IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MUNUO, J.A., MSOFFE, J.A., And KIMARO, J.A.)

CRIMINAL APPEAL NO. 29 OF 2009

IDDI SALIMU..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court at Tanga)

(Lema, PRM- Extended Jurisdiction)

Dated the 8th day of September, 2008
in
DC Criminal Appeal No. 26 of 2007

JUDGMENT OF THE COURT

9 & 12 March, 2010

MUNUO, J.A.:

In DC Criminal Appeal No. 26 of 2007, W. Lema, Principal Resident Magistrate, Extended Jurisdiction, dismissed the appellant's appeal against the conviction and sentence in Tanga District Court Criminal Case No. 63 of 2003. In the said case, the appellant had been charged with robbery with violence contrary to sections 285 and 286 of the Penal Code, Cap. 16 R.E.

2002. It was alleged that on the 5th day of January 2003, at about 04.00 hours at new Nguvumali area within the Municipality of Tanga the appellant stole one thermos flask valued at sh 4,000/=, 9 table clothes valued at sh 15,000/=, one mattress valued at 36,000/= , 2 sets of coaches valued at sh 36,000/= and sh 45,000/= respectively, a mobile phone make Erickson valued at Tsh 200,000/=, and cash sh 200,000/=, total valued at sh 500,000/=, the property of Lius Zawadi and at the time of stealing used actual violence to the complainant to obtain and retain the said properties.

The complainant, P.W.1 MT 69545 ATE Luis Zawadi deposed that he has been a National Service soldier since 1990 in 37 KJ. At about dawn at 4.00 am, PW1 was asleep with his wife and child when thieves broke into his sitting room and stole his coaches. The thieves did not stop there. They entered the bedroom and as they were stealing the TV, his wife shouted "thieves." P.W1 woke up and pursued the suspects. He managed to catch the appellant but the latter had applied oil all over his body so he slipped off. The complainant solder did not give up. He pursued the suspect and managed to catch him on his trouser to avoid the oil slippery body. The suspect in turn hit the complainant on the hand with an iron bar

whereupon he managed to escape from the room and quickly rushed to lock the door from outside to prevent the complainant from further pursuing him. The appellant struggled to lock the door and the complainant pushed the door to exit and apprehend his invader. Meanwhile, the appellant warned his co-bandits to run away which they did. When the struggle over the door intensified, the appellant gave up and started running.

The complainant soldier exited and in hot pursuit intercepted the appellant's legs ***(kukata mtama)*** causing the latter to fall down near one Mpemba's shop. Many people converged at the scene of capturing the appellant. With the help of those people, P.W.1 took the appellant to Chumbageni police station where he was charged with the offence of robbery with violence.

In the meantime, the appellant's party checked for stolen property at the house of the appellant's mother. They, however, recovered nothing. Back home, the complainant took an inventory of his stolen property as reflected in the charge sheet.

The complainant also tendered his PF3, Exhibit P1 to prove that he sustained a swelling and internal pain on his right hand, harm inflicted by a blunt object, in this case an iron bar. He also sustained bruises on his left leg.

In his sworn defence, the appellant stated that he was ambushed at dawn at about 5.30 am on his way to Sahare to do business. He said that about 10 people who identified themselves as TPDF soldiers arrested him alleging that he was a thief. They beat him and thereafter took him to the police station where he was charged with the offence of robbery with violence.

In this appeal, the appellant filed eight grounds of appeal. He complained that he was wrongly convicted on the evidence of family members namely the complainant who deposed as PW1 and his wife, PW2. Furthermore, the appellant claimed that the prosecution did not prove the case beyond all reasonable doubt considering that no stolen property was found in his possession and that the doctor who treated PW1 was not summoned to testify on the PF3, Exhibit P1.

Before us, the appellant insisted that neither PW1 nor PW2 could have identified him because they were asleep when bandits ransacked their house. Besides, the appellant further contended, P.W.1 was pursuing a suspect he had not identified and whom he did not know. He further faulted the prosecution for not producing the iron bar he beat the complainant with during the hot pursuit on the material night. He denied to have implicated a co-suspect by the name of Mwinyihamisi. It was the assertion of the appellant that the case against him was framed up.

Mr. Oswald Tibabyekomya, learned Senior State Attorney supported the conviction but not the sentence. Urging that the appellant was apprehended by the complainant in hot pursuit, the learned Senior State Attorney observed that although the appellant first slipped from the hands of P.W.1, the latter pursued him until he intercepted through the legs ***(kukata mtama)*** causing the appellant to fall down. Hence the complainant recaptured the appellant. The learned Senior State Attorney argued that there was no de-linkage during the hot pursuit so the possibility of mistaken identity was ruled out. On the evidence of family members, the learned Senior State Attorney observed that the robbery occurred in the house of P.W.1 and P.W2 so those were the witnesses who

eye witnessed the incident. The trial court saw and believed P.W.1 and P.W.2 and as there is nothing on record to fault their credibility, their evidence rightly sustains the conviction, the learned Senior State Attorney argued.

With regard to the sentence, the learned Senior State Attorney observed that under the provisions of section 5 of the Minimum Sentences Act, 1972, CAP. 90, as amended by Act no. 6 of 1994, armed robbery carries a statutory minimum sentence of thirty years imprisonment. The appellant, the learned Senior State Attorney pointed out, was armed with an iron rod with which he clobbered the complainant when the latter was pursuing him after the appellant failed to lock the victim's door from outside. Hence the appellant's sentence should be enhanced to the lawful mandatory minimum sentence of thirty years imprisonment, the Republic contended, citing the case of **Joseph Bernard versus R** Criminal Appeal no. 27 of 2005 (CA) (unreported).

As for the enhancement of the sentence, the appellant vehemently urged us not to uphold the conviction in the first place because the evidence is insufficient. In this regard, there would be no reason for

enhancing the sentence he asserted. The alleged iron bar, the appellant further complained, was not tendered as an exhibit to prove that there was armed robbery. All in all, the appellant urged us to quash the conviction and allow the appeal because there is no evidence to support the conviction.

The issue before us is whether the prosecution evidence established the guilt of the appellant beyond all reasonable doubt.

We wish to start with the appellant's attempt to dent the evidence of P.W.1 and P.W.2 because they are family members. Both witnesses are competent witnesses under the provisions of Section 127 (1) of the Evidence Act, CAP. 6 R.E. 2002 which states, *inter- alia:*

> *127: (1) All persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease (whether of body or mind) or any other similar cause.*

When the bandits struck at the complainant's house, he was asleep: so were his wife, PW2, and child. It was PW2 who shouted "thieves"

appellant wanted to lock the door from outside to prevent PW1 from pursuing the thieves who had already ransacked the sitting room and stolen a TV and cash from the bedroom. Being a soldier, PW1 valiantly chased the appellant after overpowering him at the door by preventing the appellant from locking the said door from outside.

Emerging from the house, PW1 chased the appellant, got hold of him but the appellant had oiled his body so it was slippery. So the complainant soldier missed the culprit. However, PW1 continued with the chase, caught up and held the trouser of the appellant who then assaulted the complainant with an iron bar. Nonetheless the complainant intercepted the appellant's legs in a process known as ***"kukata mtama"*** causing the appellant to fall down. People converged at the scene and helped P.W1 put the appellant under captivity after which P.W.1 took him to Chumbageni police station where he was charged with the offence of robbery with violence. Under the circumstances, we are of the settled mind that there was no disconnection to create possibilities of mistaken identity.

There could not have been independent witnesses because only family members were sleeping in the material house. PW1 stated that the

(ii) Weapons are not confined to firearms only, other types of weapons such as knives are included -----

We are satisfied, furthermore, that an iron bar is an instrument constituting armed robbery. Hence, we enhance the sentence to thirty years imprisonment.

In the result, we dismiss the appeal against conviction and enhance the sentence to the mandatory sentence of thirty years imprisonment.

DATED at TANGA this 10th day of March, 2010

E. N. MUNUO
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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

(N. N. CHUSI)
DEPUTY REGISTRAR