IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: OTHMAN, C.J., MBAROUK,J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 107 OF 2012

BETWEEN

BAKIRI SAIDI MAHURU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Lila, J.)

dated 1st December, 2009

in
Criminal Appeal No. 18 of 2009

JUDGMENT OF THE COURT

14th & 25th JUNE, 2012

OTHMAN, C.J.:

The appellant, Bakiri s/o Mahuru, aged sixteen years at the time of the commission of the offence was charged with and convicted by the District Court of Liwale of armed robbery c/s 287A of the Penal Code, Cap 16 R.E. 2002, as amended by Act No 4 of 2004. He was sentenced to thirty

years imprisonment. His appeal to the High Court (Lila, J.) was unsuccessful. Hence this second appeal.

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic, which resisted the appeal was represented by Mr. Peter Ndjike, learned Senior State Attorney.

The facts giving rise to this appeal are fairly straight forward. PW1 (Ingwaje Saidi) a standard V student at Kawawa Primary School testified on oath after a short, but proper *voire dire* examination under section 127 (2) of the Evidence Act, Cap 6 R.E. 2002 that on 3/08/2008 at 14:00 hrs while going to the shamba on a phoenix bicycle (Exhibit P.1), he met the appellant who greeted him and demanded that he leaves the bicycle. PW1 did not know him and the bicycle was not his. When PW1 refused, the appellant threatened to kill him with a "panga" (Exhibit P.2). He took the bicycle.

PW1 immediately reported the incident to PW2 (Saidi Njonjo), the Chairman of Naluleo Village. On the basis PW1's description of the assailant's facial appearance and attire, PW2 thought it must have been the appellant. On 4/08/2008, he ordered PW3 (Yasin Kandile), a militiaman to

arrest the appellant. PW2 and PW3 found the appellant with the bicycle (Exhibit P.1) at the house of Habakuku Mahuru (PW4) his brother. It was positively identified by PW.1. Earlier, when the appellant brought the bicycle to PW1's house, he informed him that he had borrowed it from a friend.

In his defence, the appellant who told the court that his age was sixteen years denied involvement. His version of the event was that, he had met the appellant whom he knew him before, but did not know his home area. PW1 had lent him the bicycle (Exhibit P1) so that he could collect maize. He was to return it to him thereafter.

The appellant's memorandum of appeal essentially contains three complaints. **First,** the identification by PW1, the sole eye witness, was unsafe. He had failed to describe the assailant's identity, such as his appearance, colour, height and any particular mark in detail to PW2. **Second,** the appellant faulted the lower courts findings that PW1 was a truthful and reliable witness. **Third**, he challenged that he was not found red-handed with the bicycle (Exhibit P.1). Rather, it was found in PW4's house, of which he was not the owner.

Before us the appellant submitted that he had temporarily borrowed the bicycle (Exhibit P.1) from PW1 whom he knew and who had agreed. That PW4 testified adversely against him as he had a personal conflict with him over the sale of a shamba. The "panga" (Exhibit P.2) belonged to PW3.

Opposed, Mr. Ndjike submitted that, the appellant was properly identified as the incident took place on 3/8/2008 at 14:00 hrs. However, he conceded that while PW1 described the appellant's appearance and attire to PW2, during PW1's testimony in court, he should have been led by the Prosecutor in examination-in-chief to provide details of those particulars. Mr. Ndjike pointed out that, the appellant himself did not deny having met PW1. That the court's below were entitled to hold that the appellant was correctly identified.

With regard to the credibly of PW1, Mr Ndjike submitted that PW1's evidence was tested by the courts below. It contained no contradictions. There was no need for the Court to visit it again.

On possession of the stolen bicycle (Exhibit P.1), Mr. Ndjike submitted that PW1 positively identified it. A fact which the appellant never disputed. He urged the Court to dismiss the appeal.

On our part, considering the whole evidence and the law on identification as contained in **Waziri Amani V.R**. (1980) T.L.R. 250 and **Igola Iguna and Noni @ Dindai Mabina V. Republic**, Criminal Appeal No. 34 of 2001 (CAT) (unreported), the appellant's identification by PW1 at the incident cannot be debated. They met at 14:00 hrs, day time. Greetings, a conversation and a confrontation ensued. PW1 immediately informed PW2 the appellant's facial appearance and attire, which enabled his speedy detection by PW3 and PW4. The appellant himself did not dispute meeting PW1. With the conditions of identification highly favourable and the possibilities of mistake identification eliminated, the High Court was correct to find that the appellant was properly identified by PW1. With respect, we find no merit in this complaint.

Dealing next with the challenge on PW1's credibility, this is what the High Court reasoned and found:

> *"PW1 stated, in this evidence, that he met the appellant holding the Panga (machete) by his hand and threatened to kill him if he does not give up the bicycle. The appellant, for his part, stated that he borrowed the bicycle from PW1 for carrying maize on agreement that he would return it. There was therefore the word of the appellant against that of PW1 on what happened at the scene of crime. As to who was*

telling the truth was a matter solely depending on credibility. That was the monopoly of the trial court which had the opportunity to see them testifying and assess their respective demeanor in court. The trial court believed PW1 to be truthful and reliable. His evidences as I see it on record, is not only clear but also consistent such that I don't see why I should interfere with the trial court finding of fact regarding his credibility. I find him truthful and a reliable witness. The appellant's defence that PW1 borrowed him a bicycle is, in the circumstances, highly improbable. PW1's testimony is corroborated by PW2, PW3, and PW4. It also does not occur to me that the appellant knew well PW1 for he could not tell where PW1 resides. I therefore take the word of PW1 to be the truthful one that he never knew the appellant prior to that incident. There was no possibility that PW1 could borrow the appellant his bicycle. There was no reason and I see no reason why he (PW1) would concoct an untrue story against the appellant."

Again, having regard to the totally of the evidence, we see no reason to fault or interfere with the lower courts assessment of PW1's evidence and its credibility. As stated by the court in **Omary Ahmed V.R. (1983)** TLR 32 (CAT):

> *"The trial Court's finding as to credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which case for a reasement of credibility". (see also,* ***Jacob Tibi Funga*** *V.R.(1982) TLR 125;* ***Antonio Dias Caldeira V Frederick Augustus Gray*** *(1936) 1 ALL ER 540).*

The third ground of complaint is on possession of the bicycle (Exhibit P.1). The trial court opined:

> *"If PW1 had given the bicycle to the accd with consent, he could have told the court that he knows him well. It was not possible for PW1a boy aged 14 yrs to given the bicycle to the accd with consent while he did not know him well, and the bicycle not his own but that of his grand mother. PW1 could not give the bicycle to the accd with consent after he was sent to collect maize at the shamba by his grand mother".*

The evidence of PW1 and PW3 was cogent that the appellant was found in possession of the bicycle (Exhibit P.1), stolen. This was corroborated by PW4 as the appellant had arrived with it at his brother's house. The bicycle (Exhibit P.1) was positively identified by PW.1. With respect, this ground has no merit.

Before concluding, one matter that has caused us some anxiety is the mandatory sentence of thirty years imprisonment levied against the appellant, a first offender and sixteen (16) years of age at the time of the commission of the offence.

Directing himself on that issue, the learned Judge, first, found out that as the appellant had indicated that he was sixteen years old, he was boundly what he told the trial court. Second, that under the Children and Young Persons Act, Cap 13 R.E. 2002 (hereinafter referred to as the Act) then applicable, he was neither a child nor an adult. He elaborated that under section 2 of the Act, a "child" is defined as "a person under the age

of twelve years" and a young person is said to comprise "a person who is under twelve years of age or more but *under* the age of sixteen years". The learned Judge reasoned that as the appellant was sixteen years at the he gave his defence on 16/10/2008) (i.e the same year the offence was committed - 3/8/2008) he was under the law an adult and his age at that time was of no assistance in mitigating the sentence or his treatment under the law.

Section 22 of the Children and Young Persons Act, then applicable, provides:

> *"'22(1) No child shall be sentenced to imprisonment.*
>
> *(2) No young person shall be sentenced to imprisonment unless the court considers that none of the other methods in which the case may be legally dealt with by the provisions of this Act or any other law is suitable".*

As correctly found by the learned Judge, taking the appellant's age as stated by the appellant at the trial court, it stands to be deemed sixteen years. He could not, therefore, squarely fall within the compass of the above Act, in particular section 22 governing imprisonment for a child or a young person. Accodingly, the full rigour of section 286 of the Penal Code, that is, the mandatory minimum sentence of thirty years imprisonment had to apply.

We are well aware that the Children and Young Persons Act was repealed by section 160(1)(d) of the Law of the Child Act, No. 21 of 2009, which came into effect on 1/04/2010, G.N. No. 156 of 2010. Thereunder, section 4(1) provides:

> *"4(1) A person below the age of eighteen years shall be known as a child".*
>
> *Section 119(1) dealing with alternative sentence reads:*
>
> *"119(1) "A child shall not be sentenced to imprisonment".*

On one hand, had the appellant been *under* sixteen he would have been covered under the repealed Act. On the other side, if his situation existed now, it would have been governed under the Law of the Child Act. But we know that in law it cannot, as the events intervened before the coming into effect of the new Act. We raise this as a matter of fairness and justice, much as the Courts hands are tied by the law.

The appellant was a first offender and with the mandatory minimum sentence of thirty years imprisonment imposed at the age of sixteen years, it would seem to us that he may effectively be deprived of opportunities for rehabilitation and reintegration that the alternative sentencing regime for a child or a young person offers. At this stage, the

mandate is that of the Prison and other appropriate Authorities whose attention we hereby draw.

In the result and for all the above reasons, the appeal without merit is hereby dismissed.

DATED at **MTWARA** this day of 22nd June, 2012.

M. C. OTHMAN
CHIEF JUSTICE

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

MBUYA R. M.
DEPUTY REGISTRAR