

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF TANZANIA AT MTWARA CRIMINAL
APPEAL NO. 128 OF 2005 ORIGINAL LINDI DISTRICT COURT CR. CASE NO. 30/2005 OSWIN THOMAS @
NANGUKA -----APPELLANT --- VERSUS THE REPUBLIC -----
RESPONDENT Date of Last Order: 19/3/2007 Date of Judgment: 4/5/2007 JUDGE GEM-ENT
SHANGALI, J. The appellant OSWIN S/O THOMAS NANGUKA was charged together with one
SAIDI MUHIBU before Lindi District Court with the offence of Robbery under sections 285 and 286 of the
Penal Code. After close of the Prosecution Case the trial District Magistrate was satisfied that
there was no case to answer against the second accused SAIDI MUHIBU and consequently
acquitted him under section 230 of the Criminal Procedure Act. On the other hand the trial
District Magistrate was satisfied that there was a case to answer against the appellant. At the end
of trial, the trial District Magistrate was equally satisfied with the prosecution evidence and
consequently convicted the appellant and awarded him a sentence of fifteen years imprisonment.
The Prosecution Case, which was based on the evidence of two witnesses avers that on
28/01/2005 at about 5.00 pm, PW1, Ester Ngombo who was working at Mission Petrol Station,
Nyangao village was on her way to the Roman Catholic Parish with TSh.196,350/= the proceeds
from the sale of the 1st day. That, on her way she was being escorted by PW2 Mzee
FLORIAN, the Petrol Station Watchman. According to her evidence, while on her way she saw the
appellant at the Bus stand and later the appellant followed her from behind. That, when she
reached at a huge tree she met a person who was holding a Panga. Suddenly that person started
to invade and attack her with a Panga while assisted by other four bandits who managed to
disappear with her money. She also stated that she was able to identify the robber who took the
money to be one Simon who was not arrested. She further claimed to have identified the other
robbers to be the appellant; one Isidory and Sosi. PW1 claimed that when she was attacked and
eventually robbed she shouted for help and PW2 responded to assist her. PW2 testified to the
effect that on the material date and time he was escorting PW1 and that when they reached at a
certain huge tree he heard PW1 shouting and on his response he saw the robbers who were able
to injure her with a Panga. He claimed that he saw and identified the appellant who was holding a
knife. In short that was the prosecution case. Before I proceed with the appellants defence it is
pertinent to point out here that when PW1 and PW2 adduced their evidence in Court the
appellant was not present. According to the Court record the appellant was admitted on bail on
2/3/2005. When the case was fixed for hearing date on 16/6/2005, the appellant failed to appear
and the trial Court was satisfied that the appellant had jumped bail. His sureties were never

summoned to show cause and instead the trial Court fixed another hearing to be 23/6/2005 and decided to proceed; with the hearing in the absence of the appellant. Under section 226 of the Criminal Procedure Act. As a result no efforts whatsoever was made by the trial Court to find out from the appellant's sureties why he failed to attend the Court. On 20/7/2005 when the trial Court was ready to pronounce its ruling on whether there was a case to answer, the appellant was brought before the court following his arrest at Dar es Salaam by the Police. The appellant's bail was cancelled and the trial Court proceeded to pronounce its ruling in which the second accused was acquitted for no case to answer and the appellant was called to make his defence. 2 I • In his sworn defence, the appellant categorically denied to have committed the alleged offence and claimed that on the material day he was either at home or at Nyangao main road with his buddies playing cards until 9 .00 pm when he surrendered to sleep in his banda. The appellant s;omplained that he was invaded and arrested by the Police in the midnight. The Police searched his banda and took him away. He stated that the Police questioned him about several people like Sosthenes, Isidory and Saidi Muhibu and that during interrogation the Police beat him up and locked him in for 3 days at the Police Station. His defence was supported by DW2 Antony Martin who happened to be with him on the material date. As I have pointed above, upon recording that prosecution evidence and defence version the trial Court opted to convict the appellant and sentenced him accordingly. The appellant was dissatisfied with the decision of the trial District Court and has preferred this appeal against both conviction and sentence. In his memorandum of appeal the appellant has mainly two grounds of appeal namely; whether there was sufficient prosecution evidence to prove the case to the required standard of proving beyond reasonable doubt and whether the appellant was properly identified as one of the bandits who invaded and robbed PW1. One more important issue, I would like to venture is the propriety of the procedure adopted by the trial District Court immediately after the arrest of the appellant when he jumped bail. During the hearing of this appeal, Mr. Hyera, Learned State Attorney who appeared for the Republic/Respondent refrained from supporting the decision of the trial District Court for three reasons, namely; One, the appellant was not properly identified because there was nowhere in the evidence of PW1 and PW2 purporting to show how they identified him. The record of proceedings is silent on any detail description of the appellant stated by the witnesses or the existence of any favourable conditions which enabled the witnesses to correctly identify the appellant; two, the obvious contradictions in the testimonies of PW1 and PW2; for instance PW1 claimed that she was being escorted by PW2 but later she claimed that when she was attacked she shouted for help and PW2 responded to rescue her. Even PW2 claimed that he heard the shouts when he reached at the big tree. Three; that the appellant was not given an opportunity to cross-examine the prosecution witnesses after his arrest. On my side, I entirely agree with the Learned State Attorney. that the appellant was not properly identified to be one of the bandits who attacked PW1. PW1 and PW2 claimed to have identified the appellant without giving any detail description or the manner of identification. The issue of proper identification has been well settled in the cases of JOSEPH SHAGEMBE Vs. R (1998) TLR 147 HC; IBRAHIM SONGORO Vs. R CR. APPEAL No. 298 OF 1993 - Mwz Registry (Unreported) and the famous case of W AZIRI AMANI V R (1980) TLR 252. Furthermore, PW1 and PW2 never said how exactly the appellant participated in the commission of the offence save for the fact that PW1 claimed to have

seen him at the bus stand and later marched behind her. There is no evidence to show that simply by taking the same route behind her, the appellant was purposely following PW1 with malice. I am also in agreement with the Learned State Attorney that the testimonies of PW1 and PW2 are full of contradictions and inconsistencies. In my opinion they were fumbling because either they were exaggerating their evidence or they were not telling the truth. Whatever way, their credibility has already been contaminated. Regarding to the procedure adopted by the trial District Court after disappearance and re-appearance of the appellant, I am certain that there was a misdirection which amounted to irregularity. In my view where the evidence against the accused has been recorded in his absence and in pursuant to section 226 of the Criminal Procedure Act and thereafter the accused re-appears during the proceedings, then all proceedings and evidence recorded in his absence should be read over to the accused and he should be given his right to decide on whether to proceed with the case at that stage or to recall the witnesses for cross-examination. That position is more so where the accused has given reasonable explanations on his non-appearance. In the present case the appellant's bail was hurriedly cancelled under section 158 of the Criminal Procedure Act, but the evidence subsequently recorded was not read over to him nor his rights to recall the witnesses for cross-examination explained to him. That skip amounts to a serious irregularity. I have been wondering what was the basis of the appellants defence because he was not aware of what was said against him by his accusers before the trial Court. The appellant was not even listened when he pleaded with the trial Court that his absence was caused by his failure to return from Dar es salaam on time. It is on the basis of the foregoing that, I respectfully side with the Learned State Attorney and the appellant that there was no sufficient prosecution evidence to warrant a conviction against the appellant. The conviction was simply hurried and unmerited in law. The appeal is therefore allowed, conviction and sentence imposed against the appellant is hereby set aside and the appellant is to be released from prison forthwith unless lawfully detained on some other reasons. It is so ordered. Delivered on 4/5/2007 in the presence of Mr. Hyera Learned State Attorney for the Republic and the appellant in person. 5

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