IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MJASIRI, J.A., JUMA, J.A., And MUGASHA, J.A.)

CRIMINAL APPEAL NO. 302 OF 2015

MSAFIRI HASSAN MASIMBA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania At Iringa)

(Mackanja, J.)

Dated the 2nd day of December, 2002
in
Criminal Appeal No. 36 of 2002

JUDGMENT OF THE COURT

1st & 3rd August, 2016.

MJASIRI, J.A.:

The main issue for consideration and determination in this appeal is whether or not there is sufficient evidence to ground the conviction of the appellant. It was twenty one years ago, way back in April, 1995 when the appellant Msafiri Hassan Masimba was charged and convicted of armed robbery contrary to sections 285 and 286 of the Penal Code. He was sentenced to thirty (30) years imprisonment. It was the prosecution case that on March, 30, 1995 at about 16:00 hours at Hesika, Pawega Division within Iringa District, the appellant stole One Hundred and Ninety Three Thousand Nine Hundred Shillings (193,900/=) from Yohana Matema and

used violence against him in order to obtain the said property by threatening him with a gun.

Aggrieved by the decision of the District Court, the appellant appealed to the High Court. The appellant filed eight grounds of appeal, which can be condensed to the following two grounds:-

1. *The first appellate court erred in law and in fact in basing his conviction on the contradictory evidence of PW1, PW2, PW3 and PW4.*

2. *The prosecution failed to prove the case against the appellant beyond reasonable doubt.*

At the hearing of the appeal the appellant appeared in person and was unrepresented and the Respondent Republic had the services of Mr. Ismail Manjoti, learned Principal State Attorney.

Initially Mr. Manjoti supported the conviction of the appellant. However upon further reflection of the record, he contended that the contradictions between the prosecution witnesses were major ones and went to the root of the matter. Of great significance is the date of the incident whereas PW1 and PW2 testified that the incident occurred on March 3, 1995, PW3 and PW4 testified that the incident occurred on April

24, 1995. He submitted that the trial magistrate did not address the significant contradictions and therefore failed to properly evaluate the evidence before arriving at a decision. The same can be said of the 1st appellate Judge, who did not even consider the grounds of appeal presented by the appellant.

We on our part, after carefully and critically examining the record, entirely agree with the learned Principal State Attorney. Looking at the first ground of appeal, on the contradictory evidence of the prosecution witnesses, it is evident from the record that there were major contradictions. We will commence with the evidence of PW1, Kazaroho Gabriel Duma. He told the Court that he was informed by the complainant, Yohana Matema, PW2 that the appellant robbed his bag containing 193,000/= Shillings on March 30, 1995. PW2 gave the same account in his testimony.

According to PW3, Simon Mgeni, he arrested the appellant when he saw him carrying a gun on April 24, 1995. He did not mention anything about the robbery. Gelson Mbembati, PW4, also testified that he saw the appellant carrying a bag and a gun on April, 24. According to Benard

Mwangasi, who was the Village Chairman, PW5, he saw the appellant on April 24, 1995, at the village offices after he was arrested.

In his judgment the learned trial magistrate did not evaluate the evidence. He did not address the contradictions in the prosecution evidence. The date the incident took place was very important, but it was not taken into consideration. He simply reached a conclusion that the evidence of PW1 (who was not the complainant) was corroborated in material particular with the rest of the prosecution witnesses especially on the issue of identification of the accused person. There was no attempt to reconcile the two distinct dates.

The first appellate court also failed to evaluate the evidence. The appellant's grounds of appeal were not considered even though a complaint was raised on the contradictions and inconsistencies of the testimonies of the prosecution witnesses. The High Court Judge simply stated by way of conclusion that "*the learned State Attorney submitted that the conviction is sound because the convicting Court analysed the evidence properly. I agree.*"

We are alive to the fact that in a second appeal, this Court would rarely interfere with the concurrent findings of fact by the courts below unless there are misdirections and non-directions on the evidence or as the case may be, or a violation of some principle of law or practice.

In the case of **Mohamed Said Matula v Republic** (1995) TLR 3, this Court provided the following guidance. It was 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."*

We are of the considered view that the circumstances of this case justify our interference. The contradictions and inconsistencies of the prosecution witnesses which were not addressed by the court affect the credibility of the complainant, PW2, who was a single witness.

In view of the grave contradictions and inconsistencies as to when the incident took place, we are of the considered view that the contradictions go to the root of the matter.

The law is settled. In a case entirely depending on the evidence of a single witness, such evidence must be absolutely watertight to justify a conviction. It must be tested with great care. See - **Abdullah bin Wendo v Rex** (1953) EACA 166 and **Yohanis Msigwa v Republic** (1990) TLR 148.

The defence of the appellant was also not considered by both the trial court and the first appellate court. It is now settled law that failure to consider the defence case is fatal and vitiates the conviction See – **Hussein Idd and Another v Republic** (1986) TLR 166 and **Siza Patrice v Republic**, Criminal Appeal No. 19 of 2010 CAT (unreported).

In relation to ground No. 2, the burden of proof is always on the prosecution to prove the case against the accused person beyond reasonable doubt. See – **Woolmington v Director of Public Prosecutions** (1935) AC 462. We are satisfied that given the contradictory nature of the prosecution witnesses, the prosecution has failed to discharge that burden. It has not been clearly established when the alleged robbery took place.

For the foregoing reasons, we entirely agree with the appellant and the learned Principal State Attorney, that the prosecution failed to prove its case against the appellant to the standard required under the law. In the result we allow the appeal, quash the conviction of the appellant and set aside the sentence of thirty years imprisonment. We order the immediate release of the appellant from prison unless otherwise lawfully held.

Order accordingly.

DATED at **IRINGA** this 2nd day of August, 2016.

S. MJASIRI
JUSTICE OF APPEAL

I. H. JUMA
JUSTICE OF APPEAL

S. MUGASHA
JUSTICE OF APPEAL

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

B. R. NYAKI
DEPUTY REGISTRAR
COURT OF APPEAL