IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO. 28 OF 2012

(Originating from Criminal Case No. 235 of 2011
of the District Court of Handeni at Handeni)

1. AMIRI NASSORO MSULWA
2. MWIJUMA AMIRI
3. NASSORO AMIRI
4. SUFIANI AMIRI
5. SAIDI SELEMANI @ NKONGA
6. THABIT ALLI NKONGA .....APPELLANTS

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Rugazia, J.

This appeal originates from Criminal Case No. 235 of 2011, instituted in the District Court of Handeni at Handeni. The appellants were jointly arraigned on two counts, namely; Armed Robbery Contrary to section 287(A) and Arson contrary to section 319(a) of the Penal Code Cap. 16 of the Laws. As regard to first count, the particulars were that, on 16th day of August 2011, night hours at Sindeni Komnyuzi village within Handeni

District, the appellants jointly and together did steal four cellular mobile phones make Nokia, one bicycle, different types of animal medicines and 43 heads of cattle, all total valued at Tshs.24,075,000/= property of Jeremia Mayapa, it was further alleged that, immediately at, or before the incident of stealing, did threaten the victims with a bush knife (panga), and local firearm (Gobore) in order to obtain the said property. In second count, it was alleged that the appellants jointly and together set fire to the dwelling house of Jeremia Mayapa and destroyed several valuable items all total valued at T.shs. 527,000/=.

Both denied the accusations but at the end of the trial, the appellants were found guilty, convicted and sentenced to 30 years imprisonment for the first count; and on second count to serve 7 years imprisonment, sentences to run concurrently and, in addition, they were ordered to pay compensation in the sum of T.shs.24,500,000/= for the injuries and property loss. Aggrieved by conviction and sentences, the appellants have now filed an appeal comprising six grounds. During hearing of the appeal, the appellants chose to adopt their memorandum of appeal with nothing more to add thereto. Ms. Kaaya learned State Attorney who appeared for

the Republic, did not support the conviction on account that, the incident occurred at night and PW1 and PW5 did not say with clarity how they were able to positively identify the appellants. What is more, she went on, material witnesses such as village chairman and neighbours were not called to testify. On the allegation that PW.1 suffered gun wounds and a bullet pellet removed from his leg Ms. Kaaya wondered why out of the three doctors who treated him not a single one testified; moreover, why the PF3 was not tendered by the maker as per section 240(3) of the *Criminal Procedure Act , Cap. 20 R.E. 2002* and, lastly, the learned state counsel had misgivings with the way the judgment was written claiming that it fell short of the requirements of section 132 of the Criminal Procedure Act in that it is not reasoned.

The case for the prosecution was comprised of six witnesses out of whom five were family members. Though the testimonial evidence is not clear, but to crystallize on it, it was common ground that, on the fateful day at night, PW1 Kalai Mayapa heard dogs barking followed by a gunshot and suddenly the bandits attacked them. According to him, he knew the bandits and he was able to mention their names and, moreso, he managed

to identify them with the aid of moonlight and also he came face to face with first appellant (Amir) who shot him on his left foot, and he also identified the third appellant. He deposed further that he saw the 4th appellant holding a bush knife and, also, the 5th appellant. The appellants also assaulted his two brothers and stole cash money Tshs.2,055,000/= which he obtained after selling his cows at the market a day earlier and some other properties were stolen. He went on to claim that, the evening before the incident, the 2nd appellant came to buy milk which was strange and unusual for him to go there to buy milk. His evidence was supported by PW2 who testified to have been assaulted by 3rd appellant using a stick and he testified to have seen the 1st appellant setting fire to their house using a piece of burning wood. He testified to have had ample time to witness the entire incident as he was hiding in a nearby bush near their house. Another testimony came from PW3 who testified to have been wounded by the 2nd appellant on his left arm finger. PW4 confirmed the occurrence and added that there was loss of 43 cows due to fire. PW5 Jeremia Mayapa who was the owner of the properties lost was not present during the incident but he was phoned by PW1 shortly after the incident, came and reported the matter to the police and took PW1 to hospital the

following day. After the incident was reported to the police station at Handeni, PW6 No.E. 3220 D/C Samwel was assigned to investigate. He visited the scene and saw PW1 with a gunshot wound; he also saw a burnt hut and several items burnt down. He was informed too about the loss of 43 cows and some other properties. Thereafter he wrote witness' statements but those statements were not produced in court, and on the same day he arrested 1st to 3rd appellants. Furthermore, this witness tendered PF.3 which I shall comment later on regarding its admission in evidence.

In their defence, all appellants completely disassociated themselves from the allegations levelled against them. The first appellant relied on the defence of *alibi,* claiming that he was not present during the incident as he was attending his daughter's ceremony at Sindeni Bwawani. As for the 2nd appellant, he claimed to have been sick and never left his home on the material day; the 3rd appellant refuted the allegations and, moreso even when his house was searched by police nothing was found. The 4th appellant claimed to have been arrested at the premises of the 2nd

appellant where he had gone to visit him. As for the 5th and 6th appellants, both refuted the allegations claiming to know nothing about the incident and relied on an *alibi* as they were not present, but had gone to visit their grandfather at Kamwenda village. In the light of the foregoing, it is apparent that the trial court magistrate was convinced that there was adequate and positive identification of the appellants. It was on this basis that the trial court proceeded to find them guilty consequently convicting them.

On their part, the appellants challenged the evidence of identification; secondly, nothing was found in their possession, thirdly, it is appellants perception that the PF3 was tendered without complying with section 240(3) of the Criminal Procedure Act; fourthly, failure of the trial magistrate to consider the quarrel between the first appellant and Mayapa family which he did not even put on record with no reason and claiming it was an afterthought, and lastly, denial of their right to call their witnesses. As I said earlier, Ms. Kaaya learned Counsel declined to support the conviction.

Having gone through the record and the memorandum of appeal, I deem it opportune to start with admissibility of the PF3 which was tendered by E. 3220 D/C Samwel. At page 25 of the typed proceedings, here is what was recorded and I reproduce the proceedings as under:

"Here is a PF3 I pray to tender"

1st accused: No objection

2nd accused; -do-

3rd accused: -do-

4th accused: -do-

5th accused: -do-

5th accused: -do-

5th accused: -do-

5th accused: -do-

6th accused: -do-

Sgd: P.G.M. Maligana, RM
18/04/2012

Court: *The accused persons are addressed in terms of S.240 of the CPA. 1985 Cap. 20 (R.E. 2002)*

Sgd: P.G.M. Maligana, RM.
18/04/2012

1st accused: I don't see the necessity to call the Doctor we pray to be tendered.

2nd accused: -do-

3rd accused: -do-

4th accused: -do-

5th accused: -do-

6th accused: -do-

Sgd: P.G.M. Maligana, RM
18/04/2012

Court: PF.3 Namely Karai Mayapa dated 16/8/2012 tendered as an Exhibit marked P.2."

It is now clear from the above extract that, the appellants were addressed in terms of section 240 of the *Criminal Procedure Act* and opted not to call the maker, so they cannot at this juncture be heard claiming infringement of that right, and therefore, it follows, that this ground has no merit.

I now turn to the other ground. Ms Kaaya faulted the prosecution for failing to call important witnesses such as the chairman and neighbours.

She urges me to draw adverse inference on that. In terms of section 143 of the Evidence Act, there is no specific number of witnesses required for a party to prove any fact. As this is a criminal case, the onus of proving the case is upon the prosecution by relevant evidence and beyond all reasonable doubt. What is important is the quality of evidence of the witnesses and where necessary the trial court should determine on the demeanor, competence and credibility of the witnesses which I believe were considered by the trial court. However, going by the record, there are apparent cracks in the prosecution case.

For instance, there was no alarm raised during the incident, none of the witnesses testified to have seen neighbours arriving at the scene regardless of several gun shots fired by the appellants, and, reasonably, one would have expected neighbours to hear those shots. PW4 claimed the village leader went to the scene and saw what happened but was not featured to corroborate that evidence. There was also no disclosure of their names even the prosecution did not list them as their witnesses and no explanation was given as to why they didn't list them. To me the non-

calling gives rise to doubt as to whether or not the incident happened and the appellants were the culprits.

On the complaint raised by the first appellant, with regard to the trial magistrate's failure to consider the quarrel between him and the victim's family and he did not put it on record, it is curious that he did not raise it during the trial so it is late in the day to raise it at this stage of appeal. As for the allegation that the magistrate did not record part of his evidence, this is a strong allegation which needs proof and not bare allegations. I do not see any reason for the trial court not to record his defence as everything on record is open, tempting me to treat this allegation as escapism. I find this ground devoid of merit.

On the issue of being denied to call defence witnesses, the record revealed that, it was only the first appellant who sought to call witnesses but his co-appellants stated that they had no witness to call; therefore I will consider the first appellant only and the record tells as under:

"1st accused:

I am not ready for defence today until my witnesses

are called upon to attend.

Sgd: P.G.M. Maligana, RM.
10/05/2012"

Public Prosecutor: I pray for the accused person to note that he will be an obstacle since I am travelling far away to conduct this case also the defence raised by the 1st accused is supposed to be supported by notice at the first date of hearing therefore such kind of defence according to S.194(4) of the CPA 1985 I pray the same to be disregarded; as the said witnesses of the 1st accused person are not helpful we pray to proceed with hearing:

RULING

This case shall proceed for hearing today the first accused prayer on defence of "alibi" overruled, S.194(4) of the CPA C/W.

"Sgd: P.G.M. Maligana, RM."

It strikes me as odd how the prosecution jumped to a conclusion that the appellant wanted to rely on defence of *alibi.* The only thing that the appellant stated was that he was not ready to proceed on that day as he needed more time to call his witnesses. Astonishingly, the trial magistrate

fell into the trap and ruled the matter in favour of the prosecution without considering that the appellant has a right to call his witnesses to defend himself. Although the first appellant's defence rotates around the defence of *alibi* which the trial magistrate in his judgment discounted whole sale pursuant to section 194(6) of the *Criminal Procedure Act* that notice of *alibi* was not furnished to the prosecution. For that reason, the error is curable under section 388(1) of the *Criminal Procedure Act,* as there was no failure of justice even if those witness were called, the decision would have been the same.

Regarding the contents of the judgment which Ms. Kaaya complained that it is not reasoned, I join hands with her because the way the trial magistrate evaluated the evidence leaves a lot to be desired. There was no serious attempt by the magistrate to give reasons for his decision much as these are serious offences attracting heavy sentences; if I may quote how he came to his conclusion this is what he said:

> *"The evidence adduced by the prosecution witness is of water tight since all the witnesses PW1, PW2, PW3 and PW4 were the victims of circumstances and*

witnesses by eyes of which the offences were committed, further more they did identify each and every accused person when they were committing the offences as charged (sic)."

Turning to the other grounds, I do agree with the appellants that, none of them was caught at the scene or found with anything that was stolen on the material day. The only evidence that was relied upon to convict them was visual identification. Here two questions arise; these are whether the offence of armed robbery and the issue of identification were proved beyond reasonable doubt against the appellants. From the evidence, it is undisputed that PW1, PW2, PW3, and PW4 were eye witnesses. Their aid of identification was moonlight though the intensity of such light was not known, but they claimed to know the bandits before the incident. Moreover, they mentioned appellant's names and the weapons they were carrying on the material day and they explained how the appellants inflicted injuries on their bodies. Nevertheless, since this is a case which entirely depend on visual identification the evidence has to be water-tight. Here we are not told of how bright the moonlight was though

the witnesses were unequivocal in their assertions of what they saw. The prosecution case, however, is silent on the distance between the bandits and victims and duration of the whole incident which are very crucial.

Another point which is still craving for an answer is the bicycle tendered as exhibit P1 with only tyres burnt and not the whole bicycle as raised by first appellant but the prosecution did not counter that. Also, the prosecution listed the sketch map as one of their exhibits but they did not produce it to prove that the said hut was burned. Another important point to note is that no alarm was raised during the incident as no other witnesses apart from family members witnessed the incident. Not only that but also, the injury inflicted by panga on PW3 by 2nd appellant was not proved to the required standard. The PF3 stated the injury was caused by a bullet but the said bullet was not tendered and in addition the injury was marked "no harm" which raises doubt as to whether it was really a gunshot (Gobore) that used to inflict that would to PW1 and no explanation was given by the prosecution on that omission.

With all these doubts in mind, obviously, it cannot be said that the prosecution case was proved beyond all reasonable doubt. That said, it follows that the conviction cannot be allowed to stand. It is therefore quashed and set aside and the resultant sentences

Appellants are to be released forthwith from custody unless otherwise lawfully held on other lawful cause.

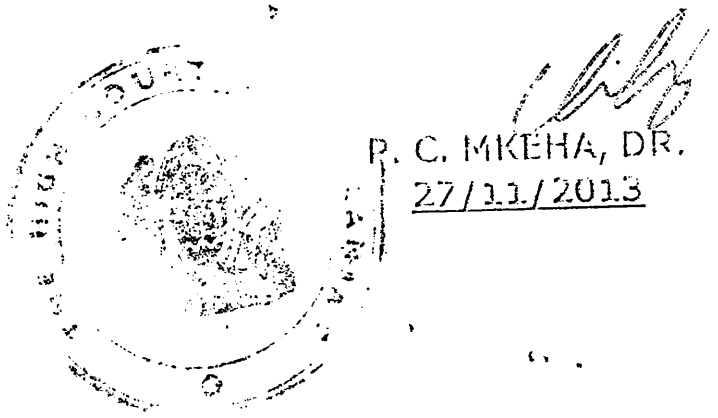
P. A. RUGAZIA, J.
27/11/2013

DATE: 27/11/2013

CORAM: P. C. MKEHA, DR.

1ST APPELLANT
2ND APPELLANT
3RD APPELLANT
4TH APPELLANT — All present
5TH APPELLANT
6TH APPELLANT
RESPONDENTS: — Mr. Mrandu for
C/CLERK: — Noel

Court: Judgment is delivered on this 27th day of November, 2013in the presence of the parties.



P. C. MKEHA, DR.
27/11/2013