IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO.276 OF 2008

JOHN CHARLES.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Sheikh, J.)

dated 6th day of August, 2008
in
Criminal Appeal No.91 of 2005

JUDGMENT OF THE COURT

28th Sept. & 5th October, 2011

NSEKELA, J.A.:

In the District Court of Arusha at Arusha, the appellant, John s/o Charles, together with one Alex s/o Wilfred were charged with and convicted of the offence of having carnal knowledge against the order of nature contrary to section 154(1) and (2) of the Penal Code as amended by section 16 of Act No. 4 of 1998. Each was sentenced to thirty (30) years imprisonment with twelve (12) strokes of the cane and their respective parents were ordered to pay to the complainant shs.200,000/=

as compensation. They unsuccessfully appealed to the High Court (Sheikh,J.) which however ordered each appellant to pay 200,000/= as compensation to the complainant and set aside the sentence of corporal punishment.

The appellant filed his notice of appeal on 11/8/2008 but Alex s/o Wilfred has not done so as at the date of hearing the appeal. Surprisingly, they filed a joint memorandum of appeal, which the appellant adopted as his own. The essence of the grounds of appeal revolved around the evaluation of the evidence, particularly that of PW1, Suzana Sumari; and PW2, Michael Nderikwa Kaaya, a ten cell leader. The complaint was to the effect that the evidence of these witnesses contained material discrepancies. It was therefore unreliable. PW1 did not know who had carnal knowledge with her against the order of nature.

The facts leading to the appellant being convicted as charged can be stated very briefly. On the 7/9/2004 at about 22.00 hours. PW1, aged seventy three (73) years, was apparently at a pombe shop. Shortly after she had left, four unknown males pounced upon her. They in turn had

carnal knowledge with her against the order of nature. She managed to raise an alarm to which PW2 responded and rushed to where the alarm had originated. He had a torch with him. Apparently near the scene of crime he saw five men who on seeing him fled. He chased them and managed to arrest the appellant. He was naked. PW2 took the appellant to where PW1 was and there was a trouser on the ground. The appellant took it. Then the appellant, and PW1 were taken to Usa Police station where she was given a PF3.

In his written submissions which he presented to the court with leave, the appellant pointed out at a number of discrepancies in the testimony of PW1 and PW2. **Firstly**, PW1 neither identified the appellant at the alleged scene of crime nor identified him while she testified during the trial; **Secondly,** PW1 testified that two people were arrested at the scene whereas PW2 testified that other people were arrested by PW3. **Thirdly**, PW1 testified that she had carnal knowledge against the order of nature with four men, whereas PW2 testified that the appellant was naked but PW1 did not say so. In addition, the appellant contended that the investigating officer was not summoned to give evidence at the trial.

Mr. Ponziano Lukosi, learned State Attorney, at the outset, supported both the conviction and sentence meted out to the appellant. He submitted that the appellant was arrested a short distance away from where PW1, was; PW2 responded to the alarm raised by PW1 and as he was approaching the scene the men he had seen ran away but after a short chase he arrested the appellant. He was taken to the scene where the appellant retrieved the trouser he had left behind. He added that the appellant was given the chance to cross-examine PW2, but he did not ask any questions. This meant that the appellant accepted the truth of PW2's evidence and the court was entitled to believe such evidence.

The cornerstone of the appellant's grounds of complaint were the alleged discrepancies in the evidence. PW1 testified that four men were involved in the commission of the offence, whereas PW2 said that he saw five men as he came nearer to the scene. Whether the number involved was five or four men is immaterial to the offence the appellant was charged with. PW2 arrested the appellant as he was fleeing from the scene, he took him to the scene where the appellant retrieved his trouser

he had left behind. What was essential was having carnal knowledge with PW1 against the order of nature and the identity of the offender. PW1 testified that she was sodomized and was candid enough to testify that she could not identify any offender. However PW2 stated in his evidence that:-

> *I found 5 men sodomizing Suzana. They ran away I chased them ... The one I caught is the first accused before this Court ... when the 1st accused had no trousers when I arrested him."*

The appellant did not challenge this piece of evidence and so the lower courts were entitled to believe and rely on it. It has often been said that one hardly comes across a witness whose evidence does not contain a grain of untruth or exaggeration, embroideries or embellishment. An attempt must be made to separate grain from cheff, truth from falsehood. (See: **Syed Ibrahim v. State of Andra Pradesh** SCR (2006) Supp 4 SCR 105). A court has to identify what are material discrepancies and what are

normal discrepancies. Normal discrepancies do not corrode the credibility of a party's case, while material discrepancies do so. The mere fact that PW2 was the only witness who arrested the appellant, that cannot be a ground to discard his evidence. In terms of section 143 of the Evidence Act, no particular number of witnesses are required for proof of any fact. Material evidence and not the number of witnesses have to be taken into account by the court to ascertain the truth of the allegations made. (See: **Yohanis Msigwa v. Republic** (1990) TLR 148.)

With respect, we have no reason to interfere with the concurrent findings of fact by the courts below that the appellant had carnal knowledge with PW1 against the order of nature. We have found no misapprehension or a violation of some principle of law or practice. (See: **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** (1981) TLR 149).

In the result, we dismiss the appeal in its entirety. It is so ordered.

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 115 OF 2008

KASSIM IDD MBAGA..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Khaday,PRM, Ext.Jur.)

dated the 21st day of December, 2007
in
Criminal Appeal No. 41 of 2007

JUDGMENT OF THE COURT

21st September & 5th October,2011

MJASIRI, J.A.

This is a second appeal from the judgment of the District Court of Moshi. The appellant Kassim Idd Mbaga @ Komandoo was charged with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code as amended by Act No.4 of 2004. He was sentenced to thirty years imprisonment. He was aggrieved by this decision and unsuccessfully

appealed to the High Court. Still dissatisfied with the decision of the High Court, the appellant has preferred this appeal to this Court.

At the hearing of the appeal, the appellant appeared in person and was unrepresented and the Respondent Republic was represented by Mr. Zakaria Elisaria, learned State Attorney.

In the night of August 24, 1997 all was not well at Kiyungi Village. The house and shop of PW2 Neema Kisavuli were raided around 2.00hurs. The appellant who was a close relative of PW2 was implicated in the robbery. He was accompanied by other people who were not known to PW2 and her children. It was the prosecution case that the appellant broke into the house of PW2 and stole the following items. Sh. 700,000, three cartons of sportsman cigarettes valued at sh. 645,000; one radio cassette Panasonic double deck valued shs. 70,000, one radio cassette Panasonic single deck valued at sh. 55,000/=. All the stolen properties were worth shs. 1,542,000/= the properties of one Musa Hussein PW3 who was the son of PW2. It was alleged by the prosecution that the appellant

used a fiream immediately before stealing in order to obtain the stolen properties.

The prosecution called seven (7) witnesses. PW2 and PW3 testified that they identified, the appellant using the light of a lamp. They stated that they knew the appellant well as he was their relative. According to them the appellant came to live with them when he came out of prison. The appellant denied any involvement in the robbery which took place on the material date.

The appellant filed seven (7) grounds of appeal which are summarized as follows:-

1. *There was non-compliance with section 99(1) of the Criminal Procedure Act. As D/SSGT Raphael was below the rank of Inspector, he was not competent to prosecute the case.*
2. *There was non-compliance with section 192(3) of the Criminal Procedure Act as the preliminary hearing was not conducted.*
3. *The appellant was not properly identified by PW2 and PW3.*

4. The conviction of the appellant was against the weight of the evidence.

Mr. Elisaria opposed the appeal. In relation to ground No.1, that is the non- compliance with section 99(1) of the Criminal Procedure Act, Cap 20 R.E. 2002 (hereinafter "the Act") he submitted that the fact that Detective Sergent (D/SSGT) Raphael did not have the rank of a police inspector did not prejudice the appellant in any way.

With regard to ground No.2 on the non-compliance with section 192(3) of the Act, on the failure to conduct a preliminary hearing, Mr. Elisaria submitted that this caused no injustice to the appellant. He relied on the case of **Joseph Munene and Another v.R** Criminal Appeal No. 109 of 2002.

On the issue of identification raised in ground No.3, Mr. Elisaria submitted that the appellant was properly identified. According to him the appellant was well known by PW2 and PW3 being a relative. He also stated that there was sufficient light. He argued that the legal principles

laid down in the case of **Waziri Amani v. R** (1980) TLR 250 were not applicable to this case. He concluded that the case against the appellant was proved beyond reasonable doubt.

The appellant in reply to the submissions raised by the learned State Attorney submitted that the circumstances leading to his identification were not favourable. The prosecution relied on the light of a lantern and a small lamp. This was not a reliable source of light.

This is a second appeal. It is settled law that very rarely does a higher appellate court interfere with concurrent findings of facts by the courts below unless there are misdirections or non directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice. See **Pandya v R** [1957] EA 336 and the **Director of Public Prosecutions v Jaffari Mfaume Kawawa** [1981] T.L.R. 149.

After reviewing the evidence on record and the submissions by the learned State Attorney and the appellant, we would like to make the

following observations. In order to convict the appellant for armed robbery the prosecution must prove that:-

1. *There was an armed robbery*
2. *It was the appellant who committed the robbery.*

Before going into the merits of the appeal we would like to address our minds to the points of law raised by the appellant.

On ground No. 1 in respect of the prosecution which was conducted by a police sergeant major, we would like to state that the law is settled on that point. In the case of **Liberati Mtende v R** [1980] T.L.R 301, CA it was stated that the said irregularity is not fatal and is curable under section 346 of the Criminal Procedure Code. Section 388 of the Criminal Procedure Act, Cap 20 R.E. 2002 is couched in similar wording with the Criminal Procedure Code. Therefore this point need not detain us.

In relation to the non-compliance with section 192(3), that is failure to conduct a preliminary hearing, we would like to state that this issue has been considered in various decisions of the Court, which has come to the

conclusion that failure to do so does not vitiate the proceedings. See **Joseph Munene and Another versus Republic**, Criminal Appeal No. 109 of 2002 C.A. (unreported).

In relation to ground No. 3 on the issue of identification, the pivotal point for consideration and decision in this case is whether the appellant was sufficiently identified as being the person who committed the robbery.

The issue of identification is very crucial in this case. The crime which the appellant was convicted of took place at 02.00hours. the premises had a kerosene lantern and lamp. The prosecution relied on the evidence of PW2 and PW3 for identifying the appellant. We need to establish whether the condition was favourable for adequate and correct identification. PW2, Neema Kisavuli and PW3 Mussa Mrisho testified that the appellant was their relative. They knew the appellant very well. The appellant had even lived with them when he came out of prison. The appellant spent quite some time at PW2's house in the course of conducting the robbery. According to the evidence of PW2 and PW3, the appellant was the one giving instructions to his accomplices. They were

found to be credible witnesses by the trial court. No cause has been shown that PW2 and PW3 have given false evidence against the appellant.

Therefore the conditions for identification in this case as gathered from the evidence on record were favourable. See **Samweli Silanga v R** [1993] T.L.R. 149 and **Rajabu Katumbo v R** 1994 T.L.R. 129.

We therefore entirely agree with the learned State Attorney that the appellant was sufficiently identified. We are fully aware that the evidence of visual identification is of the weakest kind and most unreliable. See **Waziri Amani v Republic** [1980] T.L.R. 250 and **Raymond Francis v. R** [1994] T.L.R.100.

In this case the evidence was such that there was no possibility of mistaken identity. The principles laid down in the case of **Waziri Aman v R** 1980 T.L.R. 250 are not applicable in this case.

In the event there is no reason to fault the decision of the first appellate court. The appeal is hereby dismissed in its entirety.

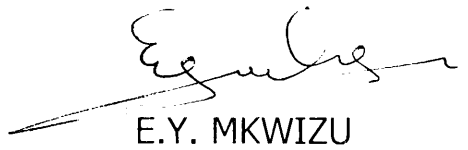
DATED at **ARUSHA** this 4th day of October, 2011.

H.R. NSEKELA
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