

TANZANIA / JUDGMENT

20101110 TZHC Dodoma

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TZHCDECIDED
10 November 2010

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ij IN THE HIGH COURT OF TANZANIA AT DODOMA DC CRIMINAL APPEAL NO. 25 OF 2010
(ORIGINAL CRIMINAL CASE NO. 161 OF 2006 AT THE DISTRICT COURT OF KONDOA AT
KONDOA) MOHAMED JUMA----- 1st APPELLANT SALUM HAMISI ----- 2 nd
APPELLANT ISMAIL IBRAHIM -----3 rd APPELLANT VERSUS THE REPUBLIC
-----::~---- RESPONDNET JUDGfvi'IENT 11-10-2010 & 10-11-2010 S. S. MWANGESI J.:
Moharr1ecl Juma, Salum Hamisi oncl lsrr1ail Ibrahim who are the appellants in ihis appeal were
the oriDinal accused persons at the District court of Koncloa where they stood charged with the
offence of orn1ed robbery contrary to section 285 cmd 286 of the Penal Code Cap 16 Volume 1 of
the Laws Revised, read together with section 5 of the Minimum Sentence Act No. 1 of 1972 · and
section 12 of the Corporal Punishment Act Cap l 7 as all amended by written Laws Act No. l 0 of
1999. The particulars of the offence were to the effect that on the 23 rd day of April 2006 at
about2130 hours at Msaada village within the District of Kondoa in the Region of Dodoma, all the
accused persons jointly and together did steal cash money Tshs. 850,000/= being the property of
one Habibu Mputi and immediately before and after such stealing, did threaten the said Habibu
Mputi by using machetes and arrows in order to obtain and or to retain the stolen money. When
the charge was read over to accused persons they did all plead not guilty. In its endeavour to
establish the case against all the accused, the prosecution did parade four witnesses. The learned
trial Magistrate after having heard the evidence from those witnesses as well as hearing the
defence evidence, was convinced beyond reosonoble doubt that the offence against oll accused
persons hod been estoblished. To tho! effect all of them were convicted and each sentenced to go
to jail for a period of thirty years. It was further ordered that each of the accused would be caned
twelve strokes of the cane on the buttocks and further that on completion of the jail sentences,
the accused persons had to compensate the victim of the incident an amount of Tshs. 200,000/= 2
r. by each. The conviction, sentence and the orders given by the trial court is what has prompted
the appeal at hand. In their merrloranda of appeal that were however poorly prepared, all the
appellants have in essence attacked the reliance of the learned trial Magistrate on the evidence of
visual identification alleged to have been made by PWl to the appellants which was very poor.
This is from the fact that the light from the kerosene lamp that was said to have been burning
inside the room of the witness when she got invaded by the bandits, its intensity was never
clearly stated so as to eliminate the possibility for mistaken identity. All the appellants have
further complained that their defence was never considered by the learned trial Magistrate in his
judgment. l It is their view that in so doing, the Magistrate was at error and occasioned injustice

to them. They have thus requested this court to re-evaluate the evidence that was tendered at the trial court and quash the findings that was reached upon by the said court and set them at liberty. 3 r, During the hearing of the appeal, all the appellants did appear in person to prosecute their appeal. And when they were required to expound their grounds of appeal, they were all of the view that what had been contained therein was sufficient and that perhaps they would have something to say after hearing from the respondent. On the other hand, the respondent was represented by Mr. Katuli learned State Attorney. The same did not support the conviction that was reached upon by the trial Magistrate to all appellants. The grounds that made the Learned State Counsel to decline to support the decision of the trial court, did mainly base on the evidence of visual identification that was relied upon to found conviction to all appellants. Arguing on the bases of the principles laid down in the landmark case of Waziri Amani Vs. Republic [1980] LRT 250, Mr. Katuli told the court that PW 1 who claimed to have identified all the appellants when they stormed into her room with the aid of light that came from the kerosene lamp that was burning, did not tell the court the intensity of the said light. Furthermore, the said witness did not tell the court the place where the said kerosene lamp had been placed so as to eliminate the possibility of mistaken identity as argued by the appellants. 4 The learned State Attorney has further challenged the evidence that was tendered by PW 1 that it was inconsistent and contradictory in that, when cross-examined by the first appellant as to why she did not raise an alarm for help after she had been invaded, she replied that she failed to do so because her neck had been held by his hands. At the same time, when she was asked the same question by the second appellant, she did reply that she did not raise an alarm because she was afraid of the bandits. These contradicting statements by the witness did raise some doubts if indeed the witness was telling the court what transpired on the fateful night opined the learned State Attorney. This court upon going through the record in the case file of the trial court, is in concurrence with what has been averred by the learned State Attorney that the evidence that was relied upon by the trial court to found conviction to all appellants was that of the victim of the incident only who happened to give her evidence as PW 1. This was so because the other two witnesses, that is Jumo Salur Nassoro the Kitongoji Chairman who testified as PW2 and Abdul Ibrahim a neighbour of the victim who gave her testimony as PW3, arrived at the scene of the incident after the robbery had been accomplished and the bandits had left. 5 The appellants on their part who were arrested at diverse places at different times on the subsequent days to the occurrence of the incident, were never found with anything relevant to the issue of the robbery that took place at the house of the victim. That being the case, the only evidence that did implicate all the appellants to the offence which they stood charged with, is the fact that they got named by the victim after having visually identified them at the scene of the incident as she claimed. The question which this court had to ask itself, is as to whether such contention by the victim could be safely acted upon. It is at such juncture where the requirement enunciated in the case of Waziri Amani comes in. In order that the evidence of this witness could safely be acted upon, it had to convince the court that the intensity of the light that assisted her to identify her assailants on the fateful nights was sufficient enough to enable her to make proper identification. And further that there was ample time in which the witness remained with the appellants to give her the chance of observing them closely etcetera. This court on considering the available

testimony of the witness on record, shares with the observation made by the learned State Attorney that it is unsafe to act or, such sole story of PW 1. 6 To that end, the appeal by all the appellants is found to be with merit and it is allowed. The decision of the trial court is thus hereby quashed, the sentence of thirty (30) years imprisonment that was imposed to each appellant is set aside and so is the order for corporal punishment. Also the order that had been made to all appellants to compensate the victim each at the tune of Tshs. 200,000/= after completion of the jail sentence is set aside ..All appellants are to be set at liberty forthwith unless lawful held for any other good cause. JUDGE 10 - 11 - 2010 Date: 10/11/2010 Coram: Hon. S. S. Mwangesi, J. 1st Appellant - Present in person 2nd Appellant - Present in person 3rd Appellant - Present in person 7 (1 Respondent - Magesa (SA) C/C: R. Nyembe Magesa: Hon. Judge. The appeal comes for judgment and we are ready. Order: Judgment read in the presence of MS. Magesa learned State Attorney the respondent and the appellants present in person this, 10/11/2010. JUDGE. 10 - 11 - 2010 8

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