

TANZANIA / JUDGMENT

19941005 TZHC Dar es Salaam

COURT
TZHCDECIDED
5 October 1994

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1.) IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM HIGH COURT CHH1U~AL APPEAL NO .117 OF 1994 Original Criminal Case No.249 of 1993 of the District Court of Ilala District at Kivukoni Before s.v. Karua, Esq., s. Res. Magistrate ALLY EW/iliIRI APPELLANT versus THE REPUBLIC RE:SP.JhDENT JUDGMEH'r MWAIKASU, J. By this appeal, the appellant, one Ally rwahiri challenges "the decision of the lower court whereby he was convicted along with another person of the offence of robbery with violence 1/s 285 and 286 of the Penal Code and sentenced to 15 years of imprisonment". The judgment of the lower court is impugned on the grounds that there was insufficient identification evidence against him and that he had wrongly been sentenced to the 15 years of imprisonment; while at the time the offence is alleged to have been committed he was aged 15 years and therefore a juvenile 1;0 which the M.S.A. 1972 did not comply. The Republic represented by Mr Maruke, learned Solicitor General, declined to support the conviction on the ground that there was insufficient prosecution evidence to establish proper identification of the appellant, in that the two principal and only prosecution witnesses were relatives of the appellant, that demanded corroboration. The appellant's contention that as he was at the time of the commission of the offence only 15 years and therefore a juvenile, the M.S.A. 1972 could not apply to him. A perusal of the record of the lower court clearly shows that the appellant, and the two prosecution witnesses are residents of the same area, being Mburahati Motomoto within Kinondoni District Dar es Salaam Region. It is also evident that the incident complained of took place in the open, in broad daylight. Thus according to the PW1, one Omari Rashid and the PW2, one Hussein Mohamed, it was in the morning of 13th day of April 1993, at 11 am and 9 am, that as the two were riding a bicycle,

- 2 - on their way to the market to buy some wheat flour and rice for their shop, a group of young people of whom was the appellant, was found and then one of them hit the PW2 on his ribs. That made him lose control of the bicycle which he was the one peddling. He then fell down, such young men including the appellant began assaulting the PW1 who had a large sum of money in the sum of Tsh.700,000/=, wrapped in a nylon bag. In the course of such struggle one of such youths, called Shai-bu, snatched such bag and ran away with it. Thereafter the PW1 and PW2 reported the matter to the police at Magomeni police station where they were given a PF3 in respect of injuries sustained by the PW2 on the ribs and head. Later the PW1 and PW2 led the police to search for the culprits and led to the

arrest of the appellant and his colleagues. The two witnesses maintained that they had no mistake about the identification of the appellant because he was their neighbour and the incident took place in broad daylight. Such evidence was also accepted by the lower court and therefore led to the conviction of the appellant. With respect to the learned State Attorney's submission to the contrary, I find no reason to suspect the credibility of the two prosecution witnesses. They have not been shown to have had any grudge with the appellant previously. And being such neighbours, and that the incident took place in broad daylight I find no reason to suspect the accuracy of their identification of the appellant. I cannot, therefore, but uphold the appellant's conviction. On the other hand, I entirely agree with the appellant, as also conceded by the learned State Attorney, that at the time of the commission of the offence the appellant is said to have been aged fifteen years, and, therefore, more was within the definition of a 'juvenile' as provided by the Children and Young Persons Ordinance Cap.13. As such in terms of s.2 of the MSA 1972, the MSA 1972, does not apply such type of offender, in fact under s.3 of the MSA 1972 a 'juvenile' is therein defined to mean any person under the apparent age of 18 years, which age is even higher than the age prescribed under the Children and Young Persons Ordinance. Thus as such juvenile the appellant ought to have been sentenced in accordance with the provisions of the Children and Young Persons Ordinance. It is the requirement under s. 22 (2) of the Children and Young Persons Ordinance that no young person shall be sentenced to

- 3 - imprisonment unless the court considers that none of the other methods in which the case may be legally dealt with by the provisions of this or any other Ordinance is suitable. Yet in this case there was no such finding by the trial court and in fact the appellant was found to be a first offender. In the circumstances, the most appropriate measure to be taken by the lower court would have been either to order the appellant to go to an approved school or to conditionally discharge him on probation. Accordingly, the sentence of 15 years of imprisonment imposed by the lower court upon the appellant is hereby set aside. Instead the appellant is hereby discharged on condition that he does not commit another offence within a period of three years from today, and during such period he shall be under the supervision of a Probation officer, attached to Dar es Salaam (Kisutu) R.M's Court. It is also noted that although the complainants complained of having been robbed sh.700,000/= which has not been recovered, no order for compensation of such sum by the convicted persons, by the lower court as required under s.7(1) of the MSA 1972. That however is remediable under subs.(2) of the said section which empowers a higher court to make such order on the application of the owner or on its own motion. It is, therefore, accordingly ordered that the convicted persons shall compensate the complainants the sum of sh.700,000/... jointly and severally. The appeal is therefore partly allowed. Delivered this 5th day of October, 1994 at Dar es Salaam in Chambers in the presence of Mrs. Rwegasira and the appellant who is Under custody. R. J. Mwakasulu Judge I certify that this is a true copy of the original! DISPOSED

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