# LEGAL PRINCIPAL DISCUSSED

| Citation | Parties | Legal Principles Discussed |
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| IN THE COURT OF APPEAL OF TANZANIA AT MWANZA.<br><br>CRIMINAL APPEAL NO. 169 OF 2006.KIMARO J.A.,LUANDA J.A AND<br><br>MANDIA J.A. | **KASSIM FADHILI TANUNU VS THE REPUBLIC.**<br><br>(Appeal from the Decision of the High Court of Tanzania at Mwanza Mchome, J) | 1. The decision to re-summons witnesses or orders a trial *de novo* lies with a particular trial magistrate. |

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

**(CORAM: KIMARO, J.A., LUANDA, J.A., And MANDIA, J.A.:)**

**CRIMINAL APPEAL NO. 169 OF 2006**

**KASSIM FADHILI TANUNU...................................................... APPELLANT**
**VERSUS**
**THE REPUBLIC .......................................................................RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Mwanza)**

**(Mchome, J.)**

**dated the 22nd day of February, 2006**
**in**
**Criminal Appeal No. 197 of 2004**

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**JUDGMENT OF THE COURT**

**30th September & 8th October, 2010**

**MANDIA, J.A.:**

This is a second appeal from a conviction entered against the appellant by the District Court of Musoma at Musoma for a charge of robbery with violence c/s 285 and 286 of the Penal Code. The appellant and his confederate who did not appeal, was sentenced to thirty years imprisonment by the trial District Court. His appeal to the High Court on conviction was dismissed, but the appellate High Court party allowed the

appeal against sentence imprisonment. The appellate High Court also vacated the order of twelve strokes of the cane imposed on the appellant by the trial Court. Aggrieved by the outcome of his appeal to the High Court, the appellant preferred this second appeal.

It was established both in the trial Court and the appellate High Court that on 13/9/1999 PW1, Moshi Kabondo was walking along Mkondo street in Musoma town while carrying a Marlboro plastic bag in which there were four old blouses, one wall clock, a white and green cloth, contribution cards for an intended wedding, mosquito coils, a torch and cash Sh. 17,000/=. PW1 passed the appellant and his confederate as these stood near a house. After she passed the two persons, they started walking briskly towards her. On catching up with her the appellant put a neck arm grip (kabali) on her while the confederate who did not appeal moved up front and aimed a bow, fitted with an arrow, at her. Then the appellant released his grip on PW1, snatched the Marlboro bag which PW1 held, and the two assailants ran away together.

As luck would have it, a short distance further PW1 Moshi Kabondo found a police vehicle on patrol. She stopped the police vehicle and reported her ordeal to the police. Her narration of what happened to her was received by PW1, B 7878 Detective Sergeant Kombe of Musoma Police Station who told the trial Court that fifteen minutes after PW1 Moshi Kabondo narrated her ordeal to them they came across two persons, one of them carrying a Malboro Plastic bag and a bow and arrows. When they followed these two persons they ran away and they (police) had to raise an alarm which enable the two persons to be apprehended. The appellant, who carried the Marlboro Plastic bag and the bow and arrows, was searched and the items described by PW Moshi Kabondo were found inside the bag. Moshi Kabondo was sent for and she identified the items stolen from her during the robbery, minus the cash Sh. 17,000/=. The items were tendered in evidence by PW1 as a collective Exhibit P. The bow and arrows were tendered as collective exhibit P3. In his defence, given under affirmation, the appellant admits that he was arrested at the place and time mentioned by PW1 Detective Sergeant Kombe but maintains that the allegation that he and his confederate robbed PW1 is all lies.

The memorandum of appeal filed by the appellant, and the subsequent oral elaboration he made in Court during the hearing of the appeal, boil down to three main points. The first point is identification where the appellant argues that the circumstances at the scene did not allow for watertight visual identification. The second point raised by the appellant is that the trial magistrate who took the trial from another magistrate was in breach of section 214 of the Criminal Procedure Act, and the third point raised by the appellant is that the doctrine of recent possession was improperly raised in a case where the items seized were "common articles".

On identification both Courts below noted that the victim of the robbery PW2 Moshi Kabondo was robbed at 6 a.m. in the morning. A short distance later he found a police vehicle on patrol and described his assailants and the property stolen from her. Barely ten minutes later the appellant and his confederate were arrested in possession of the bag. The bag which carried the items had a mark on it Marlboro and the appellant

was arrest holding such a bag. The bag contained feminine items and a wedding list belonging to PW2 which the appellant was found to be holding when arrested. Both Detective Sergeant Kombe and the victim could not lie about very person items like old undergarments and a wedding list which the appellant was found in possession of and could not account for . As for breach of s. 214(1) of the Criminal Procedure Act, chapter 20 R.E. 2002 of the laws, the decision to re-summons witnesses or order a trial de novo lies with the particular trial magistrate. The catchwords in Section 214(1) are "if he considers it necessary". In the particular circumstances of this case the record shows at page 49 that the appellant's confederate complained that the case had gone through six magistrates and nine prosecutors because of the appellant expressing no confidence in each of them, and in subsequent ruling the trial magistrate noted that even when the case reached the defence stage, and the accused persons had given their defences, the appellant kept putting up reasons for the trial not to proceed. At page 64 of the record the trial magistrate gave the reason in his judgment why he proceeded with finalizing the case. We are satisfied that there was no breach of Section 214(1) of the Criminal Procedure Act,

chapter 20 R.E. 2002 of the laws. We therefore dismiss the appeal against conviction.

On sentence, we have observed that the trial Court metted out the statutory minimum sentence for a charge of robbery with violence. On appeal to the High Court the appeal against sentence was party allowed, and the sentence was reduced to imprisonment for fifteen years. In reducing the sentence, the appellate judge made the following observation:-

> "That(appeal) against sentence has some merit. For though the appellant and his co-accused had a bow and arrow there is no evidence that they used these weapons to force the complainant to put with her property. Theirs was not an armed but just a simple robbery."

With due respect to the appellate judge, we are of the opinion that this was a serious misdirection on his part. Once he accepted that there were two offenders, and that one of the offenders grabbed the victim by

the neck and searched her while the other with an arrow at the victim, it does not matter that the arrow has not been released to hit the victim. The established facts show that the ingredients of Section 287A of the Penal Code as amended by Act No 4 of 2004 have been met.

The sentence of fifteen years imprisonment is therefore set aside, and the original term of thirty years and twelve strokes of the cane is reinstated.

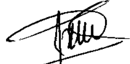
DATED at MWANZA this 5th day of October, 2010.

**N. P. KIMARO**
**JUSTICE OF APPEAL**

**B. M. LUANDA**
**JUSTICE OF APPEAL**

**W. S. MANDIA**
**JUSTICE OF APPEAL**

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



W. P. Bampikya
**SENIOR DEPUTY REGISTRAR**