IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: RUTAKANGWA, J.A., LUANDA,J.A.,And JUMA, J.A.)

CRIMINAL APPEAL NO. 356 OF 2014

FARUKU MUSHENGA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Conviction and sentence of the
High Court of Tanzania at Bukoba).

(**Khaday, J.**)

dated 6th March, 2014
in
Criminal Sessions No. 20 of 2013

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JUDGEMENT OF THE COURT

12th & 18th February 2015

LUANDA, J.A.:

In the District Court of Biharamulo at Biharamulo, the above named appellant was arraigned with "robbery with violence" C/SS 285 and 286 of the Penal Code, Cap. 16. However we wish to point out that in law there is no such offence known as "robbery with violence." The offence created under S. 285 of the Penal Code, Cap. 16 (the Act) is simply robbery.

Parliament in its wisdom did not add the clause "with violence" for the obvious reason that no any robbery can be committed without some violence or force being applied. It is superfluous, therefore, to include the word with "violence" in the charge sheet.

Back to our case. When the charge was read over to the appellant, the appellant pleaded guilty to the charge. Then the facts were adduced. Again when he was asked whether they were correct, he admitted to be correct. He was convicted as charged. The Public Prosecutor was asked by the District Court whether the appellant had any previous record of conviction. The reply was that he had none. The Court then turned to the appellant who asked him if he had anything to say before it passed sentence. The appellant gave his mitigating factors. The court then passed the sentence of 15 years imprisonment to the appellant.

The appellant was aggrieved by the finding of the District Court. He appealed to the High Court of Tanzania (Bukoba Registry). The High Court in the first place held and correctly so that once an accused person

admits the offence he is charged with, in terms of S.360(1) of the Criminal Procedure Act, Cap. 20 RE.2002 (the CPA) he has no right to appeal to the High Court, to challenge conviction, save sentence. However, the learned appellate Judge considered two aspects with a view to satisfying herself whether; one, the plea of the appellant was unequivocal or equivocal. Two, whether the facts of the case as adduced by the prosecution constitute an offence he was charged with. After revisiting the record, the learned judge was of the settled view that the plea of the appellant was unequivocal and the facts adduced disclosed the offence of robbery. She accordingly dismissed the appeal. She however did not say anything about sentence. By necessary implication she was satisfied that the sentence of 15 years imprisonment meted out to the appellant was deserving.

Undaunted, the appellant has come to this Court on a second appeal. However, the appellant, who is serving his sentence under Parole arrangement wrote a letter to the Registrar of the High Court (Bukoba Registry) of 11.2.2015 and informed the Court that he did not wish to be present when his appeal will come for hearing on 12/2/2015. Ms. Grace Komba learned State Attorney who represented the respondent/Republic

submitted and rightly so that under those circumstances, the Court in terms of Rule 80(3) of the Court of Appeal Rules, 2009 (the Rules) can proceed to entertain the appeal in absence of the appellant. So we proceeded to entertain the appeal in absence of the appellant.

Basically the appellant has raised two grounds in his memorandum of appeal namely, one, his plea of guilty was equivocal. Two, the sentence meted out is excessive.

Responding to the first ground of appeal that the plea of appellant was equivocal, Ms. Komba submitted that the appellant pleaded guilty to the offence he was charged with. Likewise when the facts were adduced and the court called him to admit or otherwise the appellant accepted them as correct. The appellant knew the offence he was charged. The plea was unequivocal, she submitted.

We entirely agree with Ms. Komba. The appellant was charged with robbery. The particulars were that on 18th April, 2006 around 08.00 hours at Igokelo Street within Biharamulo Township the appellant by using force to Pastory s/o Bashigwa stole one bicycle valued at Tsh. 70,000/= the property of the said Pastory s/o Bashigwa. When the charge was read over, the appellant pleaded guilty to the charge. Then the facts were read over to the appellant. The facts including the cautioned statement of the appellant clearly show that the appellant stole the bicycle of Pastory s/o Bashingwa by using force. The plea of the appellant was unequivocal and the facts adduced established the offence of robbery. Like the learned High Court judge, we are also satisfied that the plea of the appellant was unequivocal. This ground is arid of any merit. The appellant was properly convicted.

As to sentence of 15 years imprisonment, Ms. Komba said it is not excessive. She however, left it to the Court to decide.

As regards this ground, basically the appellant is seeking the Court indulgence to interfere with the sentence of 15 years imprisonment imposed by the trial court and affirmed by the High Court. Unfortunately he did not explain the reason for the prayer. Be that as it may, it is now settled that for this Court to interfere with a sentence passed by the lower courts, there have to be good grounds for this Court to do so and not on the mere ground that if this Court was sitting as a trial Court it would imposed a different sentence. In **Kimaki Dafu & Another VR**, Criminal Appeal No. 9 of 1993 (CAT-unreported) this Court stated the following criteria for the Court interference. It said:-

> *"On a number of occasions, this Court has reiterated the principle that on appeal the Court does not interfere with the sentence passed by a trial court unless one or more of the following conditions is fulfilled: Either, the sentence is manifestly excessive or that the sentencing court ignored to consider an important matter or circumstance which ought to be considered and that the sentence was wrong in principle."*

(see **RV Mohamed Jamal (1948) 15** EACA 126; **Ogalo s/o Owoura VR** (1954) 21 EACA 147; **Leonard Nguruwe VR** (1981) TLR 66 and **Bernadeta Paul VR** (1992) TLR 97).

The question in this appeal is whether the sentence is excessive.

Before we proceed further we wish to point out that with effect from 14/4/2004 S. 286 of the Act was amended vide Act No. 4 of 2004.

The section now reads:-

> *286. Any person who commits robbery* ***is liable to imprisonment for fifteen years.*** *[Emphasis ours]*

From that date when the section was amended and onwards naturally including the date the appellant committed the offence (18/4/2006) the section ceased to fall under the minimum sentences which the courts were required to impose. This is because of the phrase "*is liable to imprisonment*" which no longer imposes a duty on the part of the trial

Court and other higher Courts to impose the sentence of 15 years imprisonment. In **Opoya** V. **Uganda (1967) EA 752** the Court of Appeal of East Africa had the occasion to state as follows:-

> *"It seems to us beyond argument that the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the Court. In other words they are not mandatory but provides a maximum sentence only and while the liability existed the court might not see fit to impose it."*

Back home in **R V Barikiel Elibariki**, Criminal Revision No. 8 of 1989 (High Court DSM Registry) the High Court said:

> *"... Creates a liability for the convicted person to suffer a certain mode of punishment, but it does not impose an obligation upon the sentencing Court to award that penalty."*

From above, it is clear that with effect from 14/4/2004 the trial courts ought to have exercise their discretion in imposing sentence for the offence of robbery from one day to 15 years imprisonment subject to the general sentencing powers as they are provided under S. 170 of the CPA and not to impose the 15 years as it used to be.

In our case both courts below appeared to have applied the old section. It appears they were not aware of such an amendment. In so doing they went against the well-established principles of sentencing. Had they been aware of the amendment, we think they could have not imposed the aforesaid sentence.

According to the record, the appellant was a first offender. He readily pleaded guilty to the charge. He prayed for mercy. The appellant is in prison for more than 8 years (convicted on 24/4/2006). Given the circumstances of this case, we are of the considered view that the maximum custodial sentence imposed was manifestly excessive and ought to be interfered by this Court. We accordingly reduce the sentence of 15

years to such an extent that would result into the appellant's immediate release from prison.

Order accordingly.

DATED at BUKOBA this 17th day of February, 2015.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL