IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: RUTAKANGWA, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CRIMINAL APPEAL NO. 255 OF 2006

MSAFIRI ISSA DODO]
OMARY RASHID RAMADHANI] ..... APPELLANTS
VERSUS
THE REPUBLIC ..... RESPONDENT

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

(Masanche, J.)

dated the 4th day of October, 2006
in
Criminal Appeal No. 67 of 2006

JUDGMENT OF THE COURT

1 & 4 December, 2008

MBAROUK, J.A.:

The appellants Msafiri Issa Dodo, Omary Rashidi Ramadhani and six others were charged before the District Court of Kondoa at Kondoa with the offence of armed robbery contrary to sections 285 and 286 of the Penal Code. The appellants were convicted and sentenced to thirty (30) years imprisonment each. The trial District Court found the other six (Accused No. 3 – 8) not guilty and acquitted them. The

appellants appeal at the High Court (Masanche, J.) was dismissed. Aggrieved, hence this appeal.

The background giving rise to the case may briefly be stated: On 6.4.2004, Issa Dodo (PW1) the father of the 1st appellant was visited by his son who complained that his wife had run away. On 10.4.2004, at 9.00 am, about three to four days later, the same 1st and 2nd appellants in company with other people went to the house of PW1 and asked for a torch claiming that a cow had bolted out and they wanted to look for it. In the exercise of giving out the torch, a group of people entered into the house and beat up PW1 and PW2 (the mother of the 1st appellant) and injured them in the process. That group of people took away money to the tune of Tshs. 880,000/=. An alarm was raised and people gathered. PW1 and PW2 told the gathering that, the bandits were actually led by their son, the 1st appellant and 2nd appellant who married their daughter.

In his defence the 1st appellant claimed to have been in the lock up on 12.4.2004 after having been suspected to have stolen

cash Shs. 450,000/= from his employer Francis William Yanga. On 13.4.2004, he said he was out on bail. On 14.4.2004 when he went to the house of his father, "sungusungu" came and arrested him and sent him to the police at Kwamtoro where he was charged.

On the other hand, the 2nd appellant's defence was that on 13.4.2004 morning hours while he was at home with his family at 4.00 p.m., a group of people came with his neighbour and Balozi (a ten cell leader). As Gumbo Village Officer he was suspected of stealing, sent to police Kwamtoro and on 16.4.2004 sent to police Kondoa and charged.

Both, the 1st and 2nd appellants were found guilty as charged by the trial court. Their appeal at the High Court was dismissed.

Each appellant in this second appeal filed his own grounds of appeal, but looking at them, they can conveniently be reduced to the following major complaints:-

1. *That, Honourable Judge and the trial Principal District Magistrate erred in law and fact on relying on a weak identification evidence of PW1 and PW2.*

2. *That, Honourable Judge and the trial Principal District Magistrate erred in law and fact on relying on weak identification evidence which was not corroborated.*

3. *That, Honourable Judge and the trial Principal District Magistrate erred in law and fact on relying on contradictory prosecution evidence.*

4. *That, Honourable Judge and the trial Principal District Magistrate erred in law and fact by not considering the defence case in their judgment.*

In this appeal, the appellants appeared in person and Ms. Neema Mwanda, learned State Attorney appeared for the respondent Republic.

We have opted not to discuss the substance of the appeal first, before satisfying ourselves on some misdirections we have noticed in both lower courts judgments.

First, is on the issue of the failure to consider the appellants/accused defence at the trial court. With due respect to the trial Principal District Magistrate, we have seen the judgment

written by him. Clearly the record shows that he has failed to consider the appellants' defence. This was a serious error. Several decisions of this Court have ruled that failure of the trial court to fully consider the entire defence evidence in the judgment before finding the appellant guilty is a serious error. See for instance, **Charles Samson V. R.** [1990] TLR 39 and **Alfeo Velentino V. R**, Criminal Appeal No. 92 of 2006 (unreported).

In the instant case, the record at pages 34 – 35 where the trial court's judgment is found, we have noted that the Principal District Magistrate has clearly failed to consider the appellants' defence. He just wrote as follows:-

> *"**DW-1**: Msafiri Issa Dodo 28 years denied the charge and called no defence witness.*
>
> ***DW-2**: Omari Rashidi Ramadhani - Adult denied the charge.*
>
> ***3rd Accused**: Godfrey Samson Ngambi – 24years denied the charge.*

> ***4th Accused**: Hassan Abdallah 30 years denied the charge.*
>
> ***5th Accused**: Ramadhani Ally – 52 years denied the charge*
>
> ***6th Accused**: All denied the charge and had no witness each to call."*

Surely this is not the way to consider or analyse the defence. We are of the opinion that, the trial magistrate was just brushing aside the defence of the appellants after having formed the opinion that the appellants were guilty. In the decision of this Court in **Alfeo Valentino V. R.** (supra), it was stated:

> *"We are of the settled mind, therefore, that the trial court fatally erred in not considering the entire defence before finding the appellant guilty."*

In the instant case, the 1st appellant raised a defence of alibi, claiming that on the day the robbery happened, he was in the lock-up after being suspected to have stolen Shs. 450,000/= from his employer. As it appears in the record, the trial Principal District failed

to consider the appellant's defence of alibi. Surely we are of the opinion that that was a serious error. Unfortunately, even the first appellate court misdirected itself and failed to address itself on this omission Ms. Mwanda, learned State Attorney conceded to that effect.

Secondly, the learned first appellate judge seems to have been prejudiced after having thought that if a son beats up his father or mother, he will end up with a curse on earth. This is apparent at page 51 of the judgment, where he says:

> *"The appellants should remember the teachings of the scripture. One of the Ten Commandments says:*
> *"Honour your father and your mother, that your days may be long in the land which the LORD YOUR God gives you."(Exodus 20 - 12).*

We are of the considered opinion that, that was not a correct approach in dealing with judicial decisions in criminal cases. Procedures in criminal offences are being governed by the Criminal Procedure Act, Cap. 20, R. E. 2002, the relevant penal law and the Evidence Act, and not by ten commandments. This was another

gross misdirection by the learned High Court Judge which was a fatal error.

Thirdly, the leaned first appellate judge imposed an exaggeration in his judgments not to be found anywhere in the record of the testimonies of the prosecution witnesses. At page 51 of the record, he is saying:

> *"One among the gang had a **pistol**."*
>
> *(Emphasis added).*

Also at the same page, he further says:-

> *" there was light from the torch, a **lamp** and ..." (Emphasis added).*

He is not borne out by the record in these findings. None of the prosecution witness said that one among the gang had a **pistol**, or there was a **lamp**. Through his own overzealousness the learned High Court Judge added some flavour not to be found anywhere in the record. This was another gross misdirection found in the High

Court Judgment, which was also conceded by the learned State attorney for the respondent Republic as a fatal.

Fourthly, as shown at page 21 of the record, the trial Principal District Magistrate, after the closure of the prosecution case, failed to comply with section 231 of the Criminal Procedure Act, Cap.20 R.E. 2002 (C.P.A.), which provides as follows:-

> *"Section 231. Defence*
> *(1) At the close of the evidence in support of the charges, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or in relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted* ***the court shall again explain the substance of the charge to the accused and inform him of his right*** *–*
>
> *(a)* ***to give evidence whether or not on oath or affirmation, on his own behalf; and***

(b) ***to call witness in his defence,***
and shall then ask the accused person or his advocate if it is intended to exercise any of the above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not with to exercise any of those right."

(Emphasis added).

This Court in the case of **Ndamashule Ndoshi V. R.,** Criminal Appeal No. 120 of 2005 (unreported) had the following to say on the non compliance with section 231 of the C.P.A.:

"Section 231 of the Act contains a fundamental right of an accused person: the right to be heard before they are judged. It directs that a trial magistrate must inform an accused that they have a right to make a defence or choose not to make one in relation to the offence charged or to any other alternative offence for which the court could under the law convict. ***Not only is an accused entitled to give evidence in***

> ***their defence but also to call witnesses to testify in their behalf.*** *So the section is an elaboration of the all important maxim* ***audi altenam partem*** *and that no one should be condemned unheard."*
>
> *(Emphasis added).*

Ms. Mwanda conceded that the appellants were not provided with their entitled rights as stipulated by section 231 (1) of the CPA by the trial court. Hence, for those general misdirections of the courts below, the learned State Attorney, urged us to order for a re-trial.

On our side, we think, under normal circumstances we should have ordered a re-trial, but in the particular circumstances of this case, we shall go further. This is because of the weak identification evidence and the double standard on the side of the trial Principal District Magistrate.

On the issue of weak identification evidence, the prosecution mainly depended on PW1 and PW2. The record shows that the

appellants borrowed one torch from PW1. The alleged robbery happened at night where a group of about ten people invaded the house of PW1. A torch borrowed from PW1 was used by the bandits to commit robbery. As pointed out by the appellants, the record on the prosecution case is silent on the power of the batteries in the said borrowed torch. We are not told whether the torch contained fully charged batteries or half charged. The intensity of the torch light was not disclosed. The distance of illumination is not given. We think the principles laid down for proper identification in the case of **Waziri Amani V.R**. [1980] TLR 250 have not been sufficiently met. After all, how can a torch held by one of the bandits help in the identity of other bandits? We are of the considered opinion that the torch light whose intensity was not described was not sufficient for the identification of the appellants even if PW1 and PW2 knew the appellants before, as urged by the learned State Attorney. The witnesses (PW1 and PW2) might have assumed that it was their son and in-law.

For these reasons, we are of the considered view that, the identification of the appellants was doubtful in those circumstances.

Secondly, the trial Principal District Magistrate showed double standards in deciding the case. PW1 unequivocally stated that he saw not only the appellants but also their co-accused, i.e the 3rd and 4th accused. To quote him, he said:

> *"many people entered my room whom I identified, tied me by rape that was 3rd accused Godfrey Samson Nyambi, 4th accused Hassani Abadallah entered my house and tied my legs."*

Further at page 9 of the record, when PW1 was cross examined by the 1st accused he replied that:

> *"3rd accused came and beat and wanted to kill me. Accused No. 4 came with the short person."*

However, what surprises us is that in his judgment, he convicted the appellants only using the same evidence but acquitted the 3rd and 4th accused reasoning thus:

> *"The accused No. 3 – 4 all gave a story had gone to Kwamtoro and hence moved to Sanzawa to buy chicken.* ***They were not seen at the area of incident."***
>
> *(Emphasis added).*

We are of the considered opinion that, the act of the trial court to acquit the 3rd and 4th accused person and convict the 1st and 2nd appellant was an act of double standard, because all were presumably identified by PW1. Why others should be acquitted and others be convicted, at the time when the record has shown the same witness said he identified them? This clearly was a double standards found on the side of the trial court. The evidence was either good enough to cover all or unreliable for all.

In those circumstances, we are of the view that, had the courts below properly directed themselves on those issues, they would have arrived to a different conclusion.

For those misdirections and discrepancies we have found the appellants' appeal with merit. Hence, we accordingly allow the appeal, quash the conviction and set aside the sentence of imprisonment. The appellants are to be released forthwith from prison, unless otherwise lawfully held.

DATED at DODOMA this 3rd day of December, 2008.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

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

(S.S. MWANGESI)
SENIOR DEPUTY REGISTRAR