IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NSEKELA, J.A., MSOFFE, J.A., And KAJI, J.A.)

CRIMINAL APPEAL NO. 230 OF 2004

1. OMARI MOHAMED CHINA ..... 1ST APPELLANT
2. MAMLO ALLY BAKARI ..... 2ND APPELLANT
3. CHARLES NANDUTA ..... 3RD APPELLANT
4. WILSON BERNARD HODI ..... 4TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Mtwara)

(Mandia, J.)

dated the 22nd day of February, 2000
in
Consolidated Criminal Appeals Nos. 65, 66, 67, 68 of 1998

JUDGMENT OF THE COURT

KAJI, J.A.:

Omari Mohamed China, Mamlo Ally Bakari, Charles Nanduta and Wilson Bernard Hodi, who are the 1st, 2nd, 3rd and 4th appellants respectively, were among ten suspects who were jointly charged with various offences in Criminal Case No. 3 of 1998 in the Resident Magistrates Court of Mtwara at Mtwara. For the purpose of this appeal the appellants were jointly charged with two offences as follows:-

1st Count: Conspiracy to commit felony contrary to section 384 of the Penal Code.

2nd Count: Armed robbery contrary to sections 285 and 286

of the Penal Code.

The 2nd appellant Mamlo was also charged separately with two counts, namely:-

5th Count: Being in possession of goods suspected to have been stolen or unlawfully acquired, contrary to section 312 (1) of the Penal Code.

8th Count: Unlawful possession of firearm contrary to sections 30 and 31 of the Arms and Ammunitions Ordinance Cap 223, read together with sections 56 (1) and 59 and paragraph 21 of the First Schedule to the Economic and Organized Crimes Control Act No. 13 of 1984 as amended by Act No. 10 of 1989.

All of them denied the charges against them. However at the end of the day the 2nd, 3rd and 4th appellants were found guilty as charged and were convicted accordingly. They were each sentenced to ten years imprisonment on the 1st count and thirty years imprisonment and 12 strokes each on the 2nd count. The 2nd appellant Mamlo was also sentenced to a fine of shs. 10,000/= or 2 years imprisonment on the 5th count, and seven years imprisonment

on the 8th count.

Sentences of imprisonment were ordered to run concurrently for each appellant.

The facts leading to the case can briefly be stated as follows:–

During the night of 14.1.1998 PW14 Maulidi Salumu's house at Mnyambe, Newala District, was invaded by a group of bandits who broke the rear door and stole therefrom an assortment of property. One of the bandits was armed with a firearm. This bandit fired in the air to scare those who might have come to rescue PW14 and his family. PW14 was hit so hard on the head with an iron bar that he lost consciousness for nine days. The bandits also beat some of PW14's family members including his wife PW15 Sophia Dadi and his sister-in-law PW16 Shakila Dadi. The bandits who had a motor vehicle left for Mtwara with their loot.

The matter was reported to the police who, through investigation, arrested ten suspects including the appellants, and recovered some of the stolen properties.

In their defence the appellants and their confederates-in-crime denied to have been involved in the offences laid against them. However at the end of the day the 2nd, 3rd and 4th appellants and three others were found guilty as charged and were convicted

accordingly. The 1st appellant and four others were acquitted.

The 2nd, 3rd and 4th appellants were aggrieved with the conviction and sentences. They unsuccessfully appealed to the High Court at Mtwara.

The court concurred with the decision of the trial court that the appellants fully participated in the commission of the offences charged. The Director of Public Prosecutions also successfully cross-appealed against those who were not found guilty, the 1st appellant Omari being one of them. The 1st appellant was found guilty and convicted on the 1st and 2nd counts. He was sentenced to ten and thirty years imprisonment respectively.
The 1st, 2nd, 3rd and 4th appellants were dissatisfied with the decision; hence this second appeal.

In their separate memoranda of appeal, the 1st and 2nd appellants each preferred eleven grounds of appeal while the 3rd and 4th appellants twelve and 17 respectively.

However the essence of all grounds revolves around total denial of committing the offences charged, disputing the identification of the stolen properties, and challenging some of the caution statements in which they were implicated.

At the hearing of the appeal only the 1st appellant was present.

The other appellants had opted the hearing to proceed in their absence. The 1st appellant did not add anything material to his grounds of appeal.

The respondent Republic was represented by Mr. E. P. Ntwina, learned State Attorney. The learned State Attorney relied heavily on the caution statements in which the appellants were implicated, the recovery of some of the stolen properties found in the hands of the 1st, 2nd and 4th appellants, and the totality of the prosecution evidence.

As already demonstrated, the 2nd, 3rd and 4th appellants were found guilty by the trial court. Their appeals to the High Court were dismissed for want of merit. They are still protesting their innocence in this Court.

As a general principle, a court of second appeal will normally not interfere with concurrent findings of fact of the two courts below unless both courts completely misapprehended the substance, nature and quality of the evidence resulting in an unfair conviction or where there are misdirections and/or non directions on the evidence (see: **Salum Mhando v. R** (1993) TLR 170).

In the instant case the two courts below found as a fact through the evidence by various witnesses, that on the material day it was the 3rd appellant Charles Nanduta who was driving the motor vehicle Registration No. MT3396 Exh. P.7B which was involved in the robbery.

In his testimony in court the 3rd appellant admitted to have driven it, but he denied to have participated in the robbery. He said he was hired by unknown people for an unknown mission at Newala, and that he ended up at Newala and did not proceed to the scene of crime at Mnyambe village. The trial court found as a fact that there was ample evidence that apart from driving the motor vehicle which was involved in the robbery, he also involved himself heavily in hiding the loot in his father's shamba at Mbae according to the statement of his watchman Yusuf Mkadimba Exh. P.26. The learned judge on first appeal concurred with the trial court on this finding. We are in total agreement with the concurrent findings of fact by the two courts below that there was ample evidence that the 3rd appellant fully participated in committing the offences charged. We are aware that Yusuf Mkadimba did not give oral evidence at the trial after returning to his unknown village in Mozambique. His statement was tendered as evidence under section 34 (B) (2) of the Evidence Act, 1967. We have carefully perused the record and we have been satisfied that, before being admitted as evidence, all the preconditions prescribed under section 34 (B) (2) were satisfied.

As far as the 2nd appellant Mamlo is concerned, there was ample evidence by PW12 ASP Mnyampala and PW18 No. C.7758 D/Sgt. Hamisi that it was the 2nd appellant who showed them a gun which was in an inhabited hut at Amkeni village. According to the Ballistic Expert Report Exh. P.20, it was the very gun which was involved in the robbery.

There was also ample evidence that he was found in possession of some of the properties stolen in the course of the robbery, just few days after the robbery. This included a bicycle Exh. P.21. He claimed the same to be his. But the cash sale receipt he produced had different numbers from those found on the bicycle. The numbers on the cash sale receipt produced by the owner of the bicycle Exh. P.22 tallied with those found on the bicycle. It is to be observed that the robbery occurred in the night of 14.1.1998. The 2nd appellant was found in possession of some of the stolen properties on 18.1.1998. When his wife PW20 Halima Salum left for Muni village on 11.1.1998 – those properties were not there. She found them there on 17.1.1998 when she returned whereby the 2nd appellant told her he had bought them for her. On the following day they were fished out by the police – PW18. PW20 is the wife of the 2nd appellant. We have perused the record and we have been satisfied that the requirements of section 130 of the Evidence Act, 1967 were properly complied with before she was allowed to testify against her husband.

But by going through the charges laid against the 2nd appellant we have noticed one thing which has attracted our minds. One of the charges against the 2nd appellant is armed robbery. In the course of the robbery many properties were stolen. The 2nd appellant was found with some of them. He was charged in the 5th count with being in possession of goods suspected to have been stolen. The goods mentioned in the particulars of the offence appear also in the armed robbery count. We pose and ask: Was the 5th count necessary? We

think it was not necessary. It amounted to duplicity.

As far as the 4th appellant is concerned, there was ample evidence that he fully participated in the commission of the offences charged. This is supported by the totality of the evidence adduced. He was the one who assisted one of the assailants in loading into gunny bags the loot from where they had been stored at Mbae village, according to the statement of Yusuf Mkadimba (Exh. P.26). We have already discussed the admissibility of Exh. P.26.

We now come to the 1st appellant. He was acquitted by the trial court. But he was later convicted by the High Court in a cross appeal lodged by the Director of Public Prosecutions.

We note from the record that the evidence against the 1st appellant was from four sources. First, the caution statement of the 3rd appellant (Exh. P.15) who had alleged that it was the 1st appellant who hired the motor vehicle which was used in the robbery. However in that statement the 3rd appellant exculpated himself saying he was not a willing participant but merely an innocent observer. Since he exculpated himself implicating the 1st appellant, that statement cannot incriminate the 1st appellant as was amply demonstrated by this Court in **Ally Salehe Msutu v. R** (1980) TLR 1.

Secondly is the caution statement of the 4th accused (Exh. P.16) Twalibu Twalibu. In that statement Twalibu mentioned the 1st appellant to have fully participated in committing the offences

charged. But like the 3rd appellant he exculpated himself saying he was merely an innocent observer and denied to have committed the offences charged. His statement cannot incriminate the 1st appellant as we have already demonstrated above.

Thirdly is the oral evidence of the 4th accused Twalibu at the trial where he implicated the 1st appellant. That evidence is that of an accomplice which, as a matter of practice, requires corroboration to found conviction – see **Pascal Kitigwa v. R.** (1994) TLR 65. We will deal with this at length in the following ground.

Fourthly, is the statement of Mkadimba (Exh. P.26). We have already discussed its admissibility. After holding that it was properly admitted in evidence, it is our considered view that it is competent evidence capable of grounding a conviction without necessarily being corroborated. It does not require corroboration in order to be relied upon. In that statement Mkadimba had stated that it was the 1st appellant who remained at Mbae guarding the loot, and that on the following day, the 1st appellant assisted by the 4th appellant loaded the loot into gunny bags. This is sufficient evidence that the 1st appellant was a party to the crime charged. Furthermore, it is our considered view that, Mkadimba's statement Exh. P.26 corroborated the testimony of the 4th accused who had mentioned the 1st appellant to be among the robbers he travelled with from Mtwara to Mnyambe, Newala where the robbers robbed PW14 using firearm, and later left for Mtwara and hid the loot at Mbae. It is therefore our considered view

that, although the caution statements of the 3rd appellant and the 4th accused could not be the basis upon which to found a conviction on the 1st appellant for the reasons we have already stated, yet the evidence of Yusuf Mkadimba and the evidence of the 4th accused which was corroborated by Yusuf Mkadimba as we have already demonstrated, established the guilt of the 1st appellant to the standard required by law.

For that reason, we agree with the learned judge on first appeal that the 1st appellant participated fully in robbing PW14.

As far as the offence of conspiracy is concerned, the totality of the evidence suggest that the appellants, and others not in this appeal, conspired to commit the offence of armed robbery. There is nothing to fault the concurrent findings of the courts below on this. Thus the appeal against conviction in respect of the 1st and 2nd counts has no merit. The 2nd appellant's appeal against conviction in respect of the 8th count has also no merit. However his appeal against conviction and sentence in respect of the 5th count has merits as we have already demonstrated.

As far as sentence is concerned the appellants were each sentenced to ten (10) years imprisonment on the 1st count and 30 years imprisonment on the 2nd count. The 2nd, 3rd and 4th appellants were also ordered to undergo 12 strokes each. We have no

quarrel with the sentence on the 2nd count. But the sentence of 10 years imprisonment on the 1st count is definitely illegal. The maximum sentence for the offence of conspiracy to commit felony contrary to section 384 of the Penal Code Cap 16 is seven (7) years imprisonment. Therefore the sentence of ten (10) years imprisonment meted on each appellant on this offence is illegal. The learned trial Senior Resident Magistrate is also advised to revisit his sentencing powers under section 170 of the Criminal Procedure Act, 1985.

The sentence of 15 years imprisonment on the 8th count in respect of the 1st appellant is the minimum provided by law.

In the end result, and for the reasons stated, we dismiss the appeal against conviction in respect of the 1st and 2nd counts. We also dismiss the 1st appellant's appeal against conviction in respect of the 8th count. We set aside the sentence of 10 years imprisonment on the 1st count and substitute therefor a sentence of three (3) years imprisonment each. We dismiss the appeal against sentence in the 2nd count. We dismiss the 1st appellant's appeal against sentence in respect of the 8th count. We allow the 1st appellant's appeal against conviction and sentence in respect of the 5th count, and quash the conviction and set aside the sentence imposed thereat.

DATED at DAR ES SALAAM this 31st day of January, 2006.

H. R. NSEKELA
JUSTICE OF APPEAL

J. H. MSOFFE
JUSTICE OF APPEAL

S. N. KAJI
JUSTICE OF APPEAL

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

(S. M. RUMANYIKA)
DEPUTY REGISTRAR

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 230 OF 2004

1. OMARI MOHAMED CHINA ..... 1ST APPELLANT
2. MAMLO ALLY BAKARI ..... 2ND APPELLANT
3. CHARLES NANDUTA ..... 3RD APPELLANT
4. WILSON BERNARD HODI ..... 4TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the conviction of the High Court of Tanzania at Mtwara)

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1. **Omari Mohamed China]**
2. **Mamlo Ally Bakari] ……. Appellants**
3. **Charles Nanduta]**
4. **Wilson Bernard Hodi]**

Versus

The Republic …… Respondent

In Court this 31st day of January, 2006

Before: The Honourable Mr. Justice H. R. Nsekela, Justice of Appeal
The Honourable Mr. Justice J. H. Msoffe, Justice of Appeal
And The Honourable Mr. Justice S. N. Kaji, Justice of Appeal

THIS APPEAL coming for hearing on the 5th day of December, 2005 in the presence of the First Appellant and in the absence of the Second, Third and Fourth Appellants who did not wish to be present, AND UPON HEARING the First Appellant and Mr. P. Ntwina, State Attorney, for the Respondent/Republic when the appeal was stood over for judgment and this appeal coming for judgment this day;

IT IS ORDERED that the appeal by all appellants against conviction on the first count is dismissed, the sentence of ten (10) years imprisonment imposed thereon is set aside and a sentence of three (3) years imprisonment is substituted therefor.

The appeal by all Appellants against conviction and sentence on the second count is dismissed.

The appeal by the First Appellant against conviction and sentence on the fifth count is allowed, conviction is quashed and the sentence imposed thereon is set aside.

The appeal by the First Appellant against conviction and sentence on the eighth count is dismissed.

Dated this 31st day of January, 2006.

Extracted on the 31st day of January, 2006.

S. M. RUMANYIKA

DEPUTY REGISTRAR