

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: KILEO, J.A., MJASIRI, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 303 OF 2014

AWADHI ABRAHAMANI WAZIRI..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Msoffe, J.)

Dated the 17th day of April, 2004

In

Criminal Appeal No. 73 of 2003

.....

JUDGMENT OF THE COURT

17th & 24th February, 2015

MJASIRI, J.A.:

In the resident Magistrate's Court of Arusha at Arusha, the appellant Awadhi Abrahamani Waziri was charged with armed robbery contrary to section 285 and 286 of the Penal Code, Cap 16 of the Laws of Tanzania. He was convicted of a lesser offence of attempted armed robbery contrary to section 287 and 280 of the Penal Code. He was sentenced to 15 years imprisonment and to suffer six strokes of the cane.

Aggrieved by the finding of the Resident Magistrate's Court, he appealed to the High Court but his appeal was unsuccessful, hence his second appeal to this Court.

The appellant has lodged a three-point memorandum of appeal which is summarised as under:-

- 1. There were inconsistencies between PW1's testimony during the trial and the statement he made to the police*
- 2. The first appellate court wrongly relied on the prosecution evidence which was full of contradictions.*
- 3. The conviction of the appellant was against the weight of the evidence.*

The background of this case is as follows. It was alleged by the prosecution that on the 12th day of May, 2001 at about 8.30 hours at Naisinyaki Village Mererani within Simanjiro District in Arusha Region the

appellant did steal one motorcycle with Registration No. TZP. 1456 with a value of Tanzania Shillings one Million Five Hundred Thousand (1,500,000/=) the property of one Master Seki (PW1) and immediately before such stealing did discharge nine bullets in order to obtain such property.

At the hearing of the appeal, the appellant appeared in person without the assistance of counsel and had to fend for himself. The respondent Republic was represented by Mr. Augustino Kombe, learned State Attorney.

In his address to the Court the appellant stated that PW1 did not identify anybody. He stated further that all the prosecution witnesses did not witness the incident. He argued further that in his statement made to the police PW1 stated that he was not robbed of anything, whereas in his testimony in Court he stated that the bandits managed to get away with his motorcycle. The appellant also stated that no evidence was brought to show that the gun belonged to him or anybody else. He therefore asked the Court to dismiss the appeal.

Mr. Kombe, learned State Attorney did not support the conviction. He argued that the prosecution evidence was full of inconsistencies and contradictions. PW1 in his testimony stated that he was attacked by three (3) bandits who had a gun and who fired shots in the air. He abandoned his motor cycle which he did not remember the registration number. The bandits had stolen the motorcycle though he could not identify the culprits. However in his statement made to the police, which was made earlier, that is, immediately after incident he stated that he was not robbed of anything.

He submitted further that there were also contradictions between the testimonies of PW2 and PW3 who were both police officers. Whereas PW3 testified that the appellant had a shotgun No. 73269, PW2 testified that the appellant was carrying a rifle. The gun in question was not admitted in Court as an exhibit. PW6 also a police officer indicated that a rifle was tendered in Court as Exhibit P2. PW6 also testified that appellant was shot on the leg. No medical evidence was brought to support that. PW6 also testified that they traced the motorcycle at the scene of crime. In his

statement to the police, he stated that he found the motorcycle abandoned on the road that leads to Majengo.

Mr. Kombe also stated that there were contradictions between the evidence of PW1 and PW5. PW1 in his statement to the police indicated that nine bullets were fired. PW5 did not mention how many bullets were fired. Mr. Kombe submitted that the evidence on record did not support the charge sheet. He made reference to the case of **Simon Abongo V Republic**; Criminal Appeal No. 144 of 2005 CAT unreported.

After carefully reviewing the evidence on record, the memorandum of appeal and the submissions made by the learned State Attorney, we would like to make the following observations:-

"The crucial issue for consideration and determination is whether or not the evidence on record was sufficient to prove the offence of attempted armed robbery."

Given the contradictions and inconsistencies of the evidence of PW1, PW2, PW3, PW5 and PW6 we are compelled to agree with the learned State Attorney in his decision not to support the conviction. The very fact that the statement made by PW1 at the police station that he was not robbed differs materially with what he testified in Court, that his motorbike was robbed raises a doubt as to whether he was robbed at all. The aspect of attempted robbery is not supported by the evidence on record. Looking at the other contradictions and inconsistencies of the prosecution witnesses, we are of the considered view that the contradictions and inconsistencies go to the root of the matter. In **Augustine Njoroge Ritho@ Chabah V Republic**; Criminal Appeal No. 99 of 1986 the Court of Appeal of Kenya held that:-

"It is trite law that where evidence is inconsistent or where it is contradicted it cannot be relied upon."

In view of the question mark on the veracity of the complainant as a witness, we find that the evidence adduced was so riddled with inconsistencies and contradictions as to make conviction thereof unsafe.

We are of the view that the inconsistencies and contradictions of the prosecution witnesses went to the root of the matter. In our view there is sufficient doubt which ought to have been determined to the benefit of the appellant. See **Mohamed Said Matula V Republic**; 1995 TLR 3 CAT and **John Glikola V Republic**; Criminal Appeal No. 31 of 1999 CAT (unreported).

In **Mohamed Said Matula** supra the Court stated thus:-

"Where the testimonies by witnesses contain inconsistencies and contradictions, the Court has a duty to address the inconsistencies and try to resolve them where possible, else the Court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter"

It is evident from the record that the prosecution evidence did not support the charge. In **Simon Abaiyo** (supra) it was stated thus:-

"The importance of proving the offence as alleged in the charge hardly needs to be over emphasized. From the charge, the accused is made aware of the case he is facing with regard to the time of the incident and place so that he would be able to marshall his defence."

In a criminal case the burden of proof is on the prosecution to prove the case against the accused person beyond reasonable doubt. The burden never shifts (section 3(2) (a) of the Evidence Act, Cap 6, R.E. 2002). Cumulatively all the defects in the prosecution case lead to the conclusion that the evidence did not measure up to the requisite standard both in relation to credibility and reliability. We are of the considered view that the offence of attempted armed robbery has not been proved.

In the result, and for the foregoing reasons, we allow the appeal, quash the conviction and set aside the sentence imposed upon the appellant. He is to be released immediately unless otherwise lawfully detained in custody.

It is so ordered.

DATED at **ARUSHA** this 22nd day of February, 2015.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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




Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL