IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO 18 OF 2010

(ORIGINATING FROM THE DISTRICT COURT OF MPWAPWA AT

MPWAPWA CRIMINAL CASE NO 258 OF 2008)

MFAUME MASOUD @ FRESH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

14/03/2011 & 06/04/201.

JUDGMENT

KWARIKO, J.

Formerly the appellant herein and one ALEXANDER S/O MAWOPE the then second accused had been arraigned before the district court of Mpwapwa with one count of Armed Robbery c/s 287 A of the Penal Code Cap 16 Vol. 1 of the Laws R.E. 2002 as amended by Act no 4 of 2004. They had denied the charge and before the trial commenced the charge was substituted to the offence of kidnapping in Order to Murder c/s 248 of the Penal Code Cap 16 vol.1 of the Laws R.E. 2002. It was alleged that the two did jointly and together on the 20th day of August, 2008 at about 05.00

hours at Kikombo road within Mpwapwa town in Dodoma kidnap one HOSEA S/O YUSUPH in order to murder him. They had denied the charge and at the end of the prosecution case the second accused was acquitted on a no case to answer while the appellant went on full trial and in the end he was found guilty, convicted and sentenced to seven (7) years imprisonment.

The facts of the case from the evidence adduced in court can be summarized as hereunder: sometime in August, 2008 one HEZRON YUSUPH (PW2) introduced his brother HOSEA YUSUPH to the appellant who wanted to do timber business with him. Thus on 20/08/2008 the three left from HOSEA's house to go to a journey to Tanga to buy timber from the appellant's collection. LILIAN HOSEA (PW1) the wife of HOSEA YUSUPH was left behind and she witnessed as the three left to bus stand. According to PW1 her husband left with a mobile phone, a bag and Tshs 3,000,000/= for buying timber. Thereafter, PW1 started to monitor her husband's movements through mobile phone until 23.00 hours that day when he informed her that he was also together with the then second accused a timber dealer of Chipogoro area. Then PW1 lost contact with her husband and when he tried to reach the second accused he seemed evasive and after a while the phone was not reachable.

At that point PW1 sensed danger and she reported the matter to the police. A week had passed without hearing any word from her husband and when she tried to contact the appellant's relative in Mpwapwa nothing was forthcoming. Hence with the appellant's picture he had forgotten at her home PW1 went to Mkata area to trace him and he reported to police there before she returned to Mpwapwa empty handed. Later the appellant was arrested through his relative one Rashid in Arusha and upon interrogation he said that HOSEA had alighted at Mbande area but later changed the story and said he neither knew PW1 nor HOSEA. The appellant's picture was tendered in court as exhibit P1. PW1 therefore believed that her husband is dead or cannot be traced again.

HEZRON S/O YUSUPH (PW2) who is HOSEA's elder brother told the court that he really was the one who introduced the appellant to his younger brother and he escorted them to bus stand on 20/08/2008 at 05.00 hours for the journey to Tanga. REHEMA D/O RAJABU (PW3) testified that she was the complainant's neighbor and the appellant was her brothers' friend in Arusha. That the appellant visited Mpwapwa in April, 2008 for gemstones business and the last time she saw him she was informed that he was going to Arusha but never mentioned who were his companion. That it was her brothers

in Arusha who helped to trace the appellant after these allegations cropped up.

The appellant testified in his defence and called no witnesses. He denied the allegations. He said in his testimony that while at Arusha PW3 had telephoned him on 08/10/2008 with information that he was accused of kidnapping at Mpwapwa and he reported to police there before he was brought to Mpwapwa on 10/08/2008 and charged in court on 01/12/2008. He admitted PW3's evidence about his gemstones business in Mpwapwa but denied knowledge of the second accused, HOSEA, PW1 or PW2. Finally he said that exhibit P1 was one of his four photos the police had taken from him upon arrest. The same was illegally tendered in court since the prosecution did not mention it during the preliminary hearing. He tendered the three remaining photographs which were admitted as exhibit D1 collectively.

The trial court found that the evidence by the prosecution witnesses PW1 and PW2 was watertight against the appellant. That PW3 corroborated the said evidence when she testified that the appellant visited Mpwapwa some days before this incident happened. However, the appellant's photograph evidence was

found to be weak. Thus the appellant was convicted and sentenced as earlier stated.

Dissatisfied with the trial court's decision the appellant preferred this appeal where he raised about four (4) grounds of appeal which essentially complain that the prosecution evidence did not prove the case beyond reasonable doubts. The respondent Republic was represented by Mr. Kahangwa learned Senior State Attorney who did not oppose the appeal.

During the hearing of the appeal the appellant did not add anything useful and prayed his appeal to be allowed. One of the appellant's complaints was that the trial court erred to believe that PW1 and PW2 knew him before because if that was the case then the police should not have conducted identification parade for these witnesses to identify him. As rightly submitted by Mr. Kahangwa the evidence in record does not indicate that any identification parade was conducted in the appellant's respect. If there was any such exercise at the police they ought to have come to prove it in court but they did not do.

However, the evidence by PWI and PW2 which the court believed is that the appellant was the one who left with HOSEA who thereafter went missing. Mr.Kahangwa did not specifically talk about this evidence. I am of the view that this evidence did not prove that the appellant left with HOSEA on the material date from PW1's home to the journey to Tanga. This is so because these two witnesses contradict one another about this fact. While PW1 testified that her husband left to Tanga with the appellant and PW2, the story was completely different with PW2; this witness said that his brother left home with the appellant and the then second accused while himself only escorted them to bus stand. If PW2 went together with his brother and the appellant then why wasn't he charged with this offence? No one answered this question during the trial. PW3's evidence did not corroborate these two witnesses weak evidence since she didn't specify the dates the appellant was in Mpwapwa and if the same tallied the material day. The police did not either come to explain how they investigated this case. The foregone contradiction between PW1 and PW2 creates doubts on the part of the prosecution case which ought to have been resolved in favour of the appellant. Even if it was proved that the appellant left with HOSEA but still there is no proof that he had kidnapped him in order to murder him.

As for the complaint that the trial court believed the photograph evidence; I do not agree with this assertion because the trial magistrate viewed that this evidence was contradictory hence he did not base his decision on the same. This complaint is therefore unfounded.

Both parties complained that the charge against the appellant was contradictory because it was substituted before the trial commenced. It is my considered opinion that it is not illegal for the prosecution to seek leave of the court to substitute the charge when they find there is need to do so and in this case they did not commit any offence when they brought their prayer before the trial court. The trial court also did not err when it granted leave for the prosecution to substitute the charge. Once a new charge is accepted by the court then the former one becomes history. Since the new charge was read over to the accused and was given opportunity to plead thereto, one cannot say that the appellant did not know which charge he was facing. What is important therefore is for the prosecution to lead evidence to prove the preferred charge. And the accused's duty in this respect is to defend his innocence. This complaint is thus baseless.

Lastly, the appellant as well as Mr. Kahangwa were of the view that the trial magistrate erred in law when his judgment contravened the provisions of the law under section 312 (2) of the Criminal Procedure Act Cap 20 of the Laws R.E. 2002. I have gone through the judgment and I am satisfied that the same did not contravene the said provision of the law. The same specified the offence under which the appellant was found guilty which was the one he stood charged. This complaint is therefore without merits.

For the foregone analysis I hold that the charge against the appellant was not proved beyond reasonable doubts and hence I allow the appeal, quash the conviction and set aside the sentence.

It is hereby ordered that the appellant be released from prison unless he is otherwise lawfully held. Order accordingly.

(M.A.KWARIKO)

JUDGE

06/04/2011

Court: Rights of Appeal fully explained.

(M. A. KWARIKO)

JUDGE

06/4/2011

AT DODOMA.

06/4/2011

Appellant: Present.

For Respondent: Mr Kyando, State Attorney.

C/c: Ms Komba.

(M. A. KWARIKO)

JUDGE

06/4/2011