IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RAMADHANI, J.A., NSEKELA, J.A. And KAJI, J.A.)

CRIMINAL APPEAL NO. 121 OF 2002

BETWEEN

ADAM ALLY..... APPELLANT

AND

THE REPUBLIC..... RESPONDENT

(Appeal from the Conviction of the High Court of Tanzania at Arusha)

(Nyerere, PRM. Extended Jurisdiction)

dated the 2nd day of May, 2001

in

RM Criminal Appeal No. 29 of 1996

JUDGMENT OF THE COURT

NSEKELA, J. A.:

The appellant Adam Ally was charged with the offence of robbery with violence. The District Court found that there was insufficient evidence to convict him and thus he was acquitted.

Dissatisfied with the this decision, the Director of Public Prosecutions appealed to the High Court against the acquittal of the appellant. The learned Principal Resident Magistrate, Extended Jurisdiction (Nyerere, PRM) reversed the decision of the trial court, convicted the appellant and sentenced him to twenty years' imprisonment, hence this appeal.

In the memorandum of appeal and the additional grounds handed in at the hearing, the appellant had a total of thirteen grounds of appeal basically revolving around the allegations that the evidence taken as a whole did not prove the charge and that the evidence of identification was far from satisfactory.

Mrs. Neema Joseph Ringo, learned State Attorney, who appeared for the respondent Republic submitted that there was no substance in any of the grounds of appeal and prayed for the dismissal of the appeal. The learned State Attorney however submitted that the twenty years' sentence of imprisonment meted out to the appellant was illegal at the time. The correct sentence should have been fifteen years imprisonment.

Briefly, the facts of the case were as follows: On the 7.5.1995, PW1, the complainant Ngahe Nganya, accompanied by PW3, Belli Juala and Madena, took five head of cattle to an auction at Dachenche. At the auction the appellant wanted to buy PW1's cattle but apparently the purchase price was beyond his means. PW1 then sold his cattle to another person for shs.585,000/= which he safely put in his bag making a total of shs.637,000/= including some money which he previously had. PW1 then looked for his companions PW3 and Madena but could not find them and so started his journey back home. On the way at Endoboshi village, he encountered three persons coming from the opposite direction, including the appellant Adam. After a brief scuffle with the trio, he was pushed to the ground, the appellant hit him with a stick, took the bag which had money and the three escaped in the wilderness. PW1 was left helpless lying on the ground, bleeding and raised an alarm. PW3 and Madena arrived at the scene but the appellant and his colleagues were not there. They attempted a futile chase but returned to the scene. The appellant was taken to Gallapo Dispensary and ultimately to Mrara Hospital where he was admitted for five days and

discharged on the 17.5.1995. PW1 then proceeded to Bereko Police Station in Kondoa in order to report the incident but to his surprise the appellant had instead made a report that PW1 had stolen his cattle. He reported the matter at Babati Police Station and the appellant was arrested at Bereko Primary Court.

PW2 was the first person to arrive at the scene where PW1 had been attacked and his money stolen. He had earlier seen three people including the appellant and pass by him as he was grazing his cattle. He testified that he knew the appellant by facial appearance and added –

> "The complainant (Ghaha) told us he was assaulted by the people who ran away."

Under cross-examination by the appellant, PW2 said –

> "At the scene I could not find you. I did not see the assailants of the complainant by my eyes."

We now come to the evidence of PW3, Belli Juala who said –

> "I know the accused in the court by his facial appearance. I do not know him by name. I first saw the accused at Endadoshi. I had not seen him at Endadoshi at 5.00 pm. It was on 8.5.1995."

PW3 had also responded to the alarm raised by the complainant whom they found lying on the ground. He showed them the direction the appellant and his two colleagues had taken but unsuccessfully tried to chase them. Apparently the appellant had a knife and PW3 was not bold enough to continue the chase.

In accepting the prosecution evidence tendered during the trial, the learned appellate magistrate had this to say –

> "I had the opportunity of perusing the evidence of the lower court record and I am

> of a settled view that the prosecution managed to establish their case beyond any reasonable doubt. The evidence on record looking at the testimony of PW1 Ngahe Maganya the complainant is well corroborated with the testimonies of PW2 and PW3 who saw the respondent on the scene of the crime running with the bag of PW1 and PW1 was lying helpless bleeding. The vicinity was very clear as it was 5.00 pm. So the issue of mistaken identity does not arise."

From this extract of the judgment, there is no doubt that the learned magistrate on first appeal was satisfied that she could safely act on the evidence of PW2 and PW3 which purportedly confirmed the evidence of PW1, the complainant to found the conviction of the appellant. With respect, we do not agree. The prosecution case was wholly based on the identification of the appellant at the scene of crime. In other words, that the appellant was the person who attacked and stole PW1's bag containing money. It is true that on

the evidence the attack happened at about 5.00 pm. Neither PW2 nor PW3 was an eye witness. In fact there was no eye witness. PW3 essentially testified that he identified the appellant by facial appearance. In our view, this is too general a description for identification purposes. How often the witnesses had met the appellant before the incident was not mentioned; since it was still daytime, one would have expected some evidence on the attire the appellant was wearing and some other distinct descriptive features of the appellant.

With the greatest respect to the learned appellate magistrate, we are constrained to take a different view of the evidence before the trial court. More so because the evidence was not subjected to any analysis. The evidence of identification was extremely scanty. It is common knowledge that such weak evidence cannot be used to corroborate the testimony of PW1. We cannot say with the certainty required in a criminal case, that the guilt of the appellant was proved beyond reasonable doubt. The benefit of doubt should have been given to the appellant.

In view of the decision we intend to take in this appeal, it is not appropriate to discuss the legality of the sentence that was imposed upon the appellant, but a few remarks may be in order. The appellant purportedly committed the offence on the 8.5.1995 after the Minimum Sentences Act had been amended by Act No. 6 of 1994. Section 5 (b) as amended now provides –

"(b) Subject to subparagraph (ii) of this paragraph –

(i) Any person who is convicted of robbery shall be sentenced to imprisonment for a term of not less than fifteen years.

(ii) If the offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more persons, or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to

imprisonment for a term of not less than thirty years."

In view of this amendment, the sentence of twenty years imprisonment was clearly illegal.

For the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence. The appellant is to be set free unless otherwise lawfully held.

DATED at ARUSHA this 27th day of October, 2004.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. M. RUMANYIKA
DEPUTY REGISTRAR