

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 90 OF 2017

HASSAN HAJI SAWAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

*(Originating from the Decision of the District of Rufiji Criminal Case
No. 166/2016)*

JUDGMENT

Last order: 06.06.2018

Judgment date: 21.06.2018

A.Z. MGEYEKWA, J

In the District Court of Rufiji, Mr. Hassan Haji Sawa, the appellant were convicted of Armed Robbery s/c 287 'A' of the Penal Code Cap.16 [R.E. 2002] and sentenced to the statutory thirty years term of imprisonment. The appellants are still dissatisfied, hence this appeal.

The facts of the case, in so far as they are relevant to this appeal, may briefly be stated. On 2nd day of October, 2016 at about 16:30 hrs at Kibiti 'B' Village, Kibiti District in Coast Region was charged with offence of armed robbery contrary to S.287 A of the Penal Code

immediately after stealing he threatened Fedi Kazoba Anatory with a knife in order to obtain the stolen properties.

At the trial, PW1 testified that on 2nd day of October 2016 at around 16:30 hrs while he entering his premises and found the accused holding a sulfate with Television therein. PW1 realized that the said black flat screen TV was the property of his brother. PW testified that by that there was no one at the house so he doubted and asked the accused where he got the TV, the accused took out a knife with a red handle the one carried by Masai people and threatened PW1 and stated "***Dogo umewahi kufa***".

PW1 testified that he was stepped back by the accused and he managed to escape, when he was chasing the accused his brother arrived from his office and both of them started shouting 'thief' 'thief' the accused thrown down the flat screen TV and dropped the knife and a cap. After a while people came and chased the accused and arrested him. Further, PW1 said that he recognized the accused by face; he used to stay at the bus stand.

PW2 testified that on 2nd day of October 2016 around 16:00 hrs when he was going back home he heard people shouting 'thief' 'thief' then he found PW1 chasing the accused, he decided to stop his motorcycle and started chasing the accused too. He further testified that when he reached home he found his door was broken and he saw the accused with a sulfate, holding a knife. Thereafter, the accused was taken to police station.

PW3, MG. 383269 Omary Shamte informed the court that on 2nd day of October 2016 around 16:30hrs he saw many people who were chasing someone. He decided to make a follow-up and found the accused was arrested and beaten. He rescued the accused and advised the mob to take the accused to the police station.

On the defense case, DW1 Hassan Haji Sawa, stated that on 3rd day of October 2016 when he was on his way back home he met someone running, holds the accused Tshirt and shouted **"huyu ndio mwizi wangu"**. He further stated that some people appeared at the scene of crime and DW1 begged the people to stop beating him instead take him to the police station.

Before this Court the appellant filed a 11 grounds for Petition of Appeal which can be crystallized as follows:-

1. That PW1 testified before the court that, he saw the appellant holding a sulfate with a Television inside the black coloured. This raises a question how did he manage to see through the bag that the colour of television is black.
2. That PW1 testified that he saw the appellant holding a television in his hands while he previously testified that he saw the appellant holding a television in a sulfate bag. This creates a doubt.
3. That PW1 testified that the appellant stole the television at 16:30hrs while PW2 testified that the appellant stole his properties at 16:00 hrs. Their testimonies create contradiction of time at the scene.
4. That PW1 testified that his brother PW2 found the appellant in his house holding a sulfate bag with a television inside where as PW2 testified that he saw the appellant being chased by PW1 and he stopped his motorcycle and joined the chase. This testimony is doubtful.
5. That PW2 testified that he saw the appellant holding a sulfate bag with a television inside at the gate and shouted for a thief, while he previously testified that he saw the appellant being chased by PW1. This testimony creates contradiction in evidence.

6. That PW1 testified that the appellant dropped the television and a knife at the gate and ran away while PW2 testified that he saw the appellant with a knife when he was chasing him and dropped the knife. This testimony creates contradiction in evidence.
7. That PW2 testified that his properties were stolen by the appellant which means more than one and in their testimonies both PW1 and PW2 testified that only a television was stolen. These testimonies are doubtful.
8. That the weapon "knife" was not used before and after stealing and the environment of the case does not constitute armed robbery. I pray to substitute the offence to theft c/s 258 and 265 of the Penal Code Cap. 16 [2002].
9. That the prosecution side failed to produce a receipt to certify that the said television valued Tshs. 800,000/=
10. That, PW3 the militiaman testified that he rescued the appellant from being stoned and that he heard people shouting that the appellant was a thief. What he testified is purely hearsay evidence, which is not admissible before the court as per section 34 of the Tanzania Evidence Act, Cap.6 [R.E. 2002].
11. I humbly pray your court to dismiss both conviction and sentence and grant any other relief your court deems fit to grant.

At the hearing of this appeal the appellant appeared in person and defended for himself while Miss. Immelda Mushi, learned State Attorney represented the respondent.

Ms. Mushi supported the appeal basing on the grounds that the trial court failed to address PW1 and PW2 contradictory statements. PW1 stated that when he was coming from his office he met one person holding a sulfate with Television therein, then PW2 appeared and

started to shout 'thief' 'thief'. While PW2 testified that he saw his brother chasing the appellant and he heard people shouting 'thief' 'thief' he stopped his motorcycle and started chasing the appellant. These two statements are doubtfully since each witness has testified differently while both were present at the scene of the crime.

Ms. Mushi further stated that PW1 and PW2 testified that some people were at the scene of the crime, they chased and caught the appellant but there were no witnesses who testified that they were at the scene of crime and have arrested the appellant. Additional, Ms. Mushi contended that there is nowhere in the court proceeding stated how the investigation was conducted. Thus, with the aforementioned defects the prosecution side failed to prove if the appellant committed the said offence.

I have given due consideration to the argument of both sides. Now I proceed to determine the appeal. It is my considered opinion that the case against the appellants rested entirely on contradictory statements starting from ground 1 to 7 of the appeal.

With regard to the first and second grounds of the appeal, PW1 testified that he saw the appellant holding a sulfate with a black color Television (TV) inside. This statement is bewildering as to how PW1 managed to see the color of the TV through the sulfate? PW1 again testified that he saw the appellant holding a TV, these are two different evidence stated by the same witness (PW1), his testimony is doubtful. As it was articulated in the case of **Lusabanya Siyantemi v R Criminal Appeal No.89 of 1979** the court held that:

" Where conditions for correct identification of accused were unfavorable, the evidence of the single witness contradicted another witness and no corroborative evidence existed..."

On ground four and five of the appeal, it is revealed in court record that when PW2 was coming back from his office he heard people shouting 'thief' 'thief' he saw his young brother (PW1) chasing the thief he decide to stop his motorcycle and started to chase the appellant. While in his second testimony he said he arrived home and found the appellant with a sulfate, holding a knife. PW2 has issued two diverse statements. Which statement is correct between the two? He joined the chase while he was coming from his office or he saw the appellant at his premises holding a knife.

Again, PW1 testified that when he was chasing the appellant, he dropped his knife at the gate and ran away while PW2 stated that when he reached at his premises he saw the appellant holding a knife these are evidence made on the same day by two different witnesses in relation to the same accused person. Their evidences are doubtful thus the court cannot rely on.

The contradictory statement made in court signifies that the person making such statement has been untruthful. In the case of **Leonard Zedekia Maratu v R Crim. Appeal No. 37 of 2004 the Court of Appeal** stated that:-

"The magistrate did not subject the evidence to close scrutiny. If he had, he would have found some glaring contradictions in the evidence for the prosecution."

It is clear from what is set out above that PW1 and PW2 evidence diminished their credibility as witnesses hence the appellant conviction is not on merit. The lower court fell into error of making a finding that they were credible witnesses' without taking into account all the shortcomings in the same were at articulated in the case of **Abdullah Bin Wendo v R (1953) 20 EACA 166; Roria v Republic (1967) EACA.**

Grounds 8 to 10 are baseless and do not interfere or affect the rights of the appellant for that reason I have not taken my time discussing them.

For the above the prosecution case did not have a strong legal leg to stand on, leading to the conviction of the appellant. For those reasons I allow the appeal, quash the conviction and set aside the sentence. The appellant has to be released from prison forthwith unless he is held for other lawful purpose.

It is so ordered.

DATED at Dar es Salaam this 21st day of June 2018.



A.Z Mgeyekwa
JUDGE
21.06.2018

Delivered in the presence of the appellant and Ms. Immelda Mushi,
the learned State Attorney for the respondent



A.Z Mgeyekwa
JUDGE
21.06.2018