IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: JUMA, CJ., MUGASHA, J.A., And LILA, J.A.)

CRIMINAL APPEAL NO. 436 OF 2015

JAMES PAULO @ MEMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mruma, J.)

dated the 17th day of September, 2015
in
DC. Criminal Appeal No. 78 of 2013

JUDGMENT OF THE COURT

9th & 15th February, 2018

MUGASHA, J.A.:

The appellant and another person were charged in the District Court of Kahama with the offence of Armed Robbery contrary to section 287A of the Penal Code [CAP 16 RE.2002]. At the trial court, they were convicted of a lesser offence of robbery and given a sentence of 15 years imprisonment with 12 strokes of a cane. The appellant was unsuccessful in the first appellate court which dismissed his appeal. However, the other person was acquitted.

Still dissatisfied, the appellant seeks to impugn the decision of the High Court in a total of seven grounds contained in initial and supplementary memoranda of appeal conveniently summarised into one major complaint namely:

- *That, the charge of robbery was not proved against him by the prosecution.*

The prosecution case was that, on 8/12/2010 at about 06.00 hrs, **AMINA LUGOHE** (PW1) and **AZIZI MPONDI** (PW2) while on their way to the market at Lulambo, Nyihogo area within Kahama District in the region of Shinyanga, were attacked by the appellant and another person armed with a machete. The assailants managed to steal one cell phone make Nokia (Exhibit A) and Tshs. 50,000/= from PW1.

PW2 ran away leaving behind PW1 who raised alarm which was responded to by **ALJABIR HAMAD** (PW4) who apprehended the appellant on the spot and he surrendered the mobile phone he had snatched from PW1 and the matter was reported to the Police. The other assailant who ran away was pursued and arrested on 9/12/2010. **E.2544 D/CPL. EMMANUEL** (PW3), the investigator, recorded the caution statement of the appellant and testified that,

the appellant confessed to have committed the robbery. The confessional statement was tendered in the evidence as exhibit D.

The appellant and the other person all denied the charge. In his defence, the appellant testified to have been arrested on 6/12/2010 at Nyihogo garage where he worked as a mechanic. He also told the trial court that to have been on police custody subsequent to his arrest.

In evaluating the evidence, the trial court was satisfied that the prosecution had discharged burden of proof of the charge or robbery against the appellant and another person. They were thus convicted and sentenced as earlier on stated.

In the first appellate court, the learned judge upheld the conviction of the appellant on ground that, he was identified at the scene of crime having been arrested on spot. The other person was acquitted on ground that he was not identified at the scene of crime and that the confessional statement based on his conviction was irregular.

At the hearing of the appeal before us, the appellant appeared in person whereas Mr. Juma Masanja, the learned Senior State Attorney represented the respondent Republic.

The appellant opted to initially hear the submission of the learned Senior State Attorney.

The learned Senior State Attorney supported the appeal. In his brief submission he argued that, while the High Court sustained conviction of the appellant basing on evidence of identification since he was caught red handed at the scene of crime. However, the High Judge did not consider the defence evidence or else he would not have dismissed the appeal. He pointed out that, while PW1 claims to have identified the appellant in the robbery incident which occurred on 8/12/2010 at 06.00 hrs, the appellant testified to have been arrested on 6/12/2010 and taken to the police custody.

Given such circumstances, the learned Senior State Attorney argued that, it was not possible for the appellant to have been at the scene of crime on 8/12/2010. He thus concluded that, on account of the said doubt as to the presence of the appellant at the robbery scene on the fateful day, the prosecution did not prove a

charge of robbery against the appellant. The learned Senior State Attorney urged us to allow the appeal.

On his part, the appellant agreed with the submission of the learned Senior State Attorney.

In the light of the above submission and the record before us, the crucial issue for our determination is whether the charge was proved against the appellant beyond reasonable doubt.

Before embarking on above issue at the outset, we wish to state that, we are alive to the principle that, in the second appeal like the present one, the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility. This is so because we have not had the opportunity of seeing; hearing and assessing the demeanour of the witnesses. (See **SEIF MOHAMED E.L ABADAN VS REPUBLIC, Criminal Appeal No. 320 of 2009** (unreported). However, the Court will interfere with concurrent findings if there has been misapprehension of the nature, and quality of the evidence and other recognized factors occasioning miscarriage of justice. This position was well stated in **WANKURU MWITA VS REPUBLIC**, Criminal Appeal No. 219 of 2012 (unreported) where the Court said:

"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial Court and first appellate Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirection or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."

Admittedly, there is a problem with the issue of identification of the appellant and his alleged apprehension at the scene of crime on 8/12/2010 as per testimonial account of PW1, PW2, and PW4 and as spelt out in the charge sheet. The basic complaint of the appellant is that on 8/12/2010 he was not at the robbery incident. This has really taxed our minds and that is why we have decided to re-evaluate the entire evidence adduced at the trial and we shall state why.

It is the general position of the law that, failure or rather improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice. In the same vein, failure to consider defence evidence is fatal and usually vitiates the

conviction. In the case of **LEONARD MWANASHOKA VS REPUBLIC,** Criminal Appeal No. 226 of 2014 (unreported), the Court spelt out useful guidelines on what is to be considered in the evaluation of the evidence having said:

> *"It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation and analysis."*

In the matter under scrutiny, at pages 21 – 22 of the record of appeal in his sworn evidence, the appellant testified as follows:

> *"On 6/12/2010 I was found at my working place at Nyihongo Garage, I was found with two people... They identified as police officers... I accompanied them up to the police station. On 7/12/2010, two women came at police. I was asked if I did know*

them, I refused ... I was told about robbery of Nyihongo. I denied ... I deny the allegations."

When the appellant was subjected to cross examination he firmly maintained to have been arrested on 6/12/2010. Apparently, this account was not at all challenged by the prosecution. In actual fact the appellant raised the defence of alibi that he was not at the robbery incident on the fateful day. It is cardinal principle that, where an accused person relies on the defence of alibi, he does not assume any burden of proof to prove it. All that he has to is to create a reasonable doubt as to the strength of the prosecution case (**KENNEDY OWINO ONYIACHI AND OTHERS VS REPUBLIC,** Criminal Appeal No. 28 of 2006) (unreported).

However, the evidence of the appellant was treated as follows as reflected at page 30 of the record of appeal: apart from the trial magistrate making a correct narration in his judgment that he was arrested on 6/12/2010, he ended up in convicting the appellant on the robbery which occurred on 8/12/2010 as per the evidence of PW1 to PW4 and the appellant's confessional statement.

The aforesaid shows that the appellant's evidence was disregarded in the evaluation stage leading to inevitably wrong conclusion resulting into miscarriage of justice leading to the conviction of the appellant. The trial court ought to have assessed the probative value, credibility and weight of evidence adduced by the defence as against that of the prosecution in order to determine whether there are any reasonable doubts in the prosecution case. (See the case of **YUSUPH AMANI VS REPUBLIC,** Criminal Appeal No, 255 of 2014) (unreported).

On first appeal, the appellant raised the complaint as a second ground of appeal as reflected at page 32 of the record of appeal that, on the fateful day he was in police custody following his arrest on 6/12/2010. However, at page 50 of the record the High Court concluded as follows:

> *"It is my considered view that it was enough for PW1 to just say that he identified the first appellant... in the morning and the first appellant was arrested on the spot."*

In our considered view, this was not a fair treatment to the appellant's complaint which is to the effect that his defence was not considered. Therefore, the omission by the trial court was not

remedied by the High Court which was duty bound to re-evaluate the evidence and an opportunity to have the defence evidence considered. In **HUSSEIN IDD AND ANOTHER VS. REPUBLIC** 1986 TLR 166, the Court was confronted with a situation whereby, the trial

sustained. We allow the appeal, quash the judgments and convictions of the two courts below and set aside the sentence. We order the immediate release of the appellant from custody unless is held for some other lawful cause.

DATED at **TABORA** this 12th day of February, 2018.

I.H. JUMA
CHIEF JUSTICE

S. E. A. MUGASHA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

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

A. H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL