IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 310 OF 2015

RASHIDI SHABANI ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Munisi, J.)

Dated the 22nd day of May, 2014
in
DC. Criminal Appeal No. 28 of 2011

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JUDGMENT OF THE COURT

25th & 29th July, 2016

MASSATI, J. A.:

When the appellant first appeared before the District Court of Mwanga in Kilimanjaro Region on 3/4/2009, he was charged with two counts; house breaking and stealing. On 9/4/2009, the charge was substituted wherein another person was joined, but the two counts remained the same. In the first count, they were alleged to have broken into the dwelling house of one Kapesa s/o Mohamed with intent to commit an offence. In the second count, it was alleged that, after entering into

the said house they stole therefrom, one radio, and cash, shs. 500,000/= belonging to the said Kapesa Mohamed. But on 29/4/2009, the charge was substituted yet again. A new charge of armed robbery was now preferred. The duo pleaded not guilty.

In the new charge, it was now alleged that on the 1st day of April, 2009, at or about 12:00 hrs, at Msele village-Usangi, within Mwanga District, the duo did steal cash Tshs. 500,000/=, one radio, make national 2 band, valued at 30,000/= and one pair of trousers valued at shs. 10,000/= all totaling shs. 540,000/= belonging to one Kapesa s/o Mohamed but immediately after the time of such stealing did use an axe on one Zuhura d/o Iddi in order to retain the said properties.

The prosecution case as presented through PW1 **ZUHURA IDDI**, PW2 **SUFIANI JUMA,** PW3 **KAPESA MOHAMED,** and **PW4 SESHIKE MCHOMVU**, was that, PW1 was married to PW3. They resided at Ndorwe village in Usangi. Among their properties, they had livestock, such as cattle. In February and March, 2009, PW4 bought two heads of cattle from PW3, for shs. 350,000/= and 250,000/= respectively. The couple kept the money in their house.

On 1/4/2009 at 12:00 hrs PW1 was at home, while PW3 went to graze his livestock. That was when two men, armed with an axe, forcefully walked into their house, took away a pair of trousers belonging to PW3 in which he had kept some cash 500,000/= and a radio, and after cowing down PW1 with the axe, made away with the said properties.

PW1 raised an alarm, which attracted PW2, who was a Kitongoji Chairman for Mugha-Ndorwe. On hearing the alarm, PW2 left his cattle in the grazing field and ran to the rescue of PW1 who had by then fallen down. What he did was to telephone other people. PW3 also heard the alarms and came back home. With a group of about 20 people they started to follow up the suspects, whom PW2 said he saw and identified. This is what led to the arrest of the appellant on that very day at Mbiliamkwavi, and the second accused person who was arrested about 3 days later. It was therefore, the prosecution case that the appellant was one of the perpetrators of that armed robbery.

In his sworn defence, the appellant told the trial court that he was arrested by about 5 people on 28/3/2009 at Mgigiri at his farm, where he had gone to work since 06:00 hrs. He was then taken to the Ndorwe village office where PW3 claimed that he (the appellant) had stolen his

radio and cash Tshs. 500,000/=. He was eventually taken to the police and charged as herein above.

The trial court found the appellant guilty, convicted him accordingly and sentenced him to the statutory minimum of 30 years imprisonment, and ordered him to compensate shs. 500,000/= and the pair of trousers to PW3. His appeal was dismissed by the High Court in its entirety. That is why he has knocked on the doors of this Court.

In his memorandum of appeal, the appellant has raised seven (7) grounds of grievances and also filed a written submission. Briefly, in the **first** ground of appeal, the appellant claims that the case against him was not proved beyond reasonable doubt. In the **second** ground, the complaint was that the charge was at variance with the evidence as to the owner of the properties, and the place where the offence was committed. The complaint in the **third** ground was that there was discreditable evidence on his identification. In the **fourth** ground, the appellant is aggrieved by the way the exhibits were handled, alluding to want of proof of description, ownership and chain of custody. In the **fifth** ground, the appellant is complaining that the trial court applied double standards in assessing the credibility of witnesses. In the **sixth** ground of appeal, the

complaint is against the failure by the prosecution to call the investigation officer as a witness. And lastly in the **seventh** ground, the appellant's complaint is that the trial court shifted the burden of proof to him.

As shown above, the appellant then set out to elaborate his grounds of appeal in a written submission. We should say at the outset that it was commendably well written, and it has made our task, a lot easier.

In essence, in his written submission the appellant argues that although the two courts below rested the appellant's conviction on the identification of the appellant, the credibility of the witnesses left a lot to be desired. To augment, he brought forth three principles relating to the evidence of identification, relating to identification by recognition, credibility of witnesses vis a vis favourable conditions of identification, and the danger of applying double standards in assessing credibility of witnesses. On those principles, the appellant referred to us the decisions of this Court in **SHAMIR s/o JOHN vs R.** (he did not cite it in full). **JARIBU ABDALLA vs R.**, Criminal Appeal No. 220 of 1994 (unreported), **MALODA WILLIAM AND ANOTHER vs R.**, Criminal Appeal No. 256 of 2006 (unreported) and **FEDWIN MARTINE MINJA vs R.**, Criminal Appeal No. 237 of 2008 (unreported). The appellant then concluded that

the cumulative effect of the contradictions, flaws, and deficiencies, which were never considered by the two courts below, was to render the purported identification evidence suspect and doubtful. He thus prayed that the appeal be allowed.

The respondent/Republic was represented by Ms. Rose Sulle, learned State Attorney. She did not seek to support the conviction on the major ground that the particulars in the charge in respect of the place where the offence was committed, were at variance with the evidence on record. She went on to say that whereas the charge alleges that the offence was committed at Msele Village, Usangi, all the prosecution witnesses testified that the victims of the crime and supposedly, the crime, was committed at Ndorwe. This, she submitted, raised serious doubts in the prosecution case. So, she prayed that the appeal be allowed.

We appreciate that the conviction of the appellant is based on the credibility of the prosecution witnesses, as to whether it was the appellant who perpetrated the robbery in question. We are also alive to the principle that in a second appeal, such as the present one, the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility because we have not had the advantage of seeing, hearing and

assessing the demeanour of the witnesses (See **SEIF MOHAMED E.L. ABADAN vs R.**, Criminal Appeal No. 320 of 2009 (unreported). But this principle is subject to two qualifications. The first is that the Court will interfere with any such findings, if there has been a misapprehension of the nature, and quality of the evidence, resulting in an unfair conviction or a violation of some principle of law, resulting into a miscarriage of justice. (See **SALUM MHANDO vs R**. (1993); TLR. 170 **ISAYA MOHAMED ISACK vs R.**, Criminal Appeal No. 38 of 2008 (unreported). The second principle is that it is not sufficient for a trial court to merely state that it believes in the credibility of a witness, or that it has examined and satisfied with the demeanour of a witness. In the interests of justice, the record should also reflect the reason why the court reached such a conclusion or observation. (See **YUSUF SIMON vs R.**, Criminal Appeal No. 240 of 2008 (unreported). But apart from demeanour, the credibility of witnesses can also be determined in other ways. **One**, when assessing the coherence of the testimony of such witness. **Two**, when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In those ways, the credibility of witnesses may be determined even by a second appellate court when examining the findings

of the first appellate court. (See **SHABANI DAUDI vs R.**, Criminal Appeal No. 28 of 2001 (unreported) followed in **ABDALLA MUSSA MOLLEL @ BANJOR vs R.**, Criminal Appeal No. 31 of 2008 (unreported).

In other words in evaluating the testimony of a witness the Court may take into consideration all the circumstances of the case, such as whether the testimony is reasonable and consistent with other evidence, the witness's appearance, conduct, memory and knowledge of the facts, the witness's interest in the trial and the witness's emotional and mental state.

As hinted the conviction of the appellant rests on the evaluation of the testimony of PW1 mainly, and PW2 and PW3, as corroborating witnesses. But in our judgment the basis of the trial court's evaluation of the testimonies of the witnesses was not based on demeanour, but on the evidence and inferences. The question then is, on the whole of the evidence and the circumstances of the case, were the findings based on the said evaluation of the prosecution case, beyond reproach? We shall examine a few instances below.

In the **first** place, we agree with the learned State Attorney that there was a material, unexplained variance between the charge and the evidence on record. Whereas the charge alleges that the robbery was committed at Msele village, PW1 and PW3, the victims of the robbery testified that they reside at Ndorwe – Usangi, and that is where the offence was committed. The charge was not amended to accommodate this variance, nor was evidence forthcoming to show that the two places are one and the same. This has the effect of plunging the prosecution case into a cloud of doubts.

Secondly, although we do not agree with the appellant that the conditions for identification were not favourable; (since the robbery took place at midday and by people that PW1 recognized), we agree with him, and the principles he has reminded us of, that, even in recognition cases; instances of mistaken identity may occur. (See **ISSA s/o MGARA @ SHUKA vs R.**, Criminal Appeal No. 37 of 2005 (unreported), and that in matters of identification it is not enough to look at factors favouring accurate identification. Equally important is the credibility of witnesses because favourable conditions for identification alone are no guarantee against untruthful evidence. (**JARIBU ABDALLAH vs R.,** (*supra*).

Thirdly, the charge alleges that the appellant used an axe and a knife to effect the robbery on 1/4/2009. That all the witnesses, particularly PW1, PW2 and PW3 did not remember that there was a use of an axe in the robbery until 20 days later raises some eyebrows. Although the prosecution are not obliged to produce all and every witness, the testimony of an investigator of the case, would have cleared the air, first on what was the nature of the complaint first filed with the police, and secondly, why did the police first prefer a simple charge of house breaking and stealing until 20 days later when the serious charge of robbery was preferred? The question is not whether or not the charge could be amended, but the nature of the amendment and the passage of time taken to effect it, gives legitimate doubts on whether PW1 ever lodged such complaints with the police on first reporting the crime? The investigator would also have cleared the air on how, if the appellant was found in possession of the radio, and the axe, who seized them, where were they stored before PW1 tendered them in court as exhibits? It is also curious why were any of the other village leaders who were allegedly also present during the appellant's arrest not called to testify?

Fourthly, the evidence of PW1 is inconsistent not only with her own but also with that of PW2 and PW3. For instance, PW1 said that when she tried to raise an alarm, she was threatened into silence by the appellant, wielding an axe. So, she had to lie down. But while lying down she was able to see the direction that the appellant and his co accused took to run away. The record is silent as to her position while lying down, and how she was able to see so while lying down. If it was true that she tripped and fell down as she was retreating from the robbers, common sense dictates that she must have fallen on her back and on her own admission, she remained so for about half an hour. If that was so, how could she manage to see the direction taken by the robbers? But when cross examined by the appellant, she admits that she did not raise alarm because she was certain of who committed the robbery and that she would be able to tell people. She then claims that she stood up so that she could see the robbers running away. We think that these inconsistencies in her testimony were nothing but embellishments.

The alarms which PW1 was not sure whether she made or not, were apparently heard by PW2 as coming from PW1's house. So did PW3, who also claimed to have heard some alarms from his house.

Fifthly, the trial court mishandled the admission of the radio and the axe as exhibits. (Exh. PE 1and PE 2 respectively). Although PW1 tendered them as exhibits, they were not cleared for admission, in that there were no prior descriptions of how she came to identify the radio or the axe. Technically this was wrong. The law demands that before a witness is allowed to tender a physical evidence as an exhibit, she/he must first describe it, identify it and explain how it came into his/her possession. If it was seized by the police from the appellant, the chain of custody must be explained. PW1 did none of those requirements before she was let to produce the said exhibits. The irregularity in the admission of the said exhibits impacted on the appellant's right to a fair trial. As such, the existence of those exhibits in the record further renders the appellant's conviction unsafe.

After reevaluating the evidence on record, we have come to the conclusion that the lower courts did not properly assess the credibility of the witnesses, and so arrived at a wrong conclusion leading to a miscarriage of justice. In the circumstances, the appellant's conviction is not safe. We accordingly allow the appeal. We quash the conviction and

set aside the sentence. We order his immediate release from custody unless he is held therein for some other lawful cause.

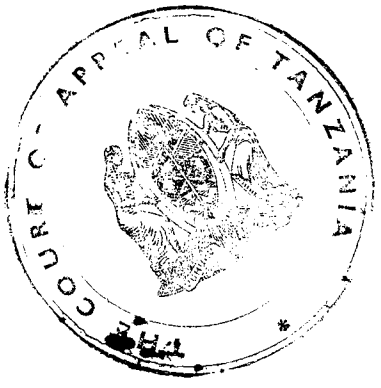
DATED at **ARUSHA** this 26th day of July, 2016.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL