IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MBAROUK, J.A., MJASIRI, J.A And MMILLA, J.A)

CRIMINAL APPEAL NO. 356 OF 2013

MWITA CHACHA KABAILA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania

at Dar es Salaam)

(Mwaikugile, J.)

dated the 2nd day of October, 2013

in

HC. Criminal Appeal No. 151 of 2011

.....

JUDGMENT OF THE COURT

27th April & 23rd August, 2016

MJASIRI, J.A.:

In the District Court of Ilala District at Kariakoo, in Dar es Salaam Region, the appellant Mwita Chacha Kabaila was charged with armed robbery contrary to section 287A of the Penal Code. He was convicted as charged and was sentenced to the mandatory minimum sentence of thirty

(30) years imprisonment. It was the prosecution case that on the 3rd day of November, 2008 at about 23:45 hours at Nyang'andu Kivule area, within Ilala District, Dar es Salaam Region, the appellant did steal cash amounting to Shillings Six Hundred and Fifty Thousand (650,000/=), the property of one Nyaiho s/o Nyanda and did use actual violence to the said Nyanda, by cutting him with a machete on his head in order to obtain the said cash. PW1 and the appellant were said to be relatives. PW1 invited the appellant to join him for drinks. However upon arrival he refused to have a drink and he ended up assaulting and robbing the appellant. The appellant denied the charge.

Being aggrieved by the decision of the trial Court, the appellant lodged his appeal in the High Court. His appeal was unsuccessful hence his second appeal to this Court.

The appellant presented an eight-point memorandum of appeal, which can be summarized as follows:-

1. *The prosecution failed to prove its case beyond reasonable doubt.*
2. *The evidence on record was not sufficient to ground a conviction.*

The appellant also presented two supplementary grounds of appeal. They are reproduced as follows:-

1. *That, the first appellate court erred in law by upholding the appellant's conviction and sentence without noting that it was based on unsworn evidence of prosecution witnesses.*

2. *That, the first appellate Judge erred in law when he upheld the appellant's conviction and sentence but failed to note that the evidence of each witness ought to be dispassionately assessed by testing it not against the entire evidence on record, be it testimonial or documentary.*

At the hearing of the appeal the appellant appeared in person and was unrepresented. The respondent Republic was represented by Ms. Helen Moshi, learned Senior State Attorney.

The appellant not having legal representation opted to let the learned Senior State Attorney address the Court first.

Ms Moshi did not support the conviction of the appellant, she presented the following arguments to support the position she had taken.

Firstly, the prosecution witnesses were not sworn by the trial magistrate. This was an anomaly and their evidence was of no value. **Secondly**, the totality of the evidence on record was not sufficient to ground a conviction. There were major contradictions between the evidence of PW1 and PW2. PW1 did not mention Muhoro Chacha. PW2 was not present at the scene when the robbery took place. **Thirdly,** there was a variance in respect of the amount stolen. According to the charge sheet the amount stolen was Shillings Six Hundred and Fifty Thousand (650,000/=). However the account given by PW1 and PW2 was that the amount stolen was Shillings Six Hundred and Ninety Thousand (690,000/=).

Ms Moshi concluded her submission by stating that there were major contradictions in the prosecution evidence which goes to the root of the matter. Therefore the doubt should be resolved in favour of the appellant.

The appellant on his part did not have much to say, he simply agreed with the arguments raised by the learned Senior State Attorney.

We on our part after reviewing the record and the submissions made by counsel, we are inclined to agree with the learned Senior State Attorney. It is evident from the record that the evidence on record is not sufficient to prove the case against the appellant beyond reasonable doubt. The two courts below relied on the evidence of the complainant (PW1) and that of his wife (PW2). However the two testimonies differed in material respect. PW2 was not present at the scene, so she never witnessed what actually transpired. The time of the incident given by her was quite different from that given by PW1. She testified that it was 7:45 p.m. Her account as to what had transpired and what she heard was not very coherent. She mentioned that **Muhere Chacha** was present at the scene. However PW1 did not mention his presence at all. No clear picture has been established as to what actually happened. It was obvious from her testimony that she was not present when the appellant joined her husband and the other guest. She did not state the distance from her house to the grocery store where PW1 was supposed to have been attacked and robbed. Surprisingly at page 17 of

the record when PW2 was being cross examined by the appellant she stated as follows:-

> *"XXD by accused*
> *I expressly all (sic) because I saw the entire scene.*
> *I saw you and I was there at Nyang'andu near the grocery."*

She however did not mention the time. Both PW3 and PW4 who came to assist PW1, testified that he was badly hurt and was unable to speak. PW2 however stated in court that PW1 told her that it was the appellant who assaulted her. PW1 in his testimony did not categorically state where, when and how the robbery took place, though it was stated in the charge sheet that the incident occurred on November 3, 2008 at 23:45 hrs. The amount specified in the charge sheet was Shs 650,000/=, but PW1 and PW2 stated that the amount taken from the appellant was Shs 690,000/=

We must state at the outset that this case was badly investigated and badly prosecuted. The recording of the evidence made things even more difficult. The prosecution evidence during the trial was scanty and vague and was presented in a haphazard manner. The appellant is facing a grievous

charge which carries a mandatory minimum sentence of 30 years imprisonment. It is also apparent from the record that the victim (PW1) was badly hurt and had to be hospitalized. However this does not change the fact that the prosecution has to prove its case to the standard required under the law.

On the complaint that the prosecution witnesses were not sworn, the position is not correct, though the typed record gives that impression. However upon checking the original record we are satisfied that all the witnesses were properly sworn.

This is a second appeal. We are cognizant of the fact that in a second appeal this Court would rarely interfere with the concurrent findings of the two courts below (the trial court and the High Court) unless there are misdirections and non-directions on the evidence or as the case may be, or a violation of some principles of law or practice. See **Wankuru Mwita v. Republic,** Criminal Appeal No. 219 of 2012 CAT (unreported).

This Court has in various occasions interfered with concurrent findings of facts where there was a misapprehension of evidence. See for instance

Ludovick Sebastian v Republic, Criminal Appeal No. 818 of 2007 and **Mbarouk Hassan @ Kashumundu v Republic,** Criminal Appeal No. 145 of 2013 CAT (both unreported).

In **Mohamed Said Matula v Republic** (1995) TLR 3 this Court provided the following guidance where there are inconsistencies and contradictions. 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, or else the court has to decide whether the inconsistencies and contradictions are only minor or whether they go the root of the matter."*

We are of the considered view that the circumstances of this case warrants our interference as the inconsistencies and contradictions of the evidence of PW1 and PW2, PW3 and PW4 and the misapprehension of the evidence was not addressed by the trial court and the High Court. The said

contradictions and inconsistencies went to the root of the matter. The courts below never considered the issue of identification even though the incident occurred during the night at 23:45 p.m.

Having carefully considered the evidence on record and the submissions by the learned Senior State Attorney, we are of the firm view that the case against the appellant was not proved beyond reasonable doubt as required under section 3(2)(a) of the Evidence Act, [Cap 6 R.E. 2002], which provides that:-

> *"a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists."*

See – **Woolmington v the DPP** (1935) AC 462.

In the result we find merit in the appeal. We allow the appeal, quash the conviction and set aside the sentence of 30 years imprisonment. The appellant should be released from custody with immediate effect unless he is otherwise lawfully held.

DATED at DAR ES SALAAM this 18th day of August, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B.M.K. MMILLA
JUSTICE OF APPEAL

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

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL