

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MBAROUK, J.A., MJASIRI, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 349 OF 2008

**FRANK LUCAS
ACKLEY AUGUST..... APPELLANTS
VERSUS
THE REPUBLIC RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania
at Moshi)**

(Mchome, J.)

**dated the 22nd day of August, 2008
in
Criminal Appeal Case No. 60 of 2008**

JUDGMENT OF THE COURT

13th & 17th October, 2011

MBAROUK, J.A.:

In the District of Moshi at Moshi, the appellants were found guilty of the offence of armed robbery contrary to **section 287A** of the Penal Code Cap 16 as amended by Act 4 of 2004. The appellants were convicted and sentenced to the mandatory minimum sentence of thirty (30) years imprisonment. Aggrieved they unsuccessfully appealed to the High Court at Moshi. Undaunted, the appellants preferred this second appeal.

Briefly, the facts of the case are as follows. On 29/7/2006 at about 14.00 hours PW1 Nasibu Selemani, a supervisor of a petrol station was at Mabungo area to collect the proceeds of sale and take them to his boss at Kyaru. On his way, he was accompanied by PW2, Mfiso Kimai. When they arrived at a place where people use as a local stone quarry, suddenly three people approached them and attacked PW1. A person who was later identified as the 1st appellant struck PW1 on his head with an iron bar and he fell down. PW2 screamed for help and one of the thugs who is not in court ran away with a bag containing money. He did not say how much it was. PW1 told the trial court that as it was day time, he managed to identify those who attacked him as the 1st and 2nd appellants. Thereafter, he said, the police who were on patrol helped him and managed to apprehend the 1st and 2nd appellants at the scene of crime and sent them to Moshi central police station where they were accordingly charged.

In their defence, the 1st appellant claimed that he was just a passerby and was surprised to be arrested for the offence charged in this

case. Whereas the 2nd appellant raised a defence of *alibi* to the effect that he was in Dar es Salaam at the time of the incident. As pointed out earlier, the trial court rejected the appellants defence and found them guilty as charged.

In this appeal, the appellants filed a joint memorandum of appeal containing six grounds of appeal, which can be reduced into the following:-

1. That, the first appellate court grossly erred in law and fact for convicting the appellants relying on dock identification while the appellants were strangers to the identifying witnesses.
2. That , the first appellate court grossly erred in law and fact for failing to note that there was a major contradiction in the prosecution's case.
3. That, the first appellate court grossly erred in law and fact for failing to note that the case against the appellants was fabricated.
4. That, **section 240 (3)** of the Criminal Procedure Act was not complied with.

At the hearing, the appellants appeared in person unrepresented, whereas the respondent Republic was represented by Mr. Zakaria Elisaria.

The appellants had nothing to add or elaborate, they opted to their joint grounds of appeal.

This is a second appeal which originated from Moshi District Court and the practice is that this Court rarely interferes with concurrent findings of fact by the courts below. In the case of **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** (1981) TLR 149 at page 153 this Court stated as under:-

*"The next important point for consideration and decision in this case is whether it is proper for this Court to evaluate the evidence afresh and come to its own conclusions on matters of facts. This is a second appeal brought under the provisions of **S.5(7)** of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this Court only on a point or points of law. Obviously this position applies only where there are no misdirections or non-directions on the evidence by the first appellate court. In cases where there are misdirections or non-directions on the evidence a court is entitled to look*

the relevant evidence and make its own findings of fact.”

On his side, the learned State Attorney from the outset opted not to support the appeal. As to the first ground of appeal that the appellants were not properly identified, he submitted that the record clearly shows that the appellants were caught red handed at the scene of crime, hence their ground of appeal is baseless.

We agree with Mr. Zakaria to the effect that all the prosecution witnesses testified that the appellants were caught red handed, hence the claim that the prosecution witnesses were strangers to the appellants and that they identified them at the dock is baseless. For that reason, we find the 1st ground of appeal devoid of merit.

As to the 2nd ground of appeal, that there were major contradictions between the evidence of PW1 and that of PW2, the learned State Attorney submitted that the record shows no contradictions. He urged us to find the 2nd ground of appeal with no merit.

We agree with the learned State Attorney that the record does not show any contradiction between the evidence of PW1 and that of PW2. It is not true that PW2 testified that he does not know PW1, instead the record shows that PW2 said PW1 was his uncle. At page 13 of the record PW2 was quoted to have stated that:-

" I remember on 29/7/2006 at about 14.30hrs was at Mabungo on our way to Njia panda with my fellow uncle PW1"

That means PW1 and PW2 were related, hence it is not true that PW2 said they do not know each other. That leads us to find that the 2nd ground of appeal also lacks merit.

As to the 3rd ground of appeal, that the case against the appellants was fabricated, the learned State Attorney contended that as the appellants were caught red handed, the prosecution case was proved beyond reasonable doubt. He said, this ground too is without merit.

We too are of the same opinion that there was no element to prove that the this case against the appellants was fabricated. This is because, the prosecution evidence demonstrated how the appellants were caught

red-handed at the scene of crime. Hence, we find that there was enough evidence to prove the prosecution case and we have seen no element of fabrication.

Lastly, on the complaint that **section 240(3)** of the Criminal Procedure Act was not complied with, the learned State Attorney conceded that the appellant was not informed of his right to have the doctor who prepared the PF3, Exhibit P1 summoned for cross-examination as directed by the said provision of the law and should therefore be expunged. We agree. The PF3 is accordingly expunged from the record. However, even if the PF3 is expunged, there is still enough evidence to sustain the appellants' conviction as shown earlier.

So since the trial District Court accepted the evidence of PW1, PW2, PW3 and PW4, a finding which was upheld by the High Court on the first appeal, there must be strong and compelling reasons to which we have found none to disturb such finding. In the circumstances, we can not fault the concurrent findings of fact of the two lower courts.

In the event and for the reasons stated herein above, we find the appeal devoid of merit. Hence, we dismiss it in its entirety.


DATED at ARUSHA this 14th day of October, 2011.

S.M. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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


E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL