LEGAL PRINCIPAL DISCUSSED

Citation	Parties	Legal Principles Discussed
IN THE COURT OF APPEAL OF TANZANIA AT ZANZIBAR CRIMINAL APPEAL NO.300 OF 2009. MUNUO,J.A., KILEO J.A.,BWANA J.A, (KILEO J.A,DISSENTING)	**YUSUPH ABDALLA ALLY VS THE DIRECTOR OF PUBLIC PROSECUTIONS** (Appeal from the Judgment of the High Court of Zanzibar, Makungu J.)	1. It is a settled law that judgment should contain *inter alia* the point or points for determination, the decision thereon and the reasons for such a decision. 2. When it comes to the imposition of a sentence by the trial court, first and foremost thing which the court should consider is the seriousness of the offence. Then it should consider the factors leading to the commission of the offence. Third it should take into account the period a convict has spent in the remand or police custody.

IN THE COURT OF APPEAL OF TANZANIA
AT ZANZIBAR

(CORAM: MUNUO, J.A., KILEO,J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 300 OF 2009

YUSUFU ABDALLA ALLY ..... APPELLANT

VERSUS
THE DIRECTOR OF PUBLIC PROSECUTIONS..... RESPONDENT

(Appeal from the Judgment of the High Court of Zanzibar)

(Makungu, J.)

dated the 28th day of January, 2008

in

Criminal Appeal No. 27 of 2007

JUDGMENT OF THE COURT
(Kileo, JA, dissenting)

BWANA, J.A:

This is a second appeal. The appellant was charged with the offence of Robbery contrary to sections 285 and 286 (2) of the Penal Act, No. 6 of 2004 of Zanzibar. He was convicted and sentenced to life imprisonment by the Vuga Regional Court. Aggrieved by that finding of the trial court, he appealed to the High Court of Zanzibar. Makungu, J,

upheld the conviction but found the sentence of life imprisonment to be harsh and excessive. The same was substituted therefor with one of fifteen years imprisonment. Undaunted, the appellant has now come before this Court.

It was the prosecution case that on 21 October, 2004 at 9.00am at Migombani area, within the Urban District of the Urban West Region of Unguja, the appellant, together with another person, did steal 150 mobile telephones; Tsh. 5,000,000/= and US $ 2500 from one Ali Ahmed and immediately before stealing the said telephones and money, the appellant did ambush his victim, hit him with a heavy object and then twisted round his neck. The prosecution called ten (10) witnesses (Pws) in support of its case. The appellant gave his defence on oath but called no defence witnesses.

During the first appeal, the Republic was represented by Ms. Raya Msellem, learned State Attorney. The appellant was unrepresented.

In his memorandum of appeal to this Court the appellant raised seven grounds of appeal which centre on being convicted on a wrongly applied provision of the law; the case against him not having been proved beyond reasonable doubt; irregularities governing the conduct of the identification parade at which he was identified; and the courts below basing their decisions on the evidence of a single witness. We will consider these points shortly.

Before us, the appellant appeared in person while the Respondent, DPP, was represented by Mudrikat Kiobya assisted by Al-Baghir Yakout, both learned State Attorneys.

The facts of the case as discerned from the record are that Ali Ahmed Mohamed (Pw1), the victim of the robbery, was riding his Vespa along the Zanzibar Airport Road. At one corner, he saw three men - two on one side of the road and the third one on the other side. Suddenly he was hit by a heavy tool by one of the two men. He fell down from his Vespa. The second man twisted his head. A scuffle ensued. He raised an alarm, calling for assistance. Pw1 could identify the appellant as one

of the two men who attacked him with the heavy object and took a basket with the mobile telephones and the money, from the Vespa. The appellant then rushed into a motor vehicle that was parked nearby and disappeared with the loot.

Meanwhile two people responded to Pw1's call for help against the thieves. One of the two was Deo Denis, Pw2, who rushed to the scene and saw the two men robbing Pw1. However, before moving closer to the scene one of the robbers – whom he later identified as being the instant appellant – chased him away threatening him with "a big knife". The other person to rush to the scene was Jackson Kasisi, Pw4, who also saw the two robbers, attacking Pw1 and then snatching his basket. They then escaped using the motor vehicle that had been parked near the scene of the robbery.

Both Pw2 and Pw4 as well as Pw1 described one of the attackers to be "a tall, thin, semi - black man" , a description that matches with the appellant. Pw1 is said to be of Arab origin. Subsequently the appellant was arrested and an identification parade was prepared by the police

under the supervision of pws 6, 7 and 8- all policemen. It was the prosecution case that the appellant was identified at the said parade as being the man who was seen at the scene of crime, robbing Pw1. Hamad Juma, Pw9, a passerby who was asked by the Police to stand in the identification parade, testified before the trial court that indeed the appellant was identified at the said parade.

In his defence, the appellant denied to have committed the robbery and that he was arrested by the police, while on a frolic of his own.

Both the two courts below agreed with the prosecution case that the appellant was indeed one of the robbers who attacked Pw1 on the material day. We are hesitant, as a second appellate court to disturb the concurrent findings of the said two courts on this factual issue in the absence of a glaring factual error and or any other plausible reasons or irregularity.

Before this Court, the appellant raised seven grounds which have been paraphrased above herein. Some of these grounds need not

detain us here. It is argued, for example, that the appellant was convicted under a wrong section of the law, that is, that sections 285 and 286 (2) of the Penal Code Act of Zanzibar are inapplicable. With due respect, they are applicable and relevant. For the avoidance of doubt, we reproduce the said provisions hereunder.

Section 285:

> *"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed "robbery",. "*

Section 286 (1)

> *"Any offender who commits the felony of robbery is liable to imprisonment for a term not exceeding twenty –five years."*

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company with one or more other person or persons, or if, at or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other personal violence to any person, he is liable to imprisonment for life."

The two provisions above considered, we are in agreement with counsel for the Respondent that they were relevant to the charge facing the appellant. Therefore the appellant's argument has no merit. He was charged and convicted under relevant provisions of the law.

We would now examine the appellant's other claims that the case against him was not proved beyond reasonable doubt and that it was improper to convict him relying on the evidence of a single witness. A prosecution case must, as the law is, be proved beyond reasonable doubt. What it means, to put it simply, is that the prosecution evidence must be

so strong to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person (and not any other) as being the one who committed the offence. That proof does not have to depend on a number of witnesses (see **Goodluck Kyando Vs Republic** Cr. Appeal No. 118 of 2003; **Majaliwa Guze Vs Republic** Crim. Appeal No. 213 of 2004, both unreported). An accused person may be convicted on the evidence of a single witness, the *pivotal* question being whether the evidence on record is sufficient to uphold a conviction. That evidence should be positive (see **Commonwealth Vs Webster** (1950) 50 Mass 255 per Shaw C.J, as cited with approval by this Court in **Daniel Nguru and others Vs Republic** Crim. Appeal No. 178 of 2004 (unreported). In the instant case, there is no need to fault the concurrent findings of the two courts below which held that the appellant was one of the robbers who attacked Pw1. He was positively identified as a thin, tall semi-black man, features that correspond with the appellant. Both Pw2 and PW4 likewise, identified the appellant as being the man who took PW1's basket and drove of using a motor vehicle, resembling a Starlet, that was parked at the scene of the robbery. The same witnesses, together with PW1, again, identified the appellant at the identification

parade, supervised by PW6, PW7 and PW8. Therefore it is not correct, on the part of the appellant, to claim that only a single witness identified the appellant, ostensibly with the hope that the court would then apply great care in admitting the evidence of that single witness. In convicting the appellant, the trial court relied on the evidence of more than a single witness, evidence that left no doubt, that the appellant was one of the robbers. We do agree with that finding.

An identification parade, on its part, is not substantive evidence. It is admitted only for collateral purposes and usually is used for purposes of corroboration (see **Moses Deo Vs Republic** (1987) 134 CAT) (un reported). The outcome of such parade is by itself of no independent probative value (see **Dennis Nyakonda Vs Republic** Criminal Appeal No. 159 of 1990) (unreported). It is for the purpose of ascertaining whether a witness can identify a suspect of the offence (see **Emilian Fungo Vs Republic** Criminal Appeal No. 278 of 2008, unreported).

An identification parade must conform to the provisions of the Police General Orders as issued by the Inspector General of Police (see **Francis**

Majaliwa and 2 Others Vs Republic, Criminal Appeal No. 139 of 2005; **Mohamed Salehe Nyauba Vs Republic**, Criminal Appeal No. 128 of 2006 - both unreported).

The appellant main point of contention is that the identification parade at which he was identified was arranged and conducted in contravention of laid down procedure. We see no such irregularity. Even if there was one and we were to discard with the corroboration evidence of such a parade, still, the evidence of PW1, PW2 and PW4 was sufficient to implicate the appellant.

The appellant has challenged the contents cum "ingredients" of the High Court judgment. We can just state in passing that writing a judgment depends, to a large extent, with a judge's style. It is settled law that a judgment should contain inter *alia,* the point or points for determination; the decision thereon and the reasons for such a decision. In the instant case, we are of the settled view that the first appellate court complied with those requirements of the law.

As to the sentence of fifteen (15) years imprisonment it cannot be said to be harsh in the circumstances of this case. The trial court had imposed a life prison term, a sentence considered by the first appellate court to be excessive. We do agree with that holding. Therefore it was proper for the court to set aside that sentence and substitute therefor with one of 15 years imprisonment. The appellant still dissatisfied with that decision, asked this Court to reconsider the said sentence.

It is important to note the well settled principle of law as enunciated in the much celebrated case of **Dingwal V Republic** (1966) Seychelles Law Report, 205, and as quoted with approval by this Court in **Robert Aron Vs Republic,** Criminal Appeal No. 68 of 2007 (unreported) thus:

> *"... an appeal court will only alter a sentence imposed by a trial court if it is evident that the said trial court has acted on a wrong principle; overlooked some material factor; or if the sentence so imposed is manifestly excessive in view of the circumstances of the case ...* ***an appeal court is***

not empowered to alter a sentence on the m ere ground that if it had been trying the case, it might have passed a somewhat different sentence ..." (Emphasis Provided).

The above principle of law seem to have been adopted in this jurisdiction as well. In deed there is a long, unbroken chain of authorities on this subject which have shown that an appellate court may alter a sentence imposed by a trial where –

1. The sentence is manifestly excessive.
2. The sentence is manifestly inadequate.
3. The sentence is based upon a wrong principle of sentencing/law.
4. A trial court overlooked a material factor.
5. The sentence is based on irrelevant factors.
6. The sentence is plainly illegal.
7. The sentence does not take into consideration the long period an appellant spent in remand or police custody awaiting trial (see: **Nyanzala Madaha Vs Republic** Criminal Appeal No. 135 of 2005, unreported).

In the Nyanzala case, *supra,* this court held:

> *"The period spent in custody is a result of problems with the administration of justice in this country.* ***So, it is our considered opinion that the period should not be loaded on the accused persons who are helpless and cannot do anything about it. Trial courts should take such period into account and if that is not evident, then appellate courts should interfere ..."*** (Emphasis Provided)

Essentially, the above means the following when it comes to the imposition of a sentence by a trial court. **First** and foremost the said court should consider the seriousness of the offence. **Then** it should consider factors leading to the commission of the offence. **Third**, it should take into account the period a convict has spent in remand or police custody.