

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 13 OF 2010

BETWEEN

DICKSON MALEKELA..... APPELLANT

AND

THE REPUBLIC.....RESPONDENT

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

(Rwakibarila, J.)

dated the 21st day of August, 2009

in

Criminal Appeal No.169 of 2007

JUDGMENT OF THE COURT

1st & 4th June, 2012

KILEO, J. A.

On 13/7/2006 the appellant Dickson Malekela was charged with, and subsequently convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 (R.E. 2002) as amended by Act No. 4 of 2004 in the District Court of Musoma sitting at Musoma in Criminal case No. 270 of 2006. The robbery was alleged to have taken place along Lake Victoria on the night of 29th of June 2006. Following his conviction the appellant was sentenced to 30 years imprisonment. Aggrieved, he

appealed to the High Court of Tanzania sitting at Mwanza in Criminal Appeal No. 169 of 2007. He lost his appeal in the High Court hence this second appeal.

The High Court sustained conviction of the appellant on the application of the doctrine of recent possession.

It was the case for the prosecution that while PW2 and PW3 who were employed by PW1 as fishermen were out fishing they were invaded by four bandits who robbed them of their employer's boat engine. The incident is alleged to have taken place at around midnight, a time when the witnesses were taking their rest. Although the two witnesses claimed to have identified the appellant as one of two bandits who had got into their boat, untying the engine and making away with it, the evidence of identification was discarded by the first appellate judge. The prosecution further alleged that on 11/7/2006 the appellant was found in possession of the boat engine which was robbed from PW2 and PW3 on 29/6/2006. The evidence leading to the arrest of the appellant was given by PW4 who allegedly posed as a buyer of the engine. It also transpired through the prosecution

evidence that the engine in question originally belonged to one Michael Nyekumbara (PW6) who had allegedly sold it to Donald Ndongo. The appellant insisted on his innocence from the very beginning maintaining that the case was framed against him as a result of business rivalry between him and PW6, Michael Nyekumbara.

The appellant fended for himself at the hearing of the appeal, while the respondent Republic was represented by Mr. Mkemwa, learned Senior State Attorney. We must admit that the appellant was very focused in arguing his appeal which comprised of 6 grounds. The thrust of his argument however was directed at the contradictions which were apparent in the testimonies of the prosecution witnesses which he claimed rendered the witnesses' credibility in serious doubt warranting the intervention of this Court. Mr. Mkemwa had at first made a vain attempt to support conviction but upon reflection he conceded that there were serious flaws in the prosecution case and for that reason he supported the appeal.

As already indicated, the case for the prosecution depended upon the doctrine of recent possession. Given the circumstances of the whole case

the application of this doctrine will be determined in the backdrop of the credibility of witnesses. Of course we are mindful of the fact that a trial court is best placed to determine the credibility of a witness. Normally a second appellate court will not interfere with the findings of fact of the trial and first appellate court. However, where it becomes evident that the trial court and the first appellate court failed to take some material point or circumstance into account a second appellate court may intervene. On intervention by a second appellate court in the assessment of the credibility of witnesses this Court in **Shabani Daudi v. R.**, Criminal Appeal No. 28 of 2000 (unreported), the stated the following:-

*"May be we start by acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned. The credibility of a witness can also be determined in two other ways: **One, when assessing the coherence of the testimony of that witness. Two, when the testimony of that witness is considered in relation with the evidence of***

other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."

The appellant argues, and we agree with him as did the learned State Attorney, that the circumstances of this case warrant this Court to reassess the credibility of the witnesses. We shall shortly show why, but first we will address ourselves to two complaints raised in ground 1 (b) in the memorandum of appeal. The appellant in this ground complains that when the engine, the subject of the charge of armed robbery was tendered in court he was not given the right to state whether or not he had any objection to the tendering of the exhibit. The appellant also complains that he was never given an opportunity to cross examine PW1 who is the witness who tendered the exhibit in court. He further submitted, and we agree with him that the denial of the right to cross examine the witness seriously prejudiced his case, particularly considering the fact that PW1 is

not the one who recovered the exhibit. The appellant argued also that there was need to ascertain ownership through cross examination since there was no documentary evidence tendered by PW1 to prove ownership of the boat engine and also the fact that there was discrepancy between his evidence and the charge sheet as to who the real owner of the boat engine was.

Turning now to credibility of witnesses, the appellant coherently led us through a series of contradictions in the witnesses' testimonies. He argued that these contradictions taken together with his defense lead to the obvious conclusion that the case for the prosecution was never established as required by law. Following are some of the contradictions that were pointed out by the appellant which taken in their totality coupled with the defense case totally discredited the case for the prosecution:

- 1. At page 9 of the record PW1 is recorded as having stated that they reported the matter to the police. At page 14 of the record PW2 who was PW1's employee was categorical that PW1 was not with them when they made the report to the police.*

2. *According to the evidence of PW2 and PW3 they were robbed of only one engine, yet in court two engines were tendered in connection to the robbery, one by PW1 as exhibit P1 and another one as exhibit P5. This discrepancy was never explained and both courts below failed to address their minds to it.*
3. *According to the evidence of PW1 and PW6 the engine stolen was written "Ndongo Nyekumbara" yet the search warrant, exhibit P6 indicated that the engine recovered from the appellant was written "Nyakumbara/Ndongo.*
4. *PW2 is recorded as having stated that when he went to the police after recovery of the boat engine he saw the serial number on the engine, yet PW1 testified that when he went to the central police station he found that his engine had its serial number removed.*
5. *Regarding the search warrant some witnesses claimed that there was only one search warrant while other witnesses claimed that there were two search warrants. This is reflected on pages 22, 24 and 27 of the Court record.*

6. *PW6 testified that the engines were found in two different rooms yet PW7 who led the search claimed that the engines were found in the same room.*
7. *Another contradiction referred to the time that PW5 was called to the scene. PW5 was a leader of the area where the appellant lived. PW5 said that he was called to the scene to witness the search at 10.40 am on 11/7/2006 yet PW6 claimed that it was in the afternoon of this same day that he was informed that his engine was in the appellant's house whereby he took steps to have the appellant arrested. He was among those who were in the search party. If he received information in the afternoon before PW5 was called to witness the search, then how come PW5 says that he was summoned at 10.40 in the morning?*
8. *There were also contradictions regarding the amount of money given by PW6 to PW4 in order to trap the appellant into leading them to the allegedly stolen engine. Whereas PW4 said that PW6 gave him shs 680,000/- PW6 said he gave PW4 shs. 600,000/=. If the two witnesses were truthful why such glaring contradiction? Contradictions were not only as between witnesses. PW4*

contradicted himself in his evidence when he at first claimed that the appellant had demanded shs. 800,000/= for the engine but within a very short time forgetting what he had earlier told the court stated that the appellant had demanded shs. 950,000/= for the engine.

The appellant was also charged separately in connection to another engine which was allegedly found in his premises alongside exhibit P1. This was in Criminal Case No. 268 of 2006 in the Musoma District Court. We have observed that the magistrate who tried this case was the same one who tried Criminal Case No 270 of 2006 from which this appeal originates. PW4 and PW7 in Criminal Case No.270 also appeared as PW4 and PW7 respectively in Criminal Case No 268. Under the circumstances it would have been very difficult, having found one case proved for the magistrate to objectively deal with the other case. The appellant appealed to the High Court against the decision that was given in Criminal case No. 268 and his appeal was given No. 170 of 2007. His appeal against Criminal case No. 270 was given No. 169 of 2007. A request was made by the learned State Attorneys representing the Republic to have the two appeals consolidated as they originated from the same set of circumstances. The request was

however denied. The appeals were heard by different judges. It is a pity that the request was denied. We must admit that the denial has resulted in a very pathetic state of affairs putting the adjudication system into a very awkward situation. As it happens, the appeal in Criminal Case No. 268 was allowed but appeal No. 270 before the judge who refused the prayer for consolidation of the two appeals was dismissed. So, here we have two opposing decisions from cases which originated from the same set of circumstances. This is a bit embarrassing to the proper administration of justice.

The appellant, as we have stated earlier maintained his innocence from the very beginning insisting that the case against him was framed up as a result of business rivalry between him and PW6. Whenever he got the opportunity to cross examine the witnesses this claim of frame up would crop up. When he gave his defense he explained how the rivalry came about. He even went to the extent of pointing out, with precision the contradictions that were apparent in the prosecution case. Unfortunately, neither the trial court nor the first appellate judge took the trouble to examine carefully the appellant's defense. The trial magistrate brushed the

appellant's defense aside by merely saying that '*the appellant had made no attempt to explain or give explanation as to how he came by the said stolen boat engine.*' The magistrate appears to have been oblivious of the appellant's defense that the case was framed up against him and that he was never in possession of the boat engine in the first place. The first appellate judge also did not address himself to the contradictions of the prosecution witnesses which were pointed out by the appellant in his defense. Had the courts below properly evaluated both the evidence for the prosecution and the defense as they were compelled to do, then no doubt this matter would not have come to this Court. It would either have ended up in the trial court by the acquittal of the appellant or in the High Court by the allowing of the appellant's appeal as did happen in the Criminal Appeal No. 170 of 2006 which as we have labored to show originated from the same set of circumstances as this appeal.

In view of our deliberations above, we find the appeal by Dickson Malekela to have been lodged with sufficient cause for complaint. We, in the circumstances allow it. Conviction entered against him is quashed and

sentence is set aside. He is to be released from custody forthwith unless held for some other lawful cause.

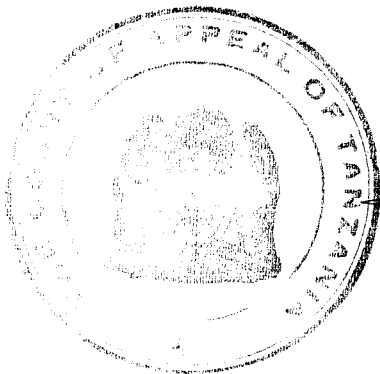
DATED at MWANZA this 3rd day of June 2012.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

K.K.ORIYO
JUSTICE OF APPEAL

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




E.Y. MKWIZU
DEPUTY REGISTRAR