IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 115 OF 2013

ORIGINAL CRIMINAL CASE NO. 201 OF 2012

ON THE DISTRICT COURT OF BUKOMBE

AT BUKOMBE

BEFORE: U.S. SWALLO Esq. RESIDENT MAGISTRATE

SIMON S/O KANONI SEMENI .....APPELLANT

(Original Accused)

VERSUS

REPUBLIC .....RESPONDENT

(Original Prosecutor)

JUDGMENT

12th June & 18th August, 2014

S.M.RUMANYIKA, J

Simoni Kanoni @ Semeni (the appellant), appeals against conviction for armed robbery c/s 287A of the Penal Code Cap. 16 RE 2002 (the Code) and a 30 years custodial sentence meted out to him on 13/03/2013 by Bukombe district court (the trial court). It is

imperative also to state from the outset, that he had one Ramadhani Andrew (1st accused) then charged jointly and together. The latter got acquitted. Unless the context otherwise requires, this judgment covers only the Appellant.

Essentially the grounds of appeal are four (4):-

1. That the case of the prosecution was not proved beyond reasonable doubts.
2. That use of weapon not having not been proved by the prosecution, the trial court shouldn't have convicted him for armed robbery.
3. The evidence of Pw2 and Pw3 was contradictory. Therefore not credible.
4. That the learned trial magistrate wrongly relied on evidence of admission by the Appellant, whereas infact his cautioned statement had no such bearing.

The Appellant appears in person. Mr. I .Rweyemamu learned statement Attorney appears for the Respondent Republic.

The Appellant had nothing to submit.

Mr. Rweyemamu supports the appeal and contends, in his submissions that the Appellant having been not properly identified at the scene, and the complainant never knew him before, he was entitled to being acquittal. Charge having been not proved beyond

reasonable doubts. That no explanation was offered why a delayed (four days) arrest. It being on the doctrine of recent possession or at all.

It is evident that hardly four days latter, the Appellant was found possessing the Motor cycle robbed from Pw1 and the latter had identified only him on the spot. The two being a commercial motor cyclist and hirer respectively.

The central issue is whether the Appellant was properly identified by Pw1 robbing him the motor cycle. The answer is yes! It was at night (about 20.00pm). Probably dark. Granted! But the complainant had dialogue with the Appellant hiring the transportation service. Price bargaining inclusive. All this done at a zero distance almost. However short time taken might be, chance of mistaken identity by Pw1 of the Appellant were ruled out.

Yet again, the issue is whether one robbed the motor cycle armed. Infact on this one, no evidence, leave alone sufficient evidence, the prosecution led one. Pw1 simply tells that the appellant just pulled the Panga out! Then inflicted several cut wounds on him. Without telling with details, where was, if any, the panga before. It is very unfortunate that too, the medical person that examined the victim (exhibit P1) fell into the same trape. As regards type of weapon/instrument used (a "Panga"). There is nothing to suggest why such medical conclusion! After all the medical man was not

called. Nor did he testify in court. Leave alone the Appellant not being addressed under section 240 of the Criminal Procedure Act Cap. 20 RE 2002. The document exhibit "P1" is expunged.

I don't think that robbery is armed robbery simply because the prosecution so alleges. It is upon court being satisfied in evidence, that the robber was in the strict sense of it, armed at the material time. Without this statutory restrictions, chances were there, a mere robbery with violence being substituted for armed robbery. Ground 2 of appeal allowed.

With it in mind, the evidence of Pw1 and Pw2 contradicting each other does not arise. But if anything, it does not go the roots of the prosecution case. Ground 3 of appeal dismissed.

The conviction was based partly on the Appellants admission/cautioned statement. On this one, I do not think that the trial court was respectfully free from a serious misdirection. Just before the statement was admitted in evidence. The Appellant, invited by Trial Court is on record to have said:-

> .....I have objection because the witness was beating
>
> me forcing me to admit. I decided to admit.....

Literally, means that the Appellant objected to the statement being admitted in evidence. Because he admitted the offence tortured by F 1568 D/CPL Erida (PW4).

Nevertheless the learned trial magistrate just admitted it as exhibit "P2". So smoothly. Without making any inquiries with a view to establishing if the Appellant had made it voluntarily or not. Case of Seleman Abdallah & 2 Others V R, Criminal appeal no. 384 of 2008 (CA) (unreported). Both law and common sense so demand. In view of the above misnoma, justice of the case demands that exhibit P2 be, and it is hereby expunged from the records. I will, though with different reasons, allow ground 4 of the appeal.

As regards ground ONE of appeal, and as said, the charge of armed robbery wasn't proved at all by the prosecution. But only the lesser one of robbery with violence (Contrary to Sections 285 and 286 of "the Code".

The ground of appeal is, for that reason dismissed.

The Appellant ought to have been convicted alternatively as such and sentenced as hereby do, to 15(fifteen) years in jail. With effect from 19/10/2012 (when charge was read to and his plea taken).

R/A explained.

S.M.RUMANYIKA

JUDGE

24/06/2014

Delivered under my hand and seal of the court in chambers this 18th August, 2014. In the presence of M/s U. Malulu, State Attorney and the Appellant.

S.M.RUMANYIKA

JUDGE

18/08/2014