IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RUTAKANGWA, J.A., MJASIRI, J.A.,And MANDIA, J.A.)

CRIMINAL APPEAL NO. 243 OF 2007

MICHAEL ALAIS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Munuo, J.)

dated the 29th day of September, 2000
in
Criminal Appeal No. 21 of 2000

JUDGMENT

25th & 26th February,2010

MANDIA, J.A.

The appellant appeared in the District Court of Moshi to answer a charge of Armed Robbery contrary to Sections 285 and 286 of the Penal Code. He was found guilty, convicted and sentenced to fifteen years imprisonment and further ordered to pay compensation sh. 1,200,000/= to the complainant. He was aggrieved by the conviction, sentence and order for compensation and preferred an

appeal to the High Court of Tanzania at Moshi. The High Court dismissed the appeal against conviction, enhanced the sentence of imprisonment to thirty years and upheld the order of compensation. Still aggrieved, the appellant preferred the present appeal to this Court.

The appellant appeared in person and unrepresented in this Court. The Respondent / Republic was represented by Mr. Hashim Ngole, learned State Attorney. The memorandum of appeal filed by the appellant centred on identification and general assessment of the evidence by the trial court and the first appellate court.

Let us put a rider here. As a second appellate court, we are only supposed to deal with questions of law. We are however of the opinion that the circumstances of this case necessitate a revisit of the evidence as will be demonstrated later. The justification for intervention has been set in **SALUM MHANDO v R** (1993) TLR 170 at page 174 thus:-

" On a second appeal to this Court, we are only supposed to deal with questions of law. But this approach rests on the premise that the findings of fact are based on a correct appreciation of the evidence. If as in this case both courts completely misapprehend the substance, nature and quality of the evidence, resulting in an unfair conviction, this court must in the interests of justice intervene."

The record of evidence shows that on 8/3/1999 at about 2 a.m in the early hours of the morning, a group of torch bearing cattle raiders invaded the home of Ibrahim Kiwaka (PW1) who was sleeping inside his house together with his wife PW3 Maria Ibrahim and a close relative PW2 John Luki.

The presence of the invaders was signalled by barking dogs, and when Ibrahim Kiwaka, also bearing a torch, got out to see what was amiss the raiders shone their torch on him. In the mutual shining of torches PW1 Ibrahim Kiwaka allegedly managed to identify

the appellant from five paces away as one of the raiders. The appellant reportedly aimed his gun at Ibrahim Kiwaka and fired but missed. The gunfire made Ibrahim's wife PW3 Maria Ibrahim scamper back to the main house for safety where she observed and identified through moonlight, the appellant and what he all did when she peeped out of the window of her house. Since PW3 Maria Ibrahim was with her husband when he first got out, her identification of the appellant was aided by the moonlight and the torches shone by her husband on one hand, and the raiders on the other. On his part PW2 John Luki's testimony shows that his identification was aided by the moonlight and the fact that on the previous day 7/3/1999 the appellant had approached him as he grazed the cattle belonging to PW1 with a view of buying some cattle. Under cross examination PW3 Maria Ibrahim admitted, at page15 of the record, that when they got out of the house to see what was going on it was raining. At page 7 of the record Ibrahim Kiwaka (PW1) admitted that the cattle left hoof prints as they were led away, and PW2 John Luki said they followed the hoof prints to a place called Nyori Nyori. This tracking effort did not, however, beer

any fruit. The record is also silent on whether the appellant has any connection with the place called Nyori Nyori. PW1 Ibrahim Kawaka was wounded as he ran away from the raiders, who had closed in and hit him with sticks and slashed him on the head with a sword. He was taken to KCMC for hospitalization. In his absence PW5 C 8020 Cpl Selemani of Moshi police Station visited the scene and collected two used cartridges which he tendered in evidence as Exhibit P2. The visit to the scene by Corporal Selemani was on the same day 8/3/1999. On the following day 9/3/1999 Corporal Selemani went to visit the injured person Ibrahim Kawaka at KCMC. On 13/3/1999 Corporal Selemani went to Mtakuja village in the company of PW2 John Luki where John Luki pointed out the appellant and another person as part of the raiding party. During cross-examination Corporal Selemani admitted that he did not send the empty cartridges he picked at the scene for ballistic examination. On 15/3/1999 PW6 Inspector Christina Kalungana conducted an identification parade consisting of nine Masai tribesmen who she said wore "lubega" and resembled the appellant. In this parade the complainant picked the appellant and thereafter Inspector Christina

Kalungana filled in the details of the identification in the Identification Parade Register which she tendered as Exhibit P3.

In his defence given under oath the appellant claimed he is a civic leader in his area and chairman of a defence and security committee for five villages. The appellant testified that he learnt of the cattle raid at the complainant's house on 8/3/1999 from the village chairman one Fanuel Mfuru. On 9/3/1999 he attended a cattle auction at Weru Weru and met two policemen who were in the company of PW2 John Luki. The policemen asked him to help track the stolen cattle at Msitu wa Tembo area. He went there but the policemen and another person called Ayubu who is an experienced cattle tracker did not turn up. On 13/3/1999 while he was at Lanana's boma Ayubu asked him to accompany him and the police on a cattle tracking trip. While they were at Chekereni Village one unnamed policeman told him he (appellant) has been named as a cattle raider and he should pay Sh. 200,000/= to secure his release. He refused and ended up in police custody. On 15/3/1999 he was put in an identification parade in which himself and another person

who was the second accused in the trial court appeared dressed in Masai clothes and all the rest in the parade dressed in normal clothing. The appellant claimed that he is an old man but was put in a parade where all the others were young people below forty years.

At the end of the trial court proceedings the trial court reasoned, at page 65, that the main issue was identification. It concluded, at page 68, that the appellant was positively identified by PW1, PW2 and PW3 and convicted accordingly. When the matter went on appeal, the appellate High court agreed that identification was the centre piece of the case for the prosecution. The appellate High Court found that visibility on the night of the crime was good because of moonlight and torchlight, as well as the fact that the appellant had previously been seen by PW2 John Luki trying to negotiate the purchase of cattle. The appellate High Court Judge also emphasized that possession of a gun on the fateful night helped in cementing identification. As we remarked earlier, the first appellate court dismissed the appeal against conviction, enhanced

the sentence passed by the trial court and affirmed the order of compensation.

Like the two courts below, we agree that the central issue in this case is identification, but hold a different view on the quality of identification. We believe that there aare factors which, if they had been taken into account, would have shown that conditions were far from ideal on the night the appellant was purportedly identified. The first point to be considered is that PW1, PW2 and PW3 all said there was moonlight which aided in identification. This raised the question on why torches should be used in bright moonlight. A possible answer on the use of torches may be found at page 11 of the record. When PW2 was being examined by the court he gave the following answer:-

- *"there was moonlight*
- *I saw 2nd accused through the window*
- *The moonlight was faint".*

These answers suggest visibility was poor hence the use of torches. Again at page 15 of the record the complainant's wife PW3 Maria

Ibrahim, during cross-examination by Eric Mchatta, advocate for the appellant gave the following answer: - at page 15 of the record:-

> *"That day it had rained very little but when we got out with my husband it was raining."*

We now have a record of witnesses who claim during examination in chief that there was bright moonlight and during cross-examination they change the story to a faint moon-lit nights and a rainy night. We do not think rainy nights and bright moonlights co-exist. Had both courts below taken these obvious discrepancies they would have come to a different view point on the question of identification.

PW1, PW2 and PW3 all mention them existence of a gun which the appellant held that night, and PW5 Corporal Selemani tendered in evidence two empty shotgun cartridges as proof that the appellant fired the gun from which the cartridges were ejected. The events allegedly happened at 2 a.m towards morning of 8/3/1999, and in the same morning Corporal Seleman picked the cartridges at the scene. Despite having information that the appellant owned a gun lawfully, he never took the gun owned by the appellant for ballistic

examination. He admitted as much in his answers during cross-examination as shown at page 24 of the record. The effort to link the appellant identification wise with the gun lacks basis. We are satisfied that both courts below have misapprehended the nature and quality of the evidence before tem. Our intervention therefore fits the test in the **Salum Mhando v Republic** (supra) case. In **Shaban Daudi v Republic**, Criminal Appeal N. 28 of 2000 (unreported) this Court stated;-

> *"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways: One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of other witnesses including that of the accused person. In those two other occasions the credibility of a witness can be determined even by a second appellate court when*

examining the findings of the first appellate court. Our concern here is the coherence of the evidence of PW1."

In the present case what comes out of the evidence of PW1, PW2, and PW3 is not clear cut lying but possible embellishment which necessarily reduces their credibility as witnesses.

Lastly, the record shows that both the trial court and the first appellate court totally ignored the appellant's defence. The appellant had put a defence that he is a person of sterling character and was the chair of the local defence and security committee. He showed that he was taken from his home under the guise of going to help track the stolen cattle and on the way locked up as a suspect in the cattle raid. He called defence witnesses on his character and bearing but all this was not considered at all by the courts below. In **Lockhart-Smith v United Republic** (1965) E.A 211 at P.217 the Court of Appeal of Eastern Africa had this to say:-

"The principle is elementary, but fundamental none the less, and authority, if authority be needed for the proposition that failure to take into account any defence put up by the accused will vitiate conviction, is not hard to find..."

and further down same page:-

"So important indeed is it that this judge of fact, as the learned magistrate was here, should keep the defence continuously in mind..."

The defence in this case raised matters which if considered, would have made the appellant a big help to the prosecution side, and would possibly have exposed possible criminal conduct on some of the prosecution witnesses. By ignoring it, the courts below occasioned injustice on the appellant, a lapse which is fatal to the prosecution case. We are persuaded that the appeal has merit and we allow it. The conviction against the appellant is quashed and the sentence is set aside. The order of compensation is similarly set

aside. The appellant should be released from custody unless he is held on some other lawful cause.

DATED at ARUSHA this 26th day of February, 2010.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL