IN THE COURT OF APPEAL OF TANZANIA

AT MUSOMA

(CORAM: NDIKA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CRIMINAL APPEAL NO. 136 OF 2020

FRED MATHIAS MARWA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Musoma at Musoma)

(Hon. M.A. Moyo, SRM – Ext. Juris.)

dated the 5th day of March, 2020
in
Criminal Appeal No. 50 of 2019

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JUDGMENT OF THE COURT

1st & 3rd June, 2022

NDIKA, J.A.:

The appellant, Fred Mathias Marwa, was tried in the District Court of Tarime for armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2002 as amended by Act No. 3 of 2011. He was convicted as charged and sentenced to the statutory term of thirty years' imprisonment. His first appeal, which was determined by the Resident Magistrate's Court of Musoma with extended powers (Hon. M.A. Moyo – SRM – Ext. Juris), went unrewarded. This is his second appeal against both conviction and sentence.

The prosecution case rested on the testimonies of four witnesses complemented by one documentary exhibit to establish that the appellant, on 16th June, 2018 stole TZS. 175,000.00 in cash and one mobile phone, make TECNO W4, valued at TZS. 260,000.00, both assets valued at TZS. 435,000.00, the properties of one Anthony s/o Mwita Masero and immediately before such stealing he injured the said Anthony s/o Mwita Masero by stabbing him with a knife on the left side of the chest in order to take the said properties.

The star witness in this case was the complainant, Anthony s/o Mwita Masero. Adducing as PW1, he recalled that he was seated at home in the lobby at Nyamihobo street in Mogabiri village in the daytime on 16th June, 2018 when three persons turned up out of the blue holding various weapons. Of these persons, he recognized the appellant and another one called Masana Kibwabwa who were wielding a knife and a machete respectively. The other person whom he did not identify brandished a club. As soon as they entered the home, they demanded money from PW1 as they assaulted him. According to PW1, the appellant stabbed him with a knife on a rib on the right of his chest while the other unidentified thug hit him with the club. In the end, they relieved of his money, TZS. 175,000.00

in cash, and one mobile phone, make TECNO W4, valued at TZS. 260,000.00 and vanished from the scene. He was subsequently taken to Bomani Police Station where he was issued with a request for medical examination (PF.3 form) and was later moved to the District Hospital at Tarime for treatment.

The complainant's mother, Rhobi Mwita (PW2), allegedly witnessed the raid. She adduced that she knew the appellant very well as he lived in their neighborhood. To a large extent, her testimony supported PW1's evidence materially that the appellant was one of the raiders who attacked and robbed the complainant. In cross-examination, she added a detail that the marauders wore black clothing but were barefaced.

Falesi Mwita (PW3), the complainant's younger brother, recalled to have rushed to the scene of the crime in response to PW1's frantic screams for help. He told the court of trial that he bumped into the appellant and his confederate (Masana Kibwabwa) rushing out of the complainant's home, with the former holding a blood-stained knife and the latter a machete. He also saw another thug whom he did not identify fleeing the scene with a club in his arm. He saw his mother (PW2) crying in agony at the scene as PW1 lay on the ground with blood oozing from a rib on the

right of his chest. Right there PW1 named the appellant and Masana Kibwabwa as the raiders who stabbed and robbed him.

Masiaga Joseph Chacha, a Clinician, attended the complainant at the District Hospital at Tarime. He said that PW1 suffered injuries from a sharp object on a rib on the left of his chest as well as from a blunt object on the right side of the head. His medical examination report was admitted as Exhibit P1.

The appellant posited the defence of general denial. Apart from telling the trial court the manner of his arrest, he raised an *alibi* upon being cross-examined, saying that he was away in Nkongole village constructing a house at the material time.

The trial court (Hon. M.R. Siliti – RM) held on the evidence on record that the appellant was positively identified at the scene of the crime as one of the robbers that stabbed the complainant and robbed him of his properties. Accordingly, he convicted and sentenced the appellant as stated earlier. Also, as stated earlier, the appellant first appeal ended in vain.

The appellant has filed six grounds of appeal, which crystallize into five complaints: **one**, that the testimonies of PW1, PW2 and PW3, who were family members, are implausible and unreliable. **Two**, that the testimonies of PW1, PW2 and PW3 contradicted PW4's evidence on the kind of injury sustained by PW1. **Three**, that the appellant was not positively identified at the scene of the crime. **Four**, that the appellant's defence was not duly considered. **Five**, that the courts below failed to evaluate the evidence on record.

We heard the appeal on 1st June, 2022. Before us, the appellant, who was self-represented, basically advocated for his appeal to be allowed on the grounds he filed, without more.

For the respondent, Mr. Tawabu Yahya Issa, learned State Attorney, who was assisted by Mr. Nico Malekela, also learned State Attorney, keenly opposed the appeal.

We begin with the appellant's attack on the testimonies of PW1, PW2 and PW3, who were family members. It was his contention that because the said witnesses were family members, there was a real possibility that they acted in concert concocting evidence against him and, therefore, their

testimonies, unsupported by any independent accounts from neighbours or local leaders, are inevitably implausible and unreliable.

In rebuttal, Mr. Issa submitted that there was no law barring family members from testifying in a case and that every witness must be given credence unless there is a good reason for not doing so. He buttressed his submission by citing the case of **Daniel Malogo Makasi & Two Others v. Republic**, Consolidated Criminal Appeals No. 346 of 2020 and No. 475 and 476 of 2021 (unreported) in which we referred to our earlier decisions in **Goodluck Kyando v. Republic** [2006] TLR 363 and **Mathias Bundala v. Republic**, Criminal Appeal No. 62 of 2004 (both unreported). In **Daniel Malogo Makasi** (*supra*), the Court restated that good and cogent reasons for disbelieving a witness include the fact that he has blatantly given improbable or implausible evidence or that his evidence has been materially contradicted by another more reliable strand of evidence.

Admittedly, it is true that PW1, PW2 and PW3 were family members; that PW1 and PW3 were siblings and PW2 was their mother. However, the common thread among them is that they all witnessed the incident from different vantage positions and that their respective testimonies were

relevant. Whether their evidence could ground a conviction, like any other evidence, depended on their credibility and reliability irrespective of the relationship between each other – see **Khatibu Kanga v. Republic**, Criminal Appeal No. 290 of 2008 (unreported). See also **Esio Nyamoloela & Two Others v. Republic**, Criminal Appeal No. 49 of 1995 and **Juma Choroka v. Republic**, Criminal Appeal No. 23 of 1999 (both unreported) which we relied upon in **Khatibu Kanga** (*supra*). Certainly, there is nothing wrong in relying upon the testimonies of family members to ground a conviction if such evidence is credible. In the instant case, the courts below addressed themselves on the issue, found the evidence credible and rightly based on it to found conviction. We thus find the ground of complaint under consideration bereft of merit.

Turning to the alleged incongruity, on the kind of injury sustained by PW1, between the testimonies of PW1, PW2 and PW3, on the one hand, and PW4's evidence, on the other, it is noteworthy that Mr. Issa partly conceded to the issue. He acknowledged that while the three witnesses were emphatic that PW1 sustained an injury to a rib on the right of his chest, the medical witness (PW4) said in his testimony as well as his report

(Exhibit P1) that the injury was on a rib on the left of the chest caused by a sharp object.

Nonetheless, as rightly argued by the learned State Attorney, the discrepancy complained of is clearly of no moment. For on the whole and in the circumstances of this case the disparity does not efface the prosecution case that immediately before the stealing the appellant and his partners-in-crime used weapons and injured the complainant so as to steal from him. Whether the injury sustained by the complainant was on the right or left of his chest is a minor detail and does not affect the credibility and reliability of the testimonies of the four witnesses. As an ingredient of the charged offence, the prosecution only had to establish existence of a threat to use or actual use of armed violence to facilitate the stealing. The second ground of complaint fails.

The next issue questions whether the appellant was positively identified at the scene of the crime.

It was the appellant's contention that he was not positively identified at the scene. He posited that there was no link between his arrest on 2nd August, 2018, which was almost two months after the alleged robbery had occurred on 16th June, 2018, and the claim that he was recognized at the

scene. He queried that if he was recognized at the scene, why he was not apprehended swiftly. He charged that the unexplained delay of his arrest dented the prosecution case.

Mr. Issa countered that the incident occurred in the daytime and that the appellant was seen and recognized at the scene by PW1, PW2 and PW3 who knew him very well and that PW1 mentioned him promptly to PW3 as the perpetrator of the crime. He relied on our decision in **Masamba Musiba @ Musiba Masai Masamba v. Republic**, Criminal Appeal No. 138 of 2019 (unreported) for the proposition that evidence of identification through recognition of a familiar person is more satisfactory, reassuring and reliable than identification of a stranger.

Having reviewed the evidence on record, we agree with Mr. Issa that the appellant was unimpeachably recognized at the scene by the three witnesses. The incident occurred in the daytime and the witnesses observed the acts of the appellant whom they knew very well as they lived in the same neighbourhood. While PW1 adduced how the appellant, wielding a knife, burst into the scene with his confederates, and then demanded money from him before he stabbed and robbed him, PW2 testified on how she saw the robbery unfold and described the attire of

the barefaced thugs. PW3 bumped into the thugs as they were withdrawing from the scene and recognized the appellant, who at the time, was brandishing a blood-stained knife.

We are at one with the learned State Counsel that, as we held in a number of cases including **Masamba Musiba** (*supra*), identification by recognition is more reassuring and reliable. Besides, we agree that the fact that PW1 named the appellant to PW3 at the earliest opportunity as one of the assailants assured of PW1's reliability. In **Marwa Wangiti & Another v. Republic** [2002] TLR 39 at page 43, the Court observed that:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent Court to inquiry."*

On the basis of the foregoing, we are firmly of the view that the courts below were justified in relying upon the evidence as adduced by the witnesses, which they found credible.

In addition, while we appreciate the appellant's complaint about the unexplained delay in his apprehension, it is on record that the matter was not raised at the trial and that it cannot be an issue at this stage belatedly.

According to the three prosecution witnesses, the robbery was immediately reported to the police and that the appellant and the said Masana Kibwabwa were named as suspects. The failure by the police to act on the said information and effect arrest promptly, in the circumstances of this case, does not deflect from the cogency of the prosecution case. We thus dismiss the complaint at hand.

Finally, we deal with the fourth and fifth complaints conjointly. On these grievances, the appellant contended that his defence was not duly considered and that the courts below, on the whole, failed to evaluate the evidence on record. In rebuttal, Mr. Issa referred us to the trial court's judgment, at pages 30 to 32 of the record, showing the said court's evaluation of the entire evidence on record that culminated with its finding that the appellant was guilty as charged. As regards the appellant's defence, he argued that it was duly considered but rejected as shown at page 31 of the record of appeal. He submitted further that the first appellate court upheld the trial court's findings after a proper review of the evidence.

Having fully reflected on the evidence on record in its totality as well its appraisal by the courts below, we entertain no doubt that their

concurrent finding that the appellant was positively identified at the scene as one of the robbers was soundly based upon properly evaluated evidence. As we stated earlier, the evidence by PW1, PW2 and PW3 from different vantage points placing the appellant at the scene was credible and watertight. His defence of general denial, being inherently self-serving and weak, was rightly rejected by the courts after due consideration.

Likewise, the appellant's *alibi* that he was not at the scene at the material time because he was constructing a house at Nkongole village was inconsequential as it failed to introduce any reasonable doubt in the prosecution case. Apart from the fact that it was, by any yardstick, an afterthought as it raised belatedly in cross-examination, the said defence dissipated once the version of three identifying eyewitnesses was believed. In this regard, we wish to recall what we stated in **Abdallah Hamisi Salim v. Republic**, Criminal Appeal No. 68 of 2008 (unreported):

> *"It follows that the trial High Court having believed PW1 and PW2 on the evidence of identification of the appellant, the defence of alibi died a natural death."*

Accordingly, we find no merit in the last two grounds of complaints. They both fall by the wayside.

In the final analysis, we find no merit in the appeal, which we hereby dismiss in its entirety.

DATED at **MUSOMA** this 2nd day of June, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of June, 2022 in the presence of the appellant in person and Mr. Isihaka Ibrahim learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL