

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MSOFFE, J.A., LUANDA, J.A., And MANDIA, J.A.)

CRIMINAL APPEAL NO. 321 "A" OF 2009

KARIM SADRUN @ MOHAMEDAL APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania
at Tanga)**

(Mussa, J.)

dated the 30th day of January, 2009

in

Criminal Appeal No. 14 of 2008

JUDGMENT OF THE COURT

4 & 8 April, 2011

LUANDA, J.A.:

The appellant KARIM s/o SADRUN @ MOHAMEDAL and YUNUS s/o ABUU were jointly and together charged with armed robbery contrary to sections 283 and 286 of the Penal Code, Cap. 16. At the close of the prosecution case, YUNUS was acquitted as he had no case to answer; whereas the appellant was found to have a case to answer. The appellant

gave his defence. At the end of the trial, he was convicted and sentenced to thirty (30) years imprisonment and 12 strokes of the cane.

The appellant was dissatisfied with the finding of the trial court, he unsuccessfully appealed to the High Court. Still aggrieved, he has come to this Court of Appeal.

In this appeal, the appellant had the services of Mr. Juma Nassoro learned counsel; whereas the respondent/Republic was represented by Mr. Faraja Nchimbi. Mr. Faraja Nchimbi supported the conviction and sentence.

In the memorandum of appeal, Mr. Nassoro raised three grounds. However, having read the grounds raised, we are of the settled view that all the three grounds can be condensed into one ground that is the evidence was insufficient, the prosecution did not prove its case beyond reasonable doubt.

Briefly the prosecution case was this:- Zuwena Ally (PW1) a businesswoman and resident of Chumbageni, Tanga Municipality was once married to Yunus s/o Abuu (the one acquitted). The two divorced. Under the said circumstances, she knew Yunus very well.

As regards to the appellant, PW1 said he was their friend. After the breakdown of the marriage, PW1 happened to get a lover one Nassir Ahmed (PW5) a businessman from Zanzibar.

On 19/9/2003 during day time PW1 and PW5 rented a room at In by the Sea Hotel within Tanga Municipality. The appellant knew they would be in that hotel through PW1 whom they met on the same day somewhere within Tanga Municipality before. However, the evidence on the prosecution was not forthcoming as to why the appellant went to meet PW1 and PW5. Be that as it may, it is on record that the appellant is reported to have gone there even before the two had arrived. Then he went for the second time. This time he was lucky. He met them. PW1 alone talked to the appellant. What they talked, PW1 did not disclose. However, whatever the position PW1 then requested the appellant to bring her of obile phone charger from her homestead. The appellant left.

On coming back, the appellant was accompanied with three other people who were armed with pistols and a knife. Among those three, Yunus was one of them. It is the prosecution case that the two were

roughed up, beaten, threatened etc. Later PW5 cheated death as the bullet fired missed him. Money and a bag were taken. The bag was later recovered; the assailants dropped it down. The matter was reported to police and eventually the appellant was charged.

In his defence the appellant raised an alibi. The court rejected it and convicted him.

There is no doubt that the case depends wholly on credibility of witnesses. Both lower courts were satisfied that the witnesses were credible and truthful.

Mr. Nassoro submitted that the evidence of PW1 and PW5 contain a number of contradictions. For instance he said PW1 said the bandits had two pistols; when PW5 said one. There is also contradiction as to where the gun shot was fired. PW2 said in the room; whereas PW1 and PW5 said outside. In view of the contradictions, Mr. Nassoro said that it is doubtful whether really robbery was committed.

Mr. Nchimbi on the other hand submitted that pieces of the evidence of PW1, PW2 and PW5 were strong enough to ground a conviction. He said the incident occurred at day time; the appellant was familiar to witnesses (PW1 and PW5) and the incident took some time.

This is a second appeal. We are alive to a well known principle of law that the second appellate Court will rarely interfere with the concurrent findings of fact by the Courts below. But the second appellate court will interfere if it is shown on the record that there are misdirections or non-directions on the evidence (See **The DPP v Jaffari Mfaume Kawawa [1981]** TLR 149).

We wish to point out from the outset that prosecution case contains a number of contradictions and lack of coherence as we shall discuss here under. To start with the evidence of PW1 and PW5. PW1 said, we reproduce:

"The first accused [appellant] was the one who beat me, he also took my mobile, my chain and thereafter they all run away. When they got out, we tried to chase them they dropped the

bag and fired a bullet, they tried to fire to my paramour unfortunately was not injured, we collected the bag and then went to report the incidence at Chumbageni Police Station. Between the two accused persons in the dock it's only the first accused that came to our room."

PW5 on the other hand said:-

"I was shocked to hear a hard knock on the door, Zuwena opened the door then Karim entered inside, so I continued with my rest on the bed after some three minutes other three persons whom I did not know entered inside, they were carrying a hybur paper bag they took a pistol from that bag and pressed it on my neck, the other pointed another pistol to me and third was armed with a long knife, Karim had nothing but the master of the whole operation. He ordered his colleague to beat and

troll me and they ordered me to give them money."

According to PW1 it was the appellant only who entered their room. By necessary implication the rest were outside. If they were outside how did they beat PW5, because PW5 said the appellant ordered his colleagues to beat him. Further if we go along with PW5 evidence at what time did the appellant beat PW1 if what PW5 had said was true that the appellant was ordering his colleagues to beat him. PW5 did not say when the appellant said so he was also beating PW1! Further, if really what PW5 had said was true about the pistol to have been wrapped in a paper bag, we failed to comprehend why PW1 fail to see and say so if the two were inside?

As regards to the evidence of PW2, we also find his evidence not credible. In his evidence in chief he said:-

"We first heard a gun fire from room No. 209 (sic), we got out and saw our guest coming out running but had only towel and was running towards the swimming club. We had a rescue

him by chasing the bandits ran away. I managed to identify Karim we did not manage to arrest them. Those bandits dropped one bag we recovered it and returned to its owner."

First, PW2 did not say the place he was when he heard the gun fire. He did not say the distance from the place he was to room no. 206. If he really saw the bandits, why did he fail to disclose their number? Furthermore, PW2 testified that they were a number of people. This is because, he used "We" and that PW5 wore a towel.

But PW5 said, we quote:-

"I had to chase them while naked while yelling out for help. One to this I got a help from passersby who joined me in chasing the bandits, one of the bandits turned back and fired against me ..."

We don't think PW5 could not be able to identify PW2, a guest house attendant if really he was also around. PW5 again differed with PW2 as to

the time the gun shot was fired. To crown it all, in the absence of a spent cartridge further raised doubt whether really robbery was committed.

In sum we find the appeal has merit. The conviction is quashed and sentence set aside. The appellant is to be released from prison forthwith unless he is detained in connection with other lawful cause.

DATED at TANGA this 8th day of April, 2011.

J. H. MSOFFE

JUSTICE OF APPEAL

B. M. LUANDA

JUSTICE OF APPEAL

W. S. MANDIA

JUSTICE OF APPEAL



I certify that this is a true copy of the original

E. Y. MKWIZU

DEPUTY REGISTRAR
COURT OF APPEAL