IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 18 OF 2013

NIKAS DESDERY @ OISSO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction and sentence of the High Court of Tanzania at Arusha)

(Sambo, J.)

Dated 18th day of October, 2012
In
Criminal Appeal No. 6 of 2012

JUDGMENT OF THE COURT

11th & 16 June, 2014

JUMA, J.A.:

This is a second appeal by NICAS DESDERI @ OISSO, hereinafter referred to as the appellant) who together with another GEORGE s/o JOHN @ TARIMO, were jointly charged before the District Court of Arusha/Arumeru at Arusha, with the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002 as amended by Act No. 4 of 2004. The particulars of the offence were that:-

"...on or about the 11th day of May, 2010 at about 22:00 hours at ESSO area within the Municipality, District and

Region of Arusha, jointly and together did steal one (1) motor cycle make Skygo with Registration Number T. 308 BGA valued at Tanzanian Shillings one million six hundred thousand (Tshs 1,600,000/=), one mobile phone make NOKIA valued at Tanzanian shillings twenty four thousand (Tshs. 24,000/=) all total valued at Tanzanian Shillings one million six hundred and twenty four thousand (Tshs. 1,624,000/=) the properties of one GEORGE S/O GODSON and immediately before and after such stealing, did use actual violence in order to obtain and retain the said properties."

The salient background facts to this appeal traces back to the night of the incident when George Godson (PW1) was at a motor cycle parking bay at Sinon area of Arusha. He was waiting for customers to hire his motor cycle. A potential passenger soon appeared and hired a ride to Phillips area of Arusha Municipality. Upon reaching at Phillips, the initial destination, the passenger asked for a further ride to Esso area where his friend was waiting. Inevitably, PW1 asked for additional fare which the passenger agreed. But, matters took a worse turn when they arrived at Esso. This was when

PW1 was suddenly set upon and attacked by the appellant, his erstwhile passenger. A second person soon joined the appellant, both assaulting him. The second assailant managed to snatch the motor cycle away. A tussle between the complainant and the appellant continued briefly, before the appellant escaped from the scene. The guards at Esso petrol station who had heard a cry for help and the ensuing commotion appeared to offer assistance. These guards chased after the escaping appellant and arrested him still wearing the helmet PW1 had given him for his own safety. Aminiel Elimo Nzaghine, PW2 testified that he is the owner of the motor cycle registration number T.308 BGA and the complainant (PW1) was his employee. PW2 confirms that appellant was arrested at the scene of crime.

It is apparent from the evidence that once in the police station, the appellant promised the police and PW2 that he would assist in the recovery of the stolen motor cycle. PW2 was present when the police interrogated the appellant who promised that if released on bail, he

would facilitate the arrest of George John Tarimo, his co-accused. PW2 testified how the appellant lived up to his promise by alerting him that George John Tarimo was at Masai Camp. This information was followed up, leading to the arrest of Tarimo. Both PW1 and PW2 insisted that it was the appellant who told the police where his co-accused had escaped to with the stolen motor cycle.

In his defence, appellant denied any involvement in the attack and stealing of the motorcycle from PW1. He insisted that the criminal case against him was a fabrication and he was the victim of his earlier differences with one person known as James. James had earlier sold to him two trays of rotten eggs and he had refused to pay him. James had promised trouble would befall the appellant before sunset. And that is exactly what happened because he was arrested and taken to the Central Police Station.

After hearing evidence from three prosecution and two accused persons who testified in their own defence, the learned trial magistrate (R.A. Ngoka-RM) was convinced that the prosecution had

proved its case to the required standard. He found the appellant and his co-accused, guilty of the offence of armed robbery and convicted them accordingly. Each appellant was sentenced to serve thirty (30) years in prison. Aggrieved with this outcome, they filed their first appeal in the High Court at Arusha (Criminal Appeal No. 6 of 2012).

The first appellate court after re-evaluating the evidence on record was left in no doubt that the prosecution had not proved its case against George John @ Tarimo to the required standard. Sambo, J. ordered his immediate release from prison. Appellant was not as successful. While agreeing that indeed the cautioned statements had indeed been taken outside the prescribed period and should be disregarded, the learned Judge all the same concluded there was still strong evidence that proved the prosecution's case against the appellant.

Aggrieved with the dismissal of his appeal, appellant has come to this Court with his five grounds of appeal which may be summarized as follows. **First,** he complains about material defect in a

charge sheet whose particulars he asserts, failed to disclose any weapon allegedly used by the appellant. **Second**, he contends that since neither PW1 nor PW2 testified about commission of the offence of armed robbery, the two courts below were not entitled to convict the appellant of that offence. **Thirdly**, he complains that the identification of the appellant at the scene of crime was not sufficient to warrant his conviction. The **fourth** ground centres on the failure of the two courts below to evaluate the evidence on record. According to the appellant, had evaluation been done, these courts would not have found the offence of armed robbery. In the **fifth** ground, appellant faulted the exhibition of the motor cycle helmet. He contended that it should not have been admitted as evidence.

At the hearing of this appeal, the appellant fended for himself. Ms Elizabeth Swai learned State Attorney represented the respondent Republic. Appellant preferred to let Ms Swai to address his grounds of appeal and he would come in by way of reply.

From the very outset, Ms. Swai resisted this second appeal. Urging us to dismiss the first ground of appeal which contend lack of ingredient of

violence in the particulars of the charge sheet, Ms Swai referred to the evidence of the complainant (PW1) on page 14 of the record about a person unknown to PW1 who had suddenly attacked him with something hard at his mouth felling him down to the ground. While urging us to dismiss this ground of appeal Ms Swai submitted that in the circumstances of this appeal there was no need to indicate in the particulars of the offence about the nature of weapon used or even the nature of violence that was directed at the complainant.

Ms Swai rejected the appellant's second ground which contends that the evidence of PW1 and PW2 was not sufficient to prove the offence of armed robbery. The learned State Attorney submitted that even if left on its own, the evidence of PW1 is sufficient to prove all the ingredients of the offence of armed robbery. She referred us to the evidence of PW1 from the time the appellant hired this complainant's motor cycle at SINON area to take this erstwhile passenger to PHILLIPS. And from PHILLIPS to ESSO where the appellant suddenly turned against the complainant before being joined by a second assailant, who stole the motor cycle, were all sufficient to prove the

offence of armed robbery. Ms Swai invited us to find that her submissions on first and second grounds of appeal sufficiently address the fourth ground contending that the two courts below failed to evaluate the evidence that was before them.

On the third ground contending insufficient visual identification of the appellant, Ms Swai placed reliance on the evidence of the complainant (PW1). She urged us to find, like the two courts below that PW1 had sufficient opportunities from the moment appellant hired his motor cycle at SINON to the time the appellant was arrested at ESSO before being taken to the police station to face the charge of armed robbery, was sufficient to facilitate positive identification.

For once, the learned State Attorney agreed with the appellant that his fifth ground of appeal has merit. She conceded that it was not proper for the motor cycle helmet (exhibit P3) to be tendered through D4931 Detective Sergeant John Mjaluo (PW3). Ms Swai however was quick to point out that there is still sufficient evidence remaining to affirm the conviction of the appellant.

In his replying submissions appellant had very little to add beyond reiterating that the insufficiency of the visual identification evidence, and wondered why the members of peoples militia who arrested him were not offered as witnesses for the prosecution.

From the foregoing submissions, we propose to begin from perspectives of the settled role of this Court when determining second appeal. **First,** on a second appeal, we are only supposed to deal with questions of law: - see **Juma Hamis Kabibi vs. R.,** CRIMINAL APPEAL NO.216 OF 2011 (unreported). **Secondly,** the Court rarely on second appeal interferes with concurrent findings of facts made by the two courts below. **Second,** amongst the rare occasions when the Court invariably interferes, is where there is misapprehension, or mis-directions or non-directions on the evidence which occasion a miscarriage of justice or a violation of some principle of law: - see **Juma Saidi and Four Others vs. R.,** CRIMINAL APPEAL NO. 235 OF 2006; **Daniel Nguru and Others vs. Republic**, CRIMINAL APPEAL NO. 178 OF 2004 (both unreported). From these two legal premises

on role of the Court on second appeal, we respectfully agree with the submission of Ms Swai the learned State Attorney that there is no reason or justification for this Court to interfere with the way the two courts below evaluated and applied the evidence on the ingredients of the offence of armed robbery under section 287A of the Penal Code. Section 287A provides,

> *"Any person who **steals anything**, and at or immediately after the time of stealing is **armed with any dangerous or offensive weapon or instrument**, or **is in company of one or more persons**, and at or immediately before or immediately after the time of the stealing **uses or threatens to use violence** to any person, commits an offence termed "armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."* [Emphasis Added].

It seems clear from the evidence on record that with the arrest of the appellant, red-handed at the scene of crime, the element of stealing was proved beyond reasonable doubt.

In **Stephen John Rutakikirwa vs. R.,** CRIMINAL APPEAL NO. 78 OF 2008 (unreported) an appellant who was arrested at the scene of crime raised a complaint that he was not properly identified at the scene of crime. The Court in rejecting this complaint made the following pertinent observations:-

> *"In the present case, even if there was darkness, the appellant was grabbed by and struggled with the complainant, and was arrested at the scene by PW2 and PW3; and immediately taken to the police. If there was any need of corroboration, we would readily find it in the appellant's own admission in his testimony that he was within the vicinity at that time (**See RUNGU JUMA v R** (1994) TLR. 176. We also find no substance in this complaint."*

Therefore the issue of visual identification of the appellant should not detain us. The complainant never lost sight of the appellant from the moment he was arrested at ESSO, to the moment he was handed over to the police. This is confirmed by the evidence of both PW2 and PW3 that the appellant was indeed arrested at the scene of crime. There is no reason for us to doubt the evidence of PW2 who stated that while under

police custody the appellant promised the police and PW2 that he would assist in the recovery of the stolen motor cycle. PW2 was present when the police interrogated the appellant who promised that if released on bail, he would facilitate the arrest of George John Tarimo, and ultimate recovery of the stolen motor cycle. The fact of the arrest of the appellant was further elaborated by PW2 who testified on how the appellant lived up to his promise to assist by alerting PW2 that George John Tarimo was at Masai Camp. This information was followed up leading to the arrest of Tarimo.

With the proof of the element of stealing considered, the prosecution was in addition required to prove other elements of the offence of armed robbery. That is, either theft was committed by people armed with any dangerous or offensive weapon or instrument; or the person who stole was in company of one or more persons, and use of violence or threats of violence.

For purposes of this appeal, although the evidence clearly suggests that some unknown offensive weapon were used to fell down the complainant injuring him in the process, it is the element of

the appellant being in the company of another person who escaped with the motorcycle that makes the offence of armed robbery complete as against the appellant. Particulars of the offence alleging that the appellant was in the company of another person is supported by the evidence of the complainant (PW1), the owner of the stolen motor cycle (PW2) and PW3, the police officer who was put in the charge of investigation. Evidence of PW2 and PW3 shows the efforts that were made by the appellant himself to reach out to his accomplice in the armed robbery. The fact that the first appellate court quashed the conviction of George John Tarimo and set aside his imprisonment does not whittle away the fact that the appellant committed the offence of armed robbery while in the company of another person. We cannot therefore fault the following reasoning of the learned Judge of first appellate court (Sambo, J.) appearing on page 68 of the record of appeal, which he made before he allowed Mr. Tarimo's appeal:

> *"I am in total agreement with the learned State Attorney that the case was not proved beyond*

reasonable doubt as against the first appellant ***[Tarimo]****. The manner he allegedly appeared at the scene of crime when the complainant had been attacked by the second appellant* ***[Appellant herein]****, could not allow him to correctly identify him. He was mentioned by the second appellant, implicating him to the effect that they were together in committing this offence, but such an accomplice evidence needs corroboration, which is not found in this case against the first appellant. The evidence on telephone calls cannot be a base for conviction because there's no direct evidence to prove that they were really talking to the said first appellant. It may also be true that they were not talking with him. The first appellant's appeal has merits."* [Emphasis Added].

We think, participation of a second person in the armed robbery is clearly borne out in the evidence of the complainant. After being felled down by the appellant, the appellant urged his companion to run away with the motor cycle, which he did. That motor cycle was never recovered. We are therefore satisfied that because the

appellant was jointly and together charged with another person, he must have been sufficiently aware that the charge of armed robbery levelled against him had the element of being in the company of another person and the actual violence that was used on the complainant.

For the reasons stated above, this second appeal lacks merit and is dismissed. It is so ordered.

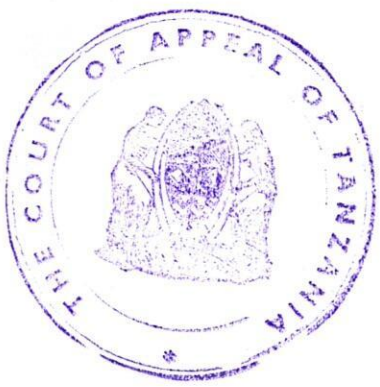
DATED at ARUSHA this 13th day of June, 2014.

N.P. KIMARO
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL