IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MSOFFE, J.A., MBAROUK, J.A. And BWANA, J.A.)

CRIMINAL APPEAL NO. 114 OF 2005

1. JUMA SAID
2. YAHAYA ABDALLAH ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

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

(Mchome, J.)

dated the 23rd day of March, 2004
in
Criminal Appeal Nos. 204 & 205 of 2002

JUDGMENT OF THE COURT

28 April & 5 May, 2010

MBAROUK, J.A.:

The appellants, Juma Said and Yahaya Abdallah were jointly charged before the District Court of Ukerewe at Nansio with the offence of armed robbery contrary to Sections 285 and 286 (1) of the Penal Code, Cap. 16 as amended by Act No. 10 of 1989 and sentenced to thirty (30) years imprisonment each. Aggrieved, the appellants unsuccessfully appealed to the High Court (Mchome, J.).

Still protesting their innocence, the appellants have lodged this second appeal.

At the hearing of the appeal, the appellants were represented by Mr. Jerome Muna, learned advocate, whereas the respondent Republic was represented by Mr. Victor Kahangwa, learned Senior State Attorney.

Initially, this Court struck out the supplementary memorandum of appeal filed by Mr. Muna after having been found to be incompetent, hence the learned advocate for the appellant argued on the issue of identification as the main ground of appeal.

As pointed out earlier, the appeal mainly stands or falls on the issue of identification of the appellants in the commission of the offence of armed robbery. Mr. Muna, strongly argued that both two courts below failed to properly evaluate the evidence of the prosecution witnesses, especially PWs 2, 3, 4 and 5. In substantiating the point, Mr. Muna submitted that PW2, PW3, PW4 and PW5 testified to the effect that while they were in the boat heading to Kunene Island, they were forced to get out of the boat

and threw themselves into the Lake. Mr. Muna further submitted and wondered as to why the above named prosecution witnesses failed to shout or cry for help while they were just 100 metres away to reach the Lake shore at Kunene Island.

Secondly, Mr. Muna wondered why PW2 failed to report the incident after they safely arrived at Kunene Island if he truly identified the appellants. Mr. Muna submitted that PW2 named the 1st Appellant to his colleagues only later on. He branded the act of naming the 1st Appellant later on as an afterthought.

Mr. Muna also submitted that there was no reason as to why the two courts below failed to consider the 1st Appellant's defence as truthful. He said that the 1st Appellant testified before the trial court that after leaving Kunene Island they arrived at Musoma Ruhu bay and parked the boat and took out the engine and sent it for custody in one Restaurant *(mgahawa)*. Thereafter, he said, the 1st Appellant took the boat engine to PW7 who contracted her to hire it. However, Mr. Muna added that no record of a written contract was tendered in

court even if PW7 confirmed that she entered into a contract with the 1st Appellant.

For those reasons, he urged us to hold that the 1st Appellant was not identified in the commission of the offence of armed robbery.

As to the 2nd Appellant, Mr. Muna submitted that both courts below failed to properly evaluate the evidence in connection with the commission of the offence charged against him. He contended that, PW2 testified to the effect that he identified the 2nd Appellant by face. However, Mr. Muna wondered, if that was true, why an identification parade was not conducted.

With those shortcomings, Mr. Muna urged us to give the benefit of doubt in favour of the appellants.

On his part, the learned Senior State Attorney from the outset supported the conviction and sentence imposed on the appellants. As on the point of identification, he submitted that, the appellants with PW1 and PW2 talked before the incident for more than one day

in broad day light. Also, he said, the robbery took place in broad day light too. Furthermore, PW7 who hired the engine boat from the appellants confirmed that she hired the boat engine from the appellants. Hence, generally he submitted that the claim that the appellants were not identified has no merit.

As to the point raised by Mr. Muna that PW2 and his colleagues failed to shout for help while they were just few metres from the lake shore, Mr. Kahangwa submitted that it could not have been easy for a person who is at gun point to raise an alarm for his safety. Mr. Kahangwa further submitted that as far as the stated 100 metres was just an estimation, it is also possible that PW2 and his colleagues dropped themselves into the lake even before the 100 metres.

As for the issue of PW2 not reporting the incident, Mr. Kahangwa submitted that PW2 immediately reported the incident and PW9 confirmed the report and he further said that even appellants names were mentioned.

On the issue of an identification parade, Mr. Kahangwa submitted that the learned High Court Judge erred when he stated in

his judgment that the appellants were identified at the Police Station at an identification parade, while in fact no parade was conducted. However, the learned Senior State Attorney contended that inspite of the fact that an identification parade was not conducted, the record shows that there is enough evidence to implicate the appellants. As to whether or not there was a written or oral contract between the 1st Appellant and PW7 concerning hiring the boat engine, Mr. Kahangwa submitted that the record impliedly shows that PW7 noted that there was an oral contract.

For the reasons he submitted, Mr. Kahangwa urged us to dismiss the appeal and uphold the conviction and sentence imposed on the appellants.

The task before us is to satisfy ourselves as to whether or not the two courts below adequately probed the matter and justifiably convicted the appellants on the strength of the evidence. However, being a second appeal we will be cautious in re-evaluating the evidence on the concurrent findings of fact made by the courts below. As stated in **Amiratlal Damodar's Maltaser and Another**

t/a Zanzibar Silk Stores v A. H. Jariwalla t/a Zanzibar Hotel [1980] TLR 31, that:

> *"in my respectful view, where, as in the instant case, there are concurrent findings of facts by two courts, this Court should as a rule of practice follow the long established rule repeatedly laid down by the Court of Appeal for East Africa, that is that an appellate court in such circumstances should not disturb concurrent findings of facts unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or violation of some principle of law or procedure."*

Also see the case of **Salum Mhando v Republic** [1993] TLR 170.

This appeal mainly stands on the issue of the appellants identification. The two courts below were of the settled view that the appellants were positively identified before and after the commission of the offence. In support of the trial court's decision, the High Court Judge stated in his judgment that he found nothing to interfere with

the trial court's well reasoned judgment. The reasons given by the High Court Judge which led him to support the trial court's decision that the appellants were positively identified as stated at page 105 of the record are that:

> *"The appellants and the complainants talked for more than one day on broad day light. The robbery took place on broad day light too."*

We on our part, fully support the reasons given by the two courts below which led to their findings that the appellants were properly identified. This is because, the record clearly shows that PW1 and PW2 met the 1st and 2nd Appellants in broad day light before the robbery concerning PW1's stolen fishnets. PW2 accompanied the 1st and 2nd Appellants in the boat with PW3, 4 and 5 until when they approached Kunene Island in Lake Victoria where the robbery occurred. The robbery incident occurred in broad day light, hence PW2, 3, 4 and 5 were able to identify the appellants. Furthermore, the record shows that PW2 testified that on their way to Kunene Island in the boat, he saw the 2nd Appellant holding a gun

whereas the 1st Appellant was wielding a *panga* which he was hit with it. This confirms the involvement of both the appellants in the incident of robbery in this case.

In addition to that, we agree with the High Court Judge in his findings concerning the stolen boat engine that was found in the possession of Mama Christina (PW7), where he stated in his judgment at page 105 that:

> *"The police informer told them the engine was hired by Mama Christina and the police went and found it there. Mama Christina corroborated that she hired the same from the appellants."*

The fact is that PW1 tendered his receipts for the buying of the engine which contained the same engine number as it appeared on the stolen engine. That confirmed that the 1st Appellant cannot deny his involvement in that incident of robbery of that engine. The 2nd Appellant too as shown earlier cannot escape his involvement in the incident of robbery in this case.

At this juncture, we are of the considered opinion that the reasons which we have stated herein above are enough to hold that both the appellants were properly identified, convicted, and sentenced for the offence they were charged with.

In the circumstances, and without going any further, we find no reason to differ or disturb the concurrent findings of the two courts below. In the event, the appeal is hereby dismissed.

DATED at MWANZA this 30th day of April, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

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

(J. S. MGETTA)
DEPUTY REGISTRAR