IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 364 OF 2014

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

ABUU RAMADHANI @ KICHECHE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dodoma)

(Mkuye, J.)

dated the 21st day of February, 2014
in
Criminal Session Case No. 146 of 2007

JUDGMENT OF THE COURT

08/06 & 10/06/2015

KILEO, J.A.:

The appellant was charged with, and convicted of attempted murder contrary to section 211 (1) and (2) of the Penal code, Cap 16 of the Laws in the High Court of Tanzania sitting at Dodoma in Criminal Sessions Case No. 146 of 2007. The facts of the case as they emerged at the trial court are brief and simple. It was alleged by the complainant Mary Masawe (PW1) whose evidence was supported by that of her daughter Yunus

Ngowo (PW2), that on 22/09/2004 at about 21.00 hrs, she was informed by one Zera (who did not testify) that there was someone outside without a shirt ('tofauti tofauti'- whatever that meant). When she went outside she saw someone standing there with his hands in his pockets. Another person was allegedly behind but a bit far. She told this person to leave the place lest the police take him for a thief. This person whom she identified as the appellant instead of leaving drew out a knife and stabbed her on her stomach causing her small intestines to protrude out. There was no dispute about the injuries she suffered.

The appellant denied culpability. He also denied to have ever been at the complainant's house on the material date and time. In his testimony he narrated at length how at first one of his brothers had been arrested in connection to the crime but subsequently the tables were turned against him and he found himself being charged, at first for assault which was subsequently dropped and a charge of attempted murder preferred instead. He insisted that the fact that his brother was the one who was at first arrested and the fact that it took time- about seven days after the incident before he was arrested showed that the complainant was not sure who her assailant was. The appellant called his brother Abdalhamani

Ramadhani (DW2) who gave evidence to the effect that he also was arrested in connection to the crime but was released after a few days. He testified further that their brother Amiri Ramadhani was the first one to be arrested. This defence witness also wondered why; if PW1 and PW2 had properly identified the appellant at the scene indulged in guess work which resulted in -first arresting Amiri, then himself and finally the appellant.

The appellant was represented at the trial by Mr. Hubert Lubyama, learned advocate. Mr. Lubyama also represented him at the hearing of the appeal. Before he had closed his client's case he asked the trial court to summon the District Court's record keeper to testify in court on the existence of the case that the appellant had claimed he was first charged with. The request was opposed by Mr. Katuli, learned State Attorney for the Republic who insisted that the doctrine of res judicata could not apply. The learned trial judge rejected Mr. Lubyama's prayer on the ground that the record keeper's evidence could not be material to the case. Just as a matter of interest, it should be noted that the principle of res judicata applies only in civil cases. The equivalent of the same in criminal matters would be autre fois acquit autre fois convict. That is by the way.

The appellant filed a five grounds memorandum of appeal which was adopted and argued upon by Mr. Lubyama. In the main the appellant complains that:

(a) The charge of attempted murder against him was not proved on the standard required

(b) Since the evidence of PW1 and PW2 was from the same family it required corroboration

(c) There was need of calling the witness who alleged to be present at the commission of the crime

(d) That the appellant's defence was not considered in view of the fact that he was denied the chance to call the record keeper from the Dodoma District Court as a witness.

The respondent Republic was represented by Mr. Evordy Kyando, learned State Attorney. He strongly resisted the appeal arguing that the appellant was amply recognized at the scene as he was well known to the witnesses and the conditions for watertight identification were prevalent at the time the crime was committed.

This appeal centers on two main issues both of which are intertwined with the question of credibility: the first is the issue of identification and the second one is the question of fair trial.

We will begin our consideration of the matter with the question of fair trial. On the fourth ground of appeal the appellant complains that his defence was not considered as he was denied the opportunity of calling in his defence the record keeper at the District Court where he had first been charged with assault. Mr. Lubyama argued that had the record keeper been summoned the learned judge would have been in a position to properly determine the question of credibility of the witnesses who were said to have also given evidence against the appellant in the case before the District Court. As it was, the appellant was not given a fair trial, Mr. Lubyama argued. Mr. Kyando on the other hand submitted that the fourth ground had no substance. He argued that the learned trial judge did consider the defence but found that there was no need of summoning the record keeper.

After the appellant and his witness had testified and before the closure of the defence case Mr. Lubyama made an application under section 295 (2) of the Criminal Procedure Act (CPA) for the issue of summons to the record

keeper so as to testify in court. The provision makes room for the summoning of defence witnesses who were not listed at the committal proceedings. It provides:

> **(2) The accused person shall not be entitled as of right to have any witness summoned other than the witnesses whose names and address were given by him to the magistrate at the committal proceedings but any subordinate court may, after committal for trial and before the trial begins, and the court of trial may, either before or during the trial, issue a summons for the attendance of any person as a witness for the defence if the court is satisfied that the evidence is in any way material to the case.**

The trial judge declined the defence request, following resistance from the prosecution side, holding in her ruling (at page 80 of the record) that the defence had not fronted strong reasons to show that the record keeper's evidence was material to the case. Also in her judgment, at page 113 of the record referring to the assault case she stated as follows:

> *"Five, there was no cogent evidence by DW1 and DW2 regarding Amiri and Abudulrahamani arrest and the assault case against the*

accused as there was no RB or Criminal case number mentioned or produced in court."

With due respect to the learned trial judge, we think she missed the point thereby failing to exercise the discretion granted under section 295 (2) of the CPA judiciously. The appellant had wished to have the record keeper testify in court about the existence of the assault case. Had he/she been called no doubt his/her evidence could have shed light and supported what the appellant was asserting concerning the arrest of the other person some days prior to his arrest. When the evidence of the appellant at the trial is looked at closely it will be shown that he went as far as to say that the assault case which was dropped was before Hon. Kibela. These particulars would have assisted the court in locating the file- for the interests of justice. We think that it was an error on the part of the learned judge to rule that the evidence of the record keeper was not material before she had an opportunity to see what was in the record that was intended to be laid before the court. We are settled in our minds that in the circumstances the appellant was not afforded a fair trial to which he was entitled.

If the record keeper had been summoned probably the learned judge could have been able to appreciate that the evidence of the key prosecution witness was not without problems.

We are mindful of the fact that the trial court was best placed to assess the creditworthiness of the witnesses who testified before it. However, being a first appellate court we have a duty of carefully examining and re-evaluating the evidence tendered at the trial before confirming the findings of the trial judge and the correctness of those findings.

When the evidence of PW1 is carefully inspected it will be realized that it was contradictory in itself and should not have been relied upon. Moreover, from the witness's own testimony there were grudges -*"chuki binafsi"* between her and the appellant. This should have put the learned trial judge on the alert and make her treat the evidence with great care and caution notwithstanding that conditions for correct identification were favourable. In **Jaribu Abdalla v. R,** Criminal Appeal No. 220 of 1994, (unreported) the Court held:

> *".....in matters of identification it is not enough merely to look at the factors favoring accurate identification. Equally important is the*

credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence...."

In the course of being cross-examined (at page 59 of the record) PW1 at first said that she was never threatened by the appellant's family. On further probing she conceded that she reported to the police that she was threatened by the appellant's family. These inconsistencies, which we think were crucial in the assessment of the witness's credibility, do not seem to have been addressed by the learned trial judge. Instead, the learned trial judge merely stated that she found the witnesses to have been witnesses of truth. It is our settled view that if the trial judge had considered these inconsistencies coupled with the fact that the appellant was arrested after another person had been arrested for the same crime but later released, she might have had second thoughts about the truthfulness of the prosecution witnesses.

We believe that the above considerations are sufficient to dispose of this appeal. As we have demonstrated above, the appellant was not afforded a fair trial, further, in the circumstances of the case the learned trial judge ought to have found that the prosecution witnesses were not worthy of trust. In the end we find merit in the appeal filed by Abuu Ramadhani @

Richeche which we hereby allow. The appellant's conviction is quashed and sentence imposed upon him is set aside. He is to be released from custody forthwith unless otherwise held for lawful cause.

DATED at **DODOMA** this 9th day of June, 2015.

E. A. KILEO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL