IN THE HIGH COURT OF TANZANIA

(AT DAR ES SALAAM)
CRIMINAL APPEAL NUMBER 47 of 2010

(Originating from Resident Magistrate's Court of Dar es Salaam at Kisutu Cr Case No. 453/2008- N.R. Mwaseba-RM)

EZEKIEL S/O MATITI @ MADILU..... APPELLANT

VS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 22-10-2010

Date of Judgment: 01-12-2010

JUMA, J.:

Appellant (Ezekiel s/o Matiti @ Madilu), Jimmy s/o Abel and David Masuke were jointly and together charged with an offence described, both in the charge sheet and in the judgment of the trial court as "Robbery with Violence" contrary to sections 285 and 286 of the **Penal Code, Cap. 16**. The charge sheet particularized that on 9 February 2008 at 14.45 hours the three stole two gold chains and 10 gold rings all valued at shillings 400,000/=. It was alleged that the stolen items belonged to one Lela Masudi; and immediately before stealing the three used actual violence on the victim by grabbing her neck. Jimmy s/o Abel and David Masuke jumped their respective bail before the conclusion of the trial and needless to say, only the appellant faced the full trial.

At his trial, the appellant strenuously denied that he and two others had stolen two gold chains and gold earrings from the complainant Lela Masudi. He also denied that he had employed any actual violence on the complainant. Despite his denial, appellant was found guilty by the trial Resident Magistrate (N.R. Mwaseba-RM) and sentenced to serve a 20 year prison term. In his petition of appeal dated 21st April 2010 appellant has disclosed twelve grounds which in essence are mixed up with appellant's own written submissions. On 10th May 2010 appellant filed four additional grounds.

In their totality, the sixteen grounds of appeal may be conveniently summarised to manifest the Appellant complaining that the trial magistrate failed to take his plea before the commencement of the trial. Appellant also contends that ingredients of the offence of Robbery with Violence were not proved to the required standard. Appellant has taken exception to his purported identification at the scene of crime and the identification parade. Appellant contended that his identification at the scene of crime was made under unfavorable circumstance; and there is nothing on record of trial court that shows how the identification parade was actually conducted following his arrest. In other words, the trial magistrate had no basis to believe the evidence of identification parade.

The prosecution case against the accused persons can be traced back in the afternoon of 09-02-2008 at Oyster-bay Primary School area of Kinondoni. The complainant Lela Masudi, PW1 with her son Samir Sahil (PW4) were heading home, after attending a school meeting. At a bus stop, a saloon car PW1 which and PW4 described as "balloon-type" stopped, and the driver of this vehicle called out to PW1 asking where

she was heading to. PW1 and his son were convinced into the saloon car on a promise that it would take them to Kariakoo where she was heading to. There were three passengers in the car. Two men sat at the back. The remaining passenger sat beside the driver. PW1 was seated between the two back-seat passengers. PW1 alleged that the two passengers who sat at the back strangled her and stole her two gold chains and two gold rings all valued at Tshs. 400,000/=. After stealing, the vehicle suddenly stopped and PW1 was pushed out of the car at a place she later identified as "container place." From that place a Good Samaritan hired a taxi which took her to Oyster-bay Police Station.

Fikirini Rajabu (PW2) was a jeweler who traded at Mwananyamala "kwa Kombo" Street. PW2 testified that on 09-02-2008 appellant went to his jewelry with a gold chain of 10 grams for sale. PW2 paid the appellant Tshs. 130,000/=. PW2 melted the gold chain and from it he made two chains, four pairs of earrings and two pendants earrings. On 29 March 2008 which was more than a month after buying the gold chain, police officers from Oyster Bay Police visited PW2's jewelry. PW2 was arrested and his statement was later taken down by the police. When arrested, PW2 allegedly told the police that he knew the appellant to be the person from whom he bought a gold chain on 09-02-2008.

Criminal investigation was conducted by detective constable Benatus (PW3). PW3 testified how that after the police had prepared a charge sheet they conducted an identification parade. According to PW3, both the complainant (PW1) and her son (PW4) identified the appellant in an identification parade. Though PW1 did not mention the colour of the car which was allegedly used to by the appellant, her son, PW4

testified that the colour of the vehicle was black. According to PW4, appellant sat at the front seat besides the driver of the saloon car with registration number T. 719 AMQ. PW4 testified that amongst the so many faces at identification parade, he easily picked out the appellant.

Appellant testified in his own defence during the trial, claiming that he was a businessman who purchased maize in Dodoma and sold the same at Tandale Market in Dar es Salaam. In 2006 he rented a house at Sinza in Dar es Salaam where lived with his wife and daughter. Mr. Kadil- a police officer based at Oyster-Bay Police also rented another room in the same house where the appellant rented at Sinza. Appellant occasionally bought rice and beans for this police officer he regarded as a friend. On 6 November 2007 Appellant and his family shifted from Sinza to Kimara. Appellant not only showed his friend (Kadil) his new rented accommodation at Kimara; but continued to supply his friend with rice and beans.

Appellant believes that his ordeal and prosecution was engineered by Mr. Kadil the police officer. That on 05-01-2009 his neighbour confided that whenever he was away from Dar es Salaam; Mr. Kadil would visit his Kimara house, to collect his wife and would return her around midnight. Appellant testified that he finally found out for himself that the police officer and his wife indeed had an affair.

Appellant revisited the day he was arrested in the morning of 27th March 2008. He was at home when two police officers- Mr. Kadil and Benatus (PW3) came and arrested him. Appellant claimed that the arresting officers took his Tshs 145,000/=, his wedding ring and bracelet. When Kadil ordered him to hand over his gold chain, appellant told the

arresting officer that he had already sold the chain. Appellant took them to the jeweler where he had sold the gold chain.

When this appeal finally came up for hearing on 22 October 2010 appellant argued his own appeal whereas Ms Saiga, learned State Attorney represented the respondent Republic. Ms Saiga was assisted by Joachim Joseph, State Attorney Trainee. In his brief address, appellant explained that his original grounds of appeal together with the additional grounds were sufficient to overturn his conviction and set aside the 20 year sentence which the trial court had imposed on him.

In her reply, Ms Saiga immediately conceded the ground of appeal to the effect that there is nothing on record showing how identification parade was conducted and trial magistrate had no basis to believe the evidence of identification parade. Otherwise Ms Saiga supported the conviction of the appellant and sentence. I am in full support of the position taken by the learned State Attorney that evidence of purported identification parade should not be considered because no proper identification parade was held with respect to the appellant.

On the ground of appeal that the trial magistrate failed to take appellant's plea before the commencement of the trial, the learned State Attorney submitted that the records do confirm that appellant's plea was taken. Ms Saiga referred to page 8 of the typed record of proceedings, where it is shown that the plea of the appellant was indeed taken. Further, Ms Saiga submitted that it was not necessary that every time before witnesses begin to testify fresh pleas must be taken. My perusal of the record of the trial proceedings clearly shows that on 1st April 2008 the charge was read over and explained to the appellant (as 1st accused) and he responded by "It is not true" and a plea of not

guilty was entered. I am therefore satisfied that this ground of appeal must fail because appellant's plea was taken and he was able to appreciate the seriousness of the charge facing him.

As to whether the offence of robbery was proved to the required standard of proof, Ms Saiga did not agree with Appellant's contention that ingredients of the offence of Robbery with Violence c/ss 285 and 286 of the **Penal Code** were not proved to the required standard. According to Ms Saiga, the proof is to be found in the evidence of PW1 and PW4 which indicate that PW1 was strangled and force was used to steal her gold chain. That, the stealing and violence that was used against PW1 was consistent with the ingredients of robbery with violence under sections 285 and 286 of the **Penal Code**.

Before I determine whether or not the trial court proved the essential ingredients of the offence under sections 285 and 286 of the **Penal Code, Cap. 16**, I propose first to pause and reflect whether the offence of robbery for which the appellant was convicted attracts a prison sentence of 20 years. Section 285 of the **Penal Code** illustrates the essential ingredients constituting the offence of robbery, i.e. stealing and using or threatening to use force to obtain or retain the thing stolen. The section states,

> Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained commits an offence of robbery.

Punishment visiting the offence of robbery is provided under section 286,

> Any person who commits robbery is liable to imprisonment for fifteen years.

The charge sheet against the appellant was prepared on 1st April 2008 when the **Penal Code** had already been amended by the **Written Laws (Miscellaneous Amendments) (No. 2) Act, 2004 [Act No. 4 of 2004]**. This Act No. 4 of 2004 among others, amended section 286 of the **Penal Code** to change sentence of offence of robbery from 20 years to 15 years. Following the amendment of section 286 of the **Penal Code**, the offence of "Robbery with Violence" for which the appellant was charged and convicted was no longer part of the laws of Tanzania when the charge sheet was prepared in April 2008. The correct name of the offence created under section 285 and punished under section 286 of the **Penal Code** should have been simple robbery and the corresponding maximum possible sentence for offence of robbery at that time should have been fifteen years imprisonment as prescribed under section 286 of the **Penal Code**.

As shown earlier, ingredients of the offence of robbery under sections 285 and 286 of the **Penal Code** for which the prosecution was required to prove beyond reasonable doubt were basically two. First the prosecution had to prove that appellant stole two gold chains and 10 gold rings all valued at shillings 400,000/=. Secondly, prosecution had to show that at time of stealing or immediately before stealing or immediately after stealing, appellant used or he threatened to use actual violence on PW1 in order to obtain the stolen item or in order to retain the thing stolen or to prevent or overcome resistance to its being stolen or it being retained.

In his opposition to the contention that it was himself who stole two gold chains and 10 gold rings from PW1, appellant contended that none of

the items that were allegedly stolen were tendered in court. The prosecution only tendered as exhibits products which PW2 had melted down. Appellant also contended that his identification at the scene of crime was made under unfavorable conditions for visual identification. Responding to the contention that prosecution had failed to bring stolen items as exhibits, Ms Saiga submitted that there was no need to bring these items since appellant himself led the police to the jeweller (PW2) where the appellant had sold the stolen gold chain. Ms Saiga submitted that all the ingredients of the offence were proved since PW1 and PW4 both testified on how PW1 was strangled, forced down, and how her gold chain was snatched. The learned State Attorney is in no doubt that stealing took place. Ms Saiga was also certain that violence was used before and after stealing. Ms Saiga noted further that offence of robbery with violence was committed since more than one person was involved in the stealing. In so far as the learned State Attorney was concerned, evidence of PW1 and PW4 was sufficient, especially evidence of PW4 who was able to note down the registration number of the vehicle which appellant used while committing the offence. Finally, Ms Saiga referred this court to the evidence of appellant taking the police to the jeweller and the jeweller (PW2) admitting that he had melted the gold chain transforming it into other products.

On the question of identification of the persons who were behind the robbery of PW1, Ms Saiga pointed out that the incident took place during broad daylight at 2 p.m. making visual identification possible; and the complainant had ample time to observe the appellant who had enticed them into the vehicle.

I have carefully considered all the grounds of appeal as set out by the appellant including the submissions of the appellant and that of the learned State Attorney in this regard. With due respect, the trial magistrate did not adequately evaluate the evidence on record beyond a four-line paragraph on page 7 of the judgment of the trial court,

> "...For the arguments above I am inclined to believe that the prosecution has succeeded to prove their case against the 1st accused beyond all reasonable doubt. Therefore the 1st accused is found guilty and I proceed to convict him forthwith."

First, I wish to point out that the prosecution case and conviction of the appellant was in mainly based on the evidence of visual identification of the appellant by PW1 and PW4 at the scene of crime (in the saloon car). The trial magistrate believed the evidence of PW1 who testified that she faced the appellant who had invited her to join other passengers in the car in that way she managed to identify the appellant because of his O-shape hair-style shave. In my view, this is too general a description for purposes of proof of an offence that took place in broad daylight. One would have expected more evidence on the attire the appellant was wearing and some other distinct descriptive features of the appellant.

There are also certain aspects of the evidence which creates doubt in my mind as to whether or not the appellant was amongst the people who had invited PW1 and PW4 into their car and robbed PW1's jewelry. For example, during his trial the appellant complained that the offence for which he was charged was committed on 09-02-2008 but complainant's statement was not taken down immediately till eight months later on 11-11-2008. Neither the prosecution nor the trial

magistrate made any attempt to explain why it took so long and whether eight months after the event PW1 could still visually identify the appellant as one of the people who had robbed her gold chain.

Again, according to the appellant, in the statement she made to the police the complainant identified one Mwarabu to be the person who stole her gold chain. Appellant poked doubts on prosecution's case on participation of Mwarabu by noting that no witness of the prosecution including the complainant herself ever mentioned the name of Mwarabu in their respective evidence in chief.

The saloon car was an important scene of crime item. Attempts by the prosecution to tender this vehicle as exhibit only served to demonstrate the extent of doubt created on prosecution's case against the appellant. The linkage of the vehicle T719 AMQ to the appellant was brought by PW4 (Samir Sahil) who testified that after he and his mother had been allowed by their captors to disembark from the vehicle recalled that vehicle's registration number plate number T719 AMQ. For inexplicable reasons, the police investigator (PW3) who testified ahead of PW4 did not in his evidence in chief give details of the vehicle and how the police came to link that vehicle to the commission of offence by the appellant. Realizing this anomaly, and in order to fill evidential gap, the prosecution prayed and were allowed to recall PW4 to identify the vehicle. PW4 returned back in the witness box on 28-09-2009 and belatedly identified the vehicle.

Prosecution also prayed to recall PW3 (detective constable Benatus) to come back and tender the vehicle. The trial court granted the request. Ten minutes later, prosecution prayed to withdraw its prayer to recall PW3. Thus, in that dramatic way, the prosecution closed its case without

tendering the saloon car as trial court exhibit. It is clear in my mind that the prosecution was stitching up the evidential gaps as the case against the appellant was progressing along.

I have my own further doubts whether the gold chain allegedly stolen from PW1 on 09-02-2008 is the same one which the jeweller (PW2) melted down and made two chains, four pairs of earrings and two pendants earrings. PW2 was an accomplice to all intents and purposes; his evidence should be taken with great circumspection. The police from Oyster-Bay Police Station visited PW2 on 29 March 2008 which was more than a month after PW2 claimed to have bought a gold chain from the appellant. As correctly pointed out by the appellant; two gold chains and 10 golden rings stolen from PW1 were not tendered in court. Although the prosecution contended that it was the appellant who had sold the stolen jewellery to PW2 it was not PW2 but PW3 (police investigator) who tendered (Exhibit P1- two gold chains, four pairs of earrings) at the trial court which PW2 is alleged to have melted down. It was only later after being recalled when PW2 who came back to identify Exhibit P1 which PW3 had earlier tendered.

Neither the complainant (PW1) nor the jeweller (PW2) who allegedly bought the stolen item from appellant identified any mark to establish that PW1 indeed had any gold chain immediately before she was lured into the vehicle. PW1 did not furnish any receipt or documentation to prove her ownership of the stolen jewelry. The trial court made no attempt to show why it chose to believe that PW1 had on her person two gold chains and 10 golden rings which were stolen by the appellant and two others. Trial court also made no attempt to show

why it thought exhibit P1 was in fact melted out of the 2 gold chains and 10 golden rings which were forcefully stolen from PW1.

These long chains of doubts on prosecution's case were not adequately evaluated by the trial magistrate. In the upshot, I cannot agree with the learned trial magistrate that the prosecution had proved the guilt of the appellant beyond reasonable doubt. The benefit of doubt I have identified should operate in favour of the appellant. Appellant's appeal is allowed, conviction is quashed and the illegal sentence of twenty years in prison is hereby set aside. Unless the appellant is otherwise lawfully held, he should be set at liberty forthwith.

I.H. Juma,
JUDGE
01-12-2010

Delivered in presence of Ezekiel s/o Matiti @ Madilu (Appellant) and Ms Katuga – State Attorney (For the Respondent).

I.H. Juma
JUDGE
01-12-2010