IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MAKANI, J.A., OMER, J.A., And MFALILA, J.A.)

CRIMINAL APPEAL NO. 65 OF 1993

BETWEEN

MOHAMED NUSURO . . . . . APPELLANT

AND

THE REPUBLIC . . . . . RESPONDENT

(Appeal from the conviction of the
High Court of Tanzania at Mwanza)

(Masanche, J.)

dated the 9th day of April, 1992

in

H/Court Criminal Appeal No. 183 of 1991

JUDGEMENT OF THE COURT

MFALILA, J.A.:

The appellant Mohamed Nusuro was charged with and convicted of the offence of robbery with violence contrary to Sections 285 and 286 of the Penal Code at the District Court of Bunda district at Bunda. He was sentenced to 15 years imprisonment. He appealed to the High Court at Mwanza where Masanche, J. dismissed the appeal but enhanced the sentence to 30 years imprisonment because "for the offence of robbery with violence c/s 285 and 286 of the Penal Code the correct punishment is 30 years". The appellant lodged this further appeal still protesting his innocence. As a second appellate Court, we are confined by Section 6 (7) of the Appellate Jurisdiction Act 1979 only to matters of law. Questions of fact are supposed to have been conclusively dealt with by the Courts better placed to do so i.e. the Court of first instance which heard and saw the witnesses and the first appellate Court which evaluated the

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evidence and is empowered to treat the appeal as a re-hearing. This is the position in cases where everything is equal. If in the course of exercising its jurisdiction under Section 6 (7) (a) of the Appellate Jurisdiction Act, it finds that findings of fact or inferences are perverse in that they are completely unrelated to the evidence on record, this Court must in the interests of justice intervene. This is because the attainment of justice is or should be the goal of any good law.

In the present case some violent intrusion was made at the home of Juma Wambura (PW.2) at Kyandege Village during the night. At the time Juma was not at home, he was in remand for some offence, only his two wives Suzana (PW.1) and Mwajuma (PW.3) were in the house. They are therefore the two witnesses who narrated the events of that night. The two women deposed that on 22/4/90, two men violently broke into their house and demanded to be given some money. When the intruders were told that there was no money, they started collecting some articles. They took one radio, International in make, two radio Cassettes, 50 Compact Cassettes, one Seiko Watch, two pairs of Shoes, two and a half pairs of Khanga, one bedsheet, two Stools, four Shirts and six pairs of trousers. In the course of this stealing, the bandits injured a five year old child with a panga on the head. Suzana added that they raised an alarm in the morning, It appears that no further action was taken, because according to Mwajuma, their father in law told them not to take any action until their husband came out of remand. Nothing therefore appears to have taken place until 30/7/90 when according to Suzana, the appellant was arrested

in possession of her radio which she identified as her property. Indeed there is no evidence that any report about this break in was ever made at the Police Station. There is therefore a gap in the circumstances leading to the arrest of the appellant apart from Juma Wambura's contention in his evidence that:

> "In August I caught the accused with my radio which was among the stolen things. We found the radio on the chair".

There was of course also the evidence of another woman Nyabanane Makarai (PW.4) who said that in April 1989 she bought 1½ pairs of khanga from the appellant, and that one day as she was wearing one piece of this khanga, she met one of Juma Wambura's wives who recognised it. This was produced as an exhibit at the trial.

In his defence at the trial, the appellant narrated the circumstances and events which led to his arrest. He said that on 29/9/90 at about 1 p.m., he was at his home when his niece Mawa Yusuf called. After a while his nephew Jumamosi also arrived carrying a radio. He asked Jumamosi whose radio it was, Jumamosi told him that it belonged to Juma Wambura PW.2. Indeed the appellant confirmed this when he examined it because he knew the radio. Juma Wambura is closely related to him as his first cousin. Jumamosi asked for batteries. He told him to get some from the book shelf and went to take a bath. While he was dressing, Jumamosi bid him good bye. The following day on 30/7/90, he went to the Police Station on some business when he was informed by one PC Francis that there was some stolen property at his house. He went back to his house accompanied by Police Officers who searched the house in the course of which a radio was recovered hidden in some coach cushions.

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He was arrested and taken to the Police Station. The appellant contended that his case was planted on him by his cousin Juma Wambura who had grudges against him based on three events. The first one involved Wambura's repatriation to Ruvuma Region as a suspected cattle thief. It was then believed that it was he who had informed on Wambura. The second one involved Wambura swindling him of Shs. 6,270/= in 1986 which led to criminal charges being made against Wambura, but he later withdrew the charges on account of their close relationship. The third involved his refusal to pay Wambura Shs. 9,000/= which he claimed to be his share in their joint hotel business.

Reading the record we find that the trial Court found that the charge against the appellant had been established for three reasons. First, that the appellant was amply identified by Suzana and Nyajuma to be one of the two bandits who broke into their house on 22/4/90. Secondly, that one of the items i.e. a piece of khanga stolen from their house by the bandits was sold to the woman Nyabanane by the appellant. Thirdly, that another item - a radio stolen that night from their house was found in possession of the appellant on 30/7/90.

We shall first deal with the identification of the appellant by PW.1 and PW.3. The trial Magistrate stated:-

> "The complainant PW.2 is related to the accused. PW.1 and PW.3 are the complainants' wives. Therefore the witnesses and the accused knew each other very well. Therefore the issue of mistaken of identity cannot be entertained. PW.1 and PW.3 told this Court that they identified the accused person with the aid of torch light and by his voice

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> when he said "tulia" and when he demanded to be given some money. I am satisfied with the evidence that the witnesses did really identify one of the robbers to be the accused. It is also true that the accused did use actual violence in order to retain the stolen property to wit he did cut a five year old child with a panga on the head".

On appeal to the High Court, the learned judge agreed with this view. After considering the misgivings expressed by the learned State Attorney whether torch light is really effective in identifying thieves, as sometimes and quite often beams of torches are directed into the eyes of complainants, dazzling them and therefore impairing their vision the judge said:

> "I agree. But, sometimes and quite often too, thieves swing such beams of lights in search of articles to be stolen. If the torches get away, it sometimes becomes easy to identify thieves".

We think with respect that the misgivings expressed by the learned State Attorney about the efficacy of torch light in identifying thieves are universally valid. The learned judge's remarks on torch beams were pure conjecture. As the learned judge will readily appreciate, conjecture and guess work have no room in criminal trials. In the circumstances of this case therefore the fact that the two women as relatives knew the appellant very well, was irrelevant for his correct identification as one of the intruders. With regard to the voice this was also most unreliable in the circumstances of this case. There was not much exchange of words in this confused atmosphere, only one word "tulia" seems to have been uttered and possibly another two "lete pesa" when the bandits

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were demanding money. This to us appears insufficient to enable the witnesses to make a clear identification based on voice.

The second piece of evidence which allegedly linked the appellant to this offence was the khanga found with Nyabanane. The trial Court make this linkage and the High Court went along. The judge stated:

> "Anyway besides the radio, a woman was caught with a piece of khanga. The woman disclosed that the piece of khanga had been given to her (sic) by the appellant".

We have found it extremely difficult to comprehend this linkage so readily made both by the trial Court and the High Court. Nyabanane's evidence is clear that she bought this piece of khanga from the appellant in April 1989, a year before the robbery at PW.2's home on 22/4/90. In her judgement, the trial Magistrate also wrote clearly that PW.4 Nyabanane testified that in April 1989 the accused sold to her one piece of khanga at the price of Shs.300/=. How then could she link this transaction which took place in 1989 to the robbery of 1990? In the circumstances we are satisfied that the transaction involving the sale of the piece of khanga by the appellant to Nyabanane in 1989 had no relevance or bearing to the robbery which took place at PW.2's house in 1990.

Lastly we turn to the radio. The robbery at PW.2's house took place in April 1990 and by the time the radio was allegedly recovered at the appellant's house, no report had been made at the Police Station, not even after the release of PW.2 from remand prison. We ask ourselves why, particularly when the two women victims of

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this robbery claimed to have clearly identified one of the bandits. The whole thing was left hanging until by some chance the appellant went to the Police Station on his own business when he was told that there were some stolen properties in his house. How did P.C. Francis know of this, who reported the stealing and presence of this radio? Why did PW.2 and his wives remain silent all this time? These unanswered questions lend credence to the appellant's theory that for the reasons which he gave, this radio was planted at his house by Jumamosi on the instructions of Juma Wambura (PW.2). Both the trial Court and the High Court capitalised on the fact that Jumamosi denied taking any radio to the appellant. But we think they overlooked two important things. If Jumamosi was part of the conspiracy, his denials could only be expected. Secondly the fact that the appellant called him as his witness, lends credence to his story that Jumamosi had brought the radio. He did this innocently. He could not have risked to call a false witness who would spoil his case by denying all knowledge of the radio. It is true that his niece Hawa was not called, but we think the appellant gave good reasons why this did not happen. If either or both the trial Court and the High Court on first appeal had addressed themselves to these weaknesses in the prosecution case, we are sure they could not have convicted the appellant. Hence the necessity for our intervention. There is also another matter which we think affects any consideration of the appellant's involvement. We think that given the close blood relationship between the appellant and Juma Wambura, the appellant could not harm his five year old nephew if he was one of the bandits who raided PW.2's house that night.

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Mr. Magoma, learned State Attorney who appeared for the Republic found himself in the unfortunate position of having a split personality. To support the appellant's conviction in accordance with official instructions and his personal conviction that the appellant's conviction was unsupportable for the very good reasons which he gave. We give credit to Mr. Magoma's personal position in this appeal with which we agree.

For all the foregoing reasons, we are satisfied that the appellant's conviction cannot be supported by the evidence on record. Accordingly we allow the appeal, quash the conviction and set aside the 30 year prison sentence. We order the appellant's immediate release from prison unless he is otherwise lawfully detained.

DATED AT MWANZA THIS 13TH DAY OF DECEMBER, 1993.

L. M. MAKAME
JUSTICE OF APPEAL

A. M. A. OTHMAN
JUSTICE OF APPEAL

L. M. MFALILA
JUSTICE OF APPEAL

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

L. B. KAIJAGE
SENIOR DEPUTY REGISTRAR