IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CRIMINAL APPEAL NO. 283 OF 2008

HAJI MUSSA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal From the Judgment of the High Court of Tanzania at Arusha)

(Bwana, J.)

Dated the 29th day of February, 2008
in
Criminal Appeal No. 99 of 2007

.....

JUDGMENT OF THE COURT

14th & 20th June ,2013

MUSSA, J.A:

In the District court of Babati, the appellant was arraigned and convicted for armed robbery, contrary to section 287A of the penal code, chapter 16 of the laws. The particulars on the charge sheet alleged that on the 9th November 2005, at Maisaka B locality, within the township of Babati, the appellant stole a Samsung cellular phone, the property of

Elizabeth Kiango. It was further alleged that immediately before such stealing, the appellant assaulted the victim by the use of a machete, in order to obtain the stolen property. Upon conviction, the appellant was sentenced to a term of thirty (30) years imprisonment with corporal punishment of twenty four (24) strokes of a cane. His appeal to the High Court was dismissed (Bwana, J; as he then was) save for the sentence of corporal punishment which was set aside. Dissatisfied, the appellant presently seeks to impugn the verdict below upon five (5) points of grievance. Before we address the points of contention, we propose to reflect on the factual background giving rise to the arrest, arraignment and subsequent conviction of the appellant.

To support its accusation, the prosecution lined up four witnesses, inclusive Elizabeth Kiango (PW2), the alleged victim of the robbery. Evidence was to the effect that, on the fateful day, around 9.00 am, PW2 was walking towards Maisaka B locality with intent to visit her plot of land. As she was passing through Migombani area, which is surrounded by a band of banana trees, PW2 was abruptly attacked from behind by an assailant who slashed her on the shoulder with a machete. The lady swirled around and caught glimpse of the appellant but, almost

immediately, the latter snatched her Samsung mobile phone and ran away with it. PW2 shouted an alarm to attract assistance as she at the same time, vainly chased the bandit.

In the immediate aftermath, two persons, namely, Hanafil Habibu (PW3) and Richard Frednands (PW4), allegedly saw the appellant who was on his heels within the vicinity of the scene of PW2's confrontation. According to their testimony, the fleeing appellant was holding a machete and a silver coloured mobile phone. Unlike PW2 who, apparently, had not known the appellant prior to the occurrence, PW3 and PW4 knew him previously. At the end of the ordeal, PW2 reported the incident to the police and was later treated at Mrara hospital. She concluded her evidence by adducing into evidence a PF3, supposedly, to disclose the extent of her injury. The investigation officer, namely, E. 7145, Detective constable Daudi (PW1), told the trial court that the appellant was arrested much later, in connection with a different offence. PW1 further claimed that the appellant was identified by PW2 as the one who perpetrated the robbery at Migombani. Nonetheless, the Detective constable did not elaborate on PW2's manner of identification. Against the foregoing backdrop, the appellant was formally arraigned on the 4th January, 2006.

In his testimonial account, the appellant completely disassociated himself from the prosecution accusation by putting forth a defence of *alibi*. As it were, he claimed that on the fateful day he and Halima Hamadi (DW2), were making bricks at Kwere area with effect from 7.00 am up until 6.00 pm; save for a brief moment when they had a lunch break. DW2 was featured on the witness box to confirm the detail although she could not recall the exact date when she and the appellant were on the bricks engagement. As regards the robbery accusation, the appellant attributed it to a prior grudge with PW2 which was allegedly prompted by his quarrel with PW2's son called Richard. The appellant claimed that he and Richard were engaged in a joint business of cultivation and sale of tomatoes but the quarrel arose over the latter's refusal to give the former his share of the tomato proceeds.

As hinted upon, on the whole of the evidence, the trial court was impressed by the version told by the prosecution witnesses. More particularly, the learned Resident Magistrate took into account that the incident occurred in broad daylight and that the appellant was identified by PW2 as well as PW3 and PW4 who saw him moments later. Again, as

already intimated, the first appellate judge found no cause to fault the trial court and, accordingly, the conviction was upheld.

At the hearing before us, the unrepresented appellant fully adopted his memorandum of appeal with an additional complaint that the PF3 was improperly adduced into evidence. The respondent Republic was represented by Mr.Marcelino Mwamnyange who declined to support the conviction, mainly on account of insufficient evidence of visual identification.

Dealing with the appeal and, in agreement with the learned State Attorney, this matter turns on the reliability of the evidence of visual identification. We make this observation whilst fully aware of the principle that on a second appeal, the appellate court is not free to interfere with the concurrent findings of fact by the two courts below. But this approach rests on the premise that the findings of fact are based on a correct appreciation of the evidence and were not derived on a wrong principle of law (see **Jaffari Mfaume Kawawa** [1981] TLR 149). As we shall shortly demonstrate, both courts below misapprehended the nature and quality of the evidence of identification, particularly, by PW2. We have intimated that the appellant was not previously known to PW2 and; thus, her claim

that he saw the appellant at the scene was essentially dock identification. In this regard, we wish to reiterate what was underscored in the unreported Criminal Appeal No. 172 of 1993 **Musa Elias and two others V Republic:-**

> *It is a well established rule that dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the witness before the witness was called to give evidence at the trial.*

In the matter before us, the dock identification of the appellant by PW2 was not preceded by an identification parade. To say the least, her identification of the appellant in court was of little value, if at all. Another shortcoming befalling on the evidence of PW2 is that her report to PW1 was not accompanied by a description of the appellant. Furthermore, it seems to us that the conditions at the scene were not exactly condusive for an unmistaken identification; particularly, in view of the suddenness of the attack and the fact that the scene of the encounter was surrounded by banana trees.

To this end, on account of the foregoing, and having doubted the evidence of identification by PW2, it follows that the evidence of PW3 and PW4 would not provide the requisite nexus with which to implicate the appellant. In the result, we find merits in this appeal which we, accordingly, allow by quashing the appellant's conviction for armed robbery and setting aside the sentence of thirty (30) years imprisonment imposed on him. The appellant is to be released from prison custody forthwith, unless if he is otherwise lawfully detained therein.

DATED at ARUSHA this 19th day of June, 2013.

J. H. MSOFFE
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.

MALEWO, M. A.
DEPUTY REGISTRAR
COURT OF APPEAL