IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: RUTAKANGWA, J.A., KILEO, J.A., And ORIYO, J.A.)

CRIMINAL APPEAL NO. 12 OF 2010

MOSES THOBIAS @ IKANGARA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Sumari, J.)

dated the 26th day of June, 2009
in
HC Criminal Appeal No. 94 of 2007

JUDGMENT OF THE COURT

31st May & 4th June, 2012

ORIYO, J.A.

In Criminal Case No. 187 of 2002, in the District Court of Geita sitting at Geita, the appellant, Moses Thobias @ Ikangara and another were convicted as charged with the offence of Armed Robbery, contrary to sections 285 and 286 of the Penal Code, Cap. 16, R.E. 2002. They were sentenced to a custodial sentence of thirty years. Being aggrieved, he unsuccessfully appealed to the High Court. He has now preferred this second appeal.

Before the trial court, the prosecution alleged that on 16.4.2002 at about 16.00 hours at Mshinde Village, Geita, armed bandits stole one AVON make bicycle, one shirt and a pair of shorts, all being the property of one Jumanne s/o Numbu, the complainant.

Three witnesses testified for the prosecution while the appellant alone testified for the defence.

PW1, Jumanne Numbu testified that on the date of the incident, he was riding his bicycle through Mshinde forest going to Buhalahala Village when he was suddenly stopped by the two persons. He was ordered to get off the bicycle. Both bandits were armed. The appellant allegedly had a *"panga"* and he used the flat side of it to hit PW1, before demanding money. PW1 allegedly gave Shs. 200/- to the bandits and fled leaving behind his bicycle which had a bag of clothes attached to it. He reported the incident to the Chairman of Mshinde Village and gave him the description and the make of the bicycle including the serial number which was C 46685. The village Chairman sent him to the village sungusungu commander for appropriate action.

PW3, Ndalahwa Thomas was assigned by the sungusungu commander the duty of arresting the bandits who attacked PW1. PW3 stated that he found the bandits at the trading centre. He arrested them and took them to the sungusungu commander where PW1 was waiting and the latter identified the bandits as his assailants. Upon interrogation they admitted the commission of the offence and led PW2 and PW3 to the bush where the bicycle was recovered.

PW2, Alphonce Martin went to the home of the sungusungu commander upon being informed of the arrest of the bandits. He took part in interrogating the bandits and retrieving the bicycle from a bush near a primary school where the bandits had led them. He added that they retrieved two bicycles from the area and he gave their descriptions. However, PW1 identified one of the bicycles as the one he was robbed of earlier in the day.

The appellant totally denied responsibility in the robbery and raised the defence of **alibi** in that he was away from Mshinde village at the time of the incident, he said that he returned home to Mshinde village around

19.00 hours on 16/4/2003 and he was arrested shortly thereafter and sent to the Geita Police Station on 18.4.2003.

In the memorandum of appeal, the appellant preferred five grounds of appeal, namely:-

1. *The first appellate judge erred by convicting the appellant on the doctrine of recent possession of the stolen article, Exhibit 'P1' where its ownership was not established by production of receipt.*

2. *The appellate judge erred by not finding that it was not proper for PW1 (the claimant) to tender exhibits 'P1' and 'P2' instead of PW2 and PW3 who retrieved them.*

3. *The appellate judge erred to convict appellant solely on evidence of PW2 and PW3 that appellant led them to the recovery of exhibits 'P1' and 'P2' without corroboration.*

4. *The appellate judge erred by overlooking the fact that PW1 did not describe his assailant to the Village Executive Officer at the earliest opportunity who was not called to testify.*

We are alive to the fact that this is a second appeal. It is trite law that a second appellate court should not interfere with the concurrent findings of the two courts below unless there are glaring errors on the face of the record, misdirections or non directions. In **Ludovide Sebastian v. R.,** Criminal Appeal No. 318 of 2009 *(unreported)* the Court stated as follows:-

> *"On a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premises that the findings of facts are based on a correct appreciation of the evidence. If both courts completely misapprehend the substance, nature and quality of evidence, resulting in an unfair conviction, this Court must in the interest of justice intervene."*

The same principal was stated in **Edwin Mhando vs. Republic** [1993] TLR 170. See also **DPP vs. Jaffari Mfaume Kawawa** (1981) TLR 149; just to name of few.

In arguing the appeal, the respondent Republic was represented by Mr. David Kakwaya, learned Senior State Attorney. The appellant who was

unrepresented appeared in person and simply adopted the grounds of appeal.

On the first ground of appeal that PW1 did not prove ownership of the bicycle by production of a receipt, Mr. Kakwaya responded that since neither the appellant nor any other person claimed to be the owner of the bicycle, there was no need for the claimant to prove ownership by receipt. He stated that the description given of the bicycle as of AVON make and the serial number C 46685 given by the complainant, sufficed for the purpose. He invited us to dismiss ground 1 as lacking in merit. He referred to the decision of the Court in the case of **Hassan Aweso vs R.,** Criminal Appeal No. 141 of 2003 (unreported) where in similar circumstances, the Court said:

> *"... in cases of this nature it is not necessary to prove ownership where there is nobody else who is claiming the same to be his."*

We associate ourselves with the reasons we stated in AWESO's case and accordingly we dismiss ground 1 of appeal.

As for the second ground of appeal, Mr. Kakwaya conceded that it has merit but submitted that the appellant could have objected or cross examined PW2 and PW3 who had retrieved the bicycle from the bush. He concluded that failure to have PW2 or PW3 tender the bicycle did not prejudice the appellant.

As we said in AWESO (supra), we accept both Mr. Kakwaya's and the appellant's view that it would have been better if PW2 or PW3 had tendered the bicycle instead of the complainat as it was done in this case. However, with respect, we think the appellant was prejudiced by the fact that PW2 and PW3 neither identified the bicycle said allegedly recovered nor did they state the serial number of the said bicycle. This ground has merit.

We agree with the learned Senior State Attorney submission on the law regarding ground 4 of appeal that the law does not provide for the number of witnesses required to prove a fact. It is the credibility of a witness which is relevant and not the number.

The last but crucial ground of appeal is on the patent irreconcilable contradictions and inconsistencies in the prosecution case; between the evidence of PW1 and PW2 and between PW1 and PW3.

Mr. Kakwaya learned Senior State Attorney, at first hesitated, but later, he reluctantly stated that he left the matter to the Court to decide. We think the reaction from the learned Senior State Attorney was correct because the exercise was quite involving and sufficient time was required to study the prosecution evidence.

In the course of studying the record of appeal, we fundamental noted fundamental inconsistencies and contradictions in the evidence of the prosecution witnesses.

For instance, the evidence of PW1 found at page 2 of the record shows that he gave the serial number of the stolen bicycle to the Chairman of Mshinde Village as No. C 46685 and that its make was AVON. It is also evident from the record that apart from the serial number and the make of the bicycle, PW1 did not give to the Chairman of the Village or the

Sungusungu Commander a description of his assailants physically or by their attire.

At page 5 of the record, PW3 testified to the effect that:-

> *"... The Chief of Sungusungu came at my home. The Chief told me to go to arrest the accused persons for banditry at the forest ... We found them at the trading centre."*

It is incredible how PW3 knew that the people he saw at the trading centre were the robbers of the bicycle of the appellant, in the absence of any description from PW1.

PW3 testified further that:

> *"We arrested them and led them to the Chief of Sungusungu.* ***There the complainant was present and he identified the two accused.*** *" (Emphasis added).*

It is the evidence of PW3 that PW1 was already at the sungusungu commander's place before PW2 and PW3 arrived with the assailants of

PW1 and the bicycle. This piece of evidence from PW3 is in sharp contrast with that of PW1 who testified that after reporting the incident to the Village Chairman, sungusungu sub chief and the sungusungu commander, they promised to help him on the following day because night had fallen by then. While at his home during the night PW1 testified that he was informed that the bicycles had been seized and one of them could be his. Then PW1 continued:-

> *"When I went there the accused persons were taken out and the bicycle I was told to identify it. I went to pick it out. The two accused persons were the persons who were taken out."*

Again this contradicts the evidence of PW3 who allegedly found PW1 at the compound of the commander when PW2 and PW3 returned to the commander with the assailants and the bicycles.

That is not all. At page 4 of the record, PW2 testified as to the state of the retrieved bicycles as hereunder:-

> *"The bicycles were in a bush near a primary school. The bicycles were two ... One of the bicycles had a box on its carrier while* ***the second one had a small bag.***

For PW1, the small bag was missing as he testified that:-

> *"**I did not find the bag there** but it was recovered on interrogation. They had thrown it in the bush."*

One is tempted to ask if the bicycle was retrieved intact by PW2 and PW3 with the bag of clothes but at the commander's place, the bag was not there, is PW1 trying to point an accusing finger to PW2 and PW3 who retrieved the bicycle?

We wish to observe here that the testimonies of the prosecution witnesses were quite brief, save for that of PW1. Now, with all these glaring inconsistencies and contradictions in the testimonies of all the three prosecution witnesses, how can they be reconciled? Or is it safe to solely sustain a conviction of the appellant on the basis of the testimonies of PW1, PW2 and PW3, the discrepancies notwithstanding?

As we have already stated above, given the contradictions and the inconsistencies in the evidence of the prosecution witnesses, the testimonies are rendered unreliable and goes to question the credibility of the witnesses and the court ought not to act on it unless it is corroborated by some other independent evidence.

On the credibility of witnesses, the Court had occasion to make the following observation in the case of **Shabani Daudi v. R.,** Criminal Appeal No. 28 of 2000 (unreported), where the Court stated:-

> *"May be we start by acknowledging that credibility of a witness is the monopoly of a trial court but only in so far as demeanor is concerned. The credibility of a witness can also be determined in two other ways:* ***One,*** *when assessing the coherence of the testimony of that witness.* ***Two,*** *when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In these two other occasions the credibility of a witness can be determined even by a second appellate court when examining the findings of the first appellate court."*

See also **Abdalla Mussa Mollel @ Banjoo vs DPP**, Criminal Appeal No. 31 of 2008 (unreported). Our concern here is the coherence of the evidence of the prosecution witnesses, which is full of discrepancies, as we have tried to show.

In another decision of the Court in Mt. 38350 Pte. **Ledman Maregesi vs The Republic,** Criminal Appeal No. 94 of 1988, the Court made the following observation:-

> *"We think that where a witness is shown to have positively told a lie on a material point in the case, his evidence ought to be approached with great caution, and generally the court should not act on the evidence of such a witness unless it is supported by some other evidence."*

The prosecution witnesses in this case either outrightly lied or testified on matters they were unsure of. It is unfortunate that both lower courts did not avert their minds to this aspect. The inconsistencies and the contradictions in the prosecution case renders the credibility of PW1, PW2

and PW3 doubtful and the courts below should not have acted on such evidence to convict the appellant.

In the result, we uphold the appeal. Further, we quash the conviction of the appellant and set aside the sentence. We order that the appellant be released forthwith from prison unless otherwise lawfully held in custody.

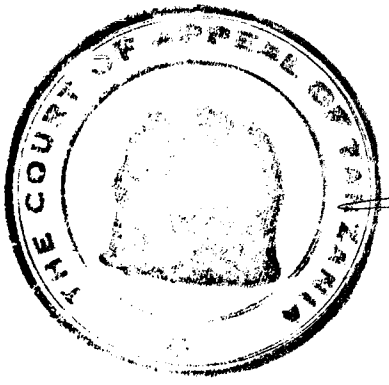
DATED at MWANZA this 4th day of June, 2012.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

E.A. KILEO
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E.Y. MKWIZU
DEPUTY REGISTRAR