IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 117 OF 2015

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

YOHANA CHIBWINGU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Mkuye, J.)

dated the 12th day of March, 2014
in
Criminal Appeal No. 11 of 2012

JUDGMENT OF THE COURT

3rd & 5th June, 2015

MASSATI, J.A.:

The appellant and another person who is not before us, were charged with and convicted of the offence of robbery with violence, contrary to sections 285 and 286 of the Penal Code. The District Court of Mpwapwa sentenced them to 30 years imprisonment and ordered to pay a compensation of Tshs.1,500/= each. The appellant's appeal was dismissed in its entirety by the High Court (Mkuye, J). This is therefore his second appeal.

The charge laid at the appellant's door claimed that on the 26th January, 1993 at around 9.00hrs at Chidibo village in Mpwapwa District, he and his colleague stole a total of Tshs.3,000/= from Edward s/o Chiwanga by threatening him with a muzzle gun.

The facts as found by the two courts below were that on the material day and time Edward Chiwanga (PW1) was pulling his bicycle, which had a puncture, heading to Gulwe auction. He was behind three other persons who were walking towards the same direction.

Somewhere in between, they were ambushed by two persons, each carrying a muzzle gun. PW1 identified the appellant as the one who engaged him, while the other armed person dealt with one Selina d/o Ngwala (PW3) while the other journeyers fled to hide in the bush. In the course, PW1 was made to part with Tshs.3,000/=. The matter was reported to the local authorities and the District Commissioner. On an unknown date and place the appellant was arrested and charged with this offence.

In his defence, the appellant raised a defence of alibi, and denied to have ever known PW1, PW2, and PW3. This notwithstanding, the trial court convicted the appellant.

The appellant believes in his innocence and has therefore come to this Court with 13 substantive grounds of appeal, which in essence, challenge the legality of the sentence, and the finding that the offence was proved beyond reasonable doubt. He has broken down the latter part of his major reason in several links, namely, **first,** that he was not found with any weapon allegedly used in the commission of the offence; **two,** PW1's evidence was not corroborated, **three,** that there are contradictions in the evidence of PW1 and PW3; **four,** his identification at the scene of crime was not watertight; **five,** the chairman to whom PW1 claimed to have reported was not called to testify; **sixth,** PW2's identification, was only dock identification and in the absence of an identification parade it was useless; **seven,** the prosecution case was a cooked up story; **eight,** there were contradictions in the testimonies of PW1, PW2 and PW3, **nine** and last, the conviction was grounded on the weakness of the defence. At the hearing of the appeal, the appellant appeared in person, but allowed the respondent to argue first, reserving his right to reply.

The respondent/Republic was represented by Ms. Salome Magesa, learned State Attorney, who vehemently resisted the appeal. On the ground on sentence, she submitted that at the time the offence was committed, the law had already been amended to enhance the penalties for robberies in which arms were used, although the term *"armed robbery"* had not been coined/defined. On the remaining grounds relating to the conviction, Ms. Magesa submitted that all the witnesses, PW1, PW2 and PW3 witnessed the use of the gun in the robbery, even if the gun was not produced as an exhibit; that under section 143 of the Evidence Act, there was no limit to the number of witnesses which the prosecution could bring. Therefore, even without the chairman being called as a witness, the prosecution case was proved to the tilt; that there were no material contradictions in the evidence of the prosecution witnesses; that as the offence was committed in broad day light, the conditions for identification were favourable and the appellant was properly identified, and finally, it was her submission that the prosecution case was not a fabrication, but proved the case against the appellant beyond reasonable doubt. In the result the learned State Attorney prayed that the appeal be dismissed in its entirely.

In reply the appellant, repeated that he was not known, to PW1, nor did PW1 know him. He criticized him for falling to give a description of him to the police and emphasized that the prosecution case was a cooked up story.

From the evidence on record, and the submissions of the parties, we think that the appeal raises two main issues for determination. The first issue is whether the appellant was properly identified at the scene of crime? The second is, if the conviction is sound, is the sentence lawful?

The first issue arises, because although the offence was allegedly committed in the daytime, of the three prosecution witnesses only PW1 claimed to have known the appellant prior to the date of the incident, which the appellant denies. The other witnesses came to know him for the first time on the day of the incident. An identification parade for PW2 and PW3 to identify the person they claimed they saw, would have been the most prudent thing to do. But this was not done. So the only real evidence of identification that remains on board is that of PW1.

At the end of the hearing of this appeal, we kept on asking ourselves a number of questions to which we had no answers. The appellant was

charged with a serious offence of robbery. Was the offence not investigated by the police? If so, who investigated it? Why wasn't the investigator called to testify? If he had testified he would have answered several questions, including for instance, whether PW1 gave a description of the appellant in his first report? Where and when was the appellant arrested? Did he really abscond? Was any statement taken from the appellant about the incident? We have also wondered why weren't the chairman of the appellant's village or the District Commissioner to whom PW1 said he reported, called to testify?

We are alive to the position of the law that it is the prosecution who have the discretion to choose and call witnesses and that it has no obligation to call each and every witness. Case law (**YOHANIS MSIGWA v R** (1990) TLR.148 (CA) and s. 143 of the Evidence Act are abundantly clear on his point. But it is equally the law that adverse inference may be made where the persons omitted to be called as witnesses are within reach, and not called without sufficient reason being shown by the prosecution (See **AZIZ ABDALLAH v. R** (1991) TLR. 71

Likewise, in some cases, such as identification by a single witness in unfavourable conditions, corroboration may be required as a matter of practice, which may be in the form of other witnesses, conduct of physical evidence. It must also be borne in mind that in matters of identification favaurable conditions of identification alone are no guarantee for the truth. Credibility is also important (See **JARIBU ABDALLAH v. R** in Criminal Appeal No. 220 of 1994 (unreported).

In the present case, no reason is known, let alone a sufficient one, for not calling the investigator, the chairman, or the District Commissioner as prosecution witnesses. In our view these witnesses are an important link in the chain of identification evidence now that the appellant has put his identification at the scene of crime, in issue.

The importance of such witnesses of identification was underscored in the celebrated case of **R v. MOHAMED B. ALLUI,** (1942) 9 EACA, in the following words:

> *"that in every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of the highest*

importance of which evidence ought always to be given first of all, of course by the person who gave the description, or purports to identify the accused and then by person to whom the description was given"

Since in the present case, identification is in issue, the above cited rule applies.

Failure to call the chairman, the investigator or the District Commissioner to whom, PW1 allegedly reported the robbery is a very serious omission in the case for the prosecution, because it leaves a lot of important questions unanswered. This is compounded by the absence of an identification parade for PW2 and PW3 to identify the perpetrators of the crime. These unanswered questions create serious doubts, which doubts must be resolved in favour of the appellant.

In the event we find that the conviction of the appellant is not safe. This ground is sufficient to dispose of this appeal. So we allow the appeal. The conviction is quashed, and the sentence set aside. Unless, he is held for some other lawful cause, we order the immediate release of the appellant from prison.

It is so ordered.

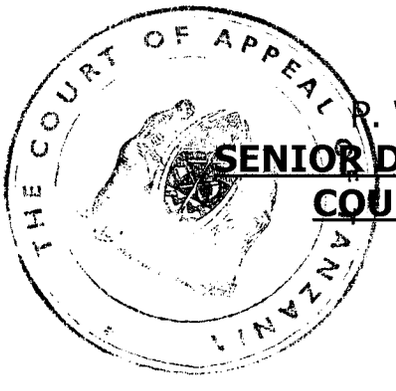
DATED at **DODOMA** this 4th day of June, 2015.

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.



R. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL