IN THE HIGH COURT OF TANZANIA

AT MBEYA

ORIGINAL JURISDICTION

(Mbeya Registry)

CRIMINAL APPEAL NO. 12 OF 2002

(From Mpanda District Court Criminal Case

No. 261 of 2002)

MAJALIWA PETRO ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

MREMA, J.

This judgement was fixed to be delivered on 25/02/2003. But since I have now got opportunity to write it, I find no reason to keep the judgement until that date. Having said that I now proceed to give reasons for my decision based on the merit of the appellant's appeal.

The appellant is MAJALIWA PETRO. He was charged with and convicted of the offence of robbery with violence C/s. 285 and 286 of the Penal Code by the Mpanda District Court. Following that conviction the [illegible] Honorary Magistrate Mr. Mlegehi sentenced him to serve fifteen (15) years imprisonment. The conviction and the sentence aggrieved the appellant and in the result he preferred this appeal.

It is the case for the prosecution at the trial, that on the 27th day of July, 2000 at about 7.00 p.m. (19.00 Hrs.), at Katumba Refugees Settlement within Mpanda District, Rukwa Region, the appellant confronted one PERAYA W/O ANDREA, the complainant (PW.1), and robbed her of her Shs.70,000/= by violent means. He (appellant) denied the charge and the evidence given by Deraya (PW.1) and Specioza d/o Bisimana.

In brief, the complainant's case was that on the date material to this case PW.1 and PW.2 were coming from Mnyaki Market and were on their way home at Kamiasula. PW.2 was walking behind PW.1. Then a thug came from behind PW.2, then went past her and on reaching PW.1 he seized her from behind, threw her down, twisted her right arm while was holding

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her hand-bag and then took it away from her. The thug then released himself from PW.1 and sped away carrying the hand-bag which, according to PW.1, contained T.Shs.70,000/= cash. PW.2 corroborated PW.1's testimony but she would not confirm whether or not the bag contained T.Shs.70,000/=.

There is only one central question and this is whether the appellant was properly identified by the witnesses (PW.1 and PW.2)? The learned State Attorney who argued the appeal on behalf of the Respondent/Republic maintained that the identification of the appellant by PW.1 and PW.2 was without mistaken identity. According to him, the offence took place when there was still light from the sun, as it was just about 7.00 p.m. when the sun was just setting. Secondly, it is Mr. Malata's submission that PW.1 had sufficient time to see and watch the appellant when the latter was searching her breasts and also when he threw her down, twisted her right arm and then snatched from her hand her hand-bag. Third, according to the Learned State Attorney, the appellant was known by both PW.1 and PW.2 and so the question of unmistaken identity would not arise. Also that the appellant never refuted the fact that the two witnesses knew him.

According to the appellant, the evidence was cooked against him because of the well known sour relationship between the two tribes - TUSI and HUTU. It is the appellant's testimony that PW.1 and PW.2 are Tusi and himself a Hutu. He further stated that at Katumba there were other two persons by the name of Majaliwa.

Having read the evidence and judgement of the District Court very closely and also the submission by the Learned State Attorney, I am not inclined to believe that there was any robbery that took place on the material date against PW.1. First, both the prosecution witnesses told the trial court that the offence took place not far away from the residential place where people were living. PW.1 claimed that they raised alarm but only children turned up. And, yet, none of those children were called to give evidence. She also said that one adult went to the scene but that was after the bandit had run away. But the said "adult" was never mentioned by the name and such witness would have been important to tell the court as what PW.1 and PW.2 related to him or her, and whatever they told him or her as who robbed PW.1.

I have also examined a document purported to be a PF.3 which the trial court admitted as exhibit "E". This document was issued by Katumba Police Station on 1/08/2000 referring PW.1 to Katumba Medical Centre. If PW.1 was injured on 27/7/2000 why did she wait for five days before she reported the matter to the police? Also in the course of perusing the district court's proceedings I came across a document written by AFISA MTENDAJI WA KIJIJI - KAMINULA - KATUMBA, which was received by the trial court and marked as Exhibit "H". This document (dated 1/8/2000) was addressed to the Police Officer incharge of Katumba Police Station, being a report relating to PW.1's complaint about the alleged robbery committed to her on 27/7/2000. On this evidence, my concern is why PW.1 had to wait for such a long period to complain to the relevant authority if it was true in fact that she did identify her assailant and robber? And if she was hurt, as purportedly indicated on exhibit "E", did she have to wait for five days before she went to hospital? After all, this exhibit "E" was admitted against legal procedure because the appellant was never asked if he had any comment on the contents of exhibit "E" before admitted into evidence. He was therefore denied his right of objecting or, otherwise, to the admission of the purported PF.3.

Again, if the complaint was reported to Katumba Police Station why there was no investigation done by the police to confirm whether or not PW.1 was really robbed of her Shs.70,000/=. Another doubt is that the appellant is claimed to have dropped down his hat (cap) when wrestling with PW.1. That after he had walked some distance away he realized his cap had dropped down. According to the evidence on record, the appellant returned and snatched it away from PW.1 who had picked it up. It was not stated that the appellant (DW.1) was armed. A supplementary question that poses, is why PW.2 did not assist PW.1 to stop the appellant from taking back the cap which would be used as part of evidence? There is nothing in evidence suggesting what PW.2 did to assist PW.1, apart from the alarm she allegedly raised after the alleged robber had run away.

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In the totality of the evidence on record, with respect to the Learned Counsel, I am not satisfied that the case for prosecution was so cogent that no reasonable doubt could be afforded to the appellant. In my considered view, the prosecution's case falls short of the standard required to prove against the innocence of the accused beyond reasonable doubt. I find it doubtful as whether the circumstances as narrated by PW.1 and PW.2 had any relationship with the offence of robbery. And if it was true that the appellant confronted the witnesses then the scuffle between them could have been of something else. In the result I allow the appeal, quash the conviction and set aside the sentence. As a consequence, I therefore, order the immediate release of the prisoner unless he is otherwise lawfully held. Accordingly it is so ordered.

A. C. MREMA

JUDGE

11.12.2002

AT MBEYA, this 11/12/2002 in the presence of Ms Sambula, Learned State Attorney.

A. C. MREMA

JUDGE

11/12/2002