IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MBAROUK, J.A, BWANA, J.A. AND MASSATI, J.A.)

CRIMINAL APPEAL NO. 3 OF 2008

EDWARD MNEMBUKA @ EDU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Mtwara)

(Mjemmas, J.)

dated the 4th day of December, 2007

in

Criminal Appeal No. 10 of 2007

JUDGMENT OF THE COURT

8 & 11 OCTOBER, 2010

MBAROUK, J.A.:

In the District Court of Masasi at Masasi, the appellant was convicted of the offence of armed robbery contrary to sections

285,286 and 287 of the Penal Code as amended by Act No. 4 of 2004. He was sentenced to thirty (30) years imprisonment. His appeal before the High Court (Mjemmas, J.) was dismissed. Undaunted, hence this second appeal.

A brief account which led to the appellant being convicted as charged was that, on 19/4/2006 at or about 03.00hrs. at Nyasa area within Masasi District in Mtwara Region, bandits invaded the house of one Abdul Mohamed Wadi (PW1). According to Barakat Ali (PW3) who was a watchman, the bandits who held "pangas" and iron bars threatened him not to make any resistance. Thereafter, the bandits broke into the house and stole one television, video deck, receiver and a generator. When the bandits had gone, PW3 informed PW1 about the incident. However, PW3, could not identify any of the bandits, PW1 reported the matter to the police. On 24/4/2006, PW1 was phoned by an unknown person that if he wanted back his stolen items, he should pay Tshs.200,000/=. He negotiated and his offer of Tshs.120,000/= was accepted. Having paid the amount, at around 19.00hrs on 26/4/2006, Betty Mdenye (PW2) the wife of PW1 while

at home saw a taxi driver by Swahiba (PW4) in which the appellant returned the TV screen and a generator. The police investigation led to the arrest of the appellant and others not in this appeal. Later, the appellant and others were charged. In his defence, the appellant denied any involvement in the alleged crime. At the trial court, the appellant was the only one convicted.

In this appeal, the appellant was unrepresented, whereas the respondent Republic was represented by Mr. Peter Ndjike and Mr. Ismail Manjoti, learned State Attorneys.

Taken in their totality, the grounds of appeal found in the appellant's memorandum of appeal are mainly centered on the following grounds of complaints:-

1. *On the legality of the cautioned statement of the appellant.*
2. *On the issue of the appellant's defence of alibi.*

3. On whether the offence of armed robbery was proved beyond reasonable doubt by the prosecution.

On the issue of the legality of the cautioned statement, the appellant claims that, he retracted and repudiated the cautioned statement at the trial court, and that is why a trial with in trial was conducted.

Mr. Ndjike, who from the outset supported the conviction and sentence imposed to the appellant submitted that, the record is very much clear that initially the appellant had no objection when the cautioned statement was to be tendered, by D. 2045 D/Cpl Johnstone (PW5). The trial magistrate admitted and marked it as Exhibit P5. Mr. Ndjike said, when PW5 proceded with his testimony, the appellant objected to the cautioned statement and a "trial within trial" was conducted by the trial court. However, Mr. Ndjike contended that, the trial magistrate was *functus officio*, hence not eligible to conduct such a "trial within trial" having earlier admitted

the appellant's cautioned statement. Mr. Ndjike, urged us, to find the admitted cautioned statement as a valid document to be used in the prosecution's case.

We agree with the learned State Attorney that after the trial magistrate had admitted the appellant's cautioned statement as Exhibit P5, he was barred from re opening the issue of its admissibility. In the event, we find this ground of complaint with no merit.

As to the issue of the defence of "alibi," Mr. Ndjike briefly submitted that the record shows that the trial court did not take cognizance of that issue. However, he said no prior notice was given as required by the law. Hence, he urged us to find the ground concerning "alibi" with no merit.

We on our part, agree with the learned State Attorney and the High Court that the required procedure of giving notice was not complied by the appellant. What the trial court was required was to

consider the appellant's defence and may accord no weight of any kind to that defence. We think, the trial court in the absence of such a notice correctly offered no weight to the defence of the appellant's "alibi." For that reason, we find this ground of complaint with no merit.

Lastly, on the issue whether the charge of armed robbery was proved by the prosecution against the appellant. Mr. Ndjike submitted that, the prosecution proved the charge as required by the law. He added that, the record shows that weapon like "panga" and iron bars were used at the scene of crime as per the testimony of PW3 (the watchman). He said as far as the evidence shows that a weapon was used in committing the crime, the offence of armed robbery was proved.

With respect to the learned State Attorney, we are of the considered opinion that looking at the totality of evidence in this case, the only evidence connecting the appellant with this case is that of PW2 and PW4 and his cautioned statement, Exhibit P5.

PW2 testified to the effect that as a wife of PW1, she saw a taxi coming to their house with the appellant and a taxi driver – PW4 who returned their stolen TV and a generator. The cautioned statement admitted as Exhibit P5 shows that, the appellant was directed by a person named as "White" to take the goods (TV and generator) to PW1's house. The appellant categorically denied his involvement in the alleged armed robbery.

As the record shows, the robbery occured at night and there was no prosecution witness who testified with certainty that the appellant was identified at the scene of crime. The appellant was only seen with the stolen goods. We are increasingly of the view that the offence of armed robbery was not proved beyond reasonable doubt against the appellant. However, we are of the opinion that the appellant is liable to be convicted for a lesser offence of receiving property stolen or unlawfully obtained contrary to section 311 of the Penal Code [Cap. 16 R.E. 2002] which states that:-

"Any person who receives or retains any chattel, money, valuable security or other property whatsoever, knowing or having reason to believe it to have been stolen, extracted, wrongly or unlawfully taken, obtained, converted or disposed of, is guilty of an offence and is liable to imprisonment for ten years."

In the instant case, the appellant was found with such properties believed to have been stolen from PW1. The evidence covering the ingredients of the offence, under Section 311 in this case clearly shows that he was found with those items. It is our considered opinion that, the lesser offence of receiving property stolen or unlawfully obtained was proved. For that reason we invoke our revisional powers conferred upon us under Section 4 (2) of the Appellate Jurisdiction Act and substitute the offence of armed robbery to the lesser offence under Section 311 of the Penal Code.

In the event, the sentence of thirty years is substituted by the sentence of seven (7) years. The appeal is hereby dismissed to the extent stated herein above.

DATED at MTWARA this 11th day of October, 2010

M.S. MBAROUK
JUSTICE OF APPEAL

S.J. BWANA
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL