

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



(CORAM: MSOFFE, J.A., KILEO, J.A. And KALEGEYA, J.A.)

CRIMINAL APPEAL NO. 73 OF 2005

**OMARI MUSSA JUMA APPELLANT
VERSUS
THE REPUBLIC RESPONDENT**

**(Appeal from the Judgment of the High
Court of Tanzania at Tanga)**

(Mkwawa, J.)

**dated the 28th day of January, 2005
in
Criminal Appeal No. 12 of 2003**

JUDGMENT OF THE COURT

25 June & 9 July 2007

MSOFFE, J.A.:

The appellant, Omari Mussa Juma, was charged together with one Abdallah Bakari Salimu in the District Court of Muheza with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code. They were convicted as charged and sentenced to a term of imprisonment for 30 years. The District Court also made an order for compensation

of shs. 50,000. On appeal to the High Court, the appellant was unsuccessful and hence this second appeal.

The facts giving rise to the case as established at the trial are simple and straight forward. On the 21st day of February 2002 shortly after midnight three bandits raided the house of one Gideon Mwanjonjo (PW1). At the material time PW1 was in the house with his wife Eliza Mathias (PW2) and his sons Ateria Eliot (PW3) and Joseph Gideon Mandondo (PW6). The bandits broke into the house after hurling a big stone which broke the door open. The bandits demanded money and were wielding a machete (panga) at the material time. As PW1 did not oblige them with the money, one of the bandits slashed him twice on the head. Thereafter, the bandits ransacked the house and made away with an assortment of properties. In the meantime, in the early morning of 21/2/2002 PW4 Joseph Gama was at his home where he saw the appellant passing around with a bicycle and a green bag. He suspected the appellant and accordingly raised an alarm and people responded. The appellant attempted to flee away but he was

quickly apprehended after a short chase. PW4 retained the bicycle which was eventually taken to the police. At some later stage PW1, PW2 and PW3 identified the bag to be among the properties stolen from the house on the fateful night of 21/2/2002. It was also in evidence at the trial that on 20/2/2002 at 4.00 p.m., a day before the above incident, PW5 Mtoo Ramadhani was at his place of business when the appellant and the other accused person came to him and hired two bicycles from him.

In their respective and concurrent findings of fact the courts below were satisfied that the case against the appellant was established beyond reasonable doubt mainly on account of the evidence by prosecution witnesses identifying the bag as being one of the properties stolen on the night in issue. The judge on first appeal was of the further view that the doctrine of recent possession was properly invoked by the District Court in grounding the conviction.

In this appeal, the appellant who was not represented raises one general ground of complaint. That the prosecution witnesses did not identify the bag, and its contents for that matter, as the properties stolen on the fateful night.

On his part, Mr. Oswald Herman Tibabyekomya, learned State Attorney, was quick to point out that the Republic was not in support of the conviction for the reason stated by the appellant. He was of the general view that no evidence was forthcoming from the prosecution witnesses to identify the bag and its contents. In the absence of such positive evidence he invited us to allow the appeal.

Admittedly, no evidence was tendered to show that the appellant was among the group of three bandits who stormed into, and stole from, the house of PW1. All the prosecution witnesses did not lead evidence to the effect that they identified the appellant on the material night. It is, therefore, evident that the appellant was convicted solely because of the bag which the witnesses, particularly PW3, identified to be

among the assortment of items stolen on that night. The crucial issue before us is whether the evidence relating to the identification of the bag sufficiently established the case against the appellant beyond reasonable doubt.

As already stated, this is a second appeal. In the case of (1) **Deemay Daati**, (2) **Hawa Durbai** and (3) **Nada Daati v. Republic**, Criminal Appeal No. 80 of 1994 (unreported) this Court stated:-

"... It is common knowledge that where there is misdirection on the evidence or the lower courts have misapprehended the substance, nature and quality of the evidence, an appellate court is entitled to look at the evidence and make its own findings of fact."

In **Deemay's** case the Court also quoted with approval the following passage from **Peters v. Sunday Post Ltd.** (1958) EA 424 where the Court of Appeal for East Africa set out the

principles in which an appellate court can act in appreciating and evaluating the evidence:-

"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide".

In **Deemay's** case this Court also referred to the English case of **Watt v. Thomas** (1947) 1 ALL. E.R. 582, and the following observation by this Court in **Salum Mhando v. Republic**, (1993) TLR 170 thus:-

"Where there are misdirections and non-directions on the evidence a Court of second appeal is entitled to look at the

relevant evidence and make its own findings of fact".

In the instant matter we are of the view that this is a fit case for us to interfere with the findings of fact by the courts below. Without hesitation we are in agreement with both the appellant and Mr. Oswald Herman Tibabyekomya that the evidence of bag identification was not sufficient to form a basis of the conviction in issue. As already observed, besides saying that they identified the bag the prosecution witnesses did not say anything else to explain exactly how they identified it. Furthermore, it is common knowledge that when the bag was exhibited in court it was not opened with a view to ascertaining whether or not the witnesses also identified the contents therein. With respect, we think it was not enough for the witnesses to say that the bag was green in colour without more. In the circumstances of the case where the only incriminating evidence against the appellant was the bag, we think it was important for the witnesses to describe the bag and its contents by their distinctive colour, marks if any etc.

This was important because anybody else for that matter could have owned a bag with similar colour. In the absence of such evidence it could not be safely said and concluded that the case against the appellant was proved beyond reasonable doubt. If we may add, evidence of description of the bag and the items contained in it was very important in the context of this case where the appellant disowned the bag saying that while riding on a bicycle he saw three persons taking out clothes from the bag the subject of this case. Assuming the three persons really existed, then the more reason for the prosecution to have contradicted this assertion by bringing in evidence in which the prosecution witnesses would have positively stated and described that the bag and the items therein actually belonged to them, and to PW3 in particular.

Having said so, there are four other features or shortcomings in the trial which we think we should mention here in passing. We say in passing mainly because the shortcomings were not grounds of appeal. To start with, the bicycle found with the appellant was not exhibited in court. If

it had been exhibited, may be PW5 would have been in a position to say whether or not it was one of the bicycles he hired to the appellant and the other accused person on 20/2/2002.

We also note that on 4/4/2002 the trial court conducted a preliminary hearing which, in our view, was casually done. The proceedings of that day read in part as follows:-

"PRELIMINARY HEARING"

Court:- The statement and substance of the charge is delivered to the accused persons who replies as follows:-

"We admit fact No.1 and we dispute fact No.2 and 4 of the facts."

Sgd. I.S. Chagike –SDM

4/4/2002

sgd: 1st Accused – R.T.I. of Omari Mussa Juma

sgd: 2nd Accused – R.T.I. of Abdallah Bakari Salimu

sgd: Public Prosecutor – A/Insp. Msofe

Section 192 (3) of C.P.A. complied with.

Sgd: I.S. Chagike – SDM

4/4/2002

Pros:- *I pray for hearing date and during the trial we shall call 7 witnesses. We shall also tender one bag containing clothes of the complainant. PF.3 and detention order showing that the 2nd accused was not at the Police Lock up during the day the theft took place.*

*Sgd. I.S. Chagike – SDM
4/4/2002”*

Surely, the above proceedings were not in full compliance with the scheme envisaged under **s. 192** of the **Criminal Procedure Act, 1985** (hereinafter the Act) read together with the **Accelerated Trial and Disposal of Cases Rules, 1988**. The trial magistrate is advised to read carefully **s. 192** and the above Rules alongside this Court's decisions in **Efraim Lutambi v. Republic**, Criminal Appeal No. 30 of 1996 (unreported) and **Mkombozi Rashidi Nassoro v. Republic**, Criminal Appeal No. 59 of 2003 (unreported) which are also relevant on the proper conduct of a preliminary hearing under **s. 192** of the Act. We hope that the magistrate will appreciate that the essence of a preliminary hearing is to accelerate trials and minimize expenses.

Finally, we also note that after recording the evidence of each witness the trial magistrate did not comply with the mandatory provisions of **sub-section (3) of s.210** of the Act.

The sub-section reads:-

“(3) The Magistrate shall inform each witness that he is entitled to have his evidence read over to him and if a witness asks that his evidence be read over to him, the magistrate shall record any comments which the witness may make concerning his evidence.”

Having laid out the above features, which we again hasten to repeat that we have done so in passing, we hope in future the trial magistrate will be properly guided in conducting criminal trials, especially in the application of sections **192** and **210 (3)** of the Act.

In conclusion, for the reasons stated, we are satisfied that the evidence taken as a whole leads us to the inevitable view that at best there was very strong suspicion against the

appellant. It is trite law that suspicion, however grave, is not a basis for a conviction in a criminal trial. This was a case in which the appellant was entitled to be given the benefit of doubt and thereby earn an acquittal.

We accordingly allow the appeal, quash the conviction and set aside the sentence. The order for compensation of shs. 50,000/= made by the trial District Court is also set aside. The appellant is to be released from prison unless lawfully held therein.

DATED at TANGA this 2nd day of July, 2007.



J. H. MSOFFE
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

L. B. KALEGEYA
JUSTICE OF APPEAL

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


(I. P. KITUSI)
DEPUTY REGISTRAR