IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MOFFE, J.A., RUTAKANGWA, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 86 OF 2005

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

(Masanche, J.)

Dated the 15th day of December, 2004
In
Criminal Appeal No. 35 of 2004

JUDGMENT OF THE COURT

23rd & 28th April, 2008

MSOFFE, J.A.:

This is a second appeal. It is against the decision of the High Court at Mwanza (Masanche, J.) dismissing the appellant's conviction and sentence in Tarime District Court Criminal case No. 241 of 2002.

The District court of Tarime (Mallaya, SDEM) convicted the appellant of armed robbery contrary to sections 2856 and 286 of the Penal Code. It sentenced him to a term of imprisonment for thirty years and corporal punishment of twelve strokes of the cane. Being aggrieved by the conviction and the sentences the appellant unsuccessfully appealed to the High Court after the judge was satisfied that he was identified among the robbers. In dismissing the appeal the judge on first appeal reasoned, *inter alia,* as follows:

> *After reading the entire record, I am satisfied that the conviction was proper. The appellant was known to PW1 before. He had been a taxi driver in the area. This robbery took place in broad daylight, (4.45 p.m.). And, as I said before the appellant was picked at an identification parade. The other person who was with the appellant, the one who went to ask about the price of Redd's could not be identified, and he is at large. The appellant, evidence shows that he never came out to do the robbery, but, surely he is netted on the doctrine of common intention. That doctrine simply says that when*

two or more people set out on a mission, I.E. to do an unlawful act, they all become involved even where only one of them fulfils the doing of the unlawful act. Appellant was, unbd3eed, in the "get away" car.

All along the appellant has been unrepresented. In this appeal he has also appeared in person before us. On 27/10/2006 he filed a memorandum of appeal. On 17/4/2008 he filed a supplementary memorandum of appeal under Rule 6691)of the Court of Appeal Rules, 1979. In essence, however, the main grounds of complaint are:- **One,** he was convicted on the basis of insufficient identification evidence. **Two,** the evidence on record did not establish the offence because the complainant, Peter Zakaria, did not testify. **Three,** the judge on first appeal did not subject the evidence to close scrutiny. If he had, he would have found some glaring contradictions in the evidence for the prosecution.

Mr. Edwin Kakolaki, learned State Attorney, appeared for the respondent Republic. At first, he sought to oppose the appeal. On reflection, however, he argued in support of the appeal. We think Mr. Kakolaki was justified in not resisting the appeal for reasons which will be apparent hereunder.

In order to appreciable the essence of the appeal before us, it is instructive to set out the facts of the case, albeit briefly.

One Peter Zakaria owned, and presumably still owns, a beer selling Depot at Tarime. On 29/5/2002at around 4.45 p.m. PW1 Maria Matiku, a cashier at the Depot, was on duty. PW2 Herege Mseti and PW3 Magabe Magesa were also on duty. While the three were on duty three robbers rampaged into the depot, fired some bullets which left PW3 with a broken arm, and then stole cash Tshs. 4,375,000/= the property of the said peter Zakaria. The robbers had gone to the scene in a vehicle that was identified to bear a plate number reading TZR 1352. According to the prosecution witnesses, one of the robbers was the appellant who was the driver of the vehicle in question. After the robbery, the robbers disappeared in the vehicle driven by the appellant. The matter was reported to the Police where the witnesses gave some description of the robbers, who included the appellant. The police mounted a search which resulted into the arrest of the appellant at Kibara, Bunda where he was driving a vehicle w3ith Reg. No. TZC 6280.

In his defence, the appellant admitted being arrested at Kibara, Bunda. He denied, however, being involved in the robbery in issue.

As already observed, this is a second appeal. The general rule is that an appellate court should not disturb concurrent findings of fact unless it is clearly shown that there was been a misapprehension of the evidence, a

miscarriage of justice or a violation of some principle of law or practice. See **Amratlal D.M t/a Zanzibar Silk Stores V A.H. Jariwala t/a Zanzibar Hotel** (1980-) TLR 31, **Dr. Pandya V R** (19857) EA 336, **Dickson Joseph Luyana and Another V Republic,** C,.A.T. Criminal appeal no. 1 of 2005 (unreported0 and **Issa Mgara @ Shuka V Republic,** criminal Appeal No. 37 of 2005 (unreported). Indeed, where there are misdirection's or 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 – See **The Director of public Prosecutions V Jaffari Mfaume Kawawa** (1981) TLR 149.

In this case, there was no dispute at the trial, and indeed in the first appeal for that matter, that a robbery incident took place at the above mentioned depot on the stated date and time. The crucial question was, and indeed still is, whether the prosecution evidence established beyond reasonable doubt that the appellant was one of the robbers.

We wish to begin with the complaint that theft was not proved because the complainant, Peter Zakaria, did not testify. The judge on first appeal addressed the point. He opined and held as follows:-

> *The charge sheet talks of the money stolen as being money belonging to Peter Zacharia, and Peter Zacharia never testified in court. He should have testified, at least; to say that the Depot was his. However, his non-testifying has not occasioned any failure of justice.*

Without hesitation, and with respect, we agree with the judge to the extent that Peter Zakaria ought to have testified to, at least, say that the depot belonged to him. We do not, however, go along with him that the failure to testify did not occasion a failure of justice.

It occurs to us that robbery is an aggravated form of theft which is accompanied by force. Indeed, without a theft there is no robbery. Theft is complete as soon as there is an appropriation with intent to steal – See **Cases and Materials On Criminal Law,** Seventh Edition by Michael J. Allen at page 728. Sectio0n 258 of the Penal Code (Cap 16 R.E. 2002) provides the definition of theft. Sub-sections(1)and 2(a) thereof read:-

> (1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or special **owner** thereof anything capable of being stolen ,steals that things.
>
> (2) A person who takes or converts anything capable of being stolen is

deemedtodosofraudulentlyifhedoessowithyan6yofthefollowing intentys that is to say:

(a) an intent permanently to deprive the general or special **owner** of the thing of it;

For our purposes in this appeal, the catch-word is the above provision of the law is "**owner".** Theft is committed where a person without a claim of right takes or converts property capable of being stolen with intent to deprive the **owner** of the thing in issue. In essence, or in other words, therefore, a person can only steal what belongs to another.

In this case, the particulars of offence in the charge sheet dated 21/6/2002 alleged:-

The Leonard s/o Zedekia Maratu is charged on the 29th day of May, 2002 at or about 16.45 hrs at Nyerere Road Tarime Township within the District of Tarime on Mara Region, **did steal cash money Tshs. 4,375,000/= the property of one Peter Zakaria** and immediately before such stealing did use actual violence by firing two bullets in order to obtain the said property.

[Emphasis supplied).

In our view, from the charge sheet, it was expected that the prosecution side would lead evidence to prove that the appellant stole the above sum of mo0ney the property of Peter Zakaria and that immediately before such stealing he fired two bullets in order to retain the money. In the circumstances, we are of the view that Peter Zakaria ought to have given evidence to show that his sum of money amounting to Tshs., 4,375,000/= was actually stolen by the appellant. After all, being the owner of the money in issue evidence from him ought to have been forthcoming to the effect that **his** money was actually stolen. As it is, in the absence of his evidence it is not certain whether the above sum of money actually belonged to him. As already stated, we do not th3erefore, agree with the judge on first appeal that the failure by Peter Zakaria to testify did not occasion a failure of justice. On the contrary, we are of the settled view that there was failure of justice in that the identified **owner** of the money did not testify. In the absence of his evidence, it is not therefore, each to say with certainty that Peter Zakaria, being the **owner** of the stolen money, was deprived of the said money thereby constituting "theft" within the above definition of "theft".

This brings us to the other complaint on the contradictions obtaining in the prosecution case. This point need not detain us. There were, indeed, a number of contradictions in the said case.

To start with, PW1, PW21 and PW3 testified and stated that on the date and time of incident there were three robbers, including the appellant. However, according to PW1 and PW2, on arrival at the scene one of the robbers came in, ordered them to sit down, and then fired bullet. A short while later he was followed by another robber who came in from a parked taxi outside the depot. According to PW1 and PW2, the person in the tax who, according to them, was the appellant, did not come out of the taxi. PW1 said that much thus:-

> "…*inside that taxi there was a driver and when out of the depot I saw him. I knew that driver before. The accused was that driver of that taxi TZR 1352*…..***The driver did not get out of the taxi.*** *I knew him from before and that was what made me identify him…"*
>
> *(Emphasis supplied).*

In somewhat similar vein, PW2stated:-

> *"…When we got out we saw a car parked in front of the Deport door some ten paces away. It was Toyota mark II Saloon there was a driver at the driver's seat. I clearly saw that driver and also managed to take note of the vehicle's registration number. I knew that driver before. The accused was the driver of that vehicle TZR 1352 Toyota Mark II…"*

In sharp contrast to the evidence of PW1 and PW2, PW3 told the court that the accused, the appellant herein, actually came out of the taxi. He said that much as follows:-

> "..When in the Depot a vehicle make Mark II came and parked at the door. It was being driven by the accused in court today. ***The driver came in the depot and asked for Redds beer.*** *The cashier informed him that one cartoon coasted shs. 14,000/=.* ***He then got outside the depot and got into the vehicle.*** *Another person from the vehicle came to the deport. He was armed with a gun and its barrel was cut to make its shorter. This one ordered us to sit down…"*
>
> (Emphasis supplied).

When the appellant cross –examined PW3 he stated:

> ***"If there is anyone who say the driver did not get out of the vehicle and went to the depot he is a liar.."***

(Emphasis supplied).

And when re-examined, PW3 stated:-

> "Before being hit **I saw the accused move from the Depot back into the parked vehicle…"**
>
> (Emphasis supplied).

There was yet another glaring contradiction in the evidence of the witnesses relating to the part of PW3's body that was hit by the bullet. PW1 stated:-

> "…*That person ordered the three of us to sit down. Then he fired a bullet that broke Magabe's* ***left hand….***"
>
> (Emphasis supplied).

And PW2 said as follows on the same point:-

> "Then he ordered @ kaa chini @ sit down. Before we could obey he fired a bullet. That made me and Magabe get outrunning. The bullet broke Magabe's right hand.,.."
>
> (Emphasis supplied).

And PW3 himself stated:-

> "…*On hearing the order I moved backwards some five paces away and seeing that he shot me on the left hand thus breaking it…"*
>
> (*Emphasis supplied)*

Surely, if the witnesses were describing incidents relating to the same event it was not to be expected that they would differ so much on important areas of the case. |In our considered view, if the witnesses contradicted themselves so much, it was very likely that even their evidence of identification of the appeal at was not necessarily all that truthful and reliable, after all.

In the upshot, the cumulative effect of our foregoing discussion and analysis of the law and the evidenced is this\; giving the fact that the absence of Peter Zakaria's evidence meant in effect that "theft" was not conclusively established in law; and the obtaining contradictions in the evidence of the prosecution witnesses; we are constrained to think, and accordingly hold, that

the prosecution case against the appellant was not proved beyond reasonable doubt. In the circumstances, the appellant was entitled to be given the benefit of doubt and the3reby earn an acquittal.

For the above reasons, we allow the appeal, quash the conviction and set aside the sentences of imprisonment and corporal punishment. The appellant is to be released from prison forthwith unless lawfully held. We so order.

DATED at MWANZA this 24th day of April, 2008.

J.H. MSOFFE
JUSTICE OF APPEAL

E.M. K.RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTIFE OF APPEAL

I certify that this is a true copy o9f the original.

S.M.RUMANYIKA
DEPUTY REGISTRAR
COURT OF APPEAL