

TANZANIA / JUDGMENT

20100303 TZHC Dar es Salaam

COURT
TZHCDECIDED
3 March 2010

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1 IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CRIMINAL APPEAL NO. 162 OF 2008 (From District Court of Rufiji at utete Cr. Case No. 28 of 2008) BENEDICT ADERICK @ MAPUNDA KIAMBE MWIKWAMBE- MARONGINENE . VERSUS ' REPUBLIC Date of last Order .22/ 1/2010 Date of Judgment 3/3/2010 .

JUDGMENT

Shangwa, J. On 25 th July, 2008 the Appellants Benedict Aderick @ Mapunda and Kiambe Mwikwambe @ Maronginene who were charged on two counts in the District Court of Rufiji with the offence of Armed Robbery C/S 287. A of the Penal Code were 2 convicted of the offence charged and each of them was sentenced to 30 years imprisonment on each count. Both Appellants were not satisfied with conviction and sentence imposed on them. They have now appealed to this court. In their joint. Memorandum of Appeal, the Appellants faults the trial Magistrate for convicting them of the offence charged without sufficient evidence. The learned State Attorney Miss Machoke did not support conviction and sentence which were imposed on them on both counts. She asked this court to set them at liberty. The particulars of the offence with which they were charged are as follows: On the first count, it was alleged that on 20 th August, 2007 at about 23.00 hours at Mlandizi Village Rufiji District, Coast Region both Appellants and one Saidi Omary Mkumba did steal cash Tshs. 240,000/=, one mobile phone valued at Tshs. 75,000/= and a pair 3 of shoes valued at Tshs. 50,000/= the property of Hija Kassimu M paka and that immediately before and after such stealing, they threatened him with a bush knife in order to steal the said properties from him. On the second count, it was alleged that on the same date, time and place, they did steal cash Tshs. 55,000/= one trouser valued at Tshs. 13,500/= the property of Hamidi Kapilili and that immediately before and after such stealing they threatened him with a bush knife and other weapons in order to steal the said properties from him. The prosecution called eleven witnesses before the trial court. One of the complainants Hija Kassimu Mpaka did testify as P.W. 5. However, another complainant whose properties are alleged to have been stolen namely Hamidi Kapilili was not called to testify on behalf of the prosecution. 4 P.W. 5 Hija Kassimu Mpaka told the trial court that the incident took place during the night on 20/8/2007 while he was driving a motor vehicle make canter loaded with paw paws, Pineapples and passion fruits which he was taking to Dar es Salaam from Chalinze. He said, one kilometer from Chalinze, he saw logs blocking the road and decided to reverse the motor vehicle. He said, in the course of doing so, he saw a group of people armed with an axe and bush knife following his

motor vehicle and that when they approached it the 1st Appellant smashed the door of his motor vehicle and that the 2nd Appellant hit him with a Panga on his face and that both Appellants and other robbers ordered him and those with whom he was travelling with to surrender all their properties and that they robbed him Tshs 240,000/=, a mobile phone and rubber shoes. Other witnesses who were together with P.W.5 namely P.W.1 Shabani Hamidu P.W.3 Mussa Bakari and P.W.9 Hassan Seif told the trial court a similar story as P.W.5 concerning what happened at the time of the incident except that during cross examination ; . J 5 between the 1st Appellant and P.W.3, it was stated by P.W.3 that he did not see the 1st Appellant at the scene of crime. The rest of the witnesses namely P.W.2 Ally Jafari. Mtangamoyo, P.W. 4 Mohamed Juma Sabili, P.W. 6 Mohamed Ally Mwalim, P.W.7 Said Salum Mangunguli, P.W.8 Salehe Juma Mkali, P.W.10 Said Omari Mpaka and P.W.11 F. 20 D/C Edward were not eye witnesses. The following is what they told the trial court:- P.W.2 told the trial court that the 1st Appellant was arrested by the villagers with a bag in which they found sandals and cloth and that when he interrogated him he said that he was coming from Kimanzichana and that the villagers wanted to kill him. P.W.4 told the trial court that the 1st Appellant was arrested by the villagers from the bush on 21/8/2007 at 7.00 hours and that he was found with a bag, an axe and other stolen properties. P.W. 6 told the trial court that the 2nd Appellant was arrested by the Militia man at Hanga village on suspicion that .. 6 he was a thief and that when he interrogated him, he said that he was going to Pwani area for trading purposes P.W.7 told the trial court that the 2nd Appellant was arrested at Hanga village on 22/8/2007 on suspicion that he was a thief and that when he interrogated him, he spoke in low voice as he had been beaten and his condition was bad. P.W. 8 told the trial court that the 2nd Appellant was arrested on 22/8/2007 at Hanga village on suspicion that he was a thief and that he was bleeding after having been beaten by some villagers "following suspicion that he was a thief. P.W.10 told the trial court that on 20/8/2007 in the morning, the 1st Appellant was arrested by villagers from the forest at Mlandizi area on suspicion that he was involved in the robbery incident which took place during the night at Mlandizi area along the High way from Mlandizi to Dar es Salaam, and that upon being searched the 1st Appellant was found with an axe, torch, shoes and a bag. P.W.11 told the trial court that the 1st Appellant was arrested on 21/8/2007 in the morning from the forest at Mlandizi on suspicion that he was involved in the robbery incident which took place at \ • 7 Mlandizi along Mlandizi Dar es Salaam road, and that the 2nd Appellant was arrested on 22/8/2007 by villagers at Hanga village on suspicion of having been involved in the said robbery incident. It appears from the testimonies of the above mentioned witnesses who were not eye witnesses that both Appellants were arrested on suspicion that they were involved in the robbery incident in issue. In their respective defences before the trial court, both Appellants denied to have been involved in the said incident. They told the trial court that they were merely suspected by the villagers to have been involved in the robbery incident at Mlandizi while each one of them was on his way to do his own business. As a whole, it appears to me that the Appellants' conviction by the trial court was based on mere suspicion of having committed the offence charged. As correctly submitted by Miss Machoke, State Attorney who did not support conviction, the robbery incident took place during the night and there was no identification parade which was conducted for identifying the Appellants who were strangers to 8 the victims of robbery. I believe it was not possible for P.W.5 who was one of the victims of robbery to identify

the Appellants through the motor vehicle's parking lights which vehicle he was driving at the time of the incident. No wonder that P.W.3 who was also one of the victims of robbery told the trial court during cross - examination that he did not see the 1st Appellant at the scene of crime. In general, where any offence is committed during the night an identification parade has to be conducted in order to identify those who committed it. In law, mere suspicion, however, strong it may be cannot form the basis of conviction. The offence charged had to be proved beyond reasonable doubt. In this case, I agree with the Appellants that the trial court erred in law in convicting them of the offence charged without sufficient evidence to show that they were involved in its commission. 9 For these reasons, I hereby quash their conviction, set aside the sentence of 30 years imprisonment which was imposed on each court and order that they should be released from prison henceforth unless they are held therein on a different matter. A.Shangwa JUDGE 3/3/2010 Delivered in open court this 3 rd day of March, 2010 in the presence of the Appellants and Miss Chilongozi State Attorney. ~ A.Shangwa JUDGE 3/3/2010

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