IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MSOFFE, J.A., LUANDA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 325 "A" OF 2009

RAJABU ATHUMANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Mussa, J.)

dated the 31st day of July, 2009
in
Criminal Appeal No. 4 of 2008

JUDGMENT OF THE COURT

6 & 8 April 2011

MSOFFE, J.A.:

The District Court of Lushoto found the appellant RAJABU ATHUMANI guilty of robbery with violence contrary to sections 285 and 286 of the Penal Code. The said court was satisfied that on 29/6/2007 at about 8.00 hours at Mandarine Hotel area, Lushoto, the appellant stole Shs. 20,000/=, one mobile phone make NOKIA valued at Shs. 165,000/=, one handbag valued at Shs. 12,000/=, an NMB

Identity Card, all total valued at Shs. 185,000/= the properties of Imelda Mchome and that before the stealing he used violence on Imelda in order to obtain the properties. The appellant was convicted and sentenced to an imprisonment term of twenty years. Aggrieved, he appealed to the High Court of Tanzania at Tanga. The appeal against conviction was dismissed. As for sentence, the High Court opined that it was illegal for being above the statutory minimum and accordingly reduced it to fifteen years imprisonment. Still aggrieved, the appellant has preferred this second appeal. He appeared in person while the respondent Republic was represented by Ms. Pendo Makondo, learned State Attorney, who argued in opposition to the appeal.

The prosecution side fielded three witnesses. Briefly, in their respective testimonies PW1 Imelda and PW2 Ason Mbaga told the trial District Court that on the material date, time and place they met the appellant who snatched PW1's handbag containing the above properties and disappeared into a nearby forest. PW1 reported the

incident to the nearby police station. On 9/7/2007 PW3 E 2073 DC Bernard arrested the appellant.

The appellant's defence was a general one in which he denied involvement in the offence in question. He went on further to say that the case against him was a frame up because allegedly he had grudges with PW2.

Admittedly the determination of the case depended on the crucial issue of identification. Indeed, the appellant has raised this point as the cornerstone of his grounds of appeal. The question is whether or not on the available evidence we can safely say and conclude that PW1 and PW2 positively identified the appellant on the fateful day and time.

To start with, there is no dispute that the incident took place at around 8.00 a.m. in the morning. It was in broad daylight, so to say. Inspite of this, we think that more evidence, particularly of identification, ought to have been forthcoming in the case.

Apparently there is no such evidence as we shall endeavour to demonstrate hereunder.

As the evidence clearly shows, the incident was sudden. The appellant approached and accordingly snatched PW1's handbag from behind. In the premise, PW1's and PW2's vision of the appellant at the time was that of a fleeting glance, so to speak. In this sense, we think that PW1 and PW2 ought to have been more forthcoming and accordingly tell the court how exactly they identified the appellant in the circumstances. For instance, they could have described the attire worn by the appellant, his physical features at the time etc. It is also known from the evidence of PW1 and PW2 that the appellant fell down in the course of snatching the handbag. Yet we are not told the estimated time in which the appellant remained on the ground. The time factor here would be relevant in the case in deciding whether or not PW1 and PW2 had ample time to identify the appellant. Also, there is no evidence on the estimated distance between the place where PW1 and PW2 stood *vis a vis* the place where the appellant fell on the ground. The distance would be

important in determining whether or not the witnesses and the appellant stood within close range or proximity to allow for correct identification. Finally, it is in the evidence of PW1 and PW2 that after snatching the bag the appellant ran or escaped into a nearby forest. If so, we think that it is difficult to believe that PW1 and PW2 could have easily identified the appellant who was at the time running away with his back facing the witnesses.

In our overall evaluation of the evidence, we are of the considered view that the appellant ought to have been given the benefit of doubt and thereby earn an acquittal.

In the event, there is merit in the appeal. We allow it, quash the conviction and set aside the sentence. The appellant is to be released from prison unless lawfully held.

DATED at TANGA this 7th day of April, 2011.

J.H. MSOFFE
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

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

(E.Y. Mkwizu)
DEPUTY REGISTRAR