IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

CRIMINAL APPEAL NO. 365 OF 2014

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

HAJI BAKARI HASSANI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Makuru, J.)

dated the 22nd day of October, 2014
in
Criminal Appeal No. 84 of 2010

JUDGMENT OF THE COURT

03/06/2015 & 05/06/2015

KILEO, J.A.:

The appellant appeared in the District Court of Kondoa at Kondoa in Criminal case No. 141 of 2009 to answer to a charge of armed robbery contrary to section 287A of the Penal Code. He was convicted and was sentenced to 30 years imprisonment in terms of section 286 and 287A of the Penal Code. At this juncture we find it befitting to observe that the first appellate court noted there was an omission in not citing s. 286 together with s. 287A of the Penal Code in the charge. The first appellate

court judge rightly held that the omission was curable under s. 388 of the Criminal Procedure Act. The background to the case is briefly to the effect that on the morning of 01/11/2009 while the complainant, (PW1) and his brothers (PW2 and PW3) were on the way to fetch water they met with the appellant, a village mate, who robbed PW1 of Tshs.100,000/= and injured him in the process. The appellant's conviction which was sustained by the High Court basically centred on identification and a 'cautioned statement' that the appellant made to PW4.

Being aggrieved by the decision of the High Court which dismissed his appeal the appellant has come to the Court on a second appeal.

The appellant's memorandum of appeal contains eight grounds of appeal. The appellant's major complaints can conveniently be condensed into four major grounds namely:

a) That the High Court ought not to have sustained the conviction basing on a cautioned statement that did not support the case for the prosecution.

b) That an adverse inference ought to have been drawn on the failure of the prosecution to call a crucial witness.

c) That the non- production of the PF3 of the victim should have been taken as a grave weakness on the case of the prosecution and ought to have been interpreted to the benefit of the appellant.

d) That there were contradictions in the testimonies of the witnesses for the prosecution which rendered its case insufficient for the proof of the case against the appellant.

The appellant appeared before us in person. He did not have much to say in addition to his grounds which were before us. He asked us to let the learned State Attorney representing the respondent Republic to begin with her address.

Ms Salome Magesa, learned State Attorney for the respondent Republic did not find it wise to support the conviction entered against the appellant and the sentence meted out.

She conceded that the failure by prosecution to tender in evidence the victim's PF3 and also failure to call the Village Executive Officer (VEO) to whom the crime was first reported prejudiced the case for the prosecution. The learned State Attorney further submitted that both courts below erred

to have relied on the cautioned statement which did not support the prosecution case.

We will begin with the cautioned statement which was taken down by PW4 D 7347 D/CPL Kichange. Both the trial court and High Court relied on the cautioned statement as part of the reasons for sustaining the conviction. This was very unfortunate. As it will shortly transpire, both courts below seriously misapprehended the cautioned statement.

At page 35 of the record of appeal the trial magistrate had this to say of the cautioned statement:

"Also as the trial magistrate, I have taken the reasonable trouble to peruse the caution statement of the accused and I found that, the accused and he admitted to commit robbery while being armed with dangerous traditional weapon and he used it to threat the accused (sic!) immediately before and after robbery to steal and retain the stolen sum. Also, it is true that the accused he was taken his caution statement being free and it is dully signed and sealed by both the accused with PW4 and its dully dated and it was taken and recorded within acceptable time as per TEA and CPA, hence I admitted it as prosecution exhibit in favour of the prosecution side against the accused person who is a maker."

The first appellate court found (at page 76) as follows concerning the cautioned statement:

"As regards the fourth ground on the cautioned statement that it was not properly admitted, she submitted that it has no legal basis and that it was an afterthought. It was her contention that the appellant did not object for it to be tendered and admitted in evidence. As the cautioned statement was tendered and admitted in court without any objection, I am of the view that the appellant slept on his right and the same cannot be challenged at this stage."

The appellant complained, and the learned State Attorney supported his complaint that his cautioned statement did not support the prosecution case. Indeed, when the so called cautioned statement (tendered at the trial as exhibit PE2) is read carefully it will be noted that the appellant nowhere admitted the offence facing him. The relevant part of his statement reads:

"Nakumbuka kwamba ilikuwa tarehe 01-011-2009 saa 06:00 hrs nilikuwa Kelema mjini kwa dada yangu HUSNA d/o ? ndipo nilikutana na ndugu MOHAMED s/o KHALIFA akiwa na mkokoteni iliyokuwa inakokotwa na ng'ombe wakati huo wamebeba maji ndipo nilimsalimia kuwa habari za asubuhi yeye alijibu kuwa salama. Wakati huo alikuwa ameongozana na

wadogo zake ambao ni ADAMU s/o KHALIFA na ALLY s/o KHALIFA pia nakumbuka kuwa nilimtania kuwa wewe unauza maji ya mtoni kama alivyoeleza kuwa nilimchoma ng'ombe mkuki siyo kweli pamoja na kuwa nillkuwa nayo. Hata yeye sikumchoma mkuki. Hata pesa sikuweza kumnyang'anya. Hatimaye muda wa saa 08.00hrs nikiwa hapo Kelema Balai nilikamatwa na askari mgambo kwa tuhuma ya kumnyang'anya (ng'ombe) pesa na kuchoma ng'ombe mkuki. Hayo ndiyo maelezo yangu.

By saying "*...hata yeye sikumchoma mkuki, hata pesa sikuweza kumyanganya*" the appellant was categorically dissociating himself from the commission of the crime. It baffles us why the courts below, given what the appellant stated, arrived at the conclusion that the appellant admitted to have committed the crime. No wonder, the appellant himself did not object to the tendering of the statement at the trial.

Apart from the misconstruction of the cautioned statement, we also agree with both the appellant and the learned State Attorney that adverse inference ought to have been drawn on the prosecution side for its failure to tender in evidence the PF3 of the victim who claimed to have been injured in the course of the robbery as well the failure to summon the VEO to whom the incident was first reported. We are mindful of the fact that in

terms of section 143 of the Evidence Act, Cap 6 R. E. 2002 no particular number of witnesses shall be required for the proof of any fact. However, as conceded by the learned State Attorney in the circumstances of this case the evidence of the VEO was crucial as it would have lent credence to the testimonies of the prosecution witnesses who, as well as the appellants, were residents in his village. In **Azizi Abdalla v. R.** [1991] TLR 71 this Court held:

"(iii) the general and well known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

We are settled in our minds, given the circumstances of this case, that it is a fit case to draw an adverse inference against the prosecution that PW1 never reported the matter to the VEO mentioning the appellant as his assailant.

Responding to the appellant's ground on contradictions apparent in the witnesses' testimonies; Ms Magesa was of the opinion that the contradictions were minor and did not go to the root of the case. We

however, with due respect to the learned State Attorney, have a different view. To start with PW1 and PW2 claimed that the appellant was armed with a *mkuki* (spear). According to PW3, who was together with the two the appellant was armed with an arrow. A spear and an arrow are two different weapons. The former is used alone; the former is used with a bow. This was not the only disparity. For some reason that is not clear to us the statement which was made to the Police by PW3 was tendered by the prosecution as exhibit PE1 under section 154 of the Evidence Act. This provision is invoked where a party wishes to declare a witness hostile. There was no application by the prosecution to declare PW3 hostile. The statement is nevertheless in record. In his statement to the Police this witness had said that PW1 was robbed of Tshs.10,000/- while at the trial he said that PW1 was robbed of Tshs.100,000/-. Ms Magesa asked us to expunge the statement from the record but on our part, though it was the prosecution who tendered it albeit misguidedly instead of the appellant, we nonetheless find no reason for expunging it as it is a document that tends to assist the Court in arriving at a just decision. When taken together, the contradictions between PW3's testimony in court and his previous statement to the police coupled with the contradictions between PW1 and

PW2 on the one hand and PW3 on the other hand, concerning the type of weapon used in the alleged robbery in our considered view made the prosecution case highly suspect.

In the light of the above considerations we find substance in the appeal preferred by Haji Bakari @ Hassan which we accordingly allow. Conviction entered is quashed and sentence is set aside. The appellant is to be released from prison forthwith unless otherwise held for some lawful cause.

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.

THE COURT OF APPEAL TANZANIA

P. W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL