

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

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

CRIMINAL APPEAL NO. 241 OF 2008

BETWEEN

SAID ALLY ISMAIL...

APPELLANT

AND

THE REPUBLIC...

RESPONDENT

**(An Appeal from the Decision of the RM's Court of Tanzania,
at Mtwara)**

**(Kinemela, PRM (Ext. Jur.)1
dated the 24th day of August, 2006
in
Criminal Appeal No. 15 of 2006**

JUDGMENT OF THE COURT

19 & 27 November, 2009

RAMADHANI, C. J.:

The appellant, Said Ally Ismail, and Shabani Nchingwalu Hassan, who was the second accused person (hereinafter referred to as Shabani), faced a charge of armed robbery c/s 285 and 286, of The Penal Code, [Cap 16 of

R. E. 2002]. The appellant was convicted and sentenced to imprisonment for thirty years while Shabani was acquitted. The appellant unsuccessfully appealed before KINEMELA, PRM Ext. Jur. This is an appeal from that refusal in which the appellant was in person while the respondent/Republic was represented by Ms. Evetta Mushi, learned State Attorney.

At about 2330 hours on 13/01/2004 the shop of Hanafi Swalehe (PW 4), at Chiwindi Village, Newala, was invaded by about nine armed people who went away with money and a number of items of property. Those people manhandled PW 4 inflicting on him some cut wounds on the head and they forced him to accompany them for about a kilometer and a half. Those facts have never been contentious but what followed thereafter has been disputed even by Ms. Mushi in this appeal.

PW 4 claimed that he was able to identify the appellant and Shabani by the aid of a hurricane lamp which was in the shop even though that was the first time he saw them. It would appear that PW 4 did not give to the Newala Police a description of the robbers. ASP Rukaya Juma (PW 1) supports the doubt that the appellant had not given a description of the appellant before. He stated that he was told by his informer of the whereabouts of the appellant and Shabani.

It was sometime in February, 2004 when PW 4 was called to the Masasi Police that he gave a description of how the robbers were dressed and was able to pick out the appellant and Shabani from the three people who were displayed. We may as well say it here that that was not an identification parade and is worthless as evidence.

So, what remains is whether PW 4 could have been believed to have identified the appellant and Shabani at the scene with the aid of a hurricane lamp. The trial court did not believe him in the following words:

I doubt this mode of identification as is not reliable because it was at night and that Mr. Hanafi (PW 4) was not under settled mind after the shots fired directly to his door followed with assault by a *panga* on the head.

We can safely make a finding that the appellant was not satisfactorily identified by PW 4 at the scene of crime that fateful night.

Let us go back to PW 1: He said that after the intelligence from the informer he, in the company of PC Bosco (PW 2) and D/Cpl Salvious (PW 3), stormed the house in question and found the two suspects in separate rooms. They found twenty rounds of ammunitions with the appellant who then led them to the house of Godfrey Banali (PW 5) where the appellant fished out an SMG No. 82 KO-4126 (Exh. C), from underneath the mattress of PW 5 who was unaware of its presence.

PW 1 and his colleagues also found some items of property including three bags which were collectively admitted as Exh. D, and three pieces of clothes admitted as Exh. E. One of the three bags was identified by PW 4 to be his which he used to travel with. PW 4 also identified from Exh. E his trouser which was patched and he explained that it was gnawed by a mouse.

As pointed out by Ms. Mushi, the evidence of PW 1 is not in some details the same as that of PW 2 which also differed from that of PW 3 though all three were present at the house of PW 5 looking for the SMG. PW 2 said that it was Shaban who showed that the gun was under PW 5's bed. PW 3 agreed with PW 1 that it was the appellant who pointed out the gun.

PW 5, on the other hand, differed from all the others: PWs 1, 2, and 3. He stated that "the accused persons answered simultaneously that we put it herein under the bed. The police took out the weapon it was SMG". PW 5 went further to explain that the accused persons were hand cuffed, and that is more probable from the nature of the case. PW 5 said further that it was the police who fished out the gun from under the mattress.

Yes, we agree with Ms. Mushi that these are contradictions within the case for the prosecution. However, it is not every discrepancy in the prosecution's witnesses that will cause the prosecution's case to flop. It is only where the gist of the evidence is contradictory then the prosecution's case will be dismantled. In this appeal the gist of the evidence was to show

that the appellant and Shabani knew where the SMG was hidden and that they caused it to be recovered. The issue as to who actually pin pointed the spot will not defeat the fact that the accused persons led to the discovery of the SMG. So, here, and with greatest respect to the learned State Attorney, we cannot but differ with her and also with the submissions of the appellant himself.

This holding is fully supported by the Criminal Case No. 20 of 2004 before the District Court of Masasi which the appellant himself referred to in his submissions in the Court. That was the case where the appellant and Shabani were convicted on their own pleas of guilty to the charge of unlawful possession of firearm and were sentenced to imprisonment for seven years each. It was the same SMG No. 82 KO 4126. The facts given by the prosecution after the pleas of guilty are exactly as what PWs I, 2, 3 and 5 stated in Criminal Case No. 86 of 2004 before the District Court of Newala. So, the appellant cannot now disown that gun.

The appellant brought up Criminal Case No. 20 of 2004 in the District Court of Masasi to show that when the robbery in Criminal Case 86 of 2004 in the District Court of Newala took place he was in jail serving the seven years. That is not so. We have called for the file of the Criminal Case No. 20 of 2004 and we have seen that the offence of unlawful possession of firearm was committed on 1st February, 2004, and that they were arrested on 31st January, 2004. The offence in the charge leading to this appeal was committed on 13th January, 2004, when the appellant was still at large.

The issue is: Was the SMG No. 82 KO 4126 recovered in Masasi used in the robbery in Newala and, therefore, pins down the appellant to the robbery?

There are two pieces of evidence: One, there were the bag and the trouser with a patch which were recovered from the house in which the appellant was found and arrested. PW 4 identified them to be his and to be among the property he was robbed. Admittedly, this has nothing to do with the gun but through the doctrine of recent possession, the appellant cannot escape being connected to the robbery as the trial court properly found.

The second piece of evidence, were the seven empty cartridges recovered from the shop of PW 4 by D/Cpl Paulo (PW 6) three (Exh. H) of which were found by a ballistic specialist to have been fired from the SMG (Exh. C). A ballistic report, Exh. G, was produced at the trial but is not in the record of appeal. Its absence, in our opinion, is not fatal for two reasons. One, the trial court saw it and admitted it as Exh. G. Two, PW 6 who sought the ballistic report received the report and testified on it. We agree with the trial Magistrate that "I do not see anything to discredit the evidence of PW 6".

For the reasons given above, we decline Ms. Mushi's invitation to allow the appeal and we, therefore, dismiss the appeal. The punishment meted out is the bare minimum and so we cannot disturb it.

DATED in MTWARA, this 27th day of November, 2009.

A. S. L. RAMADHANI
CHIEF JUSTICE

E. N. MUNUO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

(K I T U S I)
SENIOR DEPUTY REGISTRAR