THE COURT OF APPEAL OF TANZANIA
AT MTWARA
(CORAM: RAMADHANI C.J. MUNUO, J.A, And MJASIRI, J.A.1

CRIMINAL APPEAL NO. 207 OF 2004

BETWEEN

FADHILI MAJURA ... APPELLANT

AND

REPUBLIC ...RESPONDENT

(An Appeal from the Decision of the High Court of Tanzania, at Mtwara)
(Lukelelwa, J.)
dated the 5th day of May, 2004
in
Criminal Appeal No. 17 of 2004

JUDGMENT OF THE COURT

25 & 27 November, 2009

RAMADHANI, C. J.:

The District Court of Liwale convicted the appellant, Fadhili Majura, and one Nduluwi Hassan, of robbery c/ss 285 and 286 of the Penal Code, Cap 16 [R.E. 2002] and sentenced each to thirty years imprisonment.

On 23rd January, 2002, at about 2100 hours, Halidi Lipalapi (PW 1) was asleep with his three wives Tausi Mkungu (PW 2), Mwanahawa Liganga (PW 3) and a third one who was not named. Suddenly, a gang of hooligans forced their way into the house. PW 1 sneaked out but claimed to have identified the appellant and the co-accused by means of a lamp burning in their shop. PW 2 and PW 3 claimed to have done the same. The co-accused also gave a cautioned statement, Exh. P3, confessing to the robbery and implicated the appellant.

The duo unsuccessfully appealed to the High Court (LUKELELWA, J.). This is a second appeal by the appellant. The other person has not appealed. The appellant was present in person while the respondent/Republic was represented by Ms. Angela Kileo, learned State Attorney, who did not support the conviction and the sentence.

LUKELELWA, J. disregarded the caution statement Exh. P 3 because it was improperly admitted since its voluntariness was not tested. We agree with him. However, the learned judge held that there was the identification by PW 2 and PW 3 which was sufficient to secure the conviction of the appellant. So, the issue is: Was the appellant identified at the scene?

We ask with Ms. Kileo: If the appellant was identified why wasn't he arrested earlier than 15th February, 2002, when the incident took place on 23rd January, 2002, and he was all the time in the locality? No reason has been assigned to explain what to us is a pertinent issue.

Besides that issue when the appellant was arrested it was for riding a bicycle with defective brakes and not for robbery. The appellant raised this matter very early at the preliminary hearing on 8th April, 2002. The learned judge mentioned the appellant's version but did not make any comment on it. The trial Magistrate on his part merely said:

> 2nd accused person talked about a bicycle which is not relevant with this case at all.

The appellant defence version raises a reasonable doubt on the prosecution's story and as it is the law we have to give him the benefit of that doubt.

Finally, we agree with Ms. Kileo that the trial Magistrate misdirected himself when he convicted the appellant because of the weakness of his defence. He said in his judgment:

> 2nd accused admitted to hear what the prosecution witnesses said, and he didn't revoke (sic) it. By so doing attracted (sic) me that, the case has been beyond (sic) reasonable doubt.

We, therefore, allow the appeal, quash the conviction, set aside the sentence and order the immediate release of the appellant unless he is otherwise lawfully held.

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

I certify that this a true copy of the original.

(K I T U S I)
SENIOR DEPUTY REGISTRAR