

**THE COURT OF APPEAL OF TANZANIA
AT MTWARA**

(CORAM: RAMADHANI, C.J.; MUNUO, J.A; And MJASIRI, J.A.1

CRIMINAL APPEAL NO. 128 OF 2005

BETWEEN

[1] AHMAD MOHAMEDI

} ... APPELLANTS

[2] SELEMANI ATHUMANI BAKARI

AND

REPUBLIC.....RESPONDENT

**(An Appeal from the Decision of the High Court of Tanzania, at
Mtwara)**

fLukelelwa, J.)

dated the 27th day of June, 2005

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Criminal Appeals Nos. 24B & 25 of 2005

JUDGMENT OF THE COURT

17 & 20 November, 2009

RAMADHANI, C. J.:

Appellant 1, Ahmad Mohamedi, and Appellant 2, Selemani Athumani Bakari, together with a third person who was later acquitted, faced two charges: conspiracy to commit armed robbery c/s 384 of the Penal Code [Cap 16 RE 2002], and armed robbery c/s 285 of the Penal Code. The District Court of Kilwa convicted the appellants and sentenced each to an imprisonment term of thirty years. Each unsuccessfully appealed to the High Court (LUKELELWA, J.). This is their second attempt.

There is no dispute that on 3/11/2002, at about 7.00 pm, at Pande Village in Kilwa the shop of Abdallah Omari Sangara (PW 5) was robbed at gun point by four persons who got away with a total of shillings 8 million. The robbers fired some shots and disappeared in thin air. The issue is who were the robbers?

In the shop there were Said Omary (PW 4) and Shaweji Idadi (PW 3) who contradicted each other. PW 4 claimed to have identified the appellants as being among the robbers but he was unable to recognize the other two robbers. PW 4 was forthright that he identified the appellants because they are villagemates and that appellant 2 was his schoolmate. PW 4 stated further that the appellants, unlike their colleagues, were unmasked. He said that visibility was aided by a pressure lamp in the shop.

PW 3, on the other hand, did not identify any of the robbers because of two reasons: One, all were dressed in black and had hats on. Two, he was a stranger in the village.

The issue is: were all four robbers masked or only two were masked? We find it very odd that the appellants who are well known in the village would display themselves so conspicuously in a shop robbery instead of concealing their identity as the other two. The appellants held this as their trample card in their submissions which, indeed, was not parried by Ms. Evetta Mushi, learned State Attorney.

Admittedly, there were Selemani Omary Sangara (PW 1) and Jamal Hassan (PW 2) who were at a bicycle repair hut, some 10 to 15 yards from the shop. Both claimed to have recognized the two appellants because of moonlight and the fact that they were villagemates. We agree with the appellants that these two witnesses should not be believed. Both witnesses said that the robbers pounced on them and ordered them to lie with their faces downwards. We wonder how PWs 1 and 2 could possibly have identified the robbers in that way. They also claimed that they were then taken to the shop. Ms. Mushi took that as lengthening the time in which the witnesses had the appellants under observation. We do not think so.

We are of the view that identification was not beyond reasonable doubt and we give the appellants the benefit of that doubt. We, therefore, allow the appeal, quash the convictions, set aside the sentences and order their immediate release unless they are held for some other lawful cause.

DATED in MTWARA, this 20th day of November, 2009.

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

(KITUSI)
DEPUTY REGISTRAR