

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 109 OF 2008

MASANJA DENIS APPELLANT

VERSUS

THE REPUBLIC RESPONDENT
**(Appeal from the Judgment of the Principal Resident Magistrate Court of
Kilimanjaro (Ext.J.) at Moshi**

(Khaday, PRM,Ext.J.)

dated the 21th day of December, 2007
in
Criminal Appeal No. 33 of 2007

JUDGMENT OF THE COURT

19 & 21st September, 2011

MSOFFE, J.A.:

Briefly, Carol Paul testified at the trial as PW1 and stated that he was a businessman. On 10/10/2005 at 4.00 p.m. he was at Njoro Village, Same, where he had a number of commodities for sale which included two mobile phones. While there the appellant came in, seized his throat and attempted to steal the mobile phones. He tried to stop the appellant from stealing the phones and in the process two people came to his rescue and overpowered the appellant. PW1 was supported that much by his mother

PW2 Frida Charles. The District Court of Same (Lamtey, PDM) believed PW1 and PW2 and accordingly convicted the appellant of attempted robbery contrary to section 287B of the Penal Code and sentenced him to a term of imprisonment for 15 years. Aggrieved, the appellant preferred a first appeal to the High Court at Moshi where the appeal was transferred for hearing before Khaday (PRM Ext.J. as she then was) where it was dismissed. Still aggrieved, the appellant has preferred this second appeal in which he appeared in person while the respondent Republic had the services of Mr. Juma Ramadhani, learned Senior State Attorney.

In the five point memorandum of appeal the appellant has canvassed a number of grounds. In our view however, the grounds crystallize on one major ground of complaint:- That the case against him was not proved beyond reasonable doubt.

On the other hand Mr. Juma Ramadhani did not support the conviction and sentence. In his view, Section 287B under which the appellant was charged with and convicted of refers to attempted armed robbery. In this sense, in his view, the charge was defective in that the

particulars of offence did not disclose the offence under which the appellant was charged. This, according to him, contravened the provisions of section 135 of the Criminal Procedure Act (CAP 20 R.E. 2002) which sets out the mode in which offences are to be charged. The Magistrate ought to have invoked the provisions of Section 129 of the above Act and refuse to admit the charge. Since the charge was incurably defective the proceedings were a nullity, Mr. Juma Ramadhani concluded, citing the High Court decision in **Republic V. Titus Petro** (1998) TLR 395 as per Lugakingira, J. (as he then was).

As stated above, this is a second appeal. Under Section 6(7)(a) of the Appellate Jurisdiction Act (CAP 141 R.E.2002) we are mandated to deal with matters of law (not including severity of sentence) but not matters of fact. Case law has however, established that we can interfere with findings of fact by the courts below where there is a misapprehension of the evidence, a miscarriage of justice or a violation of law or practice-See **DPP V. Jaffari Mfaume Kawawa** (1981) TLR 143, **Musa Mwaikunda V. R**, Criminal Appeal No. 174 of 2006 (unreported) and **Salum Bugu V. Mariam Kibwana**, Civil Appeal No. 29 of 1992 (unreported). Having said

so, we think that this is a fit case for us to interfere with the findings of fact by the courts below.

To start with, we go along with Mr. Juma Ramadhani that the charge was defective for the reasons stated by him. But that is the farthest we can agree with him. We do not agree with him that the proceedings were necessarily a nullity. We say so for reasons which we will demonstrate hereunder.

First, we have read the case of **Titus Petro** (supra). That case is distinguishable from this one. In that case the contents of the charge and the facts revealed that there was a failed partnership between the parties which could not be the subject of a criminal charge but possibly a civil proceeding where the aggrieved party had the right to sue in contract. In the instant case, there is no suggestion anywhere that the matter could have possibly been handled by way of a civil proceeding.

Second, in the justice of this case, we agree with Mr. Juma Ramadhani that the trial Magistrate could have refused to admit the charge under section 129 (supra). But since he did not do so, the ensuing proceedings were not necessarily vitiated, as suggested by Mr. Juma Ramadhani, because they were cured by the provisions of Section 388 of

actual violence to any person, commits an offence termed "attempted armed robbery" and on conviction is liable to imprisonment for a minimum period of fifteen years with or without corporal punishment.

It will be observed at once that an offence under Section 287B is termed armed robbery. The offence of attempted robbery under which the appellant was charged is not therefore created under section 287B. Notwithstanding the foregoing, we must confess that we have carefully gone through the evidence on record. Having done so, we are of the view that the evidence on record did not only fail to establish the offence of attempted armed robbery but it did not likewise prove attempted robbery. In our reading and appreciation of the evidence on record we are of the firm view that the facts and the evidence on record disclosed or established an offence under section 288 of the Penal Code which reads:-

288. Any person who assaults any other person with intent to steal anything is guilty of an offence and is liable to imprisonment for a term of not less

than five years nor more than fourteen years, with corporal punishment.

The evidence is clear that the appellant assaulted PW1 with intent to steal the mobile phones.

Therefore, in view of the position we have taken on the appeal in exercise of our revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act (CAP 141 R.E. 2002) we hereby quash the appellant's conviction of attempted robbery and set aside the sentence of fifteen years imprisonment. We convict him of the offence of Assault with intent to steal contrary to section 288 of the Penal Code. As for sentence we notice that the appellant has been in prison for about 6 years. For this reason, we sentence him to such term as will result in his immediate release from prison.

DATED at ARUSHA this 20th day of September, 2011.