IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LUANDA, J.A., MASSATI, J.A. And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 145 OF 2015

SIMON KANONI @ SEMEN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Tabora)

(Rumanyika, J.)

dated the 18th day of August, 2014
in
(DC) Criminal Appeal No. 115 of 2013

JUDGMENT OF THE COURT

30th November & 2nd December, 2015

MASSATI, J.A.:

The appellant was arraigned for armed robbery in the District Court of Bukombe in Geita Region. It was alleged that on the 5th day of October, 2012, at about 20.30 hours, between Msasa and Ikuzi villages, within Bukombe District, the appellant and another person, RAMADHANI s/o ANDREW @ JUMA, by force of a machete (panga) with which they cut the complainant, they jointly stole from one TEDDY JOSEPH a motorcycle make SANLG with registration No. T. 369 CAS, worth Tshs. 1,900,000/=.

In brief, TEDDY JOSEPH (PW1) who was a motorcycle rider explained how on 5/10/2012 at 20.00 hours the appellant approached him at Runzewe motorcycle stand and asked him to take him to Ikuzi village. He agreed and started the journey in his motorcycle registered as T. 369 CAS. When they reached Msasa village, the appellant asked him to stop so that he could attend to a phone call. To his surprise, when he stopped, the passenger pulled out a machete and started cutting him on various parts of his body, before the appellant drove his motorcycle away.

With the aid of some civilians, he was rushed to the police station and then to the hospital. Then on 9/10/2012, he received a phone call from one "Afande" Jack. He went to the police station to meet him. The complainant offered Tshs. 40,000/= to assist in tracing the stolen motor cycle with the assistance of an informer who pretended to be the buyer of the stolen motorcycle. When the trap was set, the police, in the company of the appellant, pounced on the occupants of one house at Runzewe. Two persons from two separate rooms were woken up. The two happened to be the appellant and the informer. The motor cycle was in one of the rooms. The police arrested the appellant, who then took them to the house where the

second accused was sleeping. It was the appellant who handed over the ignition key of the motorcycle. The appellant was then formally arrested.

PW2, EDWARD JOSEPH, PW1's brother confirmed PW1's story, as he also accompanied him to the police station when PW1 was summoned by Afande Jack. He confirmed that the motorcycle No. T. 369 CAS, was recovered from one of the rooms pointed out by the appellant.

PW3, D 3034 D/SGT. JACKSON who was stationed at Runzewe police station at the material time explained how PW1 lodged his complaint about his stolen motorcycle, how he laid the trap, and how eventually the stolen motorcycle was recovered from the appellant and his associate in a certain house. He identified the motorcycle and tendered it as Exhibit P1.

PW4 F. 1568 D/Cpl. ERICK, was assigned to investigate the case. It was his evidence that on interrogating PW1, the latter told him that he knew the appellant by face and name, and how the robbery was staged. Later, when the accused persons were arrested, he took down the cautioned statements, which he tendered and the court received them as Exhibits. He also tendered the complainant's PF3 as Exh. P4.

The appellant gave his sworn testimony as DW2. He denied to have committed the offence, or to have even known PW1, or his co-accused. He criticized the prosecution for not calling the informer as a witness. In short he pleaded ignorance of the offence and prayed for an acquittal.

But the trial Court was not impressed by the appellant's defence. It found the prosecution evidence credible and believed that the case against him was proved beyond reasonable doubt. So, it convicted him as charged and proceedes to sentence him to 30 years imprisonment.

On first appeal, the High Court, after re-evaluating the evidence, found that while there was robbery, the offence of armed robbery was not proved. Instead it found that what was proved was the offence of robbery with violence whose minimum sentence was 15 years imprisonment, which the learned judge proceeded to substitute with that of 30 years imposed by the trial court. Still aggrieved, the appellant has now come to this Court on a second appeal.

In this appeal, the appellant has brought four grounds of appeal. They can be summarized as hereunder:

The **first** ground is that, in the absence of an identification parade, his identification by PW2 was not watertight. The **second** one was that, it was wrong for the first appellate court to have relied on the evidence of PW1 alone, without corroboration. The **third** ground was that the evidence as to where the motorcycle was found/recovered from was contradictory between PW2 and PW3 and so unreliable. The **fourth** ground was that the prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal the appellant appeared in person. Mr. Ildephonce Mukandara, learned State Attorney, appeared for the respondent/Republic. The appellant opted to let the respondent begin, reserving his right to reply.

Mr. Mukandara, supported the conviction, although he had serious reservations on the sentence substituted by the High Court. To the first ground, the learned counsel submitted that, although the robbery took place at night, PW1 was well known to the appellant, and he named and described him to the police before his arrest, a fact corroborated by PW4. On the second ground, he submitted that the prosecution case was corroborated by the appellant's possession of the stolen motorcycle, and his failure to account for it, as well as the evidence of his co-accused, DW1. On the third ground,

Mr. Mukandara, submitted that there were in fact no contradictions, only confusion in the naming and sitting arrangements of the two accused persons; which was taken care of by the trial court. So, in his view the prosecution case was proved to the required standard.

Responding to questions from the bench, Mr. Mukandara said that, on the evidence on record, the offence of armed robbery was in fact committed, as a panga was used; and therefore, it was wrong for the High Court to have reduced it to one of robbery with violence. This means that even the sentence of 15 years imposed by the High Court was illegal. The appropriate sentence was 30 years imprisonment. He thus asked us to intervene, and put the record right.

In response, the appellant reiterated his grounds of appeal, that he was innocent and that the case against him was not proved beyond reasonable doubt. He therefore prayed that his appeal be allowed.

Asked to react on the propriety of his conviction for robbery with violence and the sentence of 15 years imprisonment culled out by the first appellate Court, the appellant repeated his plea that he was innocent of even

the lesser offence of robbery with violence, let alone the sentence, which he did not deserve. He thus asked us to allow his appeal and set him free.

From the submissions of the parties we think this appeal raises one major issue; whether the prosecution case was proved beyond reasonable doubt; and if so, what offence? The second part of the issue arises from the High Court's substitution of the offence of armed robbery for which the appellant was convicted by the trial Court, with that of robbery with violence.

The first point that the appellant has raised to challenge his conviction was the evidence of his identification.

According to PW1, although it was at night, he was able to identify the appellant by recognition, and to prove so, he mentioned him to PW4 a police officer, who took his statement from his hospital bed. The appellant denies this.

Mr. Mukandara submitted that apart from the evidence of recognition the appellant was found in recent possession of the stolen motor cycle, which he failed to account for.

We are aware that evidence of visual identification is of the weakest kind, and courts should not act on them unless they are satisfied that the

evidence is watertight, even if the witnesses claim to have recognized their suspects. (See **HASSAN JUMA KANENYERE v R** (1992) TLR 100, **RAYMON FRANCIS v R**, (1991) TLR 100 **ISSA MGARA @ SHUKA v R**, Criminal Appeal No. 37 of 2007 (unreported).

In the present case, there is no doubt that the robbery took place at night. There is no evidence, as to how PW1 was able to identify the appellant, as the source of the light is not disclosed. However, it is evident that PW1 knew the appellant. With this knowledge, he was able to mention his name to PW4, the first time when he went to take his statement. The fact that PW1 mentioned the appellant's name at the earliest opportunity fortified his credibility (See **MARWA WANGITI AND ANOTHER V R**), (2002) TLR. 39.

Although the appellant denied to have ever known PW1, he did not deny that this was his name. Although he also denied to have been found in possession of the stolen motor cycle, the evidence of PW1, PW2, PW3 and DW1 confirms that he was the one who showed the room where the motor cycle was kept and finally recovered. So, he had knowledge of its presence, but did not explain how he came to know how it was there.

For the above reasons, we are satisfied that the evidence by PW1 as a single witness of visual identification of the appellant was watertight and was corroborated. We therefore dismiss the first and second grounds of appeal.

The third ground of appeal relates to contradictions in the evidence of PW2 and PW3, in their testimonies as to where the motor cycle was found, between the houses of the 1st and the 2nd accused persons. The appellant sought to capitalize on these apparent contradictions and argued that such evidence should not have been acted upon by the lower courts.

But Mr. Mukandara, submitted that there were no contradictions, in fact there was only a confusion in the naming of the two accused persons, as their sitting in the court room did not correspond with how their names in the charge sheet appeared.

We agree with Mr. Mukandara. What the appellant calls a contradiction is in fact, just a confusion in the way the accused persons sat in the court room. According to the charge sheet, the appellant appears as the 1st accused person, whereas the other one appeared as the 2nd accused person. We further agree with Mr. Mukandara that this confusion was cleared by the trial court as is evident on page 20 of the record where the court noted: -

"I have discovered that the accused person (sic) are standing in wrong position (sic). The first accused in the charge sheet is Simon Kanoni but in court the Simon Kanoni appear as the 2nd accused..."

So, what appears as a contradiction, is explained by wrong positioning of the accused persons in the court room. But, we quickly wish to observe here, that in such a situation, the amendment of the charge as ordered by the trial court was uncalled for. All that the court should have done was to inform the parties that the record of the trial would be rectified according to the new sitting arrangement of the accused persons.

So, we also find no merit in the third ground of appeal, which we hereby also dismiss.

The fourth ground of appeal is whether the prosecution case was proved beyond reasonable doubt, and if so what offence.

Mr. Mukandara, was of the view that since a machete was used in the robbery, armed robbery was proved, and not a mere robbery with violence as found by the first appellate court. The appellant's view is that whether armed or by violence, he was not responsible for the robbery in question. Therefore he would settle for nothing less than an acquittal.

In our judgment, we have found that the appellant was visually identified by the appellant to have robbed him of his motorcycle. It is also not seriously disputed that in the course of the robbery, a machete or panga was used. In the opinion of the learned judge on first appeal, this was not "armed robbery" presumably because there was no evidence of use of arms. In his own words:

> *"I don't think that robbery is armed robbery simply because the prosecution so alleges. It is upon court being satisfied in evidence that the robber was in the strict sense of it, armed at the material time. Without this statutory restrictions, chances were there, a mere robbery with violence by substitutes for armed robbery."*

This means, to our understanding, that the learned judge meant that to commit an armed robbery, the robber must be armed. What he did not make clear is what was his understanding of "being armed", but, if we followed his logic to the end, he was all out to show that if the complainant was only attacked by a panga this did not amount to "armed robbery."

With due respect, this was a misdirection on the part of the learned judge on first appeal. Section 285 of 286 of the Penal Code were amended

by ACT No. 4 of 2004 to introduce in the statute an offence called "armed robbery" which was defined as:

> *"Any person who steals anything and at or immediately after the time of stealing is armed with any dangerous weapon or instrument or is in the company of one or more persons and at or immediately before or immediately after the time of stealing uses or threatens to use violence to any person commits an offence termed "armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."*

In a number of decisions of this Court it was held that weapons are not confined to firearms only, other types, such as knives are included. (See **IDDI SALUM vs R**, Criminal Appeal No. 29 of 2009 (unreported). But historically this amendment was a result of this Court's earlier decision in **MICHAEL JOSEPH v R** (1995) TLR 278 where a knife was used in the robbery and the Court remarked that:

> *"... if a dangerous or offensive weapon or instrument is used, in the course of a robbery, such constitutes armed robbery, in terms of the law as amended by*

Act No. 10 of 1989. The weapons in our view, are not confined to firearms only, other types of weapons such as knives are also included."

So, with unfeigned respect to the learned judge on first appeal, the offence committed in the instant case, and which we find as proved beyond reasonable doubt is that of armed robbery.

As a result of this misapprehension of the law, the High Court also reduced the sentence of 30 years imprisonment imposed by the trial court for armed robbery to 15 years for robbery with violence. With respect, this again was wrong. According to section 287A of the Penal Code with which the appellant was charged and stood convicted of, the minimum sentence for the offence of armed robbery is 30 years imprisonment.

The issue of the first appellate court varying the conviction of armed robbery made by the trial court and substituting the sentence of 30 years, with that of 15 years for robbery with violence, was not raised by the respondent by way of a cross-appeal, but by the Court in the course of hearing the appeal. It may be doubted whether this was proper. If there is any such doubt, it was dealt with by this Court in the past. Thus in **MARWA MAHENDE v R**, (1998) TLR. 249 it was held:

> *"We think, however, that there is nothing improper about this. The duty of the courts is to apply and interpret the laws of the country. The superior courts have the additional duty of ensuring proper application of the laws by the courts below... We think that it was not only proper for this Court to adapt such a course, but that the Court had a duty to do so, provided that it affords adequate opportunity to both parties or their counsel to be heard on the matter."*

Earlier on in **ELIAS KAMAGI v R**, Criminal Appeal No. 110 of 1992 (unreported) the Court also said:

> *"The question that arises is whether this Court must turn a blind eye to the improper conviction, on the basis that the appellant gave a notice of appeal only against the sentence. We think that we cannot do so simply for the sake of formality because as a court of law we are bound to take judicial notice of matters of law... Justice may well be blind to personalities, it is certainly not blind to law."*

Having heard both parties on the issue of the propriety of the conviction and sentence for robbery with violence imposed by the first

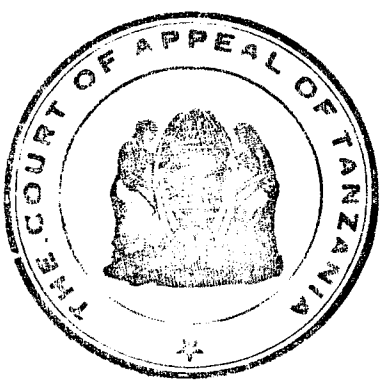
appellate Court, we are constrained to intervene and put the law on the right course.

Therefore, in exercise of our revisional powers under section 4(2) of the Appellate Jurisdiction Act, we vary the conviction and sentence given by the High Court, and reinstate the conviction and sentence imposed by the trial court.

We confirm the appellant's conviction for armed robbery and the sentence of 30 years imprisonment.

The appeal is consequently dismissed in its entirety.

DATED at **TABORA** this 1st day of December, 2015.



B. M. LUANDA
JUSTICE OF APPEAL

S. S. MASSATI
JUSTICE OF APPEAL

S. E. MUGASHA
JUSTICE OF APPEAL

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

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL