IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MBAROUK, J.A, MZIRAY, J.A AND MWAMBEGELE, J.A.)

CRIMINAL APPEAL NO. 348 OF 2017

NKANDA JILALA .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

(Appeal From the decision of the High Court of Tanzania at Dodoma)

(Mohamed, J.)

dated the 7th day of August, 2017
in
DC Criminal Appeal No 126 of 2016

JUDGMENT OF THE COURT

26th February & 12th March, 2018

MWAMBEGELE, J. A.:

In the District Court of Iramba at Kiomboi, the appellant Nkanda Jilala, together with four others, was arraigned for the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002. It was alleged in the charge sheet that the five accused persons, jointly and together, on 15.08.2015 at about 01:00 hours at Mingela village within Iramba District in Singida Region, did steal cash Tshs. 5,540,000/= the property of Johnson Lazaro and, immediately before and after, threatened the said

Johnson Lazaro with bush knives in order to obtain and retain the money.

The appellant, like his fellow accused persons, pleaded not guilty to the charge and after a full trial, he, like his co-accused persons, was found guilty, convicted and sentenced to serve a mandatory minimum sentence of thirty years in jail.

Aggrieved by the conviction and sentence, the appellant and his fellow accused persons, appealed to the High Court where Mohamed, J., on 07.08.2017, allowed the appeals of all the appellants, except for the appellant's whose appeal was dismissed. Undeterred, the appellant has come to this Court on a second appeal challenging the decision of the High Court on five grounds of complaint. The grounds may be paraphrased as under:

1. The trial and first appellate court erred in law and fact in convicting the appellant while the prosecution did not prove the case beyond reasonable doubt;
2. The trial and first appellate court erred in law and fact in convicting the appellant basing on weak evidence of identification;

3. The trial and first appellate court erred in law and fact in not considering the requirements of section 240 (3) of the CPA;
4. The trial and first appellate court erred in law and fact in admitting the Voter Registration Card while there was no evidence of chain of custody brought by the prosecution; and
5. The trial and first appellate court erred in law and fact in convicting the appellant on uncorroborated evidence.

At the hearing of the appeal before us on 26.02.2018, the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms. Rosemary Shio, learned Principal State Attorney. When called to argue his appeal, the appellant, fending for himself, adopted the five-ground memorandum of appeal and opted to hear the response of the learned Principal State Attorney after which he would rejoin if need arose.

Arguing against the appeal, Ms. Shio supported the findings of both courts below against the appellant. In her arguments, the learned Principal State Attorney anchored her arguments on mainly the first ground stating that there was enough circumstantial evidence to mount a conviction against the appellant. He submitted that

according to the testimonies of Lazaro Johnson PW1 and Mwajuma Jumanne PW2, the appellant showed up at the scene of crime some hours before the incident asking for PW1. PW1 was not at home. The appellant asked for PW1's cell phone number which was given to him by PW2 and later the appellant called PW1 at 20.00 hours. Ms. Shio added that there was another aspect of circumstantial evidence to connect the appellant with the offence; the fact that his Voter Registration Identity Card was found at the scene of crime. When a group of people went to the residence of the appellant to apprehend him in connection with the robbery, he fled and later surrendered himself at the Police Station. These pieces of circumstantial evidence put together, implicate the appellant to the hilt, the learned State Attorney concluded.

Rejoining, the appellant challenged the prosecution case as being marred with discrepancies. He argued that PW1 and Jonas Nkaya Gyunda PW3 contradicted on the time the Voter Registration Identity Card was found. He stated further that the Card was picked from his house by PW3 when they went there to arrest him and threatened to set his house on fire. The appellant stated that he did not submit himself to the police as a sign of admitting the commission

of crime but that he went to report that people wanted to burn his house. He prayed that his appeal be allowed.

We have dispassionately considered the rival arguments by the parties. Indeed, Ms. Shio seems to agree with all the grounds except the first. She has placed heavy reliance on circumstantial evidence which she submits is enough to irresistibly point to the guilt of the appellant.

The law relating to circumstantial evidence has long been settled in this jurisdiction. In the discourse, we wish to start by saying that circumstantial evidence is good evidence to sufficiently found a conviction of an accused person on its own; that is, without any other type of evidence to corroborate it. Circumstantial evidence has been described as the best evidence. As was aptly articulated by Sir Udo Udoma, the then Chief Justice of Uganda, in **Republic v. Sabudin Merali & Umedali Merali**, Uganda High Court Criminal Appeal No. 220 of 1963 (unreported):

> *"... it is no derogation to say that it was so; it has been said that circumstantial evidence is very often the best evidence. It is the evidence of surrounding circumstances*

which, by undesigned coincidence is capable of proving a proposition with the accuracy of mathematics".

[Quoted in **Julius s/o Justine & Four Others v. Republic** Criminal Appeal No. 155 of 2005 (unreported)].

And in **Georgina Masala v. Republic**, Criminal Appeal No. 128 of 2014 (unreported), we relied on **Samson Daniel v. Republic** (1934) 1 EACA 46 to state that circumstantial evidence may be conclusive than the evidence of an eye witness. We stated:

"Circumstantial evidence may be not only as conclusive but even more conclusive than eye-witness."

Likewise, in **Simon Musoke v. Republic** [1958] 1 EA 715, the Court of Appeal for East Africa, quoting from the third headnote, held:

"In a case depending exclusively upon circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt."

The defunct Court of Appeal also imported to East Africa the holding of the decision of the Privy Council in **Lezjor Teper v. Reginam** [1952] A.C 480 in which it was stated at p. 489:

> *"It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."*

The erstwhile Court of Appeal also quoted the following excerpt from **Taylor on Evidence** (11th Edn.) at p. 74:

> *"The circumstances must be such as to produce moral certainty, to the exclusion of every reasonable doubt."*

So much for the position of the law on circumstantial evidence. Adverting to the case at hand, can we say circumstantial evidence is such that it irresistibly points to the guilt of the appellant? Can we say that the inculpatory facts of circumstantial evidence in the case at hand are incompatible with the innocence of the appellant and are incapable of explanation upon any other reasonable hypothesis than that of guilt? We will endeavour to provide answers to these

questions with a view to seeing whether or not the appellant's guilt was rightly established by the trial court and the first appellate court; the High Court.

Ms. Shio is firm that circumstantial evidence in the case at hand was sufficient to prove the charge levelled against the appellant to the hilt. With due respect to the learned Principal State Attorney, we are not prepared to swim her current. We shall demonstrate.

The learned Principal State Attorney submitted that the appellant appeared at the scene of crime; the residence of PW1 where he found PW2. He enquired after PW1 and later asked his cell phone number which he was given. He later called PW1 and talked about exchanging his cow for goats. Ms. Shio is of the view that this is suggestive of the fact that the appellant went to make preparatory arrangements for the commission of robbery some hours later. We do not think this is true. One cannot say the appellant was on such a mission without injecting speculation to the facts. We say so because the appellant explained away, sufficiently in our view, why he was looking for PW1. He stated that he wanted to exchange his cow for goats and PW1 supports the appellant's averment by stating that they used to do such transactions

before. For this reason, we respectfully think, the fact that the appellant was seen at the scene of crime some hours before the robbery and that he called PW1 some hours before the commission of the offence do not irresistibly point to the guilt of the appellant in that there is another explanation to explain away the reason why he went there.

Another piece of circumstantial evidence which Ms. Shio submitted point to the appellant's involvement in the commission of the robbery is the aspect of the Voter's Registration Identity Card (henceforth "the Card") which was allegedly found at the scene of crime. The appellant did not deny that the Card belonged to him; that it was his. However, he submitted before us that the same was picked up by PW3 at his residence when they went to apprehend him and attempting to set his house on fire. This is evidenced as well in the way the appellant cross-examined PW1 and PW3 on the Card. We think the appellant has successfully cast a doubt on the prosecution's episode that the Card was found at the scene of crime. It brings another plausible hypothesis that the Card might have been picked from the appellant's residence by PW3. This puts to question the prosecution's case and thereby disqualifying this piece of

circumstantial evidence to be a material of circumstantial evidence suitable to convict the appellant with.

There is yet another piece of circumstantial evidence relied on by the prosecution. This is that the appellant surrendered himself at the police station as a sign of admitting the commission of the offence. On this aspect as well, we think the appellant explained sufficiently to challenge the prosecution episode. He said he went there to report on his house being threatened to be set on fire. The appellant's episode is somewhat supported by PW3 who testified in cross-examination that they told the appellant to come out but he ran away. It also gains support from No. D7710 Sgt. Juma PW4 who testified that the appellant told him that he went thither "to surrender himself because they were saying they would burn the house". Here, again, the appellant has brought to the fore an explanation putting to question the prosecution's episode. This kind of circumstantial evidence, we think, does not irresistibly point to the guilt of the appellant without any other reasonable hypothesis than that of guilt.

The foregoing discussion culminates into our conclusion that having directed our minds to the circumstantial evidence in the instant

case in the light of the decided cases on the point, we are satisfied that the inculpatory facts were compatible with the innocence of the accused and capable of explanations other than his guilt. The appellant was therefore wrongly convicted. We therefore allow this appeal, quash the appellant's conviction and set aside the sentence. We order that the appellant be released from prison forthwith unless he is held for some other offence.

Order accordingly.

DATED at **DODOMA** this 9th day of March, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

R.E.S. MZIRAY
JUSTICE OF APPEAL

J.C.M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL