IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 42 OF 2012

NYANDWI S/O JOHN BOSCO ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT
(Appeal from the Decision of the High Court of Tanzania at Tabora)

(Lukelelwa, J.)

Dated the 11th day of October, 2011
in
Criminal Appeal No. 108 of 2010

JUDGMENT OF THE COURT

13th & 19th June, 2014

MUSSA, J.A.:

In the District Court of Kibondo, the appellant along with two others were arraigned for armed robbery, contrary to sections 285 and 286 of the Penal Code, Chapter 16 of the Laws. The particulars laid on the indictment alleged, that on the 17th August 1999, at Kumuhasha Village, within Kibondo District, the appellant and his co- accused persons jointly stole a battery, a hoe, four Kilogrammes of sugar and a sum of shs. 5000/= in cash, properties of a certain Oscar Ilagera. It was further alleged that

immediately before such stealing, the accused persons party fired a gun shot in order to obtain the stolen properties.

During the trial, the appellant stood as first accused, whereas his co-accused persons were, namely, Kabula Innocent and Kanani Emmanuel, respectively, the second and third accused. All accused persons refuted the accusation, following which the prosecution featured three witnesses in support thereof. The appellant and the third accused testified on oath to refute the prosecution's accusation, but the second accused took the rare option of not entering a defence. At the end of the trial, all accused persons were found guilty, convicted and sentenced to respective terms of forty (40) years imprisonment.

The appellant and his co- convicts were dissatisfied and preferred an appeal to the High Court. Nonetheless, ahead of the hearing of the appeal, the High Court called for the trial court's record in order to satisfy itself on the proprieties of the sentence. In the upshot, the High Court (**Masanche, J.),** set aside the sentence of forty (40) years and substituted for it a sentence of thirty (30) years as against each convict. When, eventually, the appeal was heard, the High Court **(Lukelelwa, J),**

disimissed the appellant's appeal whilst allowing the appeal by the second and third accused. The appellant is aggrieved, hence this second appeal.

At the hearing before us, he was fending for himself whereas, the respondent Republic had services of Mr. Jackson Bulashi, learned Principal State Attorney. The appellant fully adopted his memorandum of appeal but, instead of expounding on it, he opted to make a rejoinder, if need be, after the submissions of the learned Principal State Attorney. For his part, Mr Bulashi fully supported the conviction and sentence imposed on the appellant.

To appreciate the circumstances giving rise to the arrest, arraignment and subsequent conviction of the appellant, it is necessary to explore the factual background.

The alleged incident occurred at the house of Oscar Ilagera Ntahombira (PW1), a petty businessman resident of Kamuhasha village. On the fateful day, the uneventful night at the village was broken by around 2.00 a.m. or so, the sound of a gunshot. The gun fire awakened Oscar and his wife, namely, Frorida Nzigo (PW2), who were then asleep at their house of residence. Within a while, the couple could hear some

intruding bandits who were pushing their entrance door, to force it open. PW1 moved closer and tried to hold on to the door but, no sooner, he lost grip and the door fell on his side. Some of the bandits gained entrance into the house but, just then, he caught glimpse and eroed on one of the intruders whom he hacked twice by the use of a machete which was handed to him by his wife. The two blows were, apparently, hefty and immediately fell the bandit to the ground. Soon after, the other intruders bolted away from the scene carrying along the items which are listed on the charge sheet. As they were clearing away, the bandits tried to pull along their injured colleague but gave up the operation after seeing the villagers gathering at the scene. Thus, the injured bandit, who turned out to be the appellant, still lay there, as it were, securely disabled. The villagers handed him over to a policeman, namely, No. D 9635 detective constable Aphraim (PW3) who formally apprehended him. Upon interrogation, the appellant disclosed that he was a Burundian refugee stationed at Nduta camp and that the second and third accused persons were among his colleagues who perpetrated the robbery. An empty ammunition cartridge was retrieved within the precincts of the scene, of which PW1 adduced into evidence (exhibit P2). The appellant and his co-

accused persons were, eventually, arraigned on the 25th August, 2014 and that concludes the prosecution version.

The appellant, who held himself to be a Burundi national confirmed that, at all material times, he was stationed at Nduta camp. His account was to the effect that, on the fateful day, during morning hours, he was coming from the camp and heading towards Mtendeli Village. As he, walked past PW1's house, he was intercepted by villagers who insinuated that he was a thief. Soon after, the hostile villagers hacked him with a machete, whereupon he fell down and was tied with ropes. Without specific reference to the prosecution accusation, the appellant, nevertheless, wound up his reply by contending that he was arrested and arraigned for no cause at all.

The two courts below concurrently found the evidence against the appellant to be overwhelming, more particularly, given the detail that he was immobilised and apprehended right at the scene. The appellant has presently listed several points of grievance to fault the first appellate court, but the grounds worth our consideration may be crystallized into two headings:-

1. *That the conviction was upon incomplete circumstantial evidence and;*
2. *That the trial court did not consider the defence case.*

Mr. Bulashi had a brief but focused reply to the appellant's grievances. In his submission, the appellant was not, actually, found guilty on account of circumstancial evidence. Rather, he was convicted upon cogent evidence of being seen and apprehended in the middle of perpetrating the robbery. With reference to the appellant's grievance that the trial court did not consider the appellant's defence, the learned Principal State Attorney submitted that the court duly considered the appellant's defence but rejected it, mainly in the light of its acceptance of the prosecution version.

For our part, we entirely subscribe to the formulation of the learned Principal State Attorney. We may only add that quite apart from the fact that the appellant was apprehended at the scene, the prosecution version was further enhanced by the appellant's failure to cross-examine the prosecution witnesses. It is noteworthy that throughout the conduct of the

case for the prosecution, the appellant did not put a single question to the adversary witnesses, despite their damning telling. In this regard, Mr. Bulashi referred us to the decision of this Court comprised in **Emmanuel Saguda @ Sulukuka and another Vs Republic**, Criminal Appeal No. 422 "B" of 2013 (unreported). In that case, the Court approvingly referred the English Case of **Browne V Dunn** [1893] 6 R. 67, which held:-

> *"A decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there been a clear prior notice of intention to impeach the relevant testimony".*

That would suffice to dispose of the two points of grievance, but before we conclude our judgment we should, albeit briefly, address the appellant's complaint, which he verbally raised before us, to the effect that he was unable to follow the trial proceedings due to a language ailment. To say the least, the complaint is an afterthought as it was not raised

throughout the conduct of the trial proceedings. And neither had the appellant raised the grievance in his respective petitions of appeal to the High Court and before us. Besides, it seems to us that the appellant consistently put a defence to the effect that he was merely a passer-by at the scene which indicates he clearly understood the accusation facing him. To this end, we are fully satisfied that the conviction and sentence meted against the appellant cannot be faulted. The appeal is without a semblance of merit and is, accordingly, dismissed in its entirety.

DATED at TABORA this 19th day of June, 2014.

M.S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

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

E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL