

HU DAR

IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 59 of 97 of 98 OF 2005

(Original Criminal Case No. 17 of 2005 of the
District Court of Igunga District of Igunga

Before: D. D. Malamsha, Esq., SDM)

1. RAPHAEL S/O MARWA @ MARWA S/O WAMBURA)
2. MWESE MWESE @ PIUS RAMADHANI) - APPELLANTS
3. MASASATI GISIMBA @ GODFREY MAIKO)

V E R S U S

THE REPUBLIC - RESPONDENT

13.2.2006.

21.4.2006.

4.7.2006.

J U D G M E N T

MWITA, J.:

On 14.1.2005 at about 22.00 hours armed bandits blocked the road from Igunga to Nzega by placing two big stones on the bridge at Iborogero village, Igunga District. This prevented motor vehicles to pass through. In this way the armed bandits managed to stop a number of motor vehicles and robbed passengers of the said vehicles of their properties and then disappeared. The matter was reported to the Police.

On 21.1.2005 Mwese Mwese, Masasati Gisimba and Raphael Marwa were arrested at Ziba Village, Igunga District, on suspicion that they were the armed bandits who committed the robbery at Iborogero bridge on 14.1.2005. On being interrogated they named their colleagues.

After Police investigations, Mwese Mwese, Masasati Gisimba

Raphael Marwa and 4 others were charged with armed robbery contrary to sections 285 and 286 of the Penal Code in Igunga District Court.

At the conclusion of the trial Mwese Mwese, Masasati Gisimba and Raphael Marwa were found guilty as charged and sentenced to 30 years imprisonment and 12 strokes of corporal punishment each. The others were acquitted.

Aggrieved by both convictions and sentences, Mwese Mwese, Masasati Gisimba and Raphael Marwa have appealed to this Court. Their appeals have been consolidated.

At the hearing of the appeals, the appellants appeared and argued the appeals in person. The Republic had the services of Mr. Mulwambo, learned State Attorney.

Mr. Mulwambo declined to support convictions on the grounds that conditions at the scene of crime were not favourable to a correct identification and that the cautioned statements made by the appellants may have been procured by improper means, the appellants were not taken to a Justice of the Peace to have their statements recorded and no trials within trials were conducted to determine the admissibility of the said statements before they were admitted in evidence.

Convictions were based on visual identifications at the scene of crime and on the cautioned statements made by the appellants while under Police custody.

I will first consider visual identification evidence.

The incident took place at night. The identification parade was not properly conducted in that four suspects were placed among 8 people, instead of one suspect being placed among 8 people.

P.W.4 purported to have identified Mwese Mwese. P.W.6 and P.W.7 told the Court that they identified all the appellants.

P.W.8, P.W.9 and P.W.12 said they identified the Mwese Mwese at the scene of crime. P.W.10 said he identified Mwese Mwese and Raphael Marwa. P.W.11 said he identified Masasati Gisimba.

All identifying said they were assaulted by the appellants at the scene of crime. The identifying witnesses had not seen the appellants before the incident. The incident took place at night. Some of the identifying witnesses said they identified the appellants with aid of parking lights of their motor vehicles. There is no evidence as to how bright the parking lights were. No witness gave description of the appellants or special features which made him remember the appellants.

In such circumstances I am in agreement with Mr. Mulwambo that conditions were not favourable to correct identification and possibilities of mistaken identification were not eliminated.

I must now consider the appellant's cautioned statements.

Mwese Mwese made a cautioned statement which was recorded and tendered by P.W.24, D/Sgt. Edison. It was admitted as exhibit P. 16. In that statement Mwese Mwese admitted to have taken part in the robbery. The way he cross-examined P.W.24 gives the impression that Mwese Mwese did not make the statement voluntarily. In this testimony Mwese Mwese told the Court that he was tortured by the Police Officers for two days before he made the statement. He had requested that his statement be recorded by a Justice of the Peace. His request was turned down.

Masasati Gisimba made a cautioned statement which was recorded and tendered in evidence by D/Sgt. Edson. It was admitted as exhibit P.17. In the said statement Masasati Gisimba admitted to have taken part in the armed robbery. In his unsworn statement Masasati Gisimba told the Court that he was forced to admit that he committed the offence charged. When he refused he was

tortured by the Police. That was on 22.1.2005. On 26.1.2005 he was again beaten by Police and forced to sign a statement. As he feared being injured he signed the statement. The record shows that although Masasatt Gisimba gave an unsworn statement, he was cross-examined at length by the Public Prosecutor.

Raphael Marwa @ Marwa Wambura made a cautioned statement which was recorded and tendered in evidence by P.W.23, No. C. 1720 D/Cpl. Emmanuel. It was admitted as Exhibit P.15. In the said statement Raphael Marwa admitted to have committed the offences charged. The way he cross-examined P.W.23 gives the impression that Raphael Marwa was tortured before he made the statement and that he desired to make the statement before a Justice of the Peace. Raphael Marwa made unsworn statement to the Court. He told the Court that he was severely beaten by Police and had to be hospitalised. On 27.1.2005 he alleges to have been forced to sign a document the contents of which he did not know. Although he made only as unsworn statement to the Court, Raphael Marwa was cross-examined at great length by the Public Prosecutor.

Although all the appellants were arrested on 21.1.2005, their cautioned statements were recorded on 28.1.2005. All the appellant's claim to have been tortured before they made the statements. They desired to make their statements before a Justice of the Peace. They were not taken to a Justice of the Peace.

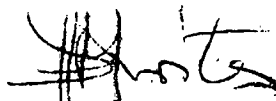
As the appellants were unrepresented their pleading not guilty to the charges implies that they were disputing their alleged confessions contained in the cautioned statements. Hence before admitting the cautioned statements, the trial Magistrate should have asked the appellants whether they intended to dispute the admissibility of the said statements.

If the appellants stated that they intended to object to the admissibility of the statements, the Court should have tried the issue of admissibility before deciding whether or not to admit the statements.

In BAKRAN V. REPUBLIC (1972) E.A. 92 the Court of Appeal for East Africa held that where the accused is unrepresented the judge or magistrate should ascertain whether a statement is objected to on grounds which would make it inadmissible; and that a trial within a trial to ascertain the admissibility should always be held in Magistrate's Court as well as in the High Court.

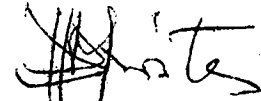
For the above reasons there is, in my opinion, ^{there is} a reasonable doubt that the alleged confessions were voluntarily made. The appellants are to be given the benefit of the doubt.

The appeals are allowed. The appellants are to be released unless they are otherwise lawfully held in custody.


D. M. MWITA,

JUDGE.

ORDER: The District Registrar to call the parties and read to them this judgment.


D. M. MWITA,

JUDGE.

21st April, 2006.

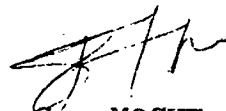
/AHM.

Date : 4th July, 2006.
 Coram : S. C. Moshi, District Registrar.
 Appellant: Raphael Marwa @ Marwa Wmbura
 Mwese Mwese
 Masasati Gisimba
 present under custody.

Respondent: The Republic, represented by Mr. Mrina, State Attorney.

Mr. Nhelegani; B/C.

COURT: Delivered on this 4th day of July, 2006 in presence of the Appellants in person and Mr. Mrina State Attorney for Respondent.



S. C. MOSHI,

District Registrar.

4th July, 2006.

/AHM.