IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NSEKELA, J.A., MASSATI, J.A., And MANDIA, J.A.,)

CRIMINAL APPEAL NO. 78 OF 2008

STEPHEN JOHN RUTAKIKIRWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania

(Mussa, J.)

dated the 4th day of March, 2008
in
Criminal Appeal No 65 of 2007

JUDGMENT OF THE COURT

9th & 15th November, 2011

MASSATI, J.A.:

In the District Court of Bukoba, the appellant was charged with and convicted of the offence of armed robbery, contrary to sections 285 and 286 of the Penal Code, Cap 16 RE 2002. He unsuccessfully appealed to the High Court, hence the present appeal.

The facts that led to this appeal are that, on the 12th day of November, 1998 at 3.30 am. the house of Aziz Karumuna (PW1) at Uswahili area, within Bukoba municipality, was broken into by several bandits. They started collecting several items from the sitting room. PW1

woke up and got hold of one of them. As they struggled, the bandit drove a knife into PW1's arms, but Azizi did not let loose of him. He screamed for assistance which attracted the attention of his neighbours, Ananius Karo (PW2) and Stephen Ezekiel (PW3). They went to PW1's residence. By then the bandit had already forced his way out by jumping PW1's fence, only to land into the hands of PW2 who overpowered him by hitting him with a stone on the head. Eventually, the bandit was arrested and PW3 also witnessed the arrest. The prosecution case was that, that bandit was the appellant. The appellant's defence was that at the material time he just happened to be returning from a discotheque with Amina, his girl friend, who also happened to be PW1's niece. He also advanced the story that PW1 had a grudge against him because he didn't like his relationship with Amina. This story did not find favour with the two courts below and he was thus convicted as charged.

At the hearing of the appeal, the appellant appeared in person and advanced a total of five grounds, which could be summarized as follows. First, that the ingredients of the offence of armed robbery were not proved because the alleged knife was not produced in court and there was no

evidence that PW1 was injured. Secondly, that the evidence of PW1 PW2 and PW3 was contradictory, and implausible because he was not found with the alleged knife or any of the alleged stolen articles Thirdly he was not properly identified. Lastly, that his defence was not considered. So believing that his appeal had substance, he urged us to allow it.

The respondent/Republic, which was represented by Mr. Castus Ndamugoba, learned State Attorney, threw its full weight behind the conviction and vehemently opposed the appeal. He submitted that, firstly, since there was evidence that some properties were stolen from the house of PW1, and some weapon used in order to steal or retain those properties, all the ingredients of armed robbery had been proved. He submitted that, it was not necessary to produce the knife or to prove PW1's injuries or to show that the appellant was found with any of the stolen properties, in order to prove the offence. Secondly, it was the learned counsel's submission that, since the appellant was arrested at the scene of crime the question of mistaken identify did not arise. He also said that there were no material contradictions between the evidence of PW1, PW2 and PW3. The witnesses were consistent in the central story, that PW1's house was

broken into, some articles stolen therefrom, PW1 was found bleeding and the appellant was apprehended at the scene of crime. Lastly, Mr. Ndamugoba submitted that the appellant's defence was considered and rightly rejected. In his view the prosecution case was proved beyond any reasonable doubt and the appeal had no merit. He prayed for its dismissal.

We think that on the evidence of record, there is on dispute that PW1's house was broken into on the material night and several of his properties stolen therefrom. We are also satisfied that PW1 was injured because, according to PW3 when he arrived at the scene PW1 was found bleeding and a knife was on the floor. So a dangerous weapon must have been used to draw blood from PW1. There is therefore proof beyond reasonable doubt that, armed robbery had taken place. We agree with Mr. Ndamugoba that although the PF3 was expunged from the record, and neither the knife nor any of the stolen articles were produced in court as evidence (which would have added weight,) their non production did not effect the admissibility and weight of the testimonies of PW1, PW2 and PW3, who, the trial court found as credible witnesses. After all, in terms of

section 61 of the Evidence Act, Cap 6 –RE 2002, all facts, except the contents of documents, may be proved by oral evidence.

The appellant has also complained about contradictions in the evidence of those witnesses. In his memorandum of appeal, the appellant pointed out two contradictions. The first one, was whether there was robbery. The second one was whether the appellant was arrested within the scene of crime.

The law demands that, where, in a trial there are contradictions and inconsistencies in the testimonies of witnesses, the trial court has to address them, and decide whether they are minor or go to the root of the matter. (**See MOHAMED SAID MATULA vR** (1995,TLR 3. We have looked at the evidence. All the witnesses are consistent that when they heard PW1 shout for assistance and arrived at the scene, they found an ongoing struggle between PW1 and the appellant, and PW1 was bleeding. There was also a knife on the floor. We cannot see any contradictions, let

alone material ones, in the testimonies of these witnesses. We therefore do not agree with the appellant on this ground.

As regards, visual identification, it is true that, usually visual identification is of the weakest type and should not be relied upon to found a conviction unless it is absolutely watertight and all possibilities of mistaken identify are eliminated (**See WAZIR AMANI vR** (1980)TLR 252. In the present case, even if there was darkness, the appellant was grabbed by and struggled with the complainant, and was arrested at the scene by PW2 and PW3; and immediately taken to the police. If there was any need of corroboration, we would readily find it in the appellant's own admission in his testimony that he was within the vicinity at that time (**See RUNGU JUMA vR** (1994) TLR. 176. We also find no substance in this complaint.

Lastly let us look at his complaint that his defence was not considered. Of course, it is the duty of a trial court to consider both the prosecution and the defence case before reaching a conclusion (**See HUSSEIN IDD AND ANOTHER v R** (1986) TLR 166. In so doing, it is

not enough to say that the defence of the accused has not in any way shaken the evidence of the prosecution. It also deserves an analysis. (**See NDEGE MARANGWE vR** Criminal Appeal No 156/1964 EACA (unreported) Evidence should always be looked at as a whole, and it is wrong to first accept the prosecution case, and then turn to see if the defence casts any doubt on the prosecution case. (**See MALANDO BADI AND 3 OTHERS vR** Criminal Appeal to 64 of 1993 (unreported). The consequences from any of the above misdirections are fatal to a conviction.

In the present case, the appellant told the trial court that on that day and time, he was in the company of Amina, who was PW1's niece, with whom she had gone to a discotheque. But PW1 was not happy with the relationship. So, on that night he waited on him. After escorting Amina home, he was descended upon, beaten, and taken to the police. He was later charged in criminal case No. 319 of 1998 which was dismissed for want of prosecution. He was rearrested and recharged with the present offence five months later.

The trial court considered the appellant's defence and dismissed it because it did not believe that, at that odd hour, PW1 would have been outside his gate waiting for the return of his niece, and to fix the appellant, just because he did not like their relationship. The High Court, on first appeal, also confirmed this finding, for the additional reason that the appellant did not cross examine PW1 on this matter. So it is not true that his defence was not considered at all. It was considered and rejected. On the evidence, we find no reason to interfere with that finding.

In the event, we find that this appeal is devoid of substance and we accordingly dismiss it in its entirety.

DATED at **MWANZA** this 11th day of November, 2011.

H. R. NSEKELA
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

I certify that this is a true copy of the original

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL