error from the part of PW.1 leading to mistaken identification notwithstanding his honest belief. Likewise, PW.2 claimed that as he was rushing to the scene of crime using his bicycle he met the 3rd appellant coming from the same direction. However, there is no evidence to show how PW.2 was able to identify the 3rd appellant while rushing to the scene with his bicycle in the darkness. PW.2 did not give any explanation and the record is silent as to how he purported to identify the 3rd appellant in

that night. It has been emphasized, time without number that, no court should act on evidence of visual identification unless all possibilities of mistaken identify are eliminated and the court is fully satisfied that the evidence is watertight - See WAZIRI AMANI VS R (1980) TLR 252 (CAT).

Another interesting issue is the way PW2 identified 1st and 2nd appellants. The evidence indicate that after getting information from PW.1 that the culprits had drove the motor cycle towards Korogwe town direction, PW.2 and his colleagues decided to parsue the culprits towards the same direction by using his (PW.2) bicycle. According to the evidence of PW.2,when they reached at Old Korogwe area they saw two people pushing the motor cycle and on torching their faces he identified them to be 1st and 2nd appellants, the very guests of the 3rd appellant. At the same time PW.2 testified that when the two people saw them they abandoned the motor cycle and ran away. Now, if the said people were pushing the motor cycle towards Korogwe township and if PW.2 and his colleagues were pursuing them from behind using a bicycle how could he manage to reach infront of them and torch their faces. Furthermore, at what time the two people abandoned the motor cycle and run away; was it during the pursue or after being torched and identified; and if PW.2 was able to be close to the culprits and identified them by using his torch light why didn't he and his colleagues arrested them.

In his evidence PW.2 stated that after identifying the 1st and 2nd appellants by the light of his torch they failed to arrest them because the appellants abandoned the motor cycle and ran away. Then during the cross examination by the 1st appellant, PW.2 changed his story and stated that they failed to arrest the culprits because they were afraid they could have been equipped with dangerous weapons. There is a lot of questions and doubts on the credibility of PW.2 let alone the apparent dangers pertinent to his ambiguous identification evidence.

In general torch lights are not effective in identifying bandits or thiefs and therefore the evidence of PW.2 and remarks of the trial District Magistrate on torch beams were pure conjecture which have no room in criminal trials. The evidence in a case where visual identification is intended to be relied upon must always be subjected to careful and serious scrutiny to make sure that there is no chance of mistaken identify or identification by assumptions.

Regarding to the issue of the club, exhibit P2 which was said to have been found at the scene of crime, PW.2 claimed that it belongs to the 3rd appellant because he used to see the club on the back seat of the 3rd appellants bicycle all the time. Apart from that evidence of PW.2 there was no other evidence to link the 3rd appellant with the club and there was no special marks or explanation to prove that the said club was exactly the same as the one used to be fixed at the back seat of the 3rd appellants bicycle, if any.

On the issue of the charge of conspiracy the Learned State Attorney submitted that there was evidence to prove the charge because the 1st and 2nd appellants stayed in the house of 3rd appellant for 3 days and on the last day they jointly participated in the commission of the offence.

With due respect to the Learned State Attorney there was no evidence at all to prove charge of conspiracy. The appellants were not even staying in the house of the 3rd appellant although he was their host. The evidence indicate that the 1st and 2nd appellants were staying in the house of PW.4. The findings of the trial District Magistrate was based on the assumption that since the 1st and 2nd appellants were the 3rd appellants guest for 3 days, then they were conspiring to commit the alleged offence. Such assumptions and suspicious are dangerous to bring home a conviction. The charge sheet itself state that the conspiracy was done on 18th April 2001 at about 13.00hrs at Manundu township in Korogwe and not at Magunga or Kwagunga village. According to the evidence of PW.5 it was

the 3rd accused Yasin Mohamed who was staying at Manundu area at Korogwe. There was no evidence whatsoever to prove or suggest that the appellants were seen at Manundu on 18th April 2001 at about 13.00 hrs or to prove that the appellants conspired to commit the alleged offence at Manundu. It is important at this juncture to remind ourselves the wisdom and experience of eminent jurists that suspicion, however strong can not take the place of proof – See Benedict Ajetu VR (1983) TLR 190 and G. MTINDA V.R Mbeya Cr.App.No.17/2001 (CAT) (unreported).

There is also the issue of the ownership of the motor cycle Registration STH 9748, exhibit P1. The charge sheet indicate that it was the property of PW.1, Josiah s/o Shughuru. In his testimony PW.1 stated that the motor cycle belongs to him but during the cross-examination he denied the ownership. In his judgment, the trial District Magistrate indicated that the motor cycle is the property of the PW.1. It is clear that the issue of ownership of the subject matter, the motor cycle was not resolved. In their memorandum of appeal the appellants went further and claimed that the motor cycle belongs to the wife of the PW.1. Whatever the case, the motor cycle has the Government Registration ante numbers STH 9748 and the assumption is that it belongs to the Government of Tanzania. If that is the case the question is how did it landed in the hands of PW.1 and why the prosecution side claimed that the motor cycle belongs to PW.1. All in all, this is another gap in the prosecution side which makes their case weaker.

Another important aspect in this appeal is the way the trial District Magistrate dealt with the defence evidence in his judgment. He narrated all the defence evidence but failed to analyse it. As a result he analysed and discussed the prosecution evidence on its own and in isolation of defence evidence and arrived at conclusion that the evidence of prosecution was true and credible. I am of the view that if the trial District Magistrate took the appellants defence seriously

and considered it accordingly he would have come out with a different decision. The defence of the appellants was strong, impressive, straight and probable to cast a doubt on the prosecution evidence. I am convinced that the trial District Magistrate misdirected himself for not seriously considering, analyzing and assessing the appellants defences.

In conclusion thereof and for the foregoing reasons, I am satisfied that the culprits were not satisfactorily identified to be the instant appellants and secondly there was no congent and sufficient evidence on the record to bring home the convictions against the appellants. That findings renders the issue of proprietness of the sentence otiose.

Accordingly, I allow the appeals of both the appellants. I hereby quash their convictions on both counts and set aside the sentences imposed against them. They should be set free at once unless lawfully held on another matter.

It is so ordered.

M.S. SHANGALI

JUDGE

17/12/2004

Judgment delivered todate 27th December 2004 in the presence of the Ms. M. Salum, State Attorney for Republic/Respondent and in absence of both the appellants.

THE HIGH COURT OF TANZANIA

M.S. SHANGALI

JUDGE

17/12/2004