IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., MWAMBEGELE, J.A. And WAMBALI, J.A.)

CRIMINAL APPEAL NO. 410 OF 2018

NURDIN IDDI NDEMULE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from Judgment of the High Court of Tanzania at Dar-es-salaam)

(Luvanda, J.)

Dated 31st day of October, 2018
in
Criminal Appeal No. 361 of 2018

JUDGMENT OF THE COURT

19th March & 6th April, 2021

MUGASHA, J.A.:

The appellant was charged with the offence of armed robbery contrary to section 287A of the Penal Code Cap 16 RE.2002. It was alleged by the prosecution that, on 22/11/2016 at Yombo Kilakala area within Temeke District in Dar-es-salaam Region, the appellant did steal cash money TZS. 10,000/= the property of Faraji Hussein and immediately before such stealing, in order to obtain the said property threatened one Gerald Raymond Kaponda with a machete.

The appellant denied the charge. To prove its case, the prosecution paraded three witnesses and tendered one physical exhibit, a machete which was alleged to have been used as weapon in the robbery incident.

It was the prosecution account that, in the evening of 22/11/2016 around 20.00 hours, Faraji Hussein and Gerald Kaponda who testified as PW1 and PW2 respectively were at PW1's shop and claimed to have seen the appellant approaching the shop. According to PW1, having seen the appellant and since he was apprehensive of his behaviour, handed his wallet to PW2 for safekeeping. Soon thereafter, the appellant threatened PW2 with a bush knife and demanded to be given the wallet. PW2 obliged and handed it to the appellant who subsequently left the scene. Then, PW1 recounted to have unsuccessfully followed the appellant pleading with him to be given his wallet and he repeatedly did so up to magengeni area. He managed to return the wallet but after emptying it with TZS. 10,000/= it contained. Subsequently, PW1 returned to his shop and narrated the fateful incident to a local leader who called the police. Then, they went to the residence of the appellant's father and upon his advice they successfully traced and found him at Sansiro area. According to PW1, the appellant attempted to escape but was given a chase and ultimately

arrested by the police and other people, taken to Chang'ombe Police station and subsequently arraigned with the offence charged.

In his defence, the appellant denied the assertions by the prosecution. Upon being satisfied that the prosecution had proved its case to the hilt, the trial court convicted the appellant and sentenced him to a jail term of thirty years with twelve strokes of a cane. The appellant unsuccessfully appealed to the High Court where his appeal was dismissed as both the conviction and sentence were sustained.

Aggrieved, the appellant has preferred this appeal to the Court fronting nine grounds of appeal which are conveniently condensed into two main grounds as follows:

1. That, the courts below erred in law having failed to consider the defence of the appellant.
2. That, the conviction is wrong because charge was not proved beyond reasonable doubt.

To prosecute the appeal, the appellant appeared in person unrepresented whereas the respondent Republic had the services of Ms. Faraja George, learned Senior State Attorney.

The appellant adopted the grounds of appeal and pleaded with the Court to allow the appeal and set him at liberty. On the other hand, Ms. George initially, did not support the appeal. However, upon being probed by the Court on the sufficiency of the prosecution evidence on the record, on a reflection, she supported the appeal. He submitted that, in the wake of the appellant's strong defence which was not considered by the two courts below, the charge was not proved beyond reasonable doubt. On this account, she urged the Court to allow the appeal and order immediate release of the appellant.

Having carefully considered the submission of the parties and the record before us, the issues for consideration are whether the defence of the appellant was considered and if ultimately the charge of armed robbery was proved against the respondents to the hilt. Before addressing the said issues, we wish to point out 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 being a second appellate court, 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 emphasized in the case of **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."*

In disposing of the present appeal, we shall be guided by the stated principles.

At the outset, we begin with the appellant's defence because it has a bearing in determining as to whether or not the charge was proved to the hilt. His defence was to the effect that; on the fateful day

he was at a certain bar drinking liquor. Around 9.00 pm he asked one of the maids to call a bodaboda rider one Faraji who took him to Tandika and he demanded a fare of TZS. 1,000/=. Since the appellant had no change, he gave the rider a TZS. 10,000/= and advised him to change it at PW1's shop. The rider obliged and informed the appellant that he had left the remaining 9,000/= at PW1's shop. However, when the appellant went at the shop to collect the money, PW1 refused to return his money and demanded that the rider be called. A fracas ensued and the police who came at the scene called the rider who obliged and was directed to collect the money from PW1 and hand it over to the appellant. Thereafter, according to the appellant, the police came with new accusations that the appellant was drunk and had caused disturbance and he was taken to the police station and later arraigned in the trial court. The question to be answered is whether the appellant's account was considered by the two courts below. Our answer is in the negative and we shall give our reasons.

In the record before us, apart from the trial court making a narration of the appellant's defence as reflected at pages 26 to 27 of the record of appeal, neither was it evaluated nor considered and instead,

the trial magistrate solely relied on the prosecution evidence to convict the appellant. Apparently, the first appellate court which was obliged to re-evaluate the evidence adduced at the trial, was unfortunately caught in a similar web having failed to consider the defence of the appellant. This was a serious misdirection on the part of the courts below to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence- see – **HUSSEIN IDDI VS REPUBLIC** [1986] T.L.R 166. Thus, on account of complete misapprehension of the substance, nature and quality of the evidence of the appellant's evidence, this occasioned a miscarriage of justice on the part of the appellant. In this regard, being a second appellate court, as of necessity we are obliged to step into the shoes of the first appellate court in order to consider and re-evaluate the appellant's defence - See **FELIX KICHELE AND ANOTHER VS REPUBLIC,** Criminal Appeal No. 159 of 2005 (unreported). We shall thus consider the prosecution account *vis a vis* the appellant's defence in determining as to whether the charge of armed robbery was proved to the hilt against the appellant.

It is glaring at page 22 of the record of appeal that, during the trial, the prosecution did not cross examine the appellant's version that he happened to be at PW1's shop to collect his money left there by a bodaboda rider and the money had to be retrieved with the assistance of the police. The prosecution's failure to cross-examine the appellant had the effect of impeaching the prosecution account given by PW1 on the involvement of the appellant in the alleged armed robbery incident. That apart, PW3's account that the wallet found with the appellant had only TZS. 9,000/= cements the appellant's account on the sum of money which was retrieved from PW1 with the assistance of the police on the fateful day. That apart, we also found PW1's account unreliable because having testified that the appellant who initially threatened PW2 was armed with a bush knife, it is unimaginable that PW1 followed the armed robber to retrieve his wallet at the expense of his life. Besides, the prosecution account as to why, who and how the arrest of the appellant was effected leaves a lot to be desired. While the account of PW1 and PW2 is to the effect that, the incident was initially reported to the ten cell leader who is claimed to have called the police who arrested the appellant, PW3 the investigator had his own different version which

was contradictory to the former prosecution's version. According to PW3, the appellant was taken to the police by many people including the complainant (PW1) and the ten cell leader. None of those people including the arresting police officer was paraded as a prosecution witness. In the premises, it is our strong considered view that these were material witnesses to clear the doubt surrounding the circumstances on the arrest of the appellant considering his uncontroverted account on what made him to be at PW1's shop. In this regard, the uncontroverted appellant's account that after the police had facilitated the retrieval of his money arrested him on accusation that he was drunk and caused disturbance, raises eyebrows or rather a cloud of doubt on the alleged appellant's involvement in the armed robbery. This in our considered view poke holes on the prosecution case and as such, the charge of armed robbery was not proved against the appellant beyond reasonable doubt. Had the two courts below considered the defence of the appellant as required by law, they would not have reached a verdict which is a subject of complaint in this appeal. Thus, it was a misdirection on the part of the two courts below not to resolve the said doubts in favour of the appellant.

In view of what we have endeavoured to discuss on what transpired in both courts below, we are obliged to disturb the concurrent findings of the two courts below on account of misapprehension of the substance, nature and quality of the evidence which occasioned a miscarriage of justice on the part of the appellant. All said and done, we agree with the parties that the charge of armed robbery was not proved against the appellant to the hilt. In this regard, we allow the appeal and order the immediate release of the appellant unless held for another lawful cause.

DATED at **DAR-ES-SALAAM** this 31st day of March, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of April, 2021 in the presence of the appellant in person linked via-Video conference and Ms. Silvia Mitanto, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL