IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

(CORAM: KIMARO, J.A., MANDIA, J.A. And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 461 OF 2007

YASSINI s/o RASHIDI @ MAIGE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(R.E.S. Mziray, J.)

dated 26th day of June, 2007
in
Criminal Appeal No. 89 of 2003

JUDGMENT OF THE COURT

18th & 23rd April, 2013

KAIJAGE, J.A.:

This is the second appeal. The appellant, YASSINI s/o RASHID @ MAIGE and six other persons, were charged before the District Court of Urambo at Urambo with the offence of armed robbery c/ss 285 and 286 of the Penal Code, Cap. 16, R.E. 2002. At the conclusion of the trial, the appellant and another person were found guilty, convicted and each was sentenced to serve a term of thirty years imprisonment with twelve strokes of the cane. They were further jointly ordered to compensate the victim of

the offence the sum of Tsh.45,000/= for the unrecovered stolen property. Appellant's appeal to the High Court was unsuccessful, hence the present appeal.

We start with the brief account of evidence which led to the conviction of the appellant. The evidence in support of the charge against the appellant came from Shaban Ramadhani (PW1), Kulwa Said (PW2), ASP Evarist Maganga (PW3) and Salum Juma Miraji (PW4).

PW1 a resident of Mabundulu Village, Urambo District, testified to the effect that on 29/7/1999 in the dead of the night, he was at home asleep with his wife. While asleep, he heard gun shots emanating from the neighbourhood. Before he could open the window to see and appreciate what was happening outside, bandits broke into his dwelling house through the door leading to his bedroom. He quickly took refuge in the living room where he came face to face with three bandits. A scuffle immediately broke out between them and the three bandits who had entered the house started assaulting PW1 in unison.

PW1 further told the trial court that in the course of scuffle, one of the bandits shouted for the back-up. On this aspect of the case, PW1 is on record to have stated the following, among other things:

> *"...I beat one bandit by my head who left me. Then the one who held me on my neck asked his colleague to bring a gun as I am troublesome (leteni bunduki apigwe huyu bwana ni mkorofi)."*

The testimony of PW1 further reveals that he managed to break out of the bandits grip and escaped to the outside of his house. At all material times the living room was illuminated by a "lamp". As and when he made his way outside the house, his immediate neighbours one William s/o Petro and PW2 were there. It did not take long before PW1, PW2 and William Petro, saw the bandits escape form the burgled house with a bundle of items of property. The said prosecution witnesses and their neighbour decided to pursue the bandits.

Both PW1 and PW2 testified to the effect that their chase after the bandits bore fruits. The appellant was arrested in possession of a bundle (furushi) of items of property and a radio at an estimated distance of 15

paces away from the house of PW1. Following his arrest, the appellant and the bundle of items of property were taken to PW4, the Village Executive Officer (VEO) of Mabundulu Village. Before the bundle was opened, PW1 was instructed to go back to the scene of crime and come out with a list of the items of property he might find missing. He complied and came with a list describing the following; one trouser, a T-shirt, 3 pieces of khanga, one radio and cash to the tune of Tsh.40,000/=. According to PW1 and PW2, the same items matching that description, were in a bundle found in possession of the appellant when same was opened for the first time at the premises of PW4. On this aspect of the case, the evidence of PW4 is in all fours with that of PW1 and PW2. In their respective evidence, the said prosecution witnesses stated that the appellant admitted to have stolen the items in the course of armed robbery, an offence he perpetrated in conjunction with his associates whom he also named. In the course of trial, the items stolen were admitted in evidence and marked Exh P2.

In his testimony, PW4 related to the trial court that during the night of an incident, he had an occasion to question the appellant. The appellant

orally confessed to him that he and his colleagues were armed with a gun in the course of the robbery. Indeed, PW4 testified to the effect that the appellant led them to a place where the gun was recovered hidden under a log. The spot at which the gun was found is at an estimated distance of about half a kilometer from the scene of crime.

In his defence, the appellant denied any involvement in the perpetration of the robbery. He told the trial court that on the fateful night, he slept at Ugowola Village, and that he was arrested on his way to Urambo from that Village. To be more precise, the appellant said:-

> *".....On 29/7/1999 I moved from Tabora going to Ugowola Village by bus. I reached there at 6.30 p.m. While there I got an information that at Urambo there is morning ceremony.*
>
> *On 30/7/1999 at about 5.00 a.m., I moved going to Urambo. While on the way at about 8.00 a.m., I met with people who stopped me. They asked me where I come from, I told them*

that I came from Dar es Salaam going to Urambo. By then those people had already arrested two people.... They decided to join me with those 2 people who were under arrest. We were taken to Usoke ***Police Out Post****."*

As to what prompted PW1 and PW2 to testify against him, he further said:

"PW2 is the uncle of PW1 so he is interested witness."

Appellant has preferred a memorandum of appeal containing twelve (12) grounds, but we think that they boil down to only one ground, namely;

"That the case for the prosecution against the appellant was not proved beyond reasonable doubt."

At the hearing of the appeal, the appellant appeared in person, unrepresented. He adopted the grounds of appeal, without more. The

respondent/Republic which resisted the appeal was represented by Mr. Hashim Ngole, learned Senior State Attorney.

When the appeal was called on for hearing, the learned Senior State Attorney rose to argue the grounds of appeal generally, submitting in the main that the case for the prosecution was proved beyond reasonable doubt.

As we proceed in embarking on the task of determining this appeal, we are mindful of the fact that this is a second appeal and we will be guided by the following principle lucidly enunciated in **LUDOVIDE SEBASTIAN v R.,** Criminal Appeal No. 318 of 2009 (unreported) thus:-

> *"On a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premises that the findings of facts are based on a correct appreciation of the evidence. If both courts below completely misapprehended the substance, nature and quality of evidence, resulting in an unfair*

Conviction, this court must in the interest of Justice intervene."

The decision of this Court in the case between the **Director of Public Prosecution and Jaffari Mfaume Kawawa** (1981) T.L.R 149 amplifies the principle in **Ludovide's case** thus:-

"The next important question for consideration and decision in this case is whether it is proper for this Court to evaluate the evidence afresh and come to its own conclusions on matters of facts. This is a second appeal brought under the provisions of S.5 (7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this Court only on a point or points of law. Obviously this position applies only where there are no misdirections or non-directions on the evidence by the first appellate court. In cases where there are misdirections or non-directions on the

evidence a Court is entitled to look at the relevant evidence and make its own findings of fact."

We alluded to earlier that the appellant is protesting his innocence on the basis that the charge of armed robbery was not proved beyond reasonable doubt. In this regard, we think that one of the fundamental issues to be resolved in this appeal is whether on the basis of the evidence on record the two Courts below were justified in findings, as they did, that the offence of armed robbery was committed during the night of the 29th day of July, 1999.

There is uncontroverted evidence of PW1 and PW2 to the effect that during the night of the 29th day of July, 1999 at about 1.20 a.m. they heard and were awakened by gun shots fired in the air. Uncontroverted is also the evidence of the said prosecution witnesses that immediately after the gun shots, bandits forcibly broke into the dwelling house of PW1, attacked and threatened to use a gun against him because he appeared 'troublesome'. Unchallenged is also the evidence of PW1 and PW2 that the bandits made away with a bundle containing items (Exh P2) established to be owned by PW1.

Upon consideration of the combination of the set of uncontroverted evidence as found on record, we are settled in our minds that the offence of armed robbery was committed. We have thus found no material basis warranting intervention, by this Court, of the concurrent findings of facts by both Courts below that the offence of armed robbery in the circumstances of this case was established and proved beyond reasonable doubt.

The next issue we have to consider and determine is whether on the evidence on record, the appellant can be said to have been one of the armed robbers who raided the house of PW1 on the night of 29th day of July, 1999.

In his defence, appellant raised a defence of **alibi** alleging that on the fateful night of the robbery incident, he had slept at Ugowola Village. both Courts below considered this defence and rejected it, the appellant having not given the requisite notices under S. 194 (4), and (5) of the Criminal Procedure Act, Cap. 20 R. 2002 (the CPA) which provides:-

"*(4) Where an accused person intends to rely upon an alibi in his defence, he* ***shall give the***

Court and the prosecution notice of his intention to rely on such defence before the hearing of the case.

(5) Where ***an accused person does not give notice*** *of his intention to rely on the defence of alibi before the hearing of the case,* ***he shall furnish the prosecution with the particulars of the alibi at any time before the case for the prosecution is closed."***

[Emphasis supplied].

Non compliance with the provisions of s. 194 (4) and (5) if the CPA compelled the trial Court, rightly in our view, to accord no weight to appellant's belated defence of alibi which raised no reasonable doubt. In this regard, s. 194 (6) of the CPA is instructive. It provides:-

"I*f the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the Court may in its discretion, accord no weight of any kind to the defence."*

From the above discussion, we see nothing suggesting or pointing to a misdirection or non direction attributable to both Courts below when they accorded no weight to the appellant's alibi.

However, this Court in **ALI AMSI V. R.**, Criminal Appeal No. 117 of 1999 (unreported) made the following observation:-

> *"It is of course not the law that once the alibi is proved to be false, or is not found to have raised doubts, the task of proving the accused person's guilt is accomplished. There must be still credible and convincing prosecution evidence, on its own merit to bring home the alleged offence."*

Our examination of the evidence on record had demonstrated that the evidence implicating the appellant to be one of the perpetrators of armed robbery at PW1's residence is overwhelming. Significantly, both Courts below found PW1 and PW2 credible witnesses and accepted their uncontroverted evidence. The witnesses testified that, the appellant was arrested few metres from the residence of PW1 with a bundle containing items (ExhP2) confirmed to be owned by PW1. It is trite law that every

witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing such witness (See; **GOODLUCK KYANDO V. R.**, Criminal Appeal No. 118 of 2003 (unreported).

We have subjected the evidence of PW1 and PW2 to a very close scrutiny. When considered in relation with the evidence of other witnesses including that of the accused, we have found no circumstance or reason to justify interference by this Court of the lower Courts assessment of the said witnesses evidence and its credibility. We so find because the trial Court's finding as to the credibility of a particular witness is usually binding on an appeal Court unless there are circumstances on the record which warrants a re-assessment of credibility [See; **OMARY AHMED V.R.**, [1983] TLR 32 (CAT)]. Incidentally, we have seen no such circumstances.

Indeed, we are satisfied that the Courts below properly invoked the doctrine of 'recent possession' to find that the appellant was one of the robbers. The appellant who was found in possession of PW1's items or property immediately after the robbery, offered no reasonable explanation as to how he acquired the possession of same, just as he asserted no right

of ownership over them. Under our criminal law, the unexplained possession by an accused person of the fruits of a crime recently after it has been committed is presumptive evidence against the accused not only on the charge of theft or receiving with guilty knowledge, but of any aggravated crime like murder as well, when there is reason for concluding that such aggravated and minor crimes were committed in the same transaction (See; **MWITA WAMBURA V. R.**, Criminal Appeal No. 56 of 1992 (CAT, unreported).

From the foregoing brief observation, we are increasingly of the view that the involvement of the appellant as one of the perpetrators of robbery at the residence of PW1 was proved on the standard required in criminal cases.

One of the appellant's complaint is that his alleged confession to PW4 should not have been taken into account in forming the basis of his conviction. We agree. In his testimony, PW4 is record to have told the trial court thus:-

> *"I asked the 1st accused person to show where there is a gun. I* ***threatened*** *the 1st accused*

person to be handed over to the sungusungu. The 1st accused person asked us to follow him where there is the said gun."

The first appellate Court considered appellant's confession and was satisfied that it was admissible. With respect, we are of the view that had both Courts below considered the fact that PW4 was a person in authority and the appellant's confession was induced by the former's **threat**, such confession should not have been admitted in evidence in terms of s. 27(3) of the Evidence Act, Cap. 6. R.E. 2002 which provides:-

> *"A confession shall be held to be involuntary if the court believes that it was* ***induced by any threat****, promise or other prejudice held out by the police officer to whom it was made or by any member of the Police Force or by* ***any other person in authority.****"* [Emphasis supplied].

Even if the evidence of PW4 on this aspect of the case were to be discounted, as we hereby do, we are satisfied that the remaining

uncontroverted evidence of PW1 and PW2 sufficiently and without doubt links the appellant to be one of the armed robbers who raided the residence of PW1.

We have found no merit in the appellant's other grievance that because PW1 is the uncle of PW2, the latter's evidence should be treated as suspect. There is no rule of law or practice which permits the evidence of near relatives to be discounted because of their relationship. What is important is the credibility of the witnesses (See**; HASSANI BAKARI @ MAMAJICHO V. R.**, Criminal Appeal No. 103 of 2012 (unreported). In **PAULO JARAYI V. R.**, Criminal Appeal No. 216 of 1994 (unreported), it was stated:-

> "*We wish also to say that ....* ***it is not the law that whenever relatives testify to any event, they should not be believed unless there is also evidence of a non-relative corroborating the story.***"
>
> *While the possibility that relatives may choose to team up and untruthfully promote a*

certain version of events must be borne in mind, ***the evidence of each one of them must be considered on merit, as should also the totality of the story told by them*** *....that is not to say a conviction based on such evidence cannot hold unless there is supporting evidence by a non-relatives..."* [Emphasis supplied].

Equally untenable, is the complaint by the appellant that PW1 did not prove ownership of the radio (one of the items constituting Exh.P2) by not stating its serial numbers and producing a receipt. We have earlier observed that PW1 positively identified same to be his property and the appellant asserted no right of ownership over ExhP2 either during the trial or immediately after his arrest. Under such circumstances, it was not necessary to prove ownership in a manner complained of. In **HASSAN AWESO V. R.**, Criminal Appeal No. 141 of 2003 (unreported) the Court said:-

"...in cases of this nature it is not necessary to prove ownership where there is nobody else who is claiming the same to be his."

All the above considered, we are satisfied that appellant's conviction was amply justified and that there is no substance whatsoever in his appeal which we accordingly hereby dismiss in its entirety.

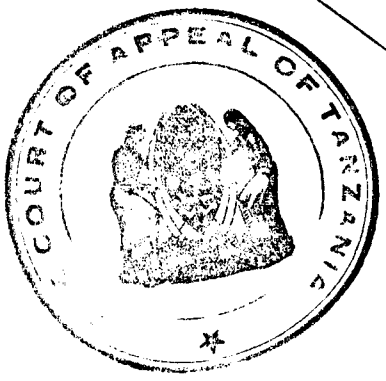
DATED at **TABORA** this 19th day of April, 2013.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL