IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MBAROUK, J.A., MUSSA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 146 OF 2013

BAHATI ROBERT ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision/Judgment of the High Court of Tanzania at Mwanza)

(Mwangesi, J.)

dated the 15th day of April, 2013
in
Criminal Appeal No. 82 of 2011

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JUDGMENT OF THE COURT

15th and 17th September, 2014

JUMA J.A.:

The appellant, BAHATI ROBERT was tried and convicted by the District Court of Magu for the offence of robbery with violence contrary to section 285 and 286 of the Penal Code Cap. 16. He was sentenced to serve fifteen years in prison. The appellant was in addition ordered to compensate the complainant a total of shs. 35,000/= and one bicycle. He appealed to the High Court of Tanzania at Mwanza against the conviction

and sentence. Mwangesi, J., the learned Judge of the first appellate court found the appeal before him to be devoid of merit and dismissed it. The learned Judge also upheld the sentence, describing it to be the minimum sentence for the offence for which the appellant was convicted. The appellant has preferred this second appeal to this Court.

The particulars of the charge alleged that at around 21:30 hours on 9th September, 2004 at Mwabasabi area of Itumbili village of Magu District in Mwanza Region, the appellant stole money in cash (shs. 35,000/=) and one bicycle (Phoenix) valued at shs. 120,000/= all belonging to the complainant Francis s/o Mabula who testified as PW1. The particulars further allege that immediately after stealing, the appellant and his colleagues in crime, used actual violence against the complainant in order to obtain or retain the property they had stolen. The complainant (PW1) testified that his child was ill and he decided to go to a nearby dispensary to buy medicine. On his way to the dispensary riding on his bicycle he found three people who had blocked the road. One of the three bandits carried a beer bottle and demanded to know why the complainant had shone his bicycle lights at their direction. Appellant was amongst the three

people who soon thereafter begun to assault the complainant with blows on his head. During the scuffle the complainant managed to detain the appellant, holding him firm while crying for help. Several people were attracted to the source of noise. Zephania s/o Ng'honzela (PW2) and Paulo Shija (PW3) were amongst those people who responded to the cries for help. PW2 testified how when he arrived at the scene he found the complainant bleeding but still holding onto the appellant. The complainant told those who had gathered that it was the appellant and two others who had attacked him and that the appellant's colleagues in crime had escaped taking with them his money and bicycle. According to PW2, the complainant and the appellant were both taken to Magu Police Station. PW3 gave a similar account explaining how upon his arrival at the scene, he found the complainant bleeding and surrounded by many people who had gathered. PW3 saw the appellant at the scene of crime holding a bicycle padlock. According to PW3, the complainant told him that he had been attacked by the appellant and his colleagues who had also stolen his money and bicycle. PW3 testified that he participated in escorting the appellant to Magu Police Station.

At his trial, the appellant testified on oath in his own defence. While admitting being at the scene of crime, he however denied any involvement in the alleged offence of robbery with violence. He explained that he received information that his father had died. He was cycling from Bujashi to Ndagulu. He decided to make a brief stopover at Kitongo village. It was while he was on his way to Kitongo village when he saw some people ahead of him. These people stopped him and begun to assault him. He fended off the attack by defending himself.

In his memorandum of appeal the appellant included seven grounds of appeal. **Firstly**, the appellant faulted the learned Judge of first appeal for failing to note that the Preliminary Hearing was not conducted in accordance with the mandatory provisions of section 192 (3) of the Criminal Procedure Act, Cap. 20 (CPA). **Secondly**, the appellant complains that the first appellate court failed to find that no robbery was in fact committed, because the evidence of PW3 Paulo Shija only alleged that he found the appellant at the scene of crime holding a bicycle padlock but not a stolen bicycle. **Thirdly,** the appellant believes that the first appellate court should have decided in his favour because, the prosecution case

against him was poorly investigated, and the investigator who should have testified, was not called to testify in court. **Fourthly,** the appellant contends that there was a material and irreparable contradiction in prosecution evidence between, on one hand the evidence of PW2 who testified that he found PW1 holding the appellant; and, on the other hand, the evidence of PW3 who testified that he found the appellant holding a padlock. In his **fifth** ground of complaint, he asserted that the PF3 which was admitted as exhibit P1 should not have been relied upon by the trial because the mandatory conditions set under section 240 (3) of CPA was not complied before PF3 was exhibited as evidence. The appellant's **sixth** ground questions the probity of the PF3 because while the event took place on 9/8/2009, the PF3 shows that the complainant (PW1) went to hospital on 9/2/2002. **Seventhly,** the appellant put to question the credibility of evidence of the three prosecution witnesses (PW1, PW2 and PW3). He described their evidence to have failed to lead to irresistible conclusion of his own guilt. All these considered, the appellant contends that his appeal should be allowed.

When the appeal came up for hearing before us on 15th September, 2014, the appellant was not represented by any learned counsel. The respondent Republic was represented by Mr. Hemedi Halidi Halifani, learned State Attorney. The appellant urged us to let the learned State Attorney respond to his grounds of appeal and he would respond thereafter. But when he was later given his chance to expound his grounds of appeal, the appellant merely reiterated his grounds of appeal; but made a serious claim that trial court had denied him an opportunity to call his witness to support his defence.

The learned State Attorney took an immediate stand to oppose this appeal by submitting that he supports both the conviction of the appellant and sentence which the first appellate court had confirmed. The learned State Attorney grouped the grounds of appeal into two. In the first group, he included grounds number one, five and six of appeal; which he described to be challenging the procedure which the trial court had followed leading to the conviction and sentencing of the appellant. In the second group, he grouped grounds number two, three, four and seven;

which he regarded as designed to challenge the probity of the evidence led by the prosecution to form the basis of the conviction of the appellant.

Submitting on the first ground which contends that Preliminary Hearing (hereinafter referred to as **the PH**) was not properly conducted, the learned State Attorney referred us to page 2 lines 41 to 47 to support his contention that in fact section 192 (3) of CPA was fully complied with. According to Mr. Halifani, the trial court complied with the statutory requirement to show the memorandum of the matters that were not in dispute. Mr. Halifani noted that the record of PH shows that the appellant had admitted his name and his personal particulars; this implies that the memorandum of what transpired was in fact read over and explained to the appellant. He pointed at the record where there was compliance with the signing of the memorandum by the prosecutor, by the appellant (as accused) and by the trial magistrate.

With all due respect, the learned State Attorney is right. We revisited pages 2 and 3 of the trial court's preliminary hearing proceedings in light of Section 192 (3) of the CPA which states:

"192 (3).- At the conclusion of a preliminary hearing held under this section, the court shall prepare a memorandum of the matters agreed and the memorandum shall be read over and explained to the accused in a language that he understands, signed by the accused and his advocate (if any) and by the public prosecutor, and then filed."

From our perusal of the record of PH, we found nothing wrong with the way the trial court handled those hearings. As this Court said in **Efraim Lutambi v. The Republic** (2000) TLR 265 and cited again in **Juma Mahamudu vs. R.,** Criminal Appeal No. 47 of 2013 (unreported), Preliminary Hearings "*were intended by the legislature not only to reduce the costs of criminal trials in the country, but also to ensure that those trials are, without prejudice to the parties, conducted expeditiously."* It seems clear to us that the appellant was tried and convicted on the basis of evidence that was presented after the completion of the PH. We saw nothing in the way the PH was conducted which prejudiced the appellant in any way.

Regarding the fifth ground of appeal, the learned State Attorney conceded that indeed the trial court did not inform the appellant of his right to require the medical officer who made the PF3 (exhibit P1) to be summoned so that the appellant could exercise his right to cross examine the medical witness who made the PF3. While citing our decision in **Alfeo Valentino vs. R.**, Criminal Appeal No. 92 of 2006 (unreported), the learned State Attorney urged us to expunge exhibit P1 from the record of appeal. He was however quick to clarify that even with the expunging of this exhibit; there was still the evidence of PW2 and PW3 who arrived at the scene of crime to find the injured PW1 holding the appellant. Their evidence proved that it was the appellant and his colleagues in the crime who had assaulted PW1 and stole his bicycle.

Like the learned State Attorney, having gone through the record at the moment the PF3 was exhibited, we too, are satisfied that section 240 (3) of CPA was not complied with. That medical report should be expunged so as not to form part of evidence of the prosecution.

Mr. Halifani has submitted to us that with the expunging of PF3 from the record, the sixth ground of appeal is no longer relevant to this appeal. This is because the complaint in ground number six was to the effect that while the offence was committed on 9/8/2009; but exhibit P1 appearing on page 7 of the record, shows that the PF3 had been sent by the Police to Magu Government Hospital seven years earlier on 09/08/2002. We agree with the learned State Attorney that with exhibit P1 (PF3) out of equation, the variance of the dates complained of by the appellant is no longer relevant for determination of the sixth ground of appeal.

Next, the learned State Attorney moved on to submit on evidential grounds of appeal number two, three, four and seven.

As we have shown earlier, in his second ground, the appellant questioned why, the trial court found that the offence of robbery had been committed in a situation where PW3 testified that he found the appellant with a padlock but not with the stolen bicycle. The learned State Attorney submitted that the trial court did not solely rely on the evidence of PW3 to

convict the appellant. He pointed out that apart from PW3; there was the evidence of the complainant (PW1) and also that of PW2.

Mr. Halifani urged us to dismiss the third ground of appeal because, while it is true the prosecution did not bring the investigator to testify as prosecution witness, the evidence of PW1, PW2 and PW3 was sufficient to prove all the ingredients of the offence. On this line of submission he referred us to our decision in **Anuary Nangu and Kawawa Athuman vs. R.**, Criminal Appeal No. 109 of 2006 (unreported) where on page 7, this Court said:

> *"...Our considered view is that the prosecution was at liberty to choose the witnesses whom they considered important because what matters was to discharge their burden of proof and not the number of witnesses they summoned.* ***See section 143 of the Law of Evidence Act, 1967.***"

On the fourth ground contending contradictions the evidence of PW2 and that of PW3, Mr. Halifani agreed with the appellant that PW2 testified that when he arrived at the scene of crime he found PW1 holding the appellant. He also agreed that PW3 testified that he found the appellant

holding a bicycle padlock. However, the learned State Attorney submitted that what is important is the evidence by both PW2 and PW3 that they found the appellant at the scene of crime.

On the seventh ground where the appellant questions the credibility of evidence of prosecution witnesses, Mr. Halifani submitted that both the trial and first appellate courts adequately evaluated the evidence and came to the conclusion that prosecution had proved its case beyond reasonable doubt.

After hearing submissions on evidential grounds of appeal number two, three, four and seven; we must begin from the perspective that this is a second appeal. We are alive to the established principle of law that once there is a concurrent finding of facts by the two courts below; this Court, sitting as second appellate court, should not readily interfere with that concurrence, unless of course, it is shown there are mis-directions or non-directions: see **DPP** v **Jaffari Mfaume Kawawa** [1981] T.L.R. 149, **Salum Mhando** v **R** [1993] T.L.R. 170, and **Mohamed Musero** v **R.**

[1993] T.L.R. 290; and **Gwandu Faustine, Daniel Wema Vs. R.,** Criminal Appeal No. 174 Of 2005, (unreported).

The main issue in essence that has emerged from the evidential grounds of appeal is whether there is any reason for us with the concurrent finding by the two courts below that it was the appellant, who not only stole a bicycle from PW1, but he also used force to commit that offence of robbery with violence for which he was charged and convicted.

Mr. O. K. Hoza the Principal District Magistrate found that from the evidence of the complainant (PW1) which he described as undisputed, that the prosecution had established that the complainant found his way blocked by three people who included the appellant. They assaulted him, injuring him. Both PW2 and PW3 found PW1 holding onto the appellant at the scene of crime. Both PW2 and PW3 found blood oozing from PW1's face. Trial magistrate also found that the prosecution had proved beyond reasonable doubt that the three assailants, who included the appellant, had stolen not only shs. 35,000/= belonging to the complainant, but also his bicycle.

The learned Judge on first appeal concurred with the trial court's finding of fact when the learned Judge of that first appellate court said:

> *"...From what can be gathered from the records of the trial court is that, there appear to be no dispute to the fact that, the applicant was found by PW2 (Zephania Ng'honzela and PW3 Paulo Shija) who responded to the alarm that had been raised by PW1, while being held by PW1 (Francis Mabula). It is also in evidence that, at the material time, PW1 was oozing blood from his right cheek. The story which the two did get from PW1 was to the effect that, the appellant in the company of his colleagues who had fled away had assaulted him as well as robbing him some money and his bicycle. To that end, they did assist him and sent the appellant to the Police Station..."*

Later on, the learned Judge added:

> *"...As it was in the trial court, I have failed to find any founded reasons to disbelieve the testimony of the three*

prosecution witnesses. To the contrary, I find the assertion by the appellant to lack any basis. One may find it a very bitter pill to swallow, to believe the contention that, a group finds someone along the road and starts to assault him for no apparent reasons."

As we shall explain shortly, we have no reason to differ from the concurrence of facts by the two courts below. With the evidence of PW1, PW2 and PW3 establishing the guilt of the appellant, we are in respectful agreement with Mr. Halifani that it was up to the prosecution to determine whether the investigator was a crucial witness to prove any of the ingredients of the offence of robbery with violence. If they believed that the prosecution could still prove the offence without bringing any particular witness, it is not for this or the two courts below to demand the testimony of any specific witness.

We found no discrepancies in the evidence of PW2 and PW3 which could shake the finding of fact that the appellant was arrested by the complainant (PW1) at the scene of crime. As the learned State Attorney

has correctly observed, what is important is that PW2 and PW3 both found PW1 had already arrested the appellant at the scene of crime. The small details suggesting that PW3 had seen the appellant holding a bicycle padlock may be due to different questions which the prosecutor had put across to PW2 and PW3. In fact, PW2 and PW3 may as well have seen so many other small details which did not feature in the record simply because they were not asked during their examination in chief and in cross examination.

Furthermore appellant does not deny that he was arrested at the scene of crime. We believe the concurrent version of evidence that he was caught red-handed, so to speak. Immediately after the appellant and his colleagues in crime had committed the offence, the complainant (PW1) managed to hold onto the appellant till help arrived. PW2 and PW3 were amongst the first people at the scene of crime. Appellant was taken straight away to the police station. In **Nikas Desdery @ OISSO vs. R.,** Criminal Appeal No. 18 of 2013 (unreported), the appellant therein had been arrested red-handed at the scene of crime. This Court on second appeal was not in any doubt that the element of stealing was proved

beyond reasonable doubt. The Court referred to the statement it made earlier in **Stephen John Rutakikirwa vs. R.,** Criminal Appeal No. 78 of 2008 (unreported) where the appellant therein who was arrested at the scene of crime raised a ground of appeal to the effect that he was not properly identified at the scene of crime:-

> *"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."* [Emphasis added].

A serious allegation was made by the appellant to complain that he was denied his right to call his own witness to testify in his defence. The appellant did not prefer this complaint as one of his grounds of appeal in the first appellate court and in this Court. Like the learned Judge on first appeal, we have perused the original hand-written record of the trial proceedings and found that the appellant had clearly told the trial court

that he had no witness to call in his defence. We as a result find the claim that the appellant was denied the right to call his witness is devoid of merit and it was an afterthought.

In the upshot, like the two courts below, we are satisfied that this appeal is devoid of merit. It is hereby dismissed.

DATED at MWANZA this 16th day of September, 2014.

M.S. MBAROUK
JUSTICE OF APPEAL

K.M. MUSSA
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