

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: MWARIJA, J. A., KOROSSO, J. A. And KITUSI, J. A.)

CRIMINAL APPEAL NO. 553 OF 2015

THOMAS S/O PETER @ CHACHA MARWA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Makaramba, J.)

dated the 28th day of October, 2015

in

Criminal Appeal No. 62 of 2010

JUDGMENT OF THE COURT

25th October & 8th November, 2019

MWARIJA, J.A.:

In the District Court of Nyamagana at Mwanza, the appellant, Thomas Peter @ Chacha Marwa was charged with and convicted of the offence of armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002]. He was found guilty of having stolen various properties total valued at Tzs 7,454,000.00 belonging to one Edward Ngowi by threatening him with

a pistol and an iron bar. Following his conviction, the appellant was sentenced to thirty years imprisonment.

The facts leading to the appellant's arraignment and his consequent conviction are not complicated. On 24/7/2008 at about 05.00 hrs, the victim, Edward Ngowi (PW1) who was at the material time a taxi driver, was driving his taxi cab, Reg. No. T. 660 AHN heading to Bugando quarters. As he was driving, another motor vehicle which was being driven opposite his direction obstructed him. The driver of that motor vehicle stopped and three men disembarked from it. The culprits threatened him with a pistol, pulled him out of his motor vehicle and stole from him various properties including cash, Tzs 270,000.00, USD 58.00, recharge vouchers total valued at Tzs 150,000.00, mobile phone, make Motorola, his duplicate driving licence and three bank cards.

After the theft, the bandits laid him down and assaulted him severely all over his body including his head. They then tried to start his motor vehicle engine but failed and decided to leave in their motor vehicle. However, the motor vehicle strayed into a ditch and it was then that PW1 decided to sound an alarm which was responded to by the neighbouring watchmen who found PW1 fighting with one of the culprits. The other two

men ran away. The watchmen including Juma Ismail (PW4), who was on duty at Bugando Hospital, blew a whistle and more people gathered at the scene. The incident was reported to the police and certain number of police officers arrived immediately and took away the person who was arrested by PW1 and the said watchmen. Upon inspecting the culprits' motor vehicle, a person was found locked in the car boot. He was rescued. According to the evidence of PW1 and PW4, the person who was arrested at the scene is the appellant.

Apart from the evidence of PW1 and PW4, the prosecution relied on the evidence of No. D. 5438 D/Cpl Peter Kijazi (PW3) and No. E 7559 DC Wenslaus (PW5). Their evidence was to the effect that, after the appellant's arrest, an identification parade was arranged by a police officer, ACP Mula. They testified that the parade was conducted in their presence and the appellant was identified by PW1.

In his defence, the appellant denied the offence. His defence was that, on 24/7/2008 at about 05.00 hrs he was returning from his fishing business. As he was walking along the road heading to Bugando Hospital to see his sick mother, he saw a motor vehicle approaching towards his direction. When it arrived closer to him, the driver stopped it and two men

disembarked and ordered him to sit down. As he tried to query as to who they were, he was hit with an iron bar on his chin and waist. He became unconscious. When he regained consciousness, he heard a person from another motor vehicle sounding an alarm that he had been a victim of attack by the same persons. As the appellant was severely injured, he could not move and thus remained at the scene until when the watchmen and the police arrived at the scene. It was his evidence further that he merely fell the victim of the circumstances. He said however that PW1 mentioned him as one of the persons who were in the bandits' motor vehicle and who fought with him. He was thus arrested and was later charged in this case.

In its decisions, the trial court found that the evidence of PW1 and PW3 sufficiently proved that the appellant was one of the bandits and the one who was actually arrested at the scene while fighting with PW1. The learned trial Resident Magistrate found further that the appellant's defence did not raise any reasonable doubt to the prosecution evidence.

On appeal, the High Court upheld the decision of the trial court. The learned first appellate Judge was of the settled view that the trial court rightly found the evidence of PW1 and PW4 watertight. He agreed with the learned Resident Magistrate that the appellant was properly identified at the

scene of crime and at the identification parade. He agreed also with the trial court that the appellant's defence did not raise any reasonable doubt to the prosecution's evidence, more so because the appellant did not challenge the prosecution evidence but instead, narrated a story trying to impress upon the trial court that he was also the victim thereof, the narration which did not raise doubt against the prosecution's case.

In this appeal, the appellant has raised 9 grounds of appeal as follows:-

- "1. *That, the charged offence against the appellant was not proved beyond reasonable doubt, thus was poor and weak to sustain conviction against.*
2. *That, the conditions under identity was in conducive as to favour a correct identification against the appellant to commit, in the circumstance where the source and intensity of light being the utmost important for, and at scene was not established.*
3. *That, mere presence at scene of crime would not render a person criminal reliability particularly to public areas as such whereas the complainant might mistaken on identity as made to innocent appellant.*
4. *That, there was no any "lota" proof that the appellant was among bandits who attacked PW1*

and stole his property nor was participated to rob the next car Toyota Corola of one Edward Nguro (as per PH) and used it to ferry to the charged offence.

- 5. That, the purported person found in car – boot was/should be a crucial witness to resolve unanswered and doubtful question due to event as well as the watchman's arrived early at, but was not testified by no reasons awarded. Since prosecution knew if brought they would exonerate the appellant.*
- 6. That, the identity of appellant was nothing but a dock identification which is unreliable as it lacks prior factual descriptions of, and neither any parade registered (PF 186) was tendered nor parade conductor officer (one Muna) come to testify on effect.*
- 7. That, fatal contradiction between PW1 and PW3 which goes to the root of the case was not properly considered as to how and by what extent the event occurred then led for the appellant apprehended.*
- 8. That, the charge sheet did differ with preliminary hearing (PH) as well as the evidence adduced in court as to what property was robbed and or stolen at.*

9. *That, the appellant defence raised reasonable doubt further corroborated with defence exhibits B₁ PF₃ and B₂ which show the variance with prosecution's evidence/witnesses who were not credible and unbelievable against the appellant."*

Out of the nine grounds, the 2nd, 3rd, 4th and 5th do not arise from matters which were heard and determined by the first appellate court. They are new grounds and this Court cannot entertain them. – See for example this Court's decision in the case of **Galus Kitaya vs Republic**, Criminal Appeal No. 196 of 2015 cited in the case of **Godfrey Wilson vs The Republic**, Criminal Appeal No. 168 of 2018 (both unreported). In that case, the Court stated as follows on that principle:-

*"... we agree with the learned State Attorney that, grounds one to five are new grounds. As the Court said in the case of **Nuridin Musa Wailu vs Republic** (supra), the Court does not consider new grounds raised in a second appeal which were not raised in the subordinate courts."*

That said, the remaining grounds for determination are grounds 1, 5, 6, 7 and 9.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Emmanuel Luvinga, learned Senior State Attorney.

In arguing the appeal, the appellant opted to hear first, the learned Senior State Attorney's reply to the grounds of appeal and later on make a rejoinder if necessary.

Responding to the grounds of appeal, at the outset, Mr. Luvinga expressed the stance that the Republic was opposing the appeal. He then went on to argue the five grounds of appeal together basing his submission on four matter which arise from those grounds; **first** that the appellant was not identified at the scene of crime; **secondly**, that the prosecution evidence was contradictory; **thirdly**, that adverse inference should have be taken against the prosecution's failure to call the person who was found in the culprits' car boot and **fourthly**, that the courts below erred in failing to find that the defence evidence raised reasonable doubt against the prosecution's case.

On the identification issue, the learned Senior State Attorney started by agreeing with the appellant that the evidence of identification parade is

invalid because, **one**, the officer who conducted it, ACP Muna, was not called to testify and **two**, the identification parade register was not tendered in evidence. He contended however that, in any case, the identification parade was not necessary because the appellant was properly identified at the scene by PW1 and PW4. He argued that, although the offence occurred at night, the conditions stated in the case of **Waziri Amani v. Republic** [1980] TLR 250 were, under the circumstances of this case where the appellant was arrested at the scene of crime, inapplicable.

With regard to the ground that there were contradictions in the prosecution evidence, Mr. Luinga argued that the complained of contradictions in the evidence of the PW1 and PW4 (referred to by the appellant as PW3) as regards how the appellant was arrested at the scene of crime was not substantial. The learned Senior State Attorney argued that, as found by the learned first appellate Judge, the variance between the said witness's evidence on the positioning at the scene of crime, of the two vehicles (the culprits' motor vehicle and that of PW1) was immaterial. He cited the case of **Omari Kasenga v. Republic**, Criminal Appeal Na. 84 of 2011 (unreported) to support his argument that not every contradiction in the prosecution evidence causes a case to flop.

Concerning the ground that the Court should take an adverse inference on the prosecution's failure to call as a witness, the person who was found in the culprits' car boot, that is; Sabinus Athanas, Mr. Luvinga submitted that the said person was actually called but upon objection by the appellant, the trial court discharged the intended witness. The appellant's objection was based on allegation that the intended witness had interest to serve because he was a complainant in another case involving the appellant.

Finally on the ground that the appellant's defence should have been found to have raised reasonable doubt, it was Mr. Luvinga's response that the written statement relied upon by the appellant was not properly admitted in evidence because it did not fall in the types of documents which are admissible under section 34B of the Evidence Act.

In rejoinder, the appellant did not have much to submit. He admitted that he raised an objection against the prosecution's intention to call Sabinus Athanas as its witness. He then reiterated his defence that he was not one of the culprits who committed the offence.

Having considered the submissions made by the learned Senior State Attorney and the appellant, like the two courts below, we are certain that the crucial evidence implicating the appellant with the offence is that of PW1 and PW4. Whereas PW1 is the person who encountered the culprits at the scene of crime, PW4 arrived at the scene immediately after an alarm was raised by PW1. The two witnesses stayed with one of the culprits until when the police arrived and arrested him. That person is the appellant who did not deny that he was arrested at the scene of crime. Both the trial and the first appellate court found that PW1 and PW4 were the witness of truth. The courts below found that the appellants' defence that he was the victim of the circumstances did not raise any reasonable doubt against the credible evidence of PW1 and PW4. The crux of their evidence is that the appellant was one of the bandits who was actually fighting with PW1 at the time when PW4 arrived at the scene.

It is trite law that an appellate court cannot interfere with concurrent findings by the two courts below on matters of fact. – See the cases of **DPP v. Jaffari Mfaume Kawawa** [1981] TLR 14 and **Alfeo Valentino v. The Republic**, Criminal Appeal No. 92 of 2006 (unreported). In the latter case, the Court stated as follows:-

*"we understand that this is a second appeal. The law on the duty of this court in an appeal of this nature is well settled. It is now well established that the Court rarely interferes with concurrent findings of fact. An appellate court can only interfere with a finding of fact by a trial court where it is satisfied that the trial court has misapprehended the evidence in such a manner as to make it clear that its conclusions are based on incorrect premises; See **Salum Bugu v. Mariam Kibwana**, Civil Appeal No. 29 of 1992 (unreported)."*

In the present case, we do not find any reason to fault the finding by the two courts below. The evidence of PW1 and PW4 is indeed watertight. At no time from the moment of encounter between PW1 and the three bandits including the appellant and the time when PW4 and the police arrived at the scene, was a break of chain of events such that there could be a possibility of the appellant's mistaken identity. PW1 engaged the appellant until when he was arrested and taken to police station.

With such overwhelming evidence, the other grounds of appeal raised by the appellant will not carry his appeal anywhere.

In the event, we find that the appeal has been brought without sufficient grounds. The same is hereby dismissed in its entirety.

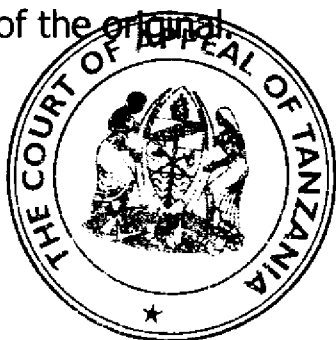
DATED at MWANZA this 7th day of November, 2019


A. G. MWARIJA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 8th day of November, 2019 in the presence of Appellant appeared in person and Hemedi Halid Halfani, learned Senior State Attorney for the Respondent Republic is hereby certified as a true copy of the original.




J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL