IN THE HIGH COURT OF TANZANIA

AT TABORA

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 143 CF 144/2007

ORIGINAL CRIMINAL CASE NO. 38 OF 1998

OF THE DISTRICT COURT OF BARIADI DISTRICT

AT BARIADI

BEFORE. D.D. MALAMSHA,Esq; DISTRICT MAGISTRATE)

1. MALANJABU s/o SHIMBI } ..... APPELLANT
2. DAMIANI s/o CHARLES } (Original Accused)

VERSUS

THE REPUBLIC

(Original Prosecutor)

JUDGMENT

19th Nov.07 & 13th Dec, 07

MUJULIZI, J.

This is a consolidated appeal. The 1st and 2nd Appellant herein, were arraigned before the District Court of Bariadi as 3rd and 1st accused together with two others, on one count of, ***"robbery with fire arms"*** (sic) c/s 285. Three of the accused; the 1st, 2nd and 3rd accused were convicted and each sentenced to thirty (30) years imprisonment, plus 12 (twelve) strokes

corporal punishment on 26/5/98. The 2nd accused has since passed away.

The appeal is against both conviction and sentences. Both appellants appeared to argue their respective appeals.

The Respondent Republic was represented by Mr. Rweyongeza, learned State Attorney, who supported the conviction.

At the trial, it was alleged that the appellants were *"jointly charged on 4th day of February, 1998 at about 1.30 hrs at*

Region, did steal two motor vehicles batteries valued at Tshs. 100,000/= the property of Luguru Co-operative Society and at or immediately before or immediately after the time of such stealing did use firearm in order to obtain or retain the stolen property."

To prove its case the prosecution had called four (4) witnesses.

P.W.1 Hamis Ludono was the night watchman at the co-operative society. He alleged that he was invaded and overpowered by a gang of six people, who; he claimed to

identify by face only, and that one of them whom he later identified to be the 2nd appellant was holding a gun at the time.

P.W.2 Gideon Maduhu was the secretary to the Co-operative society. He testified that he learnt about the theft of the two batteries from an unnamed turn-boy of the vehicle, and that, upon reaching the scene, at 8-00 am on 4/2/98 in the company of the driver, P.W.3 Masuka Shirinda, he found the batteries missing, the watchman's clothes torn, and his weapons broken. Then he went on to narrate the story as told to him by P.W.1.

lead them to the place were the bandits had sold the batteries, which were found to be with one Sayende, P.W.4.

P.W.4 alleged that the batteries had been left with him by the 1st appellant accompanied by 5 other persons, as security for money lent to them, allegedly to service their vehicle which had broken down.

The Appellants who were arrested 10 days after the alleged theft, denied the charge. They challenge the conviction on grounds inter alia that;

1) The identification testimony of a single witness-P.W.1 was not credible to sustain a conviction. He did not describe his assailants to any body.

2) That the testimony of P.W.2 and P.W.3, was mainly hearsay, and was wrongly admitted; and wrongly relied upon by the trial Court.

3) The alleged stolen batteries were recovered from or allegedly found in possession of P.W.4, who was therefore a possible suspect and therefore an

treated with caution; in any even it was not credible.

4) That the learned district magistrate misdirected himself on the question of the credibility of P.W.1 and P.W.4; after it was proved that they had falsely testified against the 4th accused who was discharge; he ought not to have believed the rest of their testimony in relation to the appellants.

Mr. Rweyongeza, learned State Attorney, did not address himself to the above specific grounds of appeal, but addressed the Court generally arguing that;

There is sufficient evidence on record to prove the charges beyond reasonable doubt. P.W.1 the night watchman said that he was able to identify them because the electric lights were on.

The 1st accused who is the 2nd appellant is, (according to P.W.1) the one who was armed and kept guard over him. He was therefore able to identify him.

Later he identified him while they were at the bar on 13/3/98.

It is argued further that according to the evidence; they admitted committing the crime and lead to the place were they had sold the batteries. It was his contention therefore, that this evidence was corroborated by the testimony of P.W.2 Gidion s/o Maduhu (at page 6 of the typed proceedings). It is also supported by the evidence of P.W.4 Samwel Sayenda - page. 8

He therefore concluded, that these were credible witnesses and on the authority of **DPP .V. NURU MOHAMED GULAM RASUL (1988) TLR 82** - admission made before many people is admissible, as it lead to the discovery of the batteries.

In answer to theses arguments, the 1st appellant argued that, the contention by the learned State Attorney was not tenable, because it is based on unproved assumption that the accused were arrested together. This is not true.

The 2nd accused who has since passed away, had been arrested and beaten up by the time the 1st appellant was arrested.

It is also not true that he, (1st appellant) admitted the offence, and that it is the 2nd accused who lead the group to ..... It is not true therefore that all accused admitted or lead to the discovery of the stolen batteries.

The 1st appellant in turn argued that he was not arrested with any of the others while at the bar, but he was arrested alone while at a "restaurant" and taken to the place where the theft was alleged to have taken place-on 01/2/1998. He was beaten up.

In my considered opinion, the appellants have raised serious grounds of appeal which merit serious consideration.

On the issue of identification and the need for early description of the identified suspect the law is well settled. In MOHAMMMED ALHUI V. REX 9 EACA, 72, it was held;

"In every case in which there is a question as to the identity of the accused, the fact of there being a description given, and the terms of that description given, are matters of the highest importance of which evidence ought always to be given; first of all, of course, by persons who give the description and purport to identify the accused, and then the persons to whom the description is given"

This early description of a suspect, prior to identifying him, must be as to physical marks, build, weight, height dress etc: ABUSHIRI AMIRI V.REP (1992) T.L.R. 178; RAYMOND FRANCIS V. REP. (1994) T.L.R.100.

Now, according to P.W.1 all that he said; and what P.W.2 and P.W.3 heard from him; was only the allegation that he could identify his assailants by face. That evidence was therefore weak from the beginning; it could not on its own, sustain a conviction. There was nothing to corroborate.

Secondly, as held in **JAMES BULOLO & ANOTHER V.R. (1981) TLR 283**, it is the duty of the court; first of all, to collect analyse, and assess the evidence; and see how far, if at all, it touches upon every accused as an individual. The court

is not to lump the accused persons together and wrap them up generally is the blanket of the prosecution evidence.

There is therefore a need to re-evaluate the evidence on record.

The most critical testimony on the charges was that of P.W.1. At page 4 of the typed proceedings his testimony is recorded thence;

> *"I remembered (sic) on 13/2/98, I saw the 1st to 3rd accused at a certain (sic) Bar at Lugoyi and identified ..... I reported to the secretary and the accused persons were arrested.*
>
> *They were interrogated and they denied to be responsible with the incident. They (sic) 3rd accused before he was arrested he knew (sic) and absconded. Therefore the 1st and 2nd accused were first arrested.*
>
> *Later the 3rd accused was arrested and interrogated and admitted to have stole (sic) the batteries and he volunteered to take the people to the place where they sold the two batteries stolen. It was found at Sayenda. The 2nd accused on the next day led the people to Sayenda again and the 2nd battery was recovered. This was on 14/3/98".*

This piece of evidence is contradictory. If we may try to make sense of it-only the 1st and 2nd accused were arrested first and interrogated - but denied. Later the 3rd accused who is the 1st appellant admitted after his arrest, leading to the discovery of one of the batteries. Then we are told the 2nd accused also admitted meaning, he changed his mind on the next day!

But this witness when cross examined by the 2nd accused said

"You were arrested together on 4/2/98 what I have told

But, was he telling the truth?

According to P.W.2 (page.6). ***"3rd accused said that he should not be beaten and told us that the batteries were at Bariadi at one person called Sayenda where they sold it there and he has not yet paid. We came to Sayenda and found one battery with could be identified. The second battery was mentioned by 2nd accused".***

But, during cross examination, P.W.2 said that the 2nd accused lead them to Sayenda, so did the 3rd accused.

If I may ask, if one of the accused had already lead to the recovery of the batteries, why would it require, a second accused to lead the same people to the same person for the same purpose? This brings us to the testimony of P.W.4 Sayenda himself.

If he is to be believed, he testified that six people including the accused brought two batteries which he checked and found them to be OK. He gave them Tshs.55, 000/= with the condition that he would return the batteries to them upon the accused repaying the money on a date and time which he

the company of the 3rd accused on 13/2/98, he did not have all the two batteries because the 2nd battery "was in town at night."

Common sense tells us then, that; if this was indeed the case, then why, I ask; was the 2nd accused taken to Sayenda's place the next day for the 2nd accused to have to say: that he had gone for the second battery which P.W.4 had already acknowledged to the same police officers the previous day?

It occurs to me that this story; as made up by the prosecution witnesses, does not tally with the natural and probable consequence of things in the circumstances painted by the witnesses.

The Appellants therefore, have a point: when they challenge the credibility of these witnesses.

In his judgment, the trial district magistrate, held that there was no doubt that the 4th accused was by 5/2/98 in police custody, yet P.W.1, and P.W.4 had stated on oath to; have seen and identified him at the scene of the crime on 4/2/1998, (P.W.1) and at Sayenda's (P.W.4) on 5/2/1998, respectively!

It is therefore clear, that they had not been quite right in this respect. For, P.W.4 who claimed to have seen [redacted] in broad day light it was not even mistaken identity, but outright falsification of testimony!!

Indeed as argued by the appellants, this witness ought not to have been believed at all. He had his own skin to spare. He was an accomplice; and the explanation given would not, had the police been minded to pursue the truth, saved him from being charged, on the basis of recent possession. For, if I may ask, why: if the batteries were received by him for security, why would they be kept in separate locations?

And if P.W.3, the driver identified the batteries, was there any need for the 2nd accused to be taken to identify the same battery already admittedly in the possession of P.W.4"

In the foregoing circumstances, the trial magistrate erred in law in failing to analyse the evidence adduced before him, leading to a manifest failure of justice.

There were simply to many holes in the prosecution's case.

For the above reasons, I allow the appeals.

Consequently the conviction of the appellants on the charged offence is hereby quashed and substituted with an acquittal of both appellants on the charged offence of armed robbery c/ss 285 and 286 of the Penal Code (Cap.16 R.E.2002)

As a result they are set at liberty. They should be released immediately unless they are held for other lawful custodial orders.

A.K. MUJULIZI

JUDGE

7/12/2007

Judgment delivered in the presence of the appellants and Mr.Mokiwa learned State Attorney for the respondent Republic.

A .K. MUJULIZI

JUDGE

3/12/2008

Right of appeal explained.

A. K. MUJULIZI

JUDGE

13/12/2007