

TANZANIA / JUDGMENT

henibo samweli another vs republic 2010 tzca 59 23 july 2010

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA (CORAM: MUNUO. 3.A., LUANDA, J.A. And M3ASIRI. J.A. CRIMINAL APPEAL NO. 132 OF 2008

1. HENIBO SAMWELI

2. BAHATI MWASHANILA.....APPELLANTS VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of High Court of Tanzania at Mbeya) (Lukelelwa, 3.) Dated 17th day of March, 2008 In DC Criminal Appeal No. 36 of 2007 C/F 37A/2007 JUDGMENT OF THE COURT 21st & 23rd July, 2010 MUNUO, J.A.: The co - appellants namely:- Henibo Samweli (accd No. 2 at the trial) and Bahati Mwashanila (accd No. 1 at the trial) i were charged with the offence of armed robbery c/s 285 and 286 of the Penal Code, Cap. 16 R.E. 2002. The prosecution alleged that on the 27th June, 2006 at 09:30 hours at Ndanga sub-village of Mbuyuni Village within Chunya District in Mbeya Region, the co - appellants stole Tsh. 960,000/= the property of Edina Mwenda and Amina John, and at the time of stealing, the appellants threatened the victims with a gun in order to retain the stolen money. Either appellant pleaded not guilty to the charge. The District Court convicted the appellants and sentenced them to 30 years imprisonment. Their first appeal to the High Court was unsuccessful. Hence the present second appeal. Two business women, PW 1 Edina Mwenda, and P.W. 2 Amina John, were walking from Mbuyuni to Ndanga Village to buy paddy. On the way, another woman, P.W. 6 Lucia Kassim who was carrying a baby joined them. Before reaching Ndanga Village, Henibo Samwel, the 2nd accused at the trial, emerged from the bush carrying a gun and walked towards the three women. The latter decided to run for their safety. Henibo caught up with P.W. 1 and brandishing a gun, he pointed it at her back and ordered P.W. 1 to give him money. P.W. 1 stated that Henibo was wearing a red jacket. Meanwhile the 1st accused, Bahati Mwashanila, caught up with P.W. 2 Amina John and threatened to cut P.W. 2 with the bush knife he wielded. The appellants ushered the two victims into the bush and stripped them naked. P.W. 2 asked the appellants not to remove her underpants because she was menstruating. P.W. 1 stated that the 2nd accused asked the 1st accused if he could kill P.W. 1. P.W. 1 pleaded for mercy and asked for permission to join P.W. 2 who was lying on the ground a few paces away. The 1st accused told Henibo to allow P.W. 1 to crawl to join her

colleague P.W. 2 whereupon getting leave from Bahati, P.W. 1 crawled on her stomach until she reached P.W. 2. The appellants left with the victims clothes. Apparently, P.W. 2 who was menstruating lent one of her underpants to P.W. 1. The bandits beat P.W. 2 with the side of the bush knife twice. After the bandits disappeared, the complainants started walking along the road. They spotted a youth coming along and when he saw the naked women he returned to the village to fetch some clothing for them. The youth rushed back carrying two pieces of vitenge with which the women covered their bodies. It was the testimony of P.W. 1 that the third woman, P.W. 6 Lucia Kassim vanished into the bush because the bandits chased her off. After covering their bodies with the pieces of cloth the youth brought to them, the complainants raised an alarm. The villagers converged at the scene of crime. It was the evidence of P.W. 1 that she sustained injuries because she crawled on her stomach on thorns to join P.W. 2 who was lying down, a few paces away. When the villagers converged at the scene of crime, they combed the surrounding area. They trailed footsteps in the farms right to the house of Bahati Mwashanila, now the second appellant. In the course of combing the area, the villagers found the clothes of the victims abandoned under a mango tree not far from the scene of crime. Upon tracing the footsteps to the house of Bahati, now the 2nd appellant, the villagers questioned him. Some villagers threw stones at the house of Bahati while he was in the material house with the 1st appellant, Henibo Samwel. With the intervention of P.W. 5 Romuadi Mwashanga, the villagers stopped throwing stones at the house of the 2nd appellant. At first Bahati said that two visitors had been at his house but they had left. Meanwhile, the neighbours said that no visitors had been at Bahati's house that morning. He denied being a party to the alleged robbery. Pressed further, Bahati disclosed that Henibo, the co - suspect, was in the house. Henibo then emerged from the house. While questioning the appellants on the armed robbery, P.W. 5 noticed some fresh digging on the ground indicating some clue. He then ordered a militiaman to dig the area where upon he uncovered a gun wrapped in a sulphate bag. Bahati said that Henibo buried the gun there. Henibo shifted the blame to Bahati. At page 25 of the record, P.W. 5 stated and we quote:- "... soil was new. I ordered the militiamen to dig the area and in the course of digging up we discovered a gun which was wrapped in a sulphate bag. I questioned the 1st accused who had buried the said weapon, he answered that it was the 2nd accused who came with it. But the 2nd accused disputed and said the gun was the property of the 1st accused. While arguing the villagers became angry and started to attack the accused persons. we were forced to take them inside the house in order to escape the attack. While inside we saw a machet. Also a red jacket was discovered which the women said was worn by the 2nd accused. (Henibo)." P.W. 5 then questioned the appellants on the money they had seized from the 2 complainants. Again, we wish to quote the response of the appellants to P.W. 5. Said, P.W. 5:- 6 " After that I questioned them where was the money they robbed from the two women. The 2nd accused (Henibo) told me that the 1st accused had given his wife to hide (it) somewhere. We called 1st accused's wife and required her to tell us whether it was true that she was given the money by her husband and where she had hidden (it). She said she hid the money in the house of their neighbour. I sent her together with one person to collect it. After a few minutes they came back with shs 600,000/= together with three pieces

of torn shs 10,000/= currency notes. " After P.W. 5 recovered the gun, cash shs 630,000/= including the three torn ten thousand shilling notes, and the clothes of the complainant as well as the appellants' red and green jackets, he turned over the appellants to P.W. 4, Inspector Haule, for investigations. Subsequently, the appellants appeared in the District Court to answer the present charge. The 1st appellant, Henibo Samweli, deposed on oath as reflected at pages 32 - 34 of the record, categorically denying robbing the women on the material morning. He stated that he had gone to collect some money from the 2nd appellant, Bahati Mwashanila, his brother in law, being payment of a Tshirt he had sold to him. On his part, Bahati Mwashanila also denied being a party to the armed robbery executed on the victims on the fateful morning. He said that the 1st appellant, his brother in law, went to his house around 10 a.m. He furthermore, claimed that one Gaudence robbed sh 20,000/= from his wife. During cross - examination, at Page 32 of the record of appeal, the 2nd appellant, Bahati Mwashanila stated and we quote:- "...The money tendered in court was not mine. I did not admit the pieces of money...." In this appeal, either appellant filed a memorandum of appeal reiterating that they were not involved in robbing the two complainants at gunpoint. In their respective memorandum of appeal, the appellants challenged their identification saying that the complainants did not give any descriptions of their appearances or what peculiar marks the armed robbers had so the identification evidence was not water-tight. Furthermore, the appellants stated that the complainants did not mention the suspects at the first opportunity apparently because they did not tell the youth who saw them naked and ran to collect clothing for them about the incident. The appellants also faulted the learned judge for believing the prosecution evidence despite their probable defences. Ms. Zainabu Mango, learned State Attorney did not support the conviction. She submitted that the footsteps traced to the house of the 2nd appellant, Bahati Mwashanila were not proved to be those of the appellants. Moreover, she contended, the victims did not give descriptions of the robbers despite the fact that the armed robbery was committed in broad daylight. Identifying the suspects by the red and green jackets they wore was not sufficient evidence to ground a conviction, the learned State Attorney observed. Besides, she contended, the recovered Sh 630,000/= was not proved to be the robbed cash of the complainants. The issue before us is whether the identification of the appellants was watertight. That armed robbers ambushed the two complaints and stripped them naked was confirmed by P.W.6 Lucia Kassim who had been walking along with the women before the ambush. She stated that upon seeing the armed suspects emerge from the bush and advance towards the three women, the latter decided to run away. P.W.6 said that she also ran for her life so she did not have an opportunity to identify the bandits because they apparently did not pursue her. The bandits targeted the two complainants which suggests that they knew they were businesswomen in possession of money which was indeed the case. The armed robbery occurred in broad day light around 9.30 a.m. The bandits were armed with a gun and bush knife, commonly known as a panga. It was a brutal assault on the business-women who were stripped 10 naked and in the case of PW 1 threatened with a gun by the 1st appellant (2nd accused at the trial) who wore a red jacket. On the intervention of the 2nd appellant, Bahati who confronted PW2 with a panga, the 1st appellant refrained from

shooting P.W.1 but ordered her to crawl on the thorny ground naked causing injuries on her stomach. P.W.1 and P.W.2 had time to identify the bandits because not only did they demand money from them but they stripped the said women naked. Having ransacked the clothes for money, they abandoned them under a mango tree, near the scene of crime. About two hours later, the villagers and the victim trailed footsteps in the farms which footsteps ended at the house of the 2nd appellant, Bahati Mwashanila. Over and above, a gun wrapped in a sulphate bag was uncovered from the compound of the 2nd appellant from a freshly dug area. Furthermore, upon the disclosure of the 1st appellant to the village executive officer that the 2nd appellant had given the robbed money to his wife, the latter actually surrendered Sh 630,000/= including 3 torn notes of ten thousand shilling denomination which the 2nd appellant had given her for safe keeping shortly after the robbery. Neither appellant claimed ownership of the recovered money. According to P.W.4 Simon Fabian Mashale, the robbery alarm occurred at about 10 a.m when he saw many villagers streaming into the home of the 2nd appellant who had allegedly robbed the complainants of cash. P.W.4 stated that the complainants identified the jackets found in the house of the 2nd appellant as the very ones the appellants wore during the robbery. At page 75 of the record, the learned judge observed that: " PW1 and PW2 had seen the second appellant (2nd accused Henibo Samwel) adorning a red jacket and the first appellant adorning a green jacket. " On identification, the learned judge held at Page 78 of the record: " I have gone through the evidence in the trial Court, like the trial court I don't find that there was any mistaken identification made by the prosecution witness namely PW1 and PW2 against the appellants. The appellants should blame themselves so to speak as they presented themselves bare; "kichwa kichwa" as the Swahili saying goes before P.W. 1 and P.W. 2. They did not take any trouble to conceal their faces. Furthermore they came into 12 u iu o c : v - u i c a v ^ L v v i u i i i . v v . j . u i i v j i . w . < - t searching for money, stripping them naked, talking to them and took quite a long time with P.W. 1 and P.W. 2. The test laid in the case of Waziri Amani versus Republic (1980) TLR 205 was met..... There was no need of identification parade when the prosecution witnesses had already seen them at the scene of incidence and at the home of the first appellant...." We are satisfied that the courts below rightly convicted the appellants. The stolen money was recovered barely two hours after the appellants seized the same from the victims at gunpoint. The gun was uncovered in freshly dug soil indicating that after the robbery the appellants buried the gun in the compound of the 2nd appellant. The money and the gun were recovered in the presence of PW 1, PW 2, PW 4, PW 5, DW 1 and DW 2. The complainants identified the appellants within hours of the armed robbery when their memories were fresh and alive with the armed robbery 13 drama. The armed robbery was executed in broad daylight so conditions of identification were favourable and visibility was good. Under the circumstances we find no ground to fault the decision of the learned judge. The appeal is devoid of merit. We accordingly dismiss the appeal. DATED at MBEYA, this 22nd day of July, 2010. JUSTICE OF APPEAL JUSTICE OF APPEAL JUSTICE OF APPEAL Q s\ ifytttaat this is a true copy of the original. SENIOR DEPUTY REGISTRAR 14

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