

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 302 OF 2012

FRANK MASSAWEAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

(Appeal From the Judgment of the High Court of Tanzania

at Moshi)

(Rugazia, J.)

Dated the 3rd day of November, 2008

in

Criminal Appeal No. 81 of 2007

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JUDGMENT OF THE COURT

20th & 25th June, 2013

KAIJAGE, J.A:

The appellant, FRANK MASSAWE, and six other persons appeared before the District Court of Moshi at Moshi, to answer a charge of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 R.E. 2002. Following a full trial, appellant's co-accuseds were acquitted. The appellant was found guilty, convicted and sentenced to serve a term of thirty (30) years imprisonment. His appeal to the High Court of Tanzania at Moshi was dismissed, hence this second appeal to this Court.

The evidence upon which appellant's conviction was grounded could be stated, briefly, as follows; on 7/8/2000 at 01.00 hours or thereabout, the premises of Kindi KNCU situated within Moshi Rural District were invaded by a group of armed bandits. The bandits made away with one motor cycle and a shotgun which was in possession of PW1, Daniel Sambuo, one of the night guards on duty at the said premises. The robbery was preceded by a serious assault against PW1 who was knocked down unconscious by a stone hurled by the bandits. His colleague, Mathey Mzee (PW2), sustained minor injuries. The said prosecution witnesses did not positively identify any of the robbers at the scene of crime. The incident was reported to the Police Authorities immediately after its occurrence. PW3, No. 4143 D/C Benard was assigned to head police investigations.

In his testimony, PW3 told the trial Court that in the course of investigations, the room occupied by the appellant at Njoro, Moshi Municipality, was searched. The search party which was superintended by PW9, Inspector Pius, recovered a shot gun hidden under a mattress in the appellant's room. The shot gun was found without its bat stock. It was believed to be the one stolen in the course of the robbery incident.

PW5, Peter Munishi, was, at the material time, the Secretary of Kindi KNCU. He testified to the effect that the shot gun bearing serial No. D 118889 which was snatched from PW1 in the course of robbery, was the property of Kindi KNCU. He tendered its licence No. 7425 (Exh P3) issued by the relevant Licensing Authority at the time when it was bought.

In his defence, the appellant disassociated himself from any involvement in the perpetration of the robbery in question. Nevertheless, on account of the evidence of PW3 and PW9, both courts below were satisfied that the case against the appellant was established beyond reasonable doubt.

The appellant filed a memorandum of appeal containing three (3) grounds which basically crystallizes into one ground namely; that the Courts below erred in finding that the case for the prosecution against the appellant was proved beyond reasonable doubt.

In this Court, the appellant appeared in person, unrepresented. Mr. Zakaria Elisaria, learned Senior State Attorney, appeared for the respondent Republic.

Arguing in support of the appeal, Mr. Elisaria contended that the record of the trial Court's proceedings exhibits sufficient evidence proving

the fact that the appellant was found in possession of a shotgun, but evidence establishing the requisite nexus between that gun and the robbery incident is very much wanting. In elaboration, he submitted that PW3 and PW9 who recovered a shotgun from the room which the appellant occupied, did not have it tendered in evidence. In fact, a shotgun allegedly found in possession of the appellant was tendered by the public prosecutor and it was accordingly admitted in evidence, by the trial Court, as Exh PI. In the circumstances, Mr. Elisaria was of the view that Exh PI was improperly admitted in evidence and that the case against the appellant was not proved beyond reasonable doubt. We have been invited to interfere with the concurrent findings of fact by the two Courts below upon the evidence adduced by witnesses called for prosecution side.

With respect, we are in agreement with the learned Senior State Attorney. However, this being a second appeal, we shall be guided in our approach to the evidence according to the principles set forth by this Court in numerous decisions including **Director of Public Prosecutions Vs Jaffari Mfaume Kawawa** [1981]TLR 149. This Court will only interfere with the concurrent findings of fact by the courts below and make its own findings in instances such as where there are misdirection or non-directions on the evidence.

The prosecution case against the appellant is based upon the evidence of PW3 and PW9 which has it that the appellant was found in possession of a shotgun believed to have been stolen during the robbery incident. As alluded to earlier, the said prosecution witnesses did not tender, in evidence, the shotgun allegedly retrieved from the appellant. A shotgun which was admitted by the trial Court as Exh PI was introduced in evidence by a public prosecutor.

This Court in a recent case of **Thomas Ernest Msungu @ Nyoka Mkenya V.R.**, Criminal Appeal No. 78 of 2012 (unreported) had an occasion to make the following pertinent observation:-

" a prosecutor cannot assume the role of a prosecutor and a witness at the same time. With respect, that was wrong because in the process the prosecutor was not the sort of a witness who could be capable of examination upon oath or affirmation in terms of section 98(1) of Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined or cross-examined."

We subscribe to that pertinent observation. In the present case, the prosecutor who tendered Exh PI was not a witness envisaged under the provisions of section 198 (1) of the Criminal Procedure Act, Cap 20 R.E 2002 (the CPA) which provides:-

" S.198(1) Every witness in a Criminal cause or matter shall, subject to the provisions of any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the oath and Statutory Declarations Act. "

So, since the prosecutor was not a witness, he could not be examined or cross-examined on a shotgun he tendered. It is also curious on how the trial court admitted a shotgun from a person who was not a witness and who could not be validly examined or cross-examined by the appellant. In the light of the circumstances in which Exh. PI was tendered by a prosecutor, it is doubtful as to whether or not it was the same shotgun recovered by PW3 and PW9 from the appellant. The record is also clear that prior to a shotgun (Exh PI) being admitted in evidence, the appellant was not accorded an opportunity to raise any objection. As this accord of such an opportunity was not forthcoming from the trial Court, it is risky to assume that Exh PI was the same shotgun recovered from the appellant's room.

We are settled in our minds that Exh PI was improperly admitted in evidence. Once the evidence of the prosecutor is disregarded, there is no evidence touching on a gun matching the description of the stolen shotgun as given by PW5, the Secretary of Kindi KNCU. Similarly, in view of the fact

they claim to have retrieved from the appellant, we are left with no evidence linking up the appellant with the robbery in question.

For the foregoing reasons, we hasten to find that the case for the prosecution was not proved beyond reasonable doubt. We consequently allow appellant's appeal, quash his conviction and set aside the sentence imposed on him. He is to be released from prison forthwith unless otherwise lawfully held.

DATED at ARUSHA this 24th day of June, 2013.

J.H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

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

(MALEWO M. A)
DEPUTY REGISTRAR
COURT OF APPEAL