IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO. 117 OF 2013

(CORAM: MSOFFE, J.A., ORIYO, J.A., And KAIJAGE, J.A.)

ISMAIL SELEMAN NOLE ..... APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

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

(Lila, J.)

dated the 17th day of November, 2011
in
Criminal Appeal No. 4 of 2010
.....
JUDGMENT OF THE COURT

20th& 24thNovember,2014

KAIJAGE J.A.:

This is a second appeal. It emanates from Criminal case No. 49 of 2009 of the Resident Magistrates' Court of Mtwara at Mtwara in which the appellant was convicted as charged of the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 R.E 2002. He was sentenced to thirty (30) years imprisonment. His appeal to the High Court against conviction and sentence was unsuccessful, hence this second appeal.

The prosecution case in the trial court rested on the evidence of six (6) witnesses. These were; PW1 Abdallah Ally, PW2 Ally Abdallah Mabangi, PW3 Khalifa Said, PW2 Abdallah Hassan Bakili, PW5 Selemani Salum Issa and PW6 No. D. 9448 D/sgt. Adam.

Testifying on the circumstances surrounding the robbery incident, PW1 told thetrial court that on 17/2/2009 at 14.00 hours or thereabout, he was travelling on a bicycle from Mangamba to Msanga Mkuu. Arriving at the coast near a place commonly known as Chumvini Prison, he saw the appellant ahead of him, coming from the opposite direction on his right hand side. Because PW1 was, apparently, riding his bicycle on slow motion, the appellant took that opportunity to grab the basket carried on the former's bicycle carrier. Consequently, PW1 fell down and his bicycle landed on him.

We shall let the evidence of PW1 speak for itself on what exactly transpired subsequently. In his sworn testimony, PW1 is on record to have stated the following, among other things:-

> *"The bicycle lied on top of my body. The accused hit me on my shoulder with a piece of iron bar. I tried to stand up, the accused inflicted a cut on my left hand. I told him that I didn't have money, he was annoyed and inflicted a second cut with a panga on my buttocks. I gave him Tshs. 5,000/=. The accused was telling me to give him the money all the time. I know the accused and his parents. The accused later took my bicycle and went with it in the bush. I raised the alarm and people came. I told them that it is the accused person (appellant) who has cut me…"*

PW5 was among the first persons who assembled at the scene of crime in response to PW1's alarm. He told the trial court that PW1 was found lying in pains on the seashore with fresh cut wounds, and that he named the appellant to be his assailant. Efforts to trace the appellant and recover the stolen items made by PW5 and other persons who had gathered at the scene of crime bore immediate results. PW1's bicycle (Exh.P2) was recovered abandoned amongst the mangrove trees, not very far from the scene of crime.

Shortly after the recovery of Exh. P2, PW2 and PW3 arrived at the scene of crime. They found PW1 in the same condition already alluded to hereinabove. Like PW5, the said two witnesses told the trial court that PW1 named the appellant a sole perpetrator of the robbery. In view of the fact that PW1 was the father of PW2, the latter in concert with other persons transported the former to Ligula Government Hospital for treatment.At the same time, the robbery incident was reported to the police authorities. While at Ligula Hospital, the police obtained and recorded a statement (Exh. P1) from PW1 in which the details as to who, when and how the robbery in question was perpetrated are disclosed.

The trial court was further told that a few hours after the robbery incident, the appellant went to the house of PW4, the then Mtawanya village Chairman, to whom he confessed having inflicted cut wounds on PW1 in order to steal the latter's money. That apart, the appellant sought refuge in PW4's house. PW4 declined to harbour the appellant in his house, but advised him to present himself to the police authorities, which he did. That done, on

19/3/2009, PW6 obtained and recorded the appellant's cautioned statement (Exh. P3) in which he confessed to have hacked PW1 by using a panga in order to steal his money.

In his defence, the appellant denied any involvement in the perpetration of the robbery, stating that he was shocked to hear from his friend, one Hassan s/o Wadhila, that he was suspected of having committed the robbery. He belatedly advanced a claim that on that day he had gone to Namayanga to visit his wife. While admitting that he went to the house of PW4 during the evening of the 17th February, 2009, he nevertheless asserted that he went there just to enquire why he was being suspected of committing the robbery.

Relying on the evidence adduced by PW1, PW4 and other prosecution witnesses, the two courts below made concurrent findings of fact that the appellant was impeccably recognised at the scene of crime and that he was the perpetrator of the robbery.

The appellant lodged a four points memorandum of appeal premised on the following main grievances:-

1. *That the appellant was not properly identified at the scene of crime.*
2. *That both courts below erred in law in relying on the appellants cautioned statement (exh. P3) which contravened the provisions of section 53 (c) (ii) of the Criminal Procedure Act, Cap 20 R.E. 2002.*

3. *That both courts below erred in law in upholding appellant's conviction in the absence of the PF3 which was not produced and admitted in evidence.*

4. *That in upholding the appellant's conviction, the trial court did not address and resolve the contradictory versions of PW2 and PW3*

Before us, the appellant appeared in person, fending for himself. He adopted his grounds of appeal, without more. The respondent Republic was represented by Mr. Paul Kimweri, learned State Attorney who resisted the appeal.

As we proceed to embark on the task of determing this appeal, we are mindful of the fact that this is a second appeal, and we will be guided by the following principle lucidly enunciated thus in **LUDOVIDE SEBASTIAN V.R;**Criminal Appeal No. 318 of 2009 (unreported):-

> *"On a second appeal, we are only supposed to deal with questions of law. But this approach rests on the premises that the findings of facts are based on a correct appreciation of the evidence. If both courts completely misapprehended the substance, nature and quality of evidence, resulting in an unfair conviction, this court must in the interest of justice intervene."*

Addressing the first ground of appeal, Mr. Kimweri contended that the appellant was impeccably identified by PW1, the victim of the robbery, on 17/2/2009 at 14.00 hours, in broad daylight. In elaboration, he submitted that prior to the robbery incident, PW1 knew very well both the appellant and his parents and that this fact had not been controverted. Indeed, immediately before the robbery, PW1 saw the appellant coming ahead of him and in the course of robbery, both the appellant and his victim were in close proximity, he stressed.

Mr. Kimweri further contended that the appellant took time to engage PW1, his victim, in a dialogue when the former was consistently and persistently demanding to be given money. So, the appellant's attack on PW1 was not quick and sudden,he emphasised. On this aspect of the case, he was finally of the view that PW1 had ample time to identify the appellant.

On our part, we think that the first ground should not detain us. Addressing the issue of identification the first appellate court stated the following, at page 45 of the record:-

> *"The conditions for identification in this case, as gathered from the evidence, were favourable. The incident occurred during the day time. It was 14.00 hours. The encounter was not sudden. PW1 saw the appellant while ahead of him on his right hand side before he touched his bicycle which caused him fall down. PW1 was thus not taken by surprise. The accused beat PW1 with iron bar and later*

cut him (PW1) twice using a panga when resisting to surrender money. PW1 knew well the accused who was born at Mtawanya and his parents. PW1 mentioned the accused to be his assailant to both PW3 and PW5 who were first to arrive at the scene of crime and found him injured. These conditions favoured PW1 to make a proper identification of the appellant."

Considering the above extract and upon our own assessment and appreciation of the evidence on record, we are, with respect, in agreement with Mr. Kimweri that the identification evidence of PW1 against the appellant cannot be justifiably assailed. Like the two courts below, we are satisfied that the appellant was impeccably identified by PW1 at the scene of crime.

Next we proceed to consider the second ground of appeal. On this, the first appellate court is being faulted for having affirmed the appellant's conviction basing on the cautioned statement (Exh. P3) obtained and recorded by PW6 without informing the appellant his rights prescribed under section 53(c) (i) and (iii) of the Criminal Procedure Act, Cap 20 R.E. 2002 (the CPA).

Admittedly, objection regarding the admissibility of Exh. P3 was taken at the trial, but in admitting it the trial court does not appear to have exercised its judicial discretion in conformity with the dictates of section 169(1)(2) and (3) of the CPA which provides:-

169 (1) Where, in any proceedings in a court in respect of an offence, objection is taken to the admission of evidence on the ground that the evidence was obtained in contravention of, or in consequence of a contravention of, or of a failure to comply with a provision of this Act or any other law, in relation to a person, the court shall, in its absolute discretion, not admit the evidence unless it is, on the balance of probabilities, satisfied that the admission of the evidence would spefically and substantially benefit the public interest without unduly prejudicing the right and freedom of any person.(emphasis supplied).

(2) The matters that a court may have regard to in deciding whether, in proceedings in respect of any offence, it is satisfied as required by subsection (1) include:-

(a) the seriousness of the offence in the course of the investigation of which the provision was contravened, or was not complied with, the urgency and difficulty of detecting the offender and the urgency or the need to preserve evidence of the fact;

(b) the nature and seriousness of the contravention or failure; and

(c) the extent to which the evidence that was obtained in contravention of in consequence of the contravention of or in consequence of the failure to comply with the provision of any law, might have been lawfully obtained.

(3) The burden of satisfying the court that evidence obtained in contravention of, in consequence of the contravention of, or in consequence of the failure to comply with a provision of this Act should be admitted in proceedings lies on the party who seeks to have the evidence admitted."

In **NYERERE NYANGUE V. REPUBLIC;** Criminal Appeal No. 67 of 2010 (unreported) this Court had an occasion to discuss the import of Section 169 of the CPA. It said:-

"It follows in our view therefore that the admission of evidence obtained in the alleged contravention of the CPA is in the absolute discretion of the trial court and that before admitting or rejecting such evidence, ***the parties must contest it, and the trial court must showthat it took into account all the necessary matters into***

consideration and is satisfied that, if it admits it, it would be for the benefit of public interest and the accused's rights and freedom are not unduly prejudiced. [Emphasis supplied].

In this case, it is clear that the fundamental procedural requirements under section 169 (1) (2) and (3) of the CPA were flouted by the trial court and, in consequence thereof, we hold that Exh. P3 was illegally admitted in evidence. Accordingly, we hereby discount the evidence in that exhibit.

On the third ground of appeal, Mr. Kimweri readily conceded that the PF3 which was issued to PW1 immediately after the robbery incident was not adduced in evidence. However, he was quick to add, correctly in our view, that the absence of the PF3 did not affect the gist of the outstanding evidence on record establishing armed robbery committed by the appellant. One of such outstanding pieces of evidence is the oral confession made by the appellant to PW4 who is on record to have told the trial court the following, among other things:-

"That on the same day around 20.00 hours, the accused came at my place and confessed to have inflicted cuts with a panga to Mr. Abdallah Ally (PW1)..."

It is significant to take note here that in the course of trial, the appellant did not cross-examine PW4 on this point. The evidence that he made an oral confession to PW4 has remained unchallenged. It is now settled that a decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been a clear notice of the intention to impeach the relevant testimony, (See, for instance, **HASSAN MOHAMEDI NGOYA V.R;** Criminal Appeal No. 134 of 2012, **HAMISI MOHAMED V. R;** Criminal Appeal No. 297 of 2011 and **HUSSEIN BAKARI KADOGOO V.R;** Criminal Appeal No. 54 of 2006 (all unreported).

The statement (Exh. P1) obtained by the police from PW1 at Ligula Hospital where the latter was admitted to treatment is another piece of evidence which goes a long way to demonstrated that the appellant used a dangerous weapon in committing the robbery. Exh. P1 was admitted in evidence in the course of trial without any objection forthcoming from the appellant. Details on how the appellant employed the panga to hack PW1 on his arm and buttocks before dispossessing him of his money and bicycle are stated therein. Like the appellant's oral testimony to PW4, the evidence in Exh. P1 has remained in record, uncontroverted.

In the light of the foregoing brief observation, we are settled in our minds that the non-production inevidence of the PF3 did not weaken the case for the prosecution against the appellant.

As regards the fourth ground of appeal, the appellant is complaining that the two courts below did not address and resolve the alleged contradictory versions in the evidence of PW2 and PW3. On this ground, we wish to say briefly that this issue was not raised and decided by the two courts below. This Court has repeatedly pronounced itself, in various decisions, that as a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided in the court(s) below to be raised on appeal. (See, **KENNEDY OWINO ONYONGO AND OTHERS V.R;** Criminal Appeal No. 48 of 2006 (unreported). On the strength of this well established principle, we decline to entertain this ground.

Having discounted the evidence in the appellant's cautioned statement (Exh. P3), we have found the remaining incriminating evidence of PW1, PW4 and that in the undisputed statement (Exh. P1) overwhelming and sufficiently implicating the appellant to be the sole perpetrator of the armed robbery in question. Indeed, we have found no circumstance or reason to justify interference by this Court of the lower court's assessment of the said witnesses' evidence and its credibility. We so find because the trial court's finding as to the credibility of a particular witness is usually binding on an appeal court unless there are circumstances on the record which warrants a re-assessment of credibility. (See; **OMARY AHMED V.R;** (1983) TLR 32. Incidentally, we have no such circumstances in this case.

All the above considered, we are satisfied that the case for the prosecution against the appellant was proved beyond reasonable doubt. The appeal is therefore dismissed.

DATED at MTWARA this 22nd day of November, 2014

J.H. MSOFFE
JUSTICE OF APPEAL

K.K. ORIYO
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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

P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL