

IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: KILEO, J.A., KIMARO, J.A. ,And MASSATI, J.A.)

CRIMINAL APPEAL NO. 27 OF 2013

OMARY RAMADHANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Resident Magistrate' Court

at Dodoma)

(Rutatinisibwa-PRM/EJ)

dated 16th October, 2012

in

PRM E.J Criminal Appeal No.18 of 2012

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JUDGMENT OF THE COURT

17th & 23rd September, 2013

KIMARO, J.A.:-

The Court of Resident Magistrate sitting in its extended powers (Rutatinisibwa, PRM/EJ) sustained a conviction and the sentence of thirty years imprisonment that was imposed on the appellant by the District Court of Singida, for the offence of armed robbery contrary to sections 287A of the Penal Code, [CAP 16 R.E.2002].

It was alleged in the trial court that on 14th October; 2009 at about 20.30 hours, the appellant stole a handset cellular phone, one bag and cash from Mwajuma Ramadhani (PW1). The testimony of PW1 was that on the material day she had come from SIDO, her work place. She passed at the old bus stand for transport but she could not immediately get a "*daladala*" because she was late. She decided to walk. When she arrived near the Lutheran Church, at a place commonly known as "*Msalaba mrefu*"), she met one Shabani Gunda who demanded her phone number. PW1 did not give him her phone number. She went on walking. When she arrived at Kabamo Primary school, the appellant emerged and passed in front of the complainant rushing, as if he was going to Sokoine Hospital. A few seconds later the appellant ran to PW1 from the back. As PW1 turned back to see what was taking place, the appellant attacked her. He held her right hand and commanded her to follow him. The complainant refused to yield to his demand. In that process, the appellant using a knife caused injuries to the complaint and then stole from her the properties mentioned in the charge sheet.

PW1 said she was able to identify the appellant because of electric light which came from tube lights at Kabama Primary School and Osaka Bar. She also said that the appellant was known to her before as they resided in the same street. Another witness for the prosecution, F. 764 D/ SSGT Dioniz (PW2) a Police Officer, testified that PW1 reported the incident at the police station. He saw her with wounds on her hand. He issued a PF3 to her. PW2 also interrogated PW1 on how she suffered the injuries. PW1 said that it was one Ramadhani who injured her. Later, on 20th October, 2009 she reported another suspect but she said that the suspect was her boyfriend and could not identify him. The witness said he became suspicious of the truthfulness of her identification of the suspect.

The doctor who attended PW1 for the wounds she suffered, Peter Sammy, (PW3) a Medical Practitioner at Mvumi Hospital said the complainant reported at the hospital on 14th October, 2009 with a wound at her right hand which was bleeding. She had a PF3. PW3 treated PW1. He had to do a minor surgery. That was the summary of the prosecution evidence in the trial court.

The appellant's defence was that he was taken to the police station on 17th October, 2009 by Juma Ramadhani to whom he was indebted, after failing to pay for the debt. It was while he was there, that he was informed that he had committed the offence of armed robbery to the complainant which he denied. As indicated, the trial court was satisfied that the offence was proved by the prosecution on the standard required and convicted the appellant accordingly and his first appeal was dismissed.

Before the Court he has filed several grounds of appeal but some grounds are repetitive. In grounds one to five the appellant faults the judgement of the trial court for omission to enter a conviction after finding him guilty. In ground six to eight the appellant says he was convicted on weak evidence of identification. In ground nine the appellant's complaint is that the PF3 was admitted in evidence without following the procedure.

At the hearing of the appeal the appellant appeared in person. He was not represented. The respondent Republic was represented by Mr. Angaza Mwipopo, learned Senior State Attorney. In arguing the appeal, the appellant insisted that the evidence of identification was weak as the

intensity of the tube lights was not revealed. He also questioned why the complainant failed to reveal the name of her boyfriend if she were to be trusted. He prayed that the appeal be allowed.

On his part the learned Senior State Attorney supported the conviction and the sentence. On the evidence of identification of the appellant, Mr. Mwipopo said the evidence was watertight as the complainant explained how the appellant robbed her by using a knife. He said the identifying circumstances at the scene were favourable because of the electric light that was coming from the tubes at the primary school and the bar. It was also his contention that the incident took some time because there was a struggle between the complainant in parting with her handbag and the appellant in taking it away from her. The incident was also immediately reported to the police and the name of the appellant mentioned as the culprit. He said even the doctor (PW3) corroborated the evidence of the complainant on the injuries she sustained. He supported his submission by the cases of **Jaribu Abdallah V R** [2003] T.L.R.271 and **Fadhili Gumbo V R** [2006] T.L.R. 50. He prayed that the appeal be dismissed.

This is a second appeal. In such appeals, the jurisdiction of the Court to interfere with concurrent findings of facts by the courts below is restricted to unreasonableness of the decision, misapprehension of the evidence or a violation of a principle of the law hence occasioning a miscarriage of justice to the appellant. See the cases of **Iddi Shabani @ Amasi V R** Criminal Appeal No. 111 of 2006 and **Musa Mwaikunda V R** Criminal Appeal No.174 of 2006 (both unreported) among others.

Guided by this principle the issue before us will be whether or not there are reasons for interfering with the concurrent finding of facts by the courts below. To start with let us say that some grounds of appeal raised by the appellant are new. They were not raised in the first appellate court. These are grounds one to five and ground nine. This Court has repeatedly held that grounds of appeal not raised in the first appeal court will not be entertained by the Court. For this reason the Court will not address those grounds.

In grounds six to eight the appellant is complaining about his identification that it was not water tight. He questioned the credibility of the complainant.

Admittedly the conviction of the appellant was based on the evidence of his identification. With respect to the learned Senior State Attorney, the credibility of the complainant is tainted for inconsistency between her evidence and that of PW2. The question which the appellant asked, which we agree that it shakes her credibility is why did she not mention her boyfriend on the day the offence was committed and reported to the police station? How could she have a second thought? If she identified the appellant was it possible for her to fail to identify her boyfriend? Our considered opinion is that if she could identify the appellant in the circumstances she said she identified him; she would not have failed to identify a person who was intimate to her in that same circumstances. Moreover, the complainant mentioned only one name of the appellant to PW2. She did not mention both names of the appellant. Under such circumstances, the likelihood of the appellant's defence being true could

not be ruled out. For this reason the credibility of the complainant was shaken.

With respect to the learned Senior State Attorney, we disagree with him that the evidence of identification was under the circumstances water tight. The credibility of the complainant was doubtful. We find his appeal having merit. We allow it, quash the conviction, set aside the sentence, and the order for compensation. We order his immediate release from prison unless he is held there for other lawful purpose.

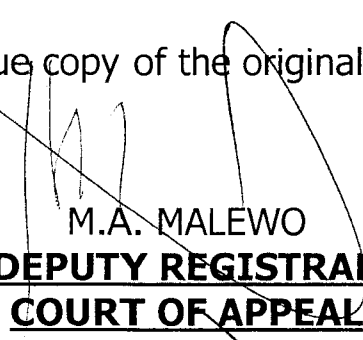
DATED at DODOMA this 20th day of September, 2013.

E. A. KILEO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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


M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL