IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: OTHMAN, C. J., RUTAKANGWA, J. A., And ORIYO, J. A.)

CRIMINAL APPEAL NO. 164 OF 2012

LUHEMEJA BUSWELU ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mwanza)

(Sumari, J.)

dated the 17th day of June, 2011
in
Criminal Appeal No. 134 of 2007

.....

JUDGMENT OF THE COURT

12th & 19th September, 2013

RUTAKANGWA, J.A.:

On 23rd July, 2006, at around 8:00 p.m. Wilson Chuma (PW1) was at Isolo Village trading centre. He was with his wife, and both were being escorted by Leah Daud (PW2) the wife of Daud Reuben (PW3). Along the road, they saw people riding a bicycle going in the opposite direction. The two cyclists allegedly yelled at them telling them to get out of their way. Suddenly, the passenger on the bicycle pushed PW1 Wilson, who fell onto

the ground. Then the said passenger got off the bicycle and assaulted PW1 Wilson to the extent of fracturing his left leg. The cyclist also joined his colleague in assaulting PW1 Wilson. While the assault was going on PW2 Leah raised an alarm. The alarm attracted a number of people who included PW3 Daud who allegedly found PW1 Wilson lying on the ground while the appellant was on top of him. The appellant was arrested there and then.

After being freed from the clutches of his assailants, PW1 claimed generally to have lost his mobile phone and cash money (per PW2 Leah and PW3 Daud) which he had kept in his "pocket". The matter was referred to the "hamlet chairman", and the appellant was subsequently sent to Kabila police out post. On 7/8/2006, the appellant was formally charged before the Magu District Court (the trial court) with the offence of Robbery with violence. On 20/11/2006, the appellant's colleague one Ng'asha Elkana @ Ntanda, was added in the case.

The two accused persons denied the charge. In their evidence, they told the trial court that on the material date and time they were riding a

bicycle towards Igombe Village when they came across PW1 Wilson along the road. They claimed to have accidentally knocked down PW1 Wilson with their bicycle. Then one woman raised an alarm. People rushed to the scene and there was a "scuffle". Because of the scuffle Ng'asha ran away from the scene, while the appellant's bicycle was seized and he was himself taken to Kabila police post.

In his judgment, the learned trial Principal District Magistrate, summarily rejected the accused persons' defence on the ground that if indeed they had accidentally knocked down PW1 Wilson, they would have been expected to help him instead of assaulting him. He accordingly believed the story of PW1 Wilson and PW2 Leah and convicted both accused as charged and sentenced them to fifteen (15) years imprisonment. They were also ordered to pay PW1 Wilson compensation of Tshs. 1,230,000/=. Aggrieved by the conviction and sentences, the appellant and his co-accused appealed separately to the High Court at Mwanza. We have found out from the memoranda of appeal that their main grievance was that the trial magistrate had erred in law in convicting them as charged without giving due consideration to the defence case.

The two appeals were consolidated. Because the facts were not complicated and the appellant, Luhemeja, did not dispute being arrested at the scene, the judgment was brief. The learned first appellate judge reasoned thus:-

> *"At the hearing both appellants were unrepresented and the Republic/Respondent represented by Miss Nchalla, learned State Attorney. The main ground for the appellant no. 1 is based on poor identification at the time of attack.*
>
> *The learned State Attorney supported the conviction of the 1st appellant on the reason that the appellant was arrested redhanded at the scene of the crime. There is no doubt on this case the evidence is too direct to that effect and the question of identification in such a case is immaterial to me. The appellant's appeal is devoid of merit and therefore I dismiss it in its entirety.*

As for the Appellant No. 2, Ngosha Elikana Ntonda the learned State Attorney Miss Nchalla did not resist the appeal on the basis that there was no strong evidence to implicate the appellant with the offence, which argument I agreed upon.

For the foregoing reasons, I allowed the 2nd appellant's appeal."

The above extract from the judgment of the High Court, speaks for itself. It has occurred to us that the learned first appellate judge, with due respect, did not address herself at all, to the complaint of the appellant (the 3rd ground of appeal) that "the learned trial magistrate erred himself in law to turn a blind eye upon appellant defence case without proper reason." We think this complaint was very crucial in the proper determination of the appellant's appeal. It had to be considered even if the end result would have been dismissing it. We are of this decided view because it is now settled law that failure to consider the defence case is fatal and usually vitiates the conviction: see, for instance,

(i) **Lockhart –Smith v. R**. [1965] E. A. 211 (Tz),

(ii) **Elias Steven v. R.** [1982] T.L.R. 313,

(iii) **Hussein Idd & Another v. R.** [1986] T.L.R. 283,

(iv) **Siza Patrice v. R., (C.A.T)** Criminal Appeal No. 19 of 2010 (unreported), etc.

It is also settled law that a magistrate's refusal to accept a defence as truthful is not a proper basis for conviction. It is not necessary to accept the evidence of the accused in order to find him not guilty. The prosecution, in cases of this nature, always bears the burden of proving beyond reasonable doubt every essential ingredient of the offence preferred against an accused: **Henry Ibrahim v. R.** [1972] H.C.D. no. 178, **Moshi Rajab v. R.** (1967) HCD no. 384, etc. It is for this reason, that we have found ourselves constrained to observe at this early stage that we entirely agree with the learned first appellate judge that in the appeal before her the question of identification was immaterial as the appellant (Luhemeja) was arrested at the scene of the fracass, to put it objectively. However, as we shall demonstrate shortly, we have respectfully found ourselves unable to share here strong assertion that he was "arrested redhanded at the scene of the crime", not of the assault but

the scene of the crime of robbery. We think it was for this reason that the appellant was aggrieved by the High Court decision and has lodged this second appeal.

In his memorandum of appeal to this Court, the appellant has listed five grounds of appeal. After studying these five grievances, we have found out that the appellant's smoking gun lies in ground of appeal No. 2 in which he is reproaching the two courts below with failing to subject the entire evidence to an objective evaluation, an omission which led them to reject his defence case without assigning any reason.

To prosecute the appeal, the appellant appeared before us in person and undefended. He adopted his grounds of appeal, urging us to hold that the case against him was fabricated to victimize him following the bicycle accident. He accordingly pressed us to allow his appeal.

Ms Revina Tibilengwa, learned State Attorney, resisted the appeal on behalf of the respondent Republic. She appears to have been very much influenced by the reasoning of the learned first appellate judge. Imploring us to dismiss the appeal, she argued that the two courts below could not

be faulted in finding the appellant guilty as charged, because of the undenied fact that the appellant was arrested at the scene of the crime. She stressed that the evidence of PW1 Wilson, which was supported by that of PW2 Leah, clearly established that there was a deliberate robbery committed by the appellant.

We take it to be common knowledge that for a charge of robbery to stand these two essential ingredients must be proved by the prosecution beyond reasonable. **Firstly**, is theft of anything capable of being stolen. This includes cash money and/or a mobile phone. **Secondly**, the steading must be accompanied by the use of actual violence or a threat of use of it exercised on the property or any person, either before, during or after the theft, in order to obtain and/or retain the said property. The crucial question we are being called upon to resolve here is whether or not the appellant stole anything capable of being stolen from PW1 Wilson.

From the judgments of the two courts below, it is plain that the two courts and Ms Tibilengwa answered affirmatively the above posed question. It was their concurrent finding that PW1 Wilson was robbed of

his Nokia 6020 mobile phone (SN. 358400005022868) and Tshs. 750,000/= in cash. They only parted company when it came to the identities of the thieves as we have already shown. On his part, the appellant pressed us to answer the question negatively because the two courts below misapprehended the nature and quality of the prosecution evidence through their failure to give an objective consideration of the evidence for the defence.

After perusing the judgments of the two courts below, we have respectfully found ourselves with no option but to accept the appellant's contention. We gain support for this stance from the extract taken from the High Court judgment quoted earlier on in this judgment. As is evident from the extract, the learned first appellate judge dismissed the appellant's appeal simply because "he was arrested redhanded at the scene of the crime".

As already indicated above, the appellant has all along been admitting the fact of being arrested at the scene of the incident. But his contention before us, as was the case in the High Court, is that had the circumstances leading to his arrest as articulated in his evidence and that

of his co-accused who was found innocent, been considered by the two courts below, he would not have been found guilty as charged. We respectfully agree with the appellant on this, for the following two good reasons.

First of all, the evidence of both PW1 Wilson and PW2 Leah, which the two courts below found to be true, placed the appellant and his co-accused Ng'asha at the scene of the so called "scene of the crime." It was for this reason that the learned trial Principal District Magistrate rejected the identical evidence of the two accused persons in favour of the evidence of PW1 Wilson and PW2 Leah and convicted them. There is no gainsaying here that going by the evidence of these two prosecution witnesses, the two accused persons jointly and together committed the offence of robbery. This is notwithstanding the fact that Ng'asha was arrested subsequently. It goes without saying, therefore, that if the evidence of PW1 Wilson and PW2 Leah was truthful and cogent enough to secure the conviction of the appellant, it ought to have secured the conviction of Ng'asha also. But if it was not strong enough to implicate Ng'asha as held by the High Court, it ought to have been so held in respect of the

appellant, who never ran away from the scene and whose evidence was supported in every essential detail by that of Ng'asha. After all, if he had robbed PW1 Wilson of his properties and was admittedly arrested at "the scene of the crime," he ought to have been found in possession of the stolen mobile phone and cash money. This, then, leads us to our second reason on which we shall be brief.

Secondly, if the evidence of PW1 Wilson, PW2 Leah and PW3 Daud who was the first person to arrive at the scene and who claimed to have removed the appellant from the body of PW1 Wilson and put him under arrest is anything to go by, the appellant never moved an inch away from the scene of the incident. That being the case and we believe it was so, then the appellant ought to have been found in possession of the allegedly stolen properties. But was he found with anything incriminating on him? The impeccable answer to this very pertinent question which the two courts below never addressed themselves to, was provided by PW3 Daud.

Answering a question from the appellant on cross-examination, PW3 Daud said:-

"You were not found with anything."

This answer told it all. It ought to have put the two courts below on a full alert in their approach to and assessment of the evidence of PW1 Wilson. If the appellant never left the scene of the incident for a single moment, how did the huge sum of money and the mobile phone he allegedly robbed disappear? We can only hazard a guess here. Either PW1 Wilson was not carrying with him the said Tshs. 750,000/= and mobile phone or other people excluding Ng'asha, who was declared innocent by the High Court at the pressing of the respondent Republic.

That PW1 Wilson might have been lying is further demonstrated by the patent lies in his evidence. While under examination in chief, he positively stated that the appellant was the one who was the passenger on the bicycle. He went on to assert that the appellant was the one who pushed him and caused him to fall down. He belied himself, however, while under cross-examination from the appellant when he claimed that the appellant was the person who was pedalling the bicycle. PW2 Leah was equally confusing. At first, while under cross-examination from the appellant, she claimed that the "bicycle was being driven by the 1st accused

ed the appellant's

"You were a mere passenger on the bicycle."

On his part PW5 Peter Leo, the area's "headman" told the trial court that when he arrived at the scene of the incident, he did not find the two accused persons there. They had only left their bicycle behind. However, he belied himself while under across-examination when he said:-

"I was present with you when you were being arrested."

Furthermore, our careful reading of the evidence of PW2 Leah, PW3 Daud, PW4 Erasto revealed to us that none of these witnesses were told by PW1 Wilson the actual amount of money stolen from him. While he told PW2 Leah and PW3 Daud that he had lost "a hand set and cash", he never told so PW4 Erasto and PW5 Peter. In our considered opinion, then, the theft of the Nokia 6020 mobile phone and cash Tshs. 750,000/= was a figment of PW1 Wilson's own imagination. Had this fact been considered

by the two courts below, in our respectful opinion, they would not have readily found PW1 Wilson to be a credible witness.

It is quite unfortunate that all these self-contradictions, inconsistencies, and implausibilities were never considered by the two courts below. In our respectful opinion had they done so they would not have afforded to ignore the defence case at all.

With the above crucial shortcomings in mind, we have found ourselves constrained to hold that the defence of the appellant was not a hopeless one. In our considered view, it introduced genuine doubts in the prosecution case. The appellant was accordingly entitled to an acquittal.

In fine, we find merit in this appeal which we hereby allow. The conviction of the appellant for the offence of Robbery is hereby quashed and set aside. We also quash and set aside the prison sentence and compensation order. We order the immediate release of the appellant from prison unless he is otherwise lawfully held.

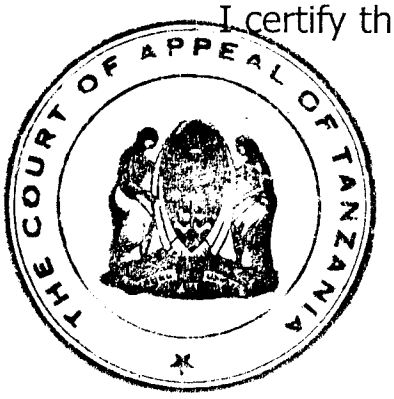
DATED at MWANZA this 19th day of September, 2013.

M. C. OTHMAN
CHIEF JUSTICE

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

K. K. ORIYO
JUSTICE OF APPEAL

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



P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
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