IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

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

CRIMINAL APPEAL NO. 168 OF 2009

ATUFIGWEGE DANKEN MWANGOMALE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

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

(Lukelelwa, J.)

dated the 18th day of August, 2008
in
(DC) Criminal Appeal No. 14 of 2008

JUDGMENT OF THE COURT

16 & 22 June, 2011

RUTAKANGWA, J.A.:

The appellant was arraigned before the District Court of Rungwe at Tukuyu for the offence of Armed Robbery. He denied the charge. After a full trial, he was found guilty as charged, convicted, and sentenced to thirty years imprisonment. He was also ordered to pay Tshs. 90,000/, being the value of the robbed bicycle as compensation. His appeal against the conviction and sentences to the High Court sitting at Mbeya, was dismissed. Still protesting his innocence he has lodged this appeal.

This is, therefore, a second appeal. In that case, in terms of section 6(7) (a) of the Appellate Jurisdiction Act, Cap 141, R.E. 2002, the

appellant's right of appeal to this Court is strictly confined to matters of law only and not facts. All the same, settled law empowers the Court to interfere with concurrent findings of fact of the two courts below in very rare and circumscribed circumstances. This is all because, as this Court aptly held in the case of **FELIX KICHELE AND EMMANUEL TIENY@ MARWA V. R.,** Criminal Appeal No. 159 of 2005 (unreported):-

> "It is an accepted practice that a second appellate court should very sparingly depart from concurrent findings of fact by the trial court and the first appellate court. Indeed, **there is a presumption that disputes on facts are supposed to have been resolved and settled by the time a case leaves the High Court**..."[Emphasis is ours].

See also, **EMILIAN AIDAN FUNGO @ALEX & ANOTHER V. R.**, Criminal Appeal No. 278 of 2008 (unreported).

This Court is enjoined to interfere to reverse the concurrent findings of facts only when:-

> "...they are on the face of it, unreasonable or perverse. Such a situation can occur when it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or a violation of some principle of law or practice..." **DANIEL NGURU & FOUR OTHERS v. R.,** Criminal Appeal No. 178 of 2004 (unreported) cited and followed in **RICHARD MGEYA @ SIKUBALI MGAYA v. R.** Criminal Appeal No. 335 of 2008 (unreported), among others.

In the determination of this appeal, therefore, we shall be guided by this established principle of law.

The appellant's memorandum of appeal lists seven grounds of complaint against the decision of the High Court. Stripped of details and in simple terms, the gravamen of his grievances is that the prosecution failed to prove its case beyond reasonable doubt and the defence case was not considered at all by the two courts below.

Before canvassing these grievances and the respondent Republic's response to them we shall start with a brief factual background to the case. It was as follows:-

The victim of the alleged armed robbery was one Ungasyege Mwangomale (PW1). PW1 Ungasyege, Angindile Mwangomale (PW2) and the appellant are siblings. On the morning of 19th December, 2006, PW2 Angindile had borrowed PW1 Ungasyege's bicycle. At about 1.00 P.M, on the same day as PW2 Angindile was about to hand back the said bicycle to PW1 Ungasyege, they were allegedly interrupted by the appellant, who was carrying a "panga" (machete). He requested them to let the bicycle go which they did. He then left with the bicycle. The incident was said to have been witnessed by Salum W. Mwaitumule (PW3), Beneth Mbije (PW4) and Clavery J. Mwasyela (PW5). A report of the incident made to Laston Mwatumle (PW6) the area's chairperson, was to the effect that the appellant had "wanted to rob the bicycle". The appellant was arrested on 17th July, 2007 and first formally arraigned in court on 19th September, 2007; exactly nine months later.

In his sworn evidence, the appellant denied committing the offence. To him, the charge against him was fabricated for reasons best known by his accusers.

The learned trial District Magistrate rejected the defence explanation. The appellant had not given any reason as to why the five key prosecution witnesses (PW1-PW5) would have fabricated the case against him, she reasoned. Bearing in mind that the appellant was well known to the five witnesses and the time of the day when the offence was allegedly committed, she was of the firm finding that the appellant committed the offence. She was upheld by the learned first appellate judge.

The appellant appeared before us in person. He had nothing to tell us in elaboration of his grounds of appeal.

The respondent Republic was represented by Mr. Prosper Rwegerera, learned State Attorney, who declined to support the appellant's conviction. He had two reasons. **One,** the appellant's conviction was based on an incurably defective charge. **Two,** the prosecution evidence was patently wanting in cogency. It left much to be desired as no evidence was led to satisfactorily prove that a machete was used in the commission of the

alleged armed robbery, he said. He accordingly pressed us to allow this appeal.

In disposing of this appeal, we have found it convenient to start with the issue of the charge the appellant was facing in the trial District Court. The appellant was charged with "Armed Robbery c/s 287(A) of the Penal Code". The particulars of the charge read as follows:-

> "ATUFUGWEGE s/o DANKENI MWANGOMALE charged on the 19th day of December, 2006 at about 13.00 hrs at Bujesi village within Rungwe District in Mbeya Region did steal one bicycle make Eagle valued at Tshs. 90,000/= the property of one UNGASYEGE s/o MWANGOMALE and immediately before or immediately after such stealing did use machete (panga) in order to obtain or detain (sic) the said property".

We believe that it will be immediately appreciated that this charge of armed robbery was patently defective. The offence of armed robbery is defined as follows in section 287 A of the Penal Code:-

> "Any person who steals anything and, at or immediately before or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument or is in company of one or more persons, and at or immediately before or immediately after the time of the stealing uses or threatens to use actual violence to any person commits an offence termed "armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment.

From the above definition it is crystal clear that for an offence of armed robbery to be said to have been committed, there must be stealing coupled with the use of violence or a threat to use actual violence on any person and the offender must be armed with a dangerous or offensive weapon.

It is a mandatory requirement of the law that every charge shall contain not only a statement of the specific offence with which an accused is

charged **but also such particulars as may be necessary for giving reasonable information as to the nature of the offence charged:** See, section 132 of the Criminal Procedure Act, Cap 20 R.E. 2002. The rationale for this requirement, was stated with sufficient lucidity by this Court in its two recent decisions. These were in the cases of:

(a) **MUSA MWAIKUNDA V R.** Criminal Appeal no. 174 of 2006, and

(b) **ISIDORE PATRICCE V. R.,** Criminal Appeal No. 224 of 2007 (both unreported).

In **MWAIKUNDA's** case (supra), the Court said that the *"principle has always been that an accused person must know the nature of the case facing him."* This can only be achieved if the preferred charge discloses the essential elements of offence charged, the Court observed before quashing the appellant's conviction. The particulars of the charge under s. 132(1) and (2) (a) of the Penal Code omitted the words *"with intent to procure prohibited sexual intercourse threatened ... for sexual purposes".* This reasoning was adopted by the Court in the case **PATRICE ISIDORE** (*supra*). Advancing this reasoning farther, the Court said:-

> "...Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege the essential facts of the offence and any intent specifically required by law. We take it as settled law also that where the definition of the offence charged specifies factual circumstances without which the offence cannot be committed they must be included in the particulars of the charge."

It is on the basis of the above reasoning that we have found ourselves in full agreement with the contention of Mr. Rwegerera that the charge preferred against the appellant was totally defective. The charge did not allude to one of the essential ingredients of armed robbery. This is the ingredient of use of violence or threatening to use violence on PW1 Ungasyege in order to obtain or retain the alleged stolen bicycle. This omission greatly prejudiced the appellant as he could not cross-examine prosecution witnesses on this aspect of the case. He only confined himself to the ingredient of theft, as we have gathered from the record. This was

understandable. This was the only offence revealed by the particulars of the charge.

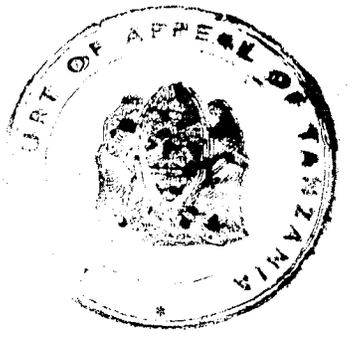
Our dispassionate study of the evidence on record has led us to the conclusion that the defect in the charge was not remedied by the evidence proffered by the five prosecution witnesses. No clear evidence was given by them to indicate that the appellant used or threatened to use actual violence on PW1 Ungasyege, at or immediately after the alleged stealing. The prosecution case was further weakened by the evidence of PW6 Mwatumle to whom the first report of the alleged robbery was made. According this witness, PW1 Ungasyege and his colleagues reported to him that the appellant had "wanted to rob the bicycle". This piece of discrediting evidence, unfortunately, was not considered by the courts below in their determination of the case. We are left wondering whether or not they would have arrived at the same verdict had they considered these deficiencies in the charge and the prosecution evidence.

For the foregoing reasons we are constrained to hold that the defect in the charge greatly prejudiced the appellant and occasioned a failure of justice as a result.

All things being equal we would have been prepared to quash the conviction for armed robbery and substituted therefor a conviction for simple theft. Because of the apparent deficiencies in the prosecution case we are not inclined to do so. This is because we are a shade unsure on whether or not the appellant committed this offence too. He is accordingly entitled to this benefit of doubt.

All said and done, we hereby allow the appeal in its entirety. The conviction for armed robbery and the sentence of imprisonment and compensation order are hereby quashed and set aside. The appellant is to be released from prison forthwith unless he is otherwise lawfully held.

DATED at **MBEYA** this 18th day of June, 2011.



E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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

P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL