IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 179 OF 2008

SLAA HINTAY.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Bwana, J.)

dated 18 day of January, 2008
in
Criminal Appeal No.81 of 2005

JUDGMENT OF THE COURT

22nd & 28th September, 2011

NSEKELA, J.A.:

The appellant, Slaa Hintay was charged with and tried for the offence of armed robbery contrary to sections 285 and 286 of the Penal Code before the District Court of Hanang at Katesh. He was convicted and sentenced to thirty (30) years imprisonment. He unsuccessfully appealed to the High Court, hence this appeal.

At the hearing of the appeal, the appellant appeared in person and unrepresented. He filed three grounds of complaint against the decision of the High Court. First, that he was convicted on the strength of very weak prosecution identification evidence. Second, the prosecution did not call to give evidence, the police officer who investigated the case and third the prosecution failed to establish the case beyond all reasonable doubt. In his written submissions which he presented during the hearing of the appeal, the appellant contended that the alleged armed robbery took place at about 7.00 pm. and PW1, Sanka d/o Boay, did not state source of light which facilitated the appellant's identification, and its intensity. In addition PW1 did not state for how long the incident lasted. The appellant also contended that if, as alleged by PW2, Kajuna Safari and PW3, Juma Mussa, that they arrested the appellant being in possession of the stolen cows, why did these witnesses not take the appellant with the cows to a police station? He concluded that he was not found in possession of the said cows.

Mr. Zakaria Elisaria, learned State Attorney represented the respondent Republic. He submitted that the appellant was identified by

PW1, a close relative and it was still daylight. He added that PW2 and two other colleagues managed to arrest the appellant at Misirai village, but two of his colleagues managed to escape. The recovered stolen cows were handed over to PW1 because of the long distance to Katesh Police Station. As regards the complaint that the investigation officer was not called to testify, the learned State Attorney submitted that it was not necessary to call him.

In the course of his judgment, the learned judge on first appeal had this to say:-

> *"Having examined the trial court record and evidence given, it is apparent that the prosecution case was proved to the required standard beyond reasonable doubt. First, is the issue of identification. It is the uncontroverted evidence of PW1 that she identified the appellant as one of her attackers. The two knew each other and are related. There was still daylight when the robbery took place. PWs 2 and 3-both neighbours of PW1, did clearly identify the appellant as one of the*

three people they found with the cattle at Misirai village, some days later. They managed to arrest him while the other two managed to escape arrest. PW1's evidence was therefore clearly corroborated by the evidence of PWs 2 and 3. Therefore, the appellant was identified and arrested in the company of the stolen eight heads of cattle, goats and sheep. I see no reason to differ with the findings of the trial court on this issue."

It is evident that the appellant's conviction was founded on the strength of identification evidence at PW1's homestead and later on after escaping with his colleagues, he was found with the alleged stolen cows, and therefore he was presumed to be the actual thief. It is said that PW1 identified the appellant at his homestead. This is disputed by the appellant. PW1 testified that it was daylight at the time, but the time given in her testimony is 7.00pm. We cannot say with certainty that it was daylight at that time PW2 does not mention the time, but PW3 also says it was 7.00pm. The other factor to take into consideration is that the appellant, was neighbour of PW1 and PW2. They knew each other.

However, there are other considerations to consider. After PW1 had been attacked by bandits, the appellant being one of them, she raised an alarm to which people responded. For one reason or another PW1 did not mention appellant to these neighbours who had responded to the alarm. After this, they started to look for the stolen cows following hoof steps. PW1 reported the theft at Endasalk Police station, but did not mention that one of the bandits was the appellant. Hence they continued looking for hoof steps instead of the appellant who was known to PW1. They eventually reached at Katesh Police station where PW1 was informed that his cattle had been retrieved on the border with Kondoa District. At this point as well, PW1 did not mention the appellant as one of the bandits who had forcibly stolen his cows. Strangely enough, PW1 did not go where the cattle had been found but returned to his home village, Sirop, where he found the stolen cattle had been sent back. Many neighbours apparently responded to PW1's original alarm, why did PW1 fail to name the appellant who was known to him at that point? Why not at Endakash Police station; or Katesh Police station? This casts serious doubts on the credibility and reliability of PW1. We come to the source of light. The time of the alleged robbery was given by PW1 and PW2 to be 7.00pm. It was said this was

daylight! How bright was it ? How long did the bandits stay? All these questions needed answers but the record is silent. It is not enough to say that there was light at the scene of crime, hence the overriding need to give sufficient details on the source of light and its intensity (see: Criminal Appeal No. 37 of 2005 **Issa s/o Mgara @ Shoka v The Republic** (unreported.)

With respect, upon an analysis of the evidence on the record, we have come to a different conclusion from that reached by the lower courts. We have found no sufficient evidence to establish that the appellant was properly identified at the scene of crime. We are fully aware that a higher appellate court rarely interferes with concurrent findings of fact by the courts below. This Court had occasion to consider this principle in the case of **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981]TLR 149 where the Court stated as follows at page 153:-

> *"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 fact. This is a second appeal brought under the provisions of section 5(7) of the Appellate Jurisdiction Act, 1976. 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 of second appeai is entitled to look at the relevant evidence and make its own findings of fact."*** *(emphasis added)*

One of the issues before the lower courts was the identification of the appellant as one of the perpetrators of the armed robbery at PW1's residence. Our examination of the evidence has demonstrated that the evidence was far from satisfactory to sustain the conviction of the appellant, hence our interference, with their conclusions. With respect, we would allow the appeal on this ground alone. However, we propose to deal with another aspect of the case.

The case against the appellant depends in part on the identification evidence of the cows and goats found in possession of the appellant. The evidence regarding armed robbery was not conclusive. It was alleged by PW1 that the appellant was one of the bandits who perpetrated the armed robbery at his residence. We have already found that the evidence of identification by PW1 at the scene of the crime was insufficient. However PW2 and PW3 testified that after a search had been mounted, the appellant was found with the stolen cows belonging to PW1. He was arrested, but other bandits managed to escape. PW2 testified that three of the eight cows were black; one had a white spot on the back; one was red and another one was grey. Those were the identifying marks that enabled PW2 to testify that the cows belonged to PW1. Significantly, PW1 in her testimony did not mention any identifying marks of her stolen cows. Under the circumstances we have found it extremely difficult to link up the appellant with the offence of armed robbery. Can it be conclusively said that the cows were stolen during the armed robbery? The circumstances in which the doctrine of recent possession can be invoked were considered by

the Court of Appeal for East Africa in the case of **Rex v. Bakari s/o Abdalla** (1949) 16 EACA 84 where it was stated as follows:-

> *"That cases often arise in which possession by an accused person of property proved to have been very recently stolen have been held not only to support a presumption of burglary or of breaking and entering but murder as well, and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal."*

In the instant case there is no link that the cows belonged to PW1 and were stolen as a consequence of an armed robbery at her homestead. This is a criminal case and any doubts have to be resolved in favour of the appellant.

In the event, the appeal is allowed; conviction quashed and sentence set aside. The appellant is to be released forthwith from custody unless otherwise lawfully detained.

It is so ordered.

DATED at ARUSHA this 27th day of September, 2011.

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
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

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 attemped 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.

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO.292 OF 2008

QAITI HAWAI
KILIMANJARO HERIA }.....**APPELLANTS**

VERSUS

THE REPUBLIC.....**RESPONDENT**

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

(Sambo, J.)

Dated 31st day of July, 2008
in
Criminal Appeal No. 129 of 2006

JUDGMENT OF THE COURT

6TH & 10TH October, 2011

MSOFFE, J.A.:

Before the Resident Magistrate's Court of Arusha the appellants QAITI HAWAI and KILIMANJARO HERIA together with one PHILEMON STELI appeared to answer a charge of Gang Rape contrary to Section 131A and 2 of the Penal Code, as amended. After a full trial the appellants were convicted as charged whereas the said Philemon Steli was acquitted. Consequently they were sentenced to life imprisonment. The appellants preferred a first appeal to the High Court at Arusha where they were unsuccessful, hence this second appeal.

The first appellant filed a six point memorandum of appeal while the second appellant had a memorandum of appeal with one ground of complaint. At the hearing of the appeal the appellants came up with "joint additional grounds of appeal".

In view of the position we have taken on the appeal we will not discuss the evidence leading to the conviction in question. In similar vein, we will not address the first appellant's grounds of appeal and the appellants' joint additional grounds of appeal. Rather, we will address the sole ground raised by the second appellant in his memorandum of appeal.

In brief, the second appellant's complaint is that he was not afforded a fair trial because the proceedings were conducted in a language he is not proficient with. The proceedings were conducted in Swahili and he was not afforded the services of an interpreter conversant with both Swahili and his native Iraqw language. In his view, the fact that this happened explains the fact that he could not even cross - examine the witnesses.

Admittedly, the above point was not raised before the High Court in the first appeal. However, since the point is fundamental and touches the

trial as a whole we have deemed it fit and proper to address it in this second appeal.

Before us the appellants appeared in person(s), unrepresented. The respondent Republic had the services of Mr. Ponsiano Lukosi, learned Senior State Attorney.

At first Mr. Lukosi was of the view that the second appellant knew some Swahili and that was why he defended himself as the record of proceedings dated 14/2/2006 shows. On reflection however, he was of the view that in the interests of justice a retrial could be ordered.

A look at the record of proceedings will show that throughout the prosecution case the second appellant did not intimate to the trial court that he was not conversant with Swahili. It was at the defence stage when he revealed this fact. On 31/1/2006 when he was asked to defend himself he said:-

I am not ready. I am not conversant with Swahili.

Thereafter, the prosecutor responded as follows:-

It is better to adjourn in order to give a chance for 2nd accused to find interpreter.

The above exchange of words was followed by an Order from the court thus:-

> *ORDER: Defence hearing on 14/2/2006. The matter is adjourned in order to give a chance for 2nd accused to find interpreter. Accused further remanded in custody.*

When the proceedings were resumed on 14/2/2006 the issue of an interpreter was never taken up again either by the prosecutor or the second appellant. Instead, the second appellant was allowed by the court to defend himself presumably in the manner described above by Mr. Lukosi.

In our view, it is probably true, as earlier intimated by Mr. Lukosi, that the second appellant is conversant with a bit of Swahili and that was why he defended himself on the above date. However, that will be far from saying that he was fully conversant with the language as to be able to understand and appreciate everything that was going on at the trial. Indeed, his lack of proficiency in the language is probably also explained by the fact that throughout the trial he did not cross-examine any witness. In fact, we may as well say here that even when he appeared before us he had to address us through an interpreter. In the premise, we think it is

safe to give the second appellant the benefit of doubt and hold that he is not versed with the Swahili language.

In the light of the foregoing, we are of the view that it will not be easy to say with utmost certainty that the second appellant was given a fair trial. In this sense, we go along with Mr. Lukosi that the best way out will be to order a retrial. In saying so, we are aware that the first appellant is not covered by the complaint raised by the second appellant. However, the effect of our decision touches the first appellant as well because by its nature the charge of gang rape involves more than one person. In this regard, the first appellant too has to go through the process of a retrial.

For the above reason, we hereby allow the appeal and accordingly declare a nullity the proceedings before the trial court and the High Court in respect of the appellants. There will be a retrial before the trial court encompassing the two appellants. We make no order relating to the said PHILEMONI STELI because following his acquittal there was no appeal by the Director of Public Prosecutions to the High Court. As it is therefore, there is nothing before us relating to the said Philemon Steli. We will only add here one point for the benefit of the trial court that at the resumed hearing or retrial it will be upon the court to look for an interpreter.

Ordinarily it is the duty of the court to look for an interpreter; it is not for an accused person to do so as the trial court appears to have thought vide its Order dated 31/1/2006 *(supra).*

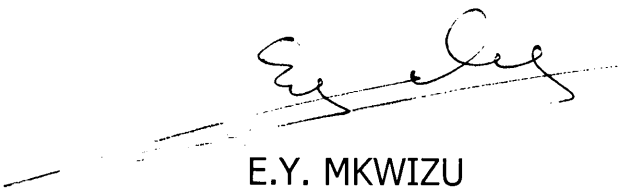
DATED at ARUSHA this 7th day of October, 2011.

H.R. NSEKELA
JUSTICE OF APPEAL

J.H. MSOFFE
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL