

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MSOFFE, J.A., KIMARO, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 221 OF 2011

**1. ABDALLAH MUSA }
2. JUMA RASHID } APPELLANTS**
VERSUS

THE REPUBLIC..... RESPONDENT
(Appeal from the judgment of the High Court of Tanzania
at Mwanza)
(Masanche, J.)

Dated the 15th day of March, 2006
in
Criminal Appeals No.40 & 59 of 2005

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JUDGMENT OF THE COURT

29 July & 1 August, 2013

KIMARO, J.A.:

The two appellants were convicted of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, CAP 16 as amended by Act No. 27 of 1991. The subject matter of the robbery was boat engine TAMAHA HP 9.9 with serial number 1000155 valued at T.shillings 1500000/= the property of Marimi Bunyanya. The robbery was alleged to have been committed on 15th February, 2004 at about 21.00 hours at Hito Islands in Lake Victoria within Sengerema District.

The appellants were charged jointly with Yasini Musa Nuru and Majid Dauda Jaffer but the latter two were acquitted at the first appellate stage. Although the charge sheet specifies that the engine boat was

stolen by use of threat, it does not specify to whom the violence was directed. An alternative court of receiving stolen property contrary to section 311 (1) of CAP 16 was also preferred against the second appellant.

At the trial court evidence was led by Balagata James (PW1) an employee of Malimi Bunyanya (PW2) that on the date of the commission of the offence, he was with two other employees fishing in Lake Victoria, using an engine boat. PW 2 had a fishing company with 60 fishing boats and 300 employees. On that day after fishing, PW1 and his co employees slept in the boat. At around 3.00 am they saw another boat with people wielding "pangas". They informed PW1 and his co employees that they were under arrest. PW1 jumped into the lake and managed to swim to the shore of the lake. He managed to get a place to sleep until the next morning where he went to the scene of crime accompanied by other persons. He found his co employee there but the engine boat was stolen.

The matter was then reported to the employer and eventually to the police. C. 3850 D/Sgt Joseph (PW3) investigated the case. He interrogated the 1st appellant who admitted involvement in the commission of the offence and also mentioned the rest of the persons who participated in the commission of the same. It is also in the

evidence of PW3 that the 1st appellant informed him that the stolen boat engine was sold to the 2nd appellant. The cautioned statements of the 1st appellant and 2nd appellants were admitted in evidence as exhibits P3 and P4 respectively. The witness said the 1st appellant took the witnesses to the house of the 2nd appellant where the boat engine was recovered. It was found hidden in the house of the 2nd appellant buried in the ground and covered by cement. The owner of the boat engine PW2 identified the boat engine. He tendered in court the cash sale receipt issued to him at the time he purchased the engine boat and it was admitted as exhibit P1.

In their defence both appellants denied the commission of the offence. The 1st appellant raised the defence of alibi without notice under section 194 (4) of the Criminal Procedure Act, [CAP 20 R.E.2002]. He denied leading PW3 to the house of the 2nd appellant where the engine boat was recovered. He also denied making a cautioned statement.

The 2nd appellant also denied involvement in the commission of the offence. He also denied that the boat engine which was admitted in court as exhibit P2 was found in his house. He said his house was searched without search warrant.

With the cautioned statements of the 1st and the 2nd appellants and the recovery of the boat engine, exhibit P2, the trial court was satisfied

that the charge against the appellants was proved on the standard required. They were convicted as aforesaid.

The first appellate court upheld the convictions of the 1st and 2nd appellants on the same reasoning as the trial court.

Before this Court the appellants filed several grounds of appeal challenging the judgment of the first appellate court. Essentially the complaint of the appellants is that the first appellate court acted wrongly in sustaining the convictions of the appellants on the evidence led before the trial court as it was not sufficient.

During the hearing of the appeal the appellants appeared in person. They were not represented. The Respondent/Republic was represented by Mr. Athumani Matuma, learned State Attorney.

Supporting their appeal, both appellants asked the Court to allow their appeal. They said that their grounds of appeal had substance. They said that they were convicted without sufficient evidence.

The learned State Attorney supported the appeal by the appellants. He said the cautioned statements relied upon by the courts below to convict the appellants was not sufficient evidence. Moreover, argued the learned State Attorney, the statements did not satisfy the requirement of a confession to be relied upon to convict the appellants. Speaking

specifically for the 2nd appellant, the learned State Attorney said that he repudiated his statement. He also put into test the credibility of the witnesses. Another aspect which featured in the learned State Attorney's submission is the double standard applied by the learned Judge on first appeal to acquit the other accused who were charged with the appellants while the evidence against all appellants was the same.

Regarding the boat engine which was said to have been recovered from the house of the 2nd appellant, Mr. Matuma said the property was not recovered through a search warrant and no receipt acknowledging seizure of the boat engine was issued as required by the law and there was no explanation given why section 38 (3) of the Criminal Procedure Act, CAP 20 was not complied with. In the alternative, the learned State Attorney said that from the evidence on record, if the Court will find that there is evidence to sustain the convictions, then the conviction should only be sustained in respect of the 2nd appellant for the offence of receiving stolen property but not the offence of armed robbery. The 1st appellant should be acquitted.

After going through the record of appeal, the grounds of appeal by the appellants and the submissions in this appeal, with respect, we agree with the learned State Attorney that there was no sufficient evidence to

sustain the conviction of the appellants for the offence of robbery or that of receiving stolen property.

Admittedly, there was no direct evidence to prove the offence. The offence was committed in the lake during night hours. PW1 ran away. The rest of the employees who were said to remain in the boat were not summoned to explain what actually took place after PW1 swam to the shore leaving them in the boat. The cautioned statements of the appellants could not be relied upon to convict the appellants because in the first place the procedure for their admission was not complied with. The appellants were not called upon to say whether or not they had any objection for their admissibility. There is nothing on record indicating that the prosecution complied with section 169 (3) of the Criminal Procedure Act. Moreover both appellants denied making their statements in their defence and the trial court did not take any effort to find out whether they were taken voluntarily. See the case of **Ali Salehe Msutu V R** [1980] T.L.R. 1 where the Court held that where an accused person denies making a confession it must be treated as repudiated confession which requires corroboration to form a basis for conviction. In this case there was no corroborative evidence to the cautioned statements of the appellants.

The evidence that the boat engine was found in possession of the 2nd appellant is also doubtful because no receipt of seizure was issued to show that it was found in the house of the 2nd appellant. There was not even an independent witness who was called to witness the recovery of the boat engine from the house of the second appellant. Section 38(3) of CAP 20 requires the officer making the seizure to issue a receipt for the property seized and person(s) from the house from where the property is seized to sign on the receipt. Short of that receipt, the evidence of the recovery of the boat engine from the house of the house of the 2nd appellant becomes suspicious.

The last aspect which waters down the prosecution case is the charge sheet. As stated earlier, the charge sheet is silent on the person who was the victim of crime. The charge sheet alleges that the boat engine was stolen through use of threats. However, the person who was threatened was not disclosed. Section 132 of the Criminal Procedure Act, provides:

*"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, **[together with such particulars as may be necessary by giving reasonable information as to the nature of the offences charged]**"*

With the omission of mentioning the victim of the offence in the charge sheet, it becomes doubtful whether the offence of armed robbery was committed at all.

From what we have said in respect of the deficiencies in the prosecution evidence we allow their appeal, quash the convictions and set aside the sentence. We order the appellants' immediate release from prison unless held there for other lawful purpose.

DATED at MWANZA this 31st day of July, 2013.


J.H. MSOFFE
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL



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


P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL