IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 9 OF 2008

EMELYE WILLIAD @ KAZIULAYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mchome, J.)

dated the 23rd October, 2007
in
D.C) Criminal Appeal No. 27 of 2006

.....

JUDGMENT OF THE COURT

1st & 3rd September, 2010

MANDIA, J.A:

The appellant EMELYE WILLIAD @ KAZIULAYA was charged with robbery c/s 285 of the Penal Code in the District Court of Njombe at Njombe. He was found guilty, and convicted and sentenced to imprisonment for thirty years. The appellant was charged jointly with one BENO MLOWE who was also convicted and sentenced to the same term of imprisonment as him.

Both the appellant and his confederate were aggrieved by the conviction and sentence, and preferred an appeal to the High Court of Tanzania at Iringa. The High Court allowed the appeal of BENO MLOWE and dismissed the appeal by the appellant. Still aggrieved, he preferred a second appeal to this Court. The appellant filed a memorandum of appeal containing two grounds, the substance of which was **first,** at the time of sentence he was seventeen years of age and should not have been sentenced to a term of imprisonment, and **secondly,** that the item he is alleged to have stolen was planted on him.

At the hearing of the appeal the appellant appeared in person, unrepresented, and the respondent/Republic was represented by Ms.Neema Mwanda, learned Senior State Attorney. The appellant adopted his memorandum of appeal and stated that he had nothing to add to it. On her part, the learned Senior State Attorney supported the conviction and sentence.

The facts as adduced in the trial court showed that on 16/1/2006 at 10.00 p.m. at night PW1 Zuberi Lugenge of Matalawe Street, Njombe town, was returning home from work. When he arrived at the post office area which was dark, he was stopped by two persons who instructed him to sit

down and surrender all his possessions. He resisted and fought the two persons. The two persons in turn grabbed him by the neck, allegedly cut him with a panga, stole his wrist watch of Seiko make valued at sh.8,000/=. PW1 tendered a wrist watch as Exhibit P1 and a panga as Exhibbit P2. PW1 testified that he went home after the robbery. After the appellant was arrested he was called by the police.

PW2 Makrine s/o Anyangile testified that on 17/1/2006 at 6.00 a.m in the morning he was on his way from home to work. He heard an alarm at the District Council slaughter house. He went there and found two persons being assaulted by a crowd which had apprehended the two persons who carried offensive weapons. At the police station the second accused, now the appellant, was found in possession of a watch. PW2 did not clarify on how the appellant reached the police station, whether he was sent there by the crowd or himself (PW2).

PW3 C 8174 Detective Sergent Kassim Mngoni testified that on 17/1/2006 at about 7.15 a.m. he was perusing the report book at Njombe Police Station and while doing that a group of persons brought the appellant there with two pangas. He searched the appellants and seized a watch from him which was identified by PW1 as his property. PW3 tendered two

statements as Exhibits P3 and P4 and testified that those were made by the appellant and the other person he was accused with.

When the prosecution closed its case each one of the two accused persons gave their defence on oath in which they claimed that they were rounded up on the morning of 17/1/2006 and joined together while they did not know each other. On his part the appellant admitted to knowing one Fadhili Msigwa and not the person he was jointly charged with i.e Beno Mlowe. Fadhili Msigwa was however, not joined in the charge. The appellant claimed PW2 planted a watch on him taken from Fadhili Msigwa. The appellant claimed that Exhibit P3 is not a voluntary statement.

In the first appeal to the High Court the then first accused person **Beno Mlowe** had his appeal allowed on the ground that there was doubt on whether the statement he made to the Police was voluntary or not, and that the statement lacked corroboration. For the appellant the High Court found corroboration in the watch found on the appellant which was identified by PW1. The appellate High Court judge therefore dismissed the appeal by the second accused. The second accused preferred the present appeal.

We have gone through the record and the arguments presented before us. Our opinion is that the issues raised in the memorandum of appeal are non-issues. The main issue is the perfunctory manner in which the trial was conducted, and which the first appellate court did not consider. **First**, it is admitted that PW1 did not identify his assailants in the dark at 10.00 p.m on 16/1/2006, and that he went home after the attack. **Second,** PW2 saw a crowd assaulting the appellant on the morning of 17/1/2006, but none of those who were in the crowd testified in court. **Third,** the crowd sent the appellant to the Police Station with two pangas but there is no record of PW3 C 8174 D/Sgt Kassim Mngoni taking possession of the pangas at the Police Station. That is why he did not tender them in evidence. **Fourth**, PW1 told the trial court he was called to the Police Station after the arrest of the appellant. He did not specify the date and time he went to the Police Station. Was it immediately after the crowd reached the Police Station, or later? **Fifth,** if PW3 D/Sgt Kassim Mngoni did not take possession of the pangas and watch, these items must have remained in the hands of the unnamed crowd. If he took possession of the items after a search as he claimed, he should have acted under Section 24 (b) of the Criminal Procedure Act and kept the items until such time they were tendered in

court. **Sixth,** if PW1 reached the Police Station after being called there by an unnamed person or persons, who gave him the watch and the pangas for him to produce in court? **Seventh**, the statement of the accused persons were admitted collectively as Exhibits P3 and P4 without each of the two accused persons being shown his statement and admitting that he made it.

We have shown the discrepancies and contradictions in the case as presented by the prosecution. There are too many ends requiring to be tied up which the trial court and the first appellate court should have seen and resolved. We are a second appellate court, and the settled principle of law is that we should be cautious in reversing concurrent findings of fact made by lower courts unless on, the face of it, they are unreasonable and perverse-see **Daniel Nguru and Four Others Versus Republic** – Criminal Appeal No. 178 of 2004 (unreported), **Deemay Daati and Two Other Versus Republic,** Criminal Appeal No. 80 of 1994 (unreported), **Peters Versus Sunday Post** (1958) E.A. 424 and **Richard Mgaya @ Sikubali Mgaya Versus Republic**, Criminal Appeal No. 335 of 2008 (Iringa registry –unreported).

We have enumerated seven shortcomings in the record of proceedings which vitiate the credibility of the prosecution case, and pointed out

irredeemable flaws in the admission of the only evidence which, if admitted properly, could link the appellant with the offence he is charged with.

The evidence on record leaves serious doubts on whether the offence was committed, if at all. In such a situation, we resolve the doubt in favour of the appellant. We therefore allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. The appellant should be set at liberty unless he is held on some other lawful cause.

DATED at IRINGA this 2nd day of September, 2010.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

W. MANDIA
JUSTICE OF APPEAL

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

J. S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL