

IN THE HIGH COURT OF TANZANIA

AT MBEYA

APPELLATE JURISDICTION

(Mbeya Registry)

DC. CRIMINAL APPEAL NO.4/2005

(Original Criminal Case No.1 of 2004

of the District Court of Mbeya at Mbeya)

1. HURUMA MSYANI @ WEGA

2. BELIUD S/O MSUKWA.....APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

MACKANJA, J.

The appellants featured at the trial as the first and second accused persons in which five of them stood trial on a charge of armed robbery c/s 285, 286 of the Penal Code. The third, fourth and fifty accused persons were acquitted. Each of them was sentenced to thirty years of imprisonment. The appellants are protecting their innocence.

The evidence against the appellants is rather thin. It is based almost entirely on evidence of visual identification at night by Deo Bernard Ikonga (PWD. According to this witness all was well on 11th December, 2003, until 10.00 p.m. when he and his family found themselves to be victims of an armed robbery. At that time he the fifth accused only. This man was acquitted. He testified that as they were eating supper five people, variously

armed with a gun, a machete and round irons rods stormed into his house. They ordered everyone to lie down. Another order was requiring PW1 and his family to show the robbers where a gun was kept. This having been done, the robbers entered the house and stole the gun together cash and some personal effects PW1 and his family received this final order.

“ Lalení dakika tano hadi sisi tuondoke”.

Eviota Mwageni (PW8), the wife of PW1, stated that she lay face-down in response to the order that required them to lie down. She claimed that even in position she managed to recognize the first accused. Although she claimed that she once lived with the first appellant in one house while he and PW1 worked for the same employer, she said this when answering a question in cross-examination by the first appellant as it appears at page nine of the typed copy of the trial Court's proceedings:-

“ I don't know you”.

She did not know the second appellant as well.

PW1 testified that he managed to recognize the accused persons because he had a long time observing them and that he engaged them in discussion. However, there is no evidence that he gave any description of the appellants to the Police. The only attempt to do so was in court giving evidence. Dock identification is, obviously, devoid of any evidentiary value.

The appellants denied complicity. He swore that he was forced to sign a document before Peter Mwasongwe (PW4, a Justice of the peace, the

contents of which he did not know. The second appellant denied ever having made a statement under caution. None of these documents was read out in court before they were tendered in evidence.

The Republic has declined to support the convictions. Mr. Mwenda, learned state Attorney, submitted that in the particular circumstances in which the robbery was committed there was need for a Police identification parade to test PW1'S allegations that he recognized two of the robbers. In fact he did not say why in the same event he could recognize two people out of five and fail to recognize the rest. Secondly, although Mr. Mwakolo, learned counsel, opposed the admission of the second appellant's caution statement, the same was admitted in evidence. In such a situation what the court was required to do was to conduct a kind of trial-within-a trial to determine if it was free made by the second appellant. I have read that caution statement and I found that it is in the form of question-and-answer. It is a record of an interview; it is not a caution statement which must be in narrative form as required by section 58 of the criminal Procedure Act, Cap 20 of the Revised Edition.

A record of interview does not constitute a confession not constitute a confession of guilt which is admissible in evidence under section 27 of the Evidence Act, 1967.

Mr. Mwenda, learned State Attorney, made the further point that apart from the weak evidence of visual identification and the inadmissible confessions, what remains was implicating testimony from other co-accused persons: the first appellant by the fourth accused and the second appellant

by the fifth accused. This evidence standing un corroborated as it does, cannot be the basis of sound convictions.

So it was after I heard Mr. Mwenda learned State Attorney, and after I have re-assessed the evidence, that I allowed the appeal; quashed the convictions and set aside the sentence after I heard the appellants as well. The foregoing are the reasons for the decision which was made on the day the appeal was called for hearing.

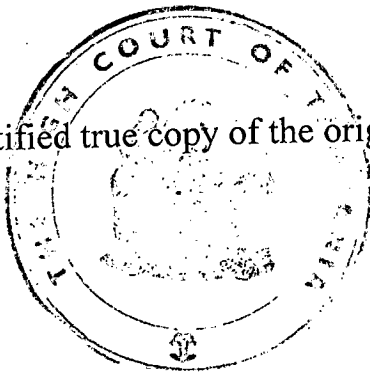
Delivered.

J.M.MACKANJA

JUDGE

15/12/2005

Certified true copy of the original.




DISTRICT REGISTRAR
MBEYA.