IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: RUTAKANGWA, J.A., KAIJAGE, J.A. And MUSSA, J.A.)

CRIMINAL APPEAL NO. 255 OF 2010

1. METUSELA JOHN BALIMI
2. RAJABU KACHWAKA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the Judgment/Decision of the High Court of Tanzania at Mwanza

(Sumari, J.)

dated the 13th day of September, 2010

in

Criminal Appeal Nos. 91 and 92 of 2008

.....

JUDGMENT OF THE COURT

19th & 27th November, 2013

MUSSA, J.A.:

In the District Court of Nyamagana, the appellants were jointly arraigned and convicted for two counts of armed robbery, contrary to section 287A of the Penal Code. At the trial, the appellants stood as, respectively, the first and second accused persons. The particulars on the first count alleged that, around 5.30 a.m. on the 4th August, 2005 at Mission street, Nyamagana District, the appellants stole a sum of shs 18,000/= in cash from the person of Humuli Mayala. On the second count, the implication was that, around the same time, date and place, the appellants dispossessed another person, namely, Antidius Lwekaka,

a sum of shs 28,000/= in cash as well as two-banded radio. In both counts, it was further alleged that, immediately before and after such stealing the appellants attacked the victims with the flap of a machete in order to obtain or retain the stolen properties.

Upon conviction, the appellants were handed down concurrent terms of imprisonment for thirty (30) years as against each count. In addition, each was to suffer coporal punishment of twelve (12) strokes of a cane. On their first appeal, the High court (Sumari, J.) found no cause to fault the verdict of the trial court. The appellants, presently, seek to impugn the decision of the High court upon two separate memoranda of appeal. Before us, they were unrepresented and fully adopted their respective memoranda. As it were, the appeal was resisted, on behalf of the respondent Republic, by Mr. Paschal Marungu, learned State Attorney. For a better appreciation of the rival points of contention it is necessary to briefly explore the factual background.

From a total of five witnesses, it was the case for the prosecution that the alleged victims of the robbery were the already mentioned Antidius Lwekaka (PW1) and Humuli Mayala (PW3). Evidence was to the effect that, on the fateful day, Antidius and Humuli were confronted with

three bandits while crossing Nata River. In the course of their testimony, the two witnesses frantically implicated the appellants as being amongst the three bandits one of whom was, allegedly, armed with a sword. As it turned out, it was Antidius who was attacked first and, according to his testimony, he was dispossessed of the sum of shs. 28,000/= in cash, a watch and a small radio. No sooner than latter, the bandits made a go at Humuli from whom they also grabbed away a sum of shs. 18,000/= in cash. The two witnesses told of an attack on another person who was dressing shoes within the vicinity but, unfortunately, no further details were adduced on this episode. Thereafter, it was said, the attackers took to their heels, whereas, Antidius and Humuli chased them in pursuit. According to Antidius, several watchmen who were closeby also joined the chase. As to what followed next, it will be best if we let the two witnesses pick the tale in their own respective words. To begin with Antidius, this is what he told the trial court:-

> *As we persued them they hid in a potatoes shamba. We started to look for them. We had torches. We saw them lying in that shamba. When they saw us they ran towards white bar. The first accused jumped the fence and fell inside. He was arrested therein. The 2nd accused climbed over the roof of that bar. By*

that time policemen had arrived. They aimed at him and shot him from the roof. He fell down. He was searched and he was found with my cell phone and radio. He had also Tshs. 15,000/=.

For his part, Humuli was, relatively, less detailed in his recollection of the chronology of events:-

The robbers ran away and the man who was dressing shoes said he was also robbed. They hid in grasses. As we saw them they ran away. Civilians had collected. One of the robbers was arrested and the other climbed the roof of the house. He was shot by the police from the roof. The two of them were arrested.

The police officers who are referred in the foregoing extracts from the testimonies of the two witnesses happened to be Nos. D 5817-Corporal Salote (PW2) and D 5114 – detective Coporal Juma (PW5). The officers found the first appellant thoroughly beaten but securely restrained by a mob of civilians that was gathered at the White Bar. As hinted upon, the second appellant had taken refuge on the Bar's rooftop. In his in – chief testimony, Corporal Salote initially told the trial court that the second appellant was gunned down as he tried to run away

after obeying a descending order given by the police officers. However, in the course of cross examination, the corporal made an about turn, disowned his version and claimed, instead, that he did not witness the second appellant's shooting as he was on the opposite side of the house. Corporal Juma who actually shot down the second appellant, gave the following account:-

> *...I saw the man on the roof with a dagger. We ordered him to descent but he refused. He attempted to jump over me but, as he did so, I shot him. I shot him through the stomach. Then I ordered my colleague to search him.*

Indeed, upon the second appellant being shot down and disabled, Corporal Salote searched his body and, allegedly, retrieved from him a machete, radio and a sum of shs, 15,000/=. Nonetheless, amongst the seized items, it was only the machete and the sum of shs. 15,000/= which were collectively adduced into evidence and marked "P1." The radio claimed by Antidius to have been seized from the second appellant was, incidentally, not produced at the trial. And neither was the cellular phone to which Antidius also made an ownership claim. With the foregoing details, so much for the prosecution version which was unveiled during the trial.

In reply, each appellant gave an own account on how, according to their respective versions, the prosecution accusation was fabricated on them. The first appellant, a fruits vendor, claimed that his confrontation with the police came much earlier, on the 2nd August, 2005. As he was walking towards the central market, around 10.00 a.m., the first appellant was apprehended by four policemen and joined in the company of five suspects who were in police hands. At the central police station, the other aspects were released but he remained in police hands till on the 14th August, 2005 when he was formally arraigned in Court for the accusation giving rise to this appeal. Thus, his defence was essentially that he could not have committed the robbery on the 4th August 2005 as, at the time, he was still in police custody.

The second appellant just as well claimed that he was arrested much earlier, on the 30th August, 2005. On the fateful day, the second appellant was allegedly confronted with and apprehended by police officers as he was walking along Uhuru Street destined for the bus terminal. He was subsequently taken to a police station where one of the arresting police officers charged that he (second appellant) was among thieves who deserved being killed. Then, all of a sudden, one of the policemen hit him on the head with the butt of a gun and

commanded him to lie down. Next, the police officer released a gun shot that hit him and rendered him unconscious. Upon recuperation three days later, the second appellant found himself under treatment at Bugando Hospital. The charge him for the robbery was read to him whilst he was hospitalized at Bugando. To this end, his defence was, similarly, that he could not have perpetrated the robbery at a time when he was hospitalized.

As already intimated, on the whole of the evidence, a conviction was had and subsequently upheld by the first appellate court. The respective memoranda through which the appellants seek to impugn the decision of the High Court may conveniently be crystalised into four points of grievance worth our consideration:-

1. *That the first appellant was a young person aged 17 who should not have been subjected to a custodial sentence;*

2. *That the case for the prosecution was frought by inconsistencies and contradictions which materially undermined the credibility of its witnesses;*

3. *That the prosecution withheld the evidence of some material witnesses without sufficient cause and;*

4. That the first appellate Judge erred in not according due consideration the respective defences of the appellants.

The first point of grievance is easily disposable, more so, as it was not raised at the hearing of the first appeal. In any event, as correctly submitted by Mr. Marungu, at the time of the trial and conviction of the appellants, the applicable law was the Children and Young Persons Act, Chapter 13 of the laws. The law as it then stood, in terms of section 2, defined a "young person" to mean a person who is twelve years of age or more but under the age of sixteen years. To say the least, at seventeen (17), the first appellant was well beyond the contemplated age of prescription and, for that matter, he was an adult.

The next point for our consideration pertains to the complaint raised by both appellants on the inconsistencies and contradictions obtaining in the prosecution case. We should caution, though, that this Court, on a second appeal, rarely interferes with the concurrent findings of fact by the courts below unless there are misdirections or non – directions on the evidence or, as the case may be, a violation of some principle of law or practice. It remains to be seen whether or not the circumstances of this case would justify such an interference. As to what should be the approach of a trial court when faced contradictory testimonies more

particularly, by prosecution witnesses, this Court gave some guidance in **Mohamed Said Matula v The Republic** [1995] TLR 3:-

> *Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else, the Court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter.*

In this regard, the learned trial Magistrate properly addressed his mind on Corporal Salote's self – contradictory testimony with respect to the shooting of the second appellant. In the end, the presiding officer concluded that the Corporal must have lied when testifying on the detail. In our view, such was a well founded conclusion but, unfortunately, both courts below did not address some other equally disquieting inconsistencies obtaining in the prosecution witnesses' accounts. Antidius and Humuli, for instance, differed in their telling with respect to where exactly the appellants headed in the immediate aftermath of the attack. Whereas, Antidius claimed that the appellants were found hiding in a potatoes shamba, Humulis' testimony was to the effect that the appellants were found hiding in grasses. What is more, Antidius claimed that upon arrest, a sum of shs. 15,000/= was retrieved from the second appellant but, apparently, Humuli makes no mention of such a detail.

Thus, a question looms: What is the explanation for these marked differences in view of the fact that the two witnesses were testifying upon one and the same episode? Mr. Marungu tried to explain away the inconsistencies on account that they were minor, the more so as, according to him, the robbery and the subsequent apprehension of the appellants were constituted in an broken chain of events. Incidentally, the first appellate Judge took the same stance when she stated:-

> ***I quite agree with the learned Attorney that the fact that the appellants were pursued by PW1 And PW2 together with other people and in the course were arrested it is as if they were arrested red handed at the scene of crime. We are not told that the appellant flee (sic) and arrested thereafter. There was no elapse of time passed before arrest effected (sic).***

With respect, the portion of the testimony of Antidius extracted above is quite to the contrary. According to Antidius, after the robberers ran away, their pursuers including him, started "to look for them" and, for that matter, by the use of torches, till when they found them lying on a potatoes shamba. Quite obviously, therefore, there was a time when chain of events was broken, hence the need to link the identity of the perpetrators of the robbery with the appellants.

Furthermore, we think there is some justification in the appellants' criticism of the prosecution for not calling the other persons who were involved in the tracing and subsequent arrest of the appellants. Granted that it is not required of the prosecution to avail a superfluity of witnesses to establish its case but; the general and well settled rule is that the prosecution is under a *prima facie* duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the Court may draw an inference adverse to the prosecution (see **Aziz Abdallah v Republic** [1991] TLR 71). We should suppose, the rule extends to situations, as here, where, for some obscure cause, the prosecution withholds a material exhibit. In this regard, it should be recalled that for some un-explained cause, the prosecution withheld and did not adduce into evidence the radio and cellular phone allegedly retrieved from the appellant and; that is, despite positive ownership telling on the items from Antidius. If anything, the items would have provided the missing link between the appellants and the perpetrators of the robbery.

To this end, we are of the opinion that the cursory handling of the inconsistences of the prosecution witnesses by the trial court and the

first appellate court were misdirections which justify our interference. Taking into consideration all the circumstances surrounding this case, we are of the settled view that owing from the referred inconsistencies, the testimonies of Antidius and Humuli fall short to sustain the conviction. In addition, on account of withholding some material prosecution witnesses as well as exhibits, the entire case for the prosecution was thrown into doubt which should be resolved in favour of the appellants. In the result, we allow this appeal, quash and set aside the conviction and sentence and order for an immediate release of the appellants from prison custody unless if they are otherwise lawfully detained therein.

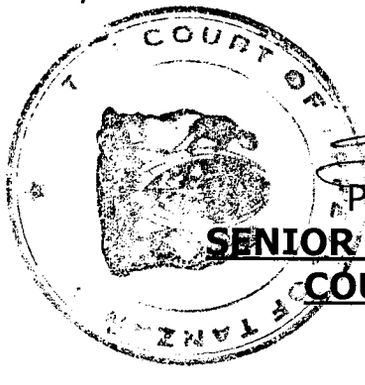
DATED at MWANZA the 26th day of November, 2013

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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



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