

TANZANIA / JUDGMENT

salumaa abrahamu vs the republic

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IN THE HIGH COURT OF TANZANIA AT TANGA CRIMINAL APPEAL N O .11 OF 2010 [Originating from Muheza Criminal case No.5/2009] SALUMAA

ABRAHAMU.....APPELLANT VERSUS THE REPUBLIC.....

RESPOND ENT Date of last order: 15/8/2010 Date of Judgment:12/li/2C'iO

JUDGMENT

Mussa, 3; This is an appeal originating from Muheza District Court Criminal case No.5 of 2009. The appellant, along with two others, were arraigned for armed robbery contrary to section 287A of the penal code, chapter 16 of the laws. The appellant stood as first accused; whereas, his co-accused persons were, namely, Aloyce Juma and Klenatus Yotamu, respectively, the second and third accused persons. The particulars alleged that on the 23rd January 2009; at Mbaramo area, Muheza District; the appellant and company stole a sum of shs.365,500/= in cash; as well as several mobile phones and pre-paid vouchers; properties of a certain Joseph Gregory Massawe. The accusation was further that immediately before, and after the stealing, the persons accused did threaten the victim with a fire arm so as to obtain or retain the properties so stolen. The appellant and his co-accused persons denied the charge; following which, a total of five witnesses were featured by the prosecution in support thereof. At the close of the case for the prosecution, the second and third accused were absolved of all responsibility and; so it was the appellant alone who traveled the full length of the enquiry. In the upshot, he was convicted and sentenced to the prescribed minimum of thirty years imprisonment with twelve strokes of a cane. The appellant is r.rpcpnttv r ' — ' — • — / ~ zjzj' ' — ; iidop v * — * 3 lonnt-hv ^ ^ / anH —. » v/prhn <;p npririnn

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- _ . of eight points of grievance. Ahead of its consideration, I should reflect on the factual background. From the five prosecution witnesses, it was commonplace that Joseph (PW.1), that is, the alleged victim, resides at Mbaramo and; carries on the business of selling phone handsets and pre-paid vouchers at a shop situate at Amtco, Muheza. On the fateful' day, Joseph and his wife Sofia (PW.2) departed home 7.00am. destined to their respective business premises. Evidence was to the effect that the couple had another shop of which was

ordinarily attended by Sofia. It was said that at the time of departure, Joseph had, in hand, a defective blending device; of which he desired to take to a repairer. Upon reaching the shop premises, that is exactly what Joseph did. Incidentally, the repairer happened to be none other person than the appellant. The appellant, as it turned out, had a repair shop just a couple of steps from Joseph's business premises. Repairs done, the appellant handed back the device to Joseph around 2 noon and; the way it appears, the twosome agreed to seal off the bargain later. Around 7.00pm or so, both Joseph and Sofia called it a day at their respective business premises and were up to knocking off. Joseph had had prior breakages at his shop and; on the score, it was his daily routine to pack and take home the entire shop stuff at the closing of business. Soon after, the couple were heading homewards in a car driven by Joseph. They arrived home around 7.40pm or so but; surprisingly, their security guard was not at his usual place. Advancing then to the park yard, Joseph heard some noise coming from the roof of his car. Just then, he was confronted by a man; wielding at him a muzzle-loading gun and; pronouncing that he [Joseph] was under arrest. There was a second intruder who, momentarily, grabbed Joseph hold by his shirt; pulling him out of the car and, eventually, emptying the victim's belongings from his trousers pockets. Two other bandits were located at the other side of the car; as it were, just as busy in their confrontation of Sofia. During the encounter, those two stole a sum of shs.250,000/= from Sofia's hand- bag; just as they as well, grabbed away the shop items of which were stuffed in a plastic bag. Mission accomplished, the bandits had no mere .business at the premises; whereupon, they geared towards clearing off the scene. If I should pose the tale to interject some detail about the surroundings; the 3 premises were well lit. by electric tube-lights, apparently, fixed at each of the four corners of the house. Yet the eye witnesses would not, immediately, recognize any of the culprits; on account of their being stockingly masked in disguise. To resume the tale at the particular when the intruders were clearing away; one amongst them was, sort of, dragging his feet; following which, Joseph picked the courage to give him a chase. Somehow/ the pursuer had an edge to close in; whereupon, he courageously grabbed hold the mask of the man in flight; stripped it down and; as -a* result, letting the face of the intruder in the open. To Joseph's surprise, that man turned out to be the appellant herein. The appellant, it was told, had an iron rod in hand with which he swiped at Joseph but; fortunately, the latter dodged away from it. Upon recuperation, so went the telling; the appellant picked the fallen stocking mask to resume his flight away from the scene. As he did so, all what the hapless Joseph did was to yell about; despairingly expressing his surprise at the appellants' involvement and; as told, repeatedly pronouncing the appellant's name: " Salumaa, Salumaa" When all dust was clear, the security guard, namely, Mussa Nampanga (PW.3), resurfaced with a pronouncement that he just as well had two bandits right under his nose who kept vigil on him soon after the couple drove in. Admittedly, from where he was positioned, Mussa could not see all what was happening but; he, at least, heard Joseph as he was 4 repeatedly yelling about the appellant's name. In the immediate aftermath of the occurrence; Joseph did not spare the involvement and the identity of the appellant; as he conversed with Andrea Barnabas (PW.5), a next door neighbour whom had anxiously braved to the scene. And, indeed, a bit later, on that very

fateful date; Joseph repeated the accusation in a police statement. Incidentally, that statement was, graciously, availed into evidence by the appellant himself. On account of the accusation, somehow the appellant was arrested and, accordingly, arraigned and; so much concludes the prosecution version. In reply, the appellant denied the accusation; setting up, in effect, an alibi. Nonetheless, he did not quite refute that he operates for gain as a repairer; only, he said, his expertise has, exclusively, to do with radio, repairs. And so, in his affirmed testimony, the appellant refuted Joseph's detail about the blending device. Repairing such devices, he charged, is simply not his cup of tea. Then, the appellant went to some detail; explaining that on the fateful day he was, actually, indisposed and diagnosed to having contracted malaria. As a consequence thereof, the appellant attended treatment as an out-patient at a certain dispensary called Kwa Hamza Mafua. To fortify his contention, the appellant adduced into evidence two exercise books in which are comprised particulars, of his registration and prescription at the health center. It is noteworthy, however, that the stamping on the exercise books reflects that the same originated from, rather, Mkombozi Health Center. Evidence was, finally, to the effect that in the aftermath of treatment; the appellant was throughout glued at his home of residence. To this, the appellant sought and obtained testimonial support from Zuhura Yusuf (DW.2) and Nassoro Juma (DW.3); respectively, his wife and employee at the radio repair business. As regards the prosecution accusation, the appellant refuted it and; actually, singled out several instances where the prosecution witnesses contradicted themselves. It should be recalled that earlier on, at the presentation of the case for the prosecution; the appellant's attempt to impeach the prosecution version, had gone so far as to adduce Joseph's previous police statement. There was then, finally, unsubstantiated rumbling about there being a grudge between him and Joseph; that is, before the appellant laid his defence to rest. His was, nonetheless, a version that did not, in the least, appeal to the learned trial Magistrate whom, rather, was impressed by the version as told by the prosecution. The appellant's defence of alibi was reflected at; only to be accorded no weight. To express at once, a wrong principle was involved in the non-weighting; in that the presiding officer, erroneously adjudged that the appellant had not given notice required of section 194 of the CPA. Unfortunately, the Magistrate had not reflected on a detail derived of his own recording; on the 7th May, 2009. Nonetheless, 6 12/ 11/2010 Coram: Mussa, J; Appellant: Present Republic: Mr. Mikidadi, state attorney Judgment delivered in the presei ' " 3. 12/11V2010 8

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