

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 237 OF 2011

ALFRED WILLIAM NYAMHANGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Sumari, J.)

**Dated 9th day of September, 2011
in
Criminal Appeal No. 34 of 2010**

JUDGMENT OF THE COURT

2nd & 5th August, 2013

JUMA, J.A.:

This is a second appeal by ALFRED WILLIAM NYAMHANGA seeking to overturn his conviction and sentence for armed robbery contrary to sections 285 and 286 of the Penal Code, Cap. 16 RE 2002 as amended by Act No. 4 of 2004. Particulars of this offence stated that, on the 8th day of June, 2007 at around 11:00 hrs in Sirari village within Tarime District the appellant stole one Phoenix bicycle from John s/o Obat Mundebe and immediately before stealing he used actual violence by cutting his victim on his neck using a machete. This violence was designed to obtain the bicycle.

The District Court of Tarime (Criminal Case No. 367/2007) had upon conviction, sentenced the appellant to thirty years imprisonment and twelve strokes of the cane. On his first appeal, the High Court, (Sumari, J.) dismissed that appeal, after concluding that the prosecution had proved its case beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented. Mr. Victor Karumuna, learned State Attorney, appeared for the respondent Republic. The appellant has preferred four grounds in his memorandum of appeal. These grounds in their essence revolve around the complaint that the prosecution did not prove its case against him to the standard required. These grounds contend that the facts that were narrated during the Preliminary Hearing differed in material particulars with evidence that was presented during his trial. This, according to the appellant, suggests that the whole case against him was fabricated. Secondly, the appellant contends that the learned Judge failed to address the contradictions in the evidence of material witnesses and the failure to summon Mr. Gervas Ishengoma who was present a few minutes before the incident deserved some adverse comments of the learned Judge. In his third ground, the appellant is aggrieved that the learned Judge failed to take into account the appellant's own defence. Finally, the learned Judge

should have expunged the medical examination report (PF3) which was admitted in violation of section 240 (3) of the Criminal Procedure Act, Cap. 20.

The grounds of appeal will be better appreciated if we revisit the factual background which founded the offence of armed robbery. On the day of the incident, John Obati Mondela (PW1) the Ngerengere Village Executive Officer was at Buriba when Ng'oma Peter (PW2) suddenly appeared riding his bicycle at high speed. PW2 was at the time Chairman of Kitongoji of Nyamaraga. The Kitongoji Chairman told PW1 that he was running away from the appellant who was armed with a machete and was a few metres behind. PW1 remained on, as PW2 rode away. Soon after, one Gervas Ishengoma came to where PW1 was. The two were still talking when the appellant arrived from the direction of Ng'ereng'ere village. Appellant ordered Mr. Ishengoma to leave because he did not want him to witness anything. Mr. Ishengoma left without a word. The appellant then demanded to know what PW2, whom he described as "foolish Chairman of Kitongoji of Nyamaraga," had just told him. The appellant ordered PW1 to return with him back to Ng'ereng'ere village. PW1 refused and had begun to turn his bicycle towards Sirari. On seeing this, the appellant ordered PW1 to hand over his bicycle. When PW1 refused, the appellant assaulted

of his bicycle. Appellant then cut his neck using the machete, this fell PW1 down to the ground. Appellant took off with PW1's Phoenix bicycle. Injured, PW1 was carried to Sirari Police Station where he was issued with PF3 for treatment. The PF3 was admitted as exhibit P1. In his testimony, PW1 insisted that the appellant left the scene taking his Phoenix bicycle with him.

Mr. Karumuna had initially argued in support of the conviction. Although he conceded that the PF3 should be expunged from the record because it was admitted contrary to section 240 (3) of the Criminal Procedure Act, Cap. 20, he hastened to insist that there is ample evidence which proves all the ingredients of the offence of armed robbery. He in particular, referred to the evidence of witnesses like PW1, PW2 and PW3 who, according to the learned State Attorney, saw the incident. He argued that theft was proved by the fact that several witnesses saw the appellant taking the bicycle away from the complainant.

We drew the attention of Mr. Karumuna to the peculiar circumstances of this case where the initial misunderstanding was between the appellant and Ng'oma Peter (PW2), and the complainant (PW1) just happened to be at the wrong place between the appellant and the Chairman of Kitongoji of

inyamaraga. Armed robbery was not at the centre of altercation. We addressed Mr. Karumuna on apparent contradictions in the evidence of PW1 and PW2 to the extent of raising doubt as to whether they were credible witnesses for purposes of proof of the offence of armed robbery. On reflection, the learned State Attorney began to doubt whether the evidence of these two witnesses should have been accorded so much credence by the two courts below. For example, while being cross-examined by the appellant, PW1 said "he had no personal grudges against the appellant. A moment later he changed and suggested that in fact there was another case still pending against the appellant where appellant had slashed PW1 with a simi (machete) and he had reported the matter to police who were still looking up for the appellant. With this possible longstanding dispute between the appellant and the complainant (PW1), it was necessary for the two courts below to evaluate the appellant's claim he raised in his defence that there were personal grudges between him and the complainant. This misunderstanding arose when the complainant announced in a public meeting that the appellant was a thief.

The two courts below should also have accorded the evidence of PW2 Ng'oima Peter a more scrutiny. It was after PW2's altercation with the appellant when PW2 climbed into his bicycle and cycled away while using

his mobile phone to call Sirari Police for help to arrest the appellant. It is not clear if the appellant was also riding a bicycle to be able to catch up with PW2 so soon. No witness testified how the appellant arrived at the place where the complainant was, was he running or was like PW2 cycling his bicycle. The two courts below did not evaluate the appellant's evidence contending that the complainant did not have any bicycle when he was accosted by the appellant.

It is clear from the judgment of the first appellate court; the learned Judge (Sumari, J.) did not address the possibility that there were personal differences between the appellant and the complainant which may have a bearing on credibility of PW1 and PW2. The learned Judge restricted her determination of the first appeal to the question whether the "elements constituting the offence of Armed Robbery were proved against the appellant." Then revisited the evidence of PW1, PW2 and PW3 before arriving at a conclusion that the prosecution side had proved its case beyond reasonable doubt.

As we have said in many of our decisions, where contradictions show up in evidence it is the duty of the trial court to either resolve them or explain them away (**MOHAMED SAID MATULA V. REPUBLIC** (1995))

THE REPUBLIC (unreported).

We think failure by the two courts below to address inconsistencies and contradictions of the PW1 and PW2, the main prosecution witnesses, coupled with the failure to address the appellant's own defence of possible previous personal grudges and misunderstandings, leaves many questions at abeyance. This puts to question whether the prosecution case was proved beyond reasonable doubt.

In the result, we allow this appeal, quash the conviction and set aside the sentence. The appellant is to be set free unless otherwise lawfully held.

DATED at MWANZA this 3rd day of August 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

I Certify that this is a true copy of the Original.


P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL