

**IN THE COURT OF APPEAL OF TANZANIA**

**AT IRINGA**

**CRIMINAL APPEAL NO. 302 OF 2009**

**(CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MMILLA, J.A.)**

**KIDIS COSMAS @ MSIGWA ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania  
at Iringa)**

**(Uzia, J.)**

**dated 7<sup>th</sup> day of October, 2009**

**in**

**(DC) Criminal Appeal No. 22 of 2009**

**JUDGMENT OF THE COURT**

25<sup>th</sup> & 30<sup>th</sup> June, 2014

**KAIJAGE, J.A.:**

The District Court of Mufindi at Mafinga found the appellant guilty of the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code, Cap 16, R.E. 2002. It sentenced him to fifteen (15) years imprisonment. Aggrieved, he unsuccessfully appealed to the High Court at Iringa. He has now come to this Court on a second appeal.

We propose to preface our judgment with the brief account of what led the appellant being convicted as charged.

At around 2:00 hours on 15<sup>th</sup> December, 2007, PW1 Mario Endihasi Ndanzi was in his dwelling house asleep. He was awakened by light shone in his bedroom. As he walked outside, he saw a person flashing torch light on and off at the merchandise stall. When he approached the stall, he noticed the door leading therein wide open. As and when he was about to close it, he saw somebody following him from behind. He then raised an alarm, after which he was suddenly hit with a steel bar on his forehead. He fell down, but gathered strength to ran after a person who had assaulted him.

It was the testimony of PW1 that with the help of a dog and fifteen (15) neighbours who responded to his alarm, the appellant was apprehended a few paces away from the former's house. The appellant was also allegedly found armed with a steel bar which the police retained as an exhibit. A stock taking exercise carried out in the stall by PW1 immediately after the apprehension of the appellant, led to the discovery of various items total

valued at Tsh.1,480,000/= stolen therefrom. The incident was reported to the police for further necessary investigations.

PW2 No. C7089 D/Sgt. Raphael obtained and recorded the appellant's cautioned statement (EXHP1) which the latter retracted, but was all the same admitted without a proper conduct of an inquiry. Both PW2 and PW3 Yasin Yacob Mwenga confirmed PW1's story to the extent that the appellant was apprehended by a group of civilians in the vicinity of the latter's house, near the main road.

In his sworn defence, the appellant flatly denied to have committed the robbery in question. He told the trial court that he was arrested and assaulted by a group of civilians along the road a few paces from PW1's house, when he was on his way to Igowole Guest House. Those who arrested him alleged that he was a thief and that he deserved to be punished. The appellant also strongly refuted the evidence of PW1 who gave an estimated distance of about one kilometre between the latter's house and the main road along which the former was arrested. He finally dismissed the evidence adduced by the prosecution witnesses as being nothing but a pack of lies.

On the basis of the evidence on record, the two courts below made a concurrent finding that the appellant was guilty as charged.

The appellant filed five (5) grounds of appeal which basically crystallize on one major ground of complaint namely; that the case for the prosecution was not proved beyond reasonable doubt.

Before us, the appellant appeared in person, fending for himself. The respondent Republic was represented by Ms. Kasana Maziku, the learned State Attorney who resisted the appeal.

Arguing generally on the sole ground of appeal, Ms. Kasana correctly opined that in the absence of an inquiry properly conducted by the trial court, the appellant's retracted cautioned statement (EXHP1) which did not amount to a confession should be expunged from the evidence. However, she maintained that the remaining evidence of PW1 and PW3 provides proof beyond reasonable doubt that the appellant committed the offence of which he was convicted.

This being a second appeal, we are ordinarily not free to interfere with the concurrent findings of facts by the two courts below. We are only supposed to deal with questions of law. But this approach rests on the

premise that the findings of facts are based on a correct appreciation of the evidence on record or findings arrived at without breach of any established principle of law. If both courts below completely misapprehend the substance, nature and quality of evidence resulting in an unfair conviction, this court must in the interest of justice intervene. (See, for instance, **LUDOVIDE SEBASTIAN V. REPUBLIC**; Criminal Appeal No. 318 of 2009 and **YASIN s/o RASHID @ MAIGE V. REPUBLIC**; Criminal Appeal No. 461 of 2007 (both unreported)).

Having subjected the entire evidence on record to a very close scrutiny, we hold a firm view that in this case the two courts below misapprehended the substance and the quality of the evidence adduced by the prosecution witnesses. In other words, the unsatisfactory features besetting the prosecution case which we shall endeavour to unearth hereinbelow, warrant this Court's intervention. Incidentally, the two courts below took no notice and did not address these features.

It is clear from the record that the prosecution case is by and large built upon the evidence of PW1 which we have found porous, self contradictory and which contradicts the evidence of PW3. PW3's evidence

tallies with the evidence of the appellant who told the trial court that he was arrested along the road, a few paces from PW1's house. Curiously, PW1 gave an estimated distance of about one Kilometre between his house and the mainroad where the appellant was arrested. A reasonable doubt which immediately comes to the fore is this; where exactly could the appellant have been arrested so as to dispel his line of defence that at the time he was arrested he was just an innocent passer-by along the road.

The next significant unsatisfactory feature is that in his evidence in chief, PW1 stated that he arrested the appellant with the assistance of about fifteen (15) persons who had gathered in response to his alarm. This version, however, is diametrically opposed to his testimony, on the same aspect of the case when he was under cross-examination. This, in our view, dented PW1's credibility. Upon being cross-examined, PW1 categorically told the trial court that he single handedly arrested the appellant who was armed with a steel bar. Upon being further cross-examined, PW1 said:-

*"When I arrested you, I found you with a nondo. The exhibits were taken by the police. The one who had taken it are the ones authorized to tender them."*

In the course of trial, no witness from the prosecution side was called to tender, in evidence, a steel bar allegedly found in the possession of the appellant. The appellant having denied in his defence that he was found in possession of a steel bar (*nondo*), a doubt remains as to whether he was the actual person who inflicted a fatal blow on PW1's forehead during the night of the robbery incident. A possibility that the appellant might have been mistaken to be the actual perpetrator of an assault cannot be ruled out. In any case, no evidence was forthcoming from PW1 on how, during that night, he was able to identify his assailant against whom he claimed to have given a chase. On this, we are increasingly of the view that this might be a case of mistaken identity.

From the foregoing brief observations, we are satisfied that the unsatisfactory features unveiled hereinabove went to the root of the prosecution case thereby rendering it weak and incapable of sustaining the appellant's conviction. Consequently, we allow the appeal, quash the appellant's conviction and set aside the sentence meted out by the trial court and affirmed by the High Court. The appellant is to be released from prison unless otherwise lawfully held.

DATED at IRINGA this 30<sup>th</sup> day of June, 2014.

J. H. MSOFFE  
**JUSTICE OF APPEAL**

S. S. KAIJAGE  
**JUSTICE OF APPEAL**

B. M. MMILLA  
**JUSTICE OF APPEAL**

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

  
Z. A. MARUMA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**