IN THE HIGH COURT OF TANZANIA

AT DODOMA

DC CRIMINAL APPEAL NO. 60 OF 2008

(ORIGINATING FROM CRIMINAL CASE NO.428 OF 2006 AT THE DISTRICT COURT OF DODOMA SITTING AT DODOMA)

1. MANYOTA MANGWELA ---------- 1st APPELLANT
2. MATAJI MGAJI ---------- 2nd APPELLANT

VERSUS

THE REPUBLIC ----------REPSONDENT

JUDGMENT

18th NOV. 2009 & 07th DEC. 2009

S. S. MWANGESI J.

The appellants herein were charged at the District court of Dodoma with the offence of armed robbery contrary to section 285 and 286 of the Penal Code Cap 16 Vol. 1 of the Laws as amended by Act No. 4 of 2004 . It was the prosecution's case that on the 01st day of September, 2006 at about 2000 hours, at Nsasa – Chiboli village within the Dodoma Rural District and Region of Dodoma, the two accused persons did steal 30 herds

of cattle total valued at Tshs. 5,000,000 the property of one Sanura Gayo and immediately before and after such stealing did use actual violence to wit; they used a gun and fired one bullet in the air in order to obtain and retain the said property.

During the trial of the case, the prosecution called four witnesses to establish the case against both accused persons. At the end of the day, the learned trial Magistrate presiding over the matter, did find that the case against both accused persons had been proved beyond reasonable doubts. He did therefore convict both of them and sentenced each to go to jail for a period of thirty (30) years.

The current appeal by the appellants is to challenge the findings of the trial court. Each appellant has lodged his own appeal containing about seven grounds. A close observation to the said grounds, reveals that they are the same or rather similar. As such, the said grounds of appeal by the two will be considered together. The appellants are challenging the learned trial Magistrate that he did misdirect himself to hold them guilty relying on evidence that was not perceptible. It has been argued that the learned trial Magistrate did not warn himself in relying on the visual identification that was not sound enough to warrant conviction. And further that the evidence tendered by the prosecution witnesses did contradict each other as regards the number of the assailants on the material night. Also the exhibits alleged to have been recovered during the search of the robbed property were not tendered as exhibits in court. And lastly that, their defence evidences was never considered at all by the trial Magistrate.

During the hearing of the appeal, both the appellants did appear in person to argue their appeal. In essence, they had nothing relevant to add to what is contained in their memoranda of appeal. The respondent Republic on the other hand was represented by Mr. Wambali learned State Attorney. In his response to the grounds of appeal raised by the appellants, he did submit as hereunder:

On the question of identification, it has been his view that the appellants in this appeal were well known to the victim (complainant) and that before the commission of the offence, there was conversation between them that lasted for some time and thereby giving chance for the victim to identify them perfectly.

Regarding the contention by the appellants that there was contradiction between the testimonies of Pw1 and Pw3, it was his view that much as the records in the case file reveal, there were no conspicuous contradictions between them and that if any, they were minor ones that cannot be said to have occasioned any injustice to the appellants.

The learned State Attorney did submit further to the effect that, the failure by the prosecution to tender as exhibits in court the recovered properties was not fatal. It has been his opinion that there was no necessity of tendering the said exhibits if the evidence given by the witnesses did sufficiently establish the offence against the appellants. And on the issue of the defence evidence, the same was said to have been considered by the

learned trial Magistrate as it is well reflected in his judgment. From the foregoing therefore, it was the opinion of Mr. Wambali that, the appeal by the appellants is without any sound grounds and he has prayed that it be dismissed.

The issues which the learned trial Magistrate did frame before starting to analyse the evidence that was tendered during the hearing of the case from both sides were three. However, all of them can be paraphrased to constitute only one main issue, that is to say, as to whether the appellants were properly identified on the fateful night as the ones who committed the offence of armed robbery. The task before this court is as to whether the trial court was justified to reach at the findings it made, that is to hold both appellants culpable.

As it has been complained by the appellants, their conviction was based on the visual identification alleged to have been made to them by the complainant who gave his evidence as Pw1. This issue of visual identification appear to have tasked very ~~task~~ much the learned trial Magistrate. Contrary to what the appellants have argued in their grounds of appeal that the learned trial Magistrate did not warn himself on the issue of visual identification during night, the records reveal that he very much did. After having consulted a number of authorities, he did cautiously direct himself to ingredients that were laid down in the landmark case of **Waziri Amani Vs Republic** [1980] 250. And ultimately, he was of the considered view that there was ample light from the lamp that was on when the assailants were entering into the house where they robbed on the material

evening, and that a fairly long period did elapse while the victim was exchanging words with the assailants. And lastly which is of more weight, that the victim, that is Pw1, had been knowing the appellants before as they were both his fellow village mates.

This court commends the learned trial Magistrate on the efforts he undertook to attempt to satisfy himself regarding the visual identification alleged to had been made by Pw1 to the appellants on the fateful night. However, it is far from being sufficiently convinced that the same was free from being marred with any doubts. The doubts arise from the way the victim was answering their questions in cross examination, it would appear he was not certain with what the appellants had been carrying with them on the fateful night. Under the circumstances, such doubts have to benefit the appellants.

The foregoing notwithstanding, the testimonies of Pw1, Pw2, and Pw3, have left this court with no doubt that, the two appellants were arrested at Mkumbwanyi village driving herds of cattle that were identified to be among those robbed or stolen from Pw1. The said arrest according to the evidence is said to have been made at about 1300 hours of the following day. Since the robbery or theft is said to have happened at about 2000 hours, then the arrest was made after the elapse of about 17 hours. Although the five herds of cattle alleged to have been recovered in that exercise were never tendered in court as exhibit, the court will come to consider it later.

It has as well been submitted by the appellants that there were contradictions to the evidence that was testified by the prosecution witnesses and in particular that of Pw1, Pw2 and Pw3 regarding the number of the assailants or robbers who are said to have been involved in the incident at issue. This court upon going through the testimonies of the named witnesses, has failed to find such sound contradiction. This is from the fact that the number mentioned by Pw1 did concern the assailants who entered into his house, while that of the other witnesses did concern those found driving the herds of cattle near the village of Mkumbwanyi. In any case, the question of the credibility of witnesses is one that falls under the province of the trial court which has the advantage of assessing the demeanour of the witness while testifying in court and evaluating his credibility as per the holding in the Court of Appeal in the case of **Rashid Kaniki Vs Republic** Criminal Appeal No. 116 of 1993 (CAT) (unreported).

There has been the issue of exhibits that is, the recovered herds of cattle which were never tendered in court that was reserved earlier on above. Indeed the same were named during the preliminary hearing, however were never tendered during the trial. That was an anomaly on the part of the prosecution. However, it is the opinion of this court that under the circumstances, it cannot be said that such exhibits did not exist. Exhibit P1, that is a letter that was written by the OCS of Chipogolo Police Station assigning Pw1 to take care of the five herds of cattle that had been recovered during the pursuing of the robbed herds of cattle, establishes such existence. As such, the omission to tender them in court as exhibit,

can be termed to have been a minor procedural irregularity which did not occasion injustice.

On the question of exhibits, there was also a muzzle gun that had been mentioned during the preliminary hearing which was said to be the one that was used in the armed robbery. Again this one was also never tendered as exhibit in court. Nothing was said about it during the hearing of the case. This court is of the view that, the position of the muzzle gun is different from that of the herds of cattle in that, first it is easily portable that it could have been easily taken to court when needed, secondly, it was preserved at the Police Station and therefore a more secured place and easily traceable and thirdly, there is nothing to signify that it did exist. To that effect, this court has been left to understand and believe that, there was nothing like a muzzle gun in the incident at issue.

Regarding the ground that the defence evidence was not considered by the learned trial Magistrate, this court is in concurrence with what got submitted by the learned State Attorney that such grounds have no basis. The typed judgment of the learned trial Magistrate at pages 9 and 10 refutes such contention by the appellants. The Magistrate did amply analyse the defence evidence and in the end ruled out that it was too weak to raise any doubts to the evidence tendered by the prosecution witnesses.

From the analysis of the evidence given above, it is the opinion of this court that the evidence tendered by the prosecution witnesses, did fail to sufficiently establish that an armed robbery did occur at the house of Pw1.

This stand is further confirmed by the failure by Pw1 (the complainant) who claimed to had been invaded and injured, to tender any exhibit like a PF3 to establish such allegation. However as already stated above, there was ample evidence to establish that his herds of cattle got stolen on the fateful night, and that both appellants herein, were arrested in the wilderness near Mkumbwanyi village driving herds of cattle which were identified to be among those stolen from Pw1.

Having held earlier above that the appellants were never sufficiently identified at the scene of the incident at the house of Pw1, and having also held that the two appellants were found red handed driving the herds of cattle stolen from the complainant, the question that has to be tackled by the court is as to whether the two appellants can be held culpable. And if such question is answered in the affirmative, then they can be held culpable of what. Since it has been held that the offence of armed robbery was not established, then the offence committed at Pw1 was normal cattle theft. And so far as the two appellants were arrested driving the stolen herds of cattle about 17 hours from when the same got stolen, the doctrine of recent possession can properly be invoked under such circumstances.

The question that follows from the above scenario, is as to whether that can be legally viable. Under the provisions of section 306 of the Criminal Procedure Act, Cap 20 R.E. 2002, the court is empowered to enter an alternative verdict in charges of stealing and kindred offences. Since the offence of armed robbery is an aggravated offence to that of ordinary theft this court is of the view that, the case at hand is a fit one for the invocation

of the provisions of section 306 of the named Act. As such, the conviction to the offence of armed robbery under the provisions of section 287A of the Penal Code, entered to the appellants by the trial court, is hereby quashed and in lieu thereof, an alternative conviction to the offence of cattle theft under the provisions of section 268 of the Penal Code is entered to both appellants.

Having quashed the conviction entered under the provisions of section 287A of the Penal Code, it ipso facto sets aside the sentence that had been imposed to that offence, and in lieu thereof, a sentence of going to jail for a period of eight (8(years to each appellant, is hereby imposed to the offence of cattle theft under which the two appellants have been found to have committed. To that end, the appeal by the appellants partly succeeds to the extent explicated above.

Order accordingly.

(S. S. MWANGESI)

JUDGE

07 – 12 - 2009