

TANZANIA / JUDGMENT

hashimu mohamedali another vs republic 2010 tzca 58 12 march 2010

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IN THE COURT OF APPEAL OF TANZANIA AT TANGA (CORAM: MUNUO, J.A.. MSOFFE, 3. A, And
KIMARO. J. A.~) CRIMINAL APPEAL NO. 152 OF 2008

1. HASHIMU MOHAMEDALI

2. YUSUFU HASSANI..... APPELLANTS VERSUS THE
REPUBLIC..... RESPONDENT (Appeal from the decision of
the Resident Magistrate's Court of Tanga at Tanga) (Lema. PRM - Extended Jurisdictions
dated the 29th day of May, 2008 in Criminal Appeal No. 5 of 2007 JUDGMENT OF THE COURT
8 & 12 March, 2010 MUNUO. J.A.: The co-appellants, namely Hashimu Mohamed and Yusufu
Hassani, were jointly convicted of armed robbery c/s 285 and 286 of the Penal Code, CAP. 16
R.E. 2002, in Criminal Case No. 292 of 2005 in the District Court of Muheza at Muheza within
Tanga Region. They were sentenced to a term of thirty years imprisonment. They were also
ordered to compensate the complainant the value of the stolen property. Per the charge
sheet, the value of the stolen property was Tsh. 1,136,000/=. The appellants were aggrieved
by the decision of the trial court whereupon they lodged Criminal Appeal No. 5 of 2007 in
the Court of Resident Magistrate at Tanga (Extended Jurisdiction) before W. E. Lema, PRM
(Extended Jurisdiction). The learned Principal Resident Magistrate - Extended Jurisdiction,
upheld the decision of the trial court. Still aggrieved, the appellant filed this second appeal.
The alleged armed robbery took place on the 5th day of September, 2005 at about 6.45 p.m.
before dusk at Bwiti Village in Muheza District. A shop attendant, Mfundia Hassani, deposed
as PW2. He stated that on the material evening he was on duty when some four armed
customers went to his shop posing as buyers. According to PW2, the main door of the shop
was closed and he was serving customers through the shop's window. One of the armed
customers wanted to buy national batteries. The four customers turned hostile when one of
them broke into the door of the shop enabling his co- bandits to invade the shop. While the
three bandits invaded and 2 looted from the shop after inflicting multiple cut wounds on the
shop attendant per his PF3, Exhibit PI, the 2nd appellant remained outside apparently
keeping watch. PW2 stated, furthermore, that the cut wounds he suffered rendered him
unconscious, he regained consciousness on the second day and found himself admitted to
Maramba hospital in Muheza. PW2 asserted that he identified the 2nd appellant because he

knew him before. Besides, the 2nd appellant often visited his girlfriend at Bwiti Village. Subsequently, the 2nd appellant was traced and charged with the offence of armed robbery. He was jointly charged with the 1st appellant. The respective appellants filed memoranda of appeal challenging the conviction and sentence. The first appellant faulted the courts below for convicting him on insufficient evidence. Furthermore, the 1st appellant argued, his defence of alibi was probable for it was supported by the testimony of the shop owner, PW1 Ally Hassani who said that the 1st appellant and himself were at Kwasupaki Village at the material time so he could not have simultaneously been at Bwiti Village to be incriminated in the armed robbery. The learned Senior State Attorney, Mr. Oswald Tibabyekomya, did not support the conviction of the 1st appellant. Neither do we. One, PW2 could not identify the three bandits who entered the shop, demanded money and inflicted cut wounds on his face and head causing him to fall unconscious. As it was, PW2 only identified the second co-appellant who remained outside the shop keeping watch. In the absence of concrete evidence to link the 1st appellant with the crime charged, we agree with the learned Senior State Attorney that the evidence against the 1st appellant cannot sustain a conviction. We accordingly allow the appeal of the 1st appellant, Hashimu Mohamedi. With regard to the 2nd appellant, Yusufu Hassani, he filed nine grounds of appeal and an additional three grounds of appeal faulting the courts below for convicting him despite the fact that the prosecution did not establish his guilt beyond all reasonable doubt. In summary, the 2nd appellant contends that he was not properly identified by PW2, that the police identification parade was not properly conducted and that the complainant did not produce his licence or VAT agreement to prove that he really owned a shop at the material time and place. The 2nd appellant urged us to allow his appeal for lack of sufficient evidence to sustain the conviction. Mr. Oswald Tibabyekomya, learned Senior State Attorney, supported the conviction of the 2nd appellant. First, the armed robbery occurred during day light so visibility was good. Second, PW2 and PW3 who knew the 2nd appellant before. He said that the 2nd appellant and his co-suspects initially posed as customers but later turned out to be bandits. The issue before us is whether the identification of the 2nd appellant was watertight. As observed by the learned Senior State Attorney, PW2, PW3 and PW5 were familiar with the 2nd appellant because they knew him. PW2 stated that the 2nd appellant had a girlfriend at Bwiti Village so he frequented the area. On the fateful day, the 2nd appellant and three other co-bandits went to the material shop posing as customers. It was not until the three bandits invaded the shop while the 2nd appellant kept guard outside that PW2 realized that the four men were bandits. The learned Principal Resident Magistrate - Extended Jurisdiction considered the issue of the identification of the 2nd appellant at page 59 of the record and observed - ... PW3 identified the 2nd appellant; and the 2nd appellant identified him (PW3) and dared ask him, "wewe Ushanga umekuja kufanya nini hapa." As they knew each other before, the 2nd appellant was surprised to see him at the scene of crime apart from their business (mining business) area ... Evidence of PW2, PW3 and PW5 was to the effect that they knew the 2nd appellant even before this incident as he used to be into (sic) their village ... the incident occurred during broad day light there was no doubt about the identification of the 2nd appellant. So the 2nd appellant was properly identified as

the one holding a panga and torch on that date, and he cut PW3, assisted by another person known as Juma who was not arrested. So the issue of identification comes no water (was watertight?) and all the 6 conditions for identification were favourable to avoid any mistaken identity. It is trite law that evidence on identification must be watertight in order to sustain a conviction. This age long principle was pronounced by the East Africa Court of Appeal in the cases of Abdallah Wendo and Another versus Regina (1953) xx E.A.C.A. 166 and also in the case of Regina versus Elia Sebwato (1960) E.A. 174. In a more recent case of Waziri Amani versus Republic (1980) TLR 250 at page 252, the Court of Appeal of Tanzania held, and we quote: "Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of disputed identity, it seems dear to us that he could not be said to have properly resolved the issues unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would for example expect to find on record questions such as the following posed and resolved by him: the time the witness had the accused under observation, the distance at which he observed him, the conditions in which such observation occurred, for instance, whether it was day or night time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not...." The evidence on record in this case meets the above criteria on identification. The armed robbery occurred during day time at 6.45 p.m. Moreover, the 2nd appellant was not a stranger to PW2, PW3 and PW5. These three witnesses knew him before. When PW3 asked the 2nd appellant what he was doing at the village, the latter inflicted a panga cut on him. PW2 noted that the 2nd appellant often visited his girlfriend at Bwiti Village so he knew him well. That the 2nd appellant had a girlfriend at Bwiti Village was also corroborated by PW5 Salum Mohamed. When PW5 got word that bandits had invaded the complainant's shop, he went to the scene of crime with another co- villager, PW4 Tao Mchemba. PW4 and PW5 found the 2nd appellant holding a panga and a torch warning - 8 "Kusifike mtu katika eneo hii asiye husika na sisi" - meaning "nobody who is not in our mission should approach the area." There was shooting from the scene of crime so PW4 and PW5 hurled stones at the 2nd appellant. The bandits fired thrice and left. Thereafter PW4 and PW5 approached the scene of crime where they found PW2 wounded; they took him to the hospital. In view of the fact that the armed robbery was committed during the day when visibility was favourable and considering that PW2, PW3, PW4 and PW5 knew the 2nd appellant before the incident, we have no doubt in our minds that his identification was watertight. He spent considerable time at the shop first as a customer and while his co- bandits were looting in the shop after injuring PW2 with a panga, the 2nd appellant remained outside the shop warding off people. Under the circumstances we find no justification to upset the conviction of the 2nd appellant. The appeal of the 2nd appellant is devoid of merit. 9 We accordingly dismiss the appeal against the conviction and sentence of the 2nd appellant. Consequent to allowing the appeal of the 1st appellant, we quash his conviction and set aside the sentence of thirty years imprisonment imposed on him. The 1st appellant should be set at liberty forthwith unless otherwise detained for other lawful cause. DATED at TANGA this 9th day of March, 2010. E. N. MUNUO JUSTICE OF APPEAL

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3. H. MSOFFE JUSTICE OF APPEAL N. P. KIMARO JUSTICE OF APPEAL I certify that this is a true copy of the original. 10
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