

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MUSSA, J.A., MZIRAY, J.A., And NDIKA, J.A.,)

CRIMINAL APPEAL NO. 259 OF 2015

MWITA JUMA @ WAMBURA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Ebrahim, J.)

dated 18th day of May, 2015

in

HC Criminal Appeal No. 135 of 2014

JUDGMENT OF THE COURT

18th & 24th May, 2017

MZIRAY, J.A.:

Mwita Juma @ Wambura, the appellant in this appeal, was charged and convicted by the District Court of Musoma at Musoma for the offence of Armed Robbery contrary to section 287(A) of the Penal Code, Cap 16 of the Laws (R.E. 2002). The robbery took place at about 01.00 hours on 4th February, 2010 at Kamugegi village within the Rural District of Musoma in Mara Region at the home of one Juma Ibagi, who testified as PW1. The properties robbed included cash money Tshs.

400,000/= the property of the said Juma Ibagi. It is alleged that the appellant with one Munanka, during the robbery used a machete to cut the complainant on his mouth in order to obtain the said money. After the incident the assailants ran away. PW1 raised alarm in which PW3 Chabudiba Ibagi and other good samaritans responded. They immediately chased them and lucky enough they managed to apprehend the appellant herein. His fellow friend, Munanka, was never found. The appellant was then taken to the trial court and as we have pointed out earlier on, he was charged with the offence of armed robbery.

Although the appellant denied the charge, he was convicted as charged. He was then, sentenced to the statutory minimum sentence of thirty (30) years imprisonment and corporal punishment of twenty four (24) strokes of the cane. He was aggrieved and appealed to the High Court. The High Court, sitting at Mwanza (Ebrahim, J.), upheld the conviction and sentence and dismissed his appeal. Still aggrieved he lodged this second appeal.

The appellant appeared in person fending for himself at the hearing of his appeal, whereas the respondent Republic was represented by Ms. Angelina Nchala, learned Senior State Attorney assisted by Mr. Morris Mtoi, learned State Attorney.

The appellant filed a memorandum of appeal consisting of a total of four grounds and an "additional" memorandum of appeal with two grounds. In both documents, a number of points have been canvassed. Very briefly, they all crystallize into two major grounds of complaint. Which are:-

- "1. That the identification evidence in the case did not establish the prosecution case against him beyond reasonable doubt.*
- 2. The court erred in relying on exhibits P3 and P4 which however violated the procedure in admitting them as provided under the Criminal Procedure Act, Cap 20 R.E 2002 and that its chain of custody was also broken and unknown."*

When the appellant was given a chance to elaborate his grounds of appeal, he opted to allow the learned Senior State Attorney to submit first.

On her part, Ms. Angelina Nchala, learned Senior State Attorney from the outset did not support the appeal. She fully supported the conviction and sentence and urged us to do the same in view of the strong evidence on record analyzed by the two courts below. She submitted that the evidence of visual identification in the circumstance of this case was unnecessary as according to Juma Ibagi (PW1), Sophia Juma (PW2) and Chabudiba Ibagi (PW3) the appellant was chased and caught on the spot at the scene. To support her position, she referred this Court to the cases of **Stephen John Rutakikirwa v. Republic**, Criminal Appeal No. 78 of 2008 and that of **Damian Ruhele v. Republic**, Criminal Appeal No. 501 of 2007 [both unreported].

On the issue of exhibits, the learned Senior State Attorney aptly conceded, and rightly so in our view, that the admission of exhibits P3 and P4 did not follow the procedure and that the chain of custody was indeed broken. The police officer (PW5) who tendered the exhibits did

not explain how the exhibits came into his possession. In **PAULO MADUKA AND OTHERS vs R** Criminal Appeal No. 110 of 2007 (unreported) this Court underscored the importance of a proper chain of custody of exhibits and that there should be:-

"... chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime..."

In **Magesa Chacha Nyakibali and Yohana Josia Manumbu vs. R.**, Criminal Appeal No. 307 of 2013 (unreported), the evidence was to the effect that the Spice Rite Hotel in Bunda was burgled by bandits and a shotgun was stolen. Later, two guns and several machetes were recovered. One of the guns was exhibit PI tendered by PW2. The Court made the following observation:-

"...the evidence is not clear as to how the shotgun subject of this case found its way to PW2 who eventually tendered it in court. As it is, by sequence of events there was a broken

'chain of custody' in the handling of the shotgun which raises doubts as to whether the gun exhibited in court was the same one as the one which was said to have been recovered at Rubana River."

All the above authorities reiterate through various circumstances, the underlying rationale for ascertaining a chain of custody, which is, to show to a reasonable possibility that the item that is finally exhibited in court as evidence, has not been tampered with along its way to the court. With the above settled rationale in mind and the fact that the record does not show how the exhibits came into Pw5's hands, then, exhibits P3 and P4 are expunged from the record.

That being the position, the remaining evidence on record is that of chase and arrest of the appellant from PW1, PW2 and PW3. According to these witnesses, immediately after being invaded by the bandits they chased them and that in the due course, assisted by the mob that came after hearing the alarm, they managed to catch the appellant only. The testimonies of PW1, PW2 and PW3 were consistent, supported by the evidence of the Village Chairman, Julius Nyakitira

(PW4) to whom the appellant confessed to have committed the offence and named one Munanka who have been in his company in the commission of that offence.

In view of such glaring evidence against the appellant, the High Court rightly sustained the conviction. The defence of the appellant that he was arrested gallivanting in a personal errand at that odd hours of the night does not sound probable in the circumstances. We are, therefore, satisfied that the appeal is totally lacking in merit.

We accordingly dismiss the appeal.

DATED at **MWANZA** this 23rd day of May, 2017.

K.M. MUSSA
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

G.A.M. NDIKA
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL