

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

(CORAM: MBAROUK, J.A., MANDIA, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 270 OF 2012

LAURENT S/O RAJABU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

**(Appeal from the decision of the High Court of Tanzania at
Tabora)**

(Lukelelwa, J.)

dated the 21st day of August, 2012

in

Criminal Appeal No. 116 of 2010

JUDGMENT OF THE COURT

16th & 20th September, 2013

MBAROUK, J.A.:

The appellant, Laurent s/o Rajabu and another not subject to this appeal were convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 of

the laws by the District Court of Kigoma at Kigoma. He was sentenced to thirty (30) years imprisonment with twelve (12) strokes of the cane. Dissatisfied, the appellant appealed to the High Court (Lukelelwa, J.) where his appeal was dismissed in its entirety. Undaunted, he preferred this appeal.

The facts which led to the conviction of the appellant at the trial court were as follows: On 01-11-2009 at Kazuramimba village within the District and Region of Kigoma, Jumanne Buyane (PW1) testified that, while he was selling fish, the appellant took some fish worth shs. 100/= on credit. He promised to pay PW1 during the evening. At around 6.30 p.m, PW1 closed his business and followed the appellant at a bar. When he followed him, he said, he expected to be paid by someone, but had not been paid, hence he cannot pay PW1 back. Thereafter, the appellant promised PW1 to pay him the following day at around 1.00 p.m. Without any problem, PW1

accepted the appellant's request. PW1 then left the bar heading to his residence. However, after few minutes, he saw two people approaching him and he identified them as the appellant and Ndanda (the other accused at the trial court). PW1 testified that, suddenly the appellant held his shirt and drew near him and ordered to give him all the money he obtained from selling fish. He said the other person (Ndanda) fell him down and the appellant searched PW1's pockets and took T.shs. 20,000/=. He said, the appellant and Ndanda also took from him his trousers, shirt and shoes leaving him naked. PW1 then raised alarm asking for help and one policeman appeared and arrested the appellant whereas Ndanda escaped with PW1's belongings.

In his defence, the appellant denied to have committed the offence charged against him. He deposed that on 01-11-2009 at around 4.30 p.m he was in custody at the Central

Police Station Kigoma. He was arrested during the afternoon on that day alleged to have been found in possession of alcohol at Kazuramimba village. He appeared in court on 26-11-2009. He wondered, how could he have committed an offence on 1-11-2012 at 7.30 p.m while he was in police custody.

In this appeal, five grounds of appeal were preferred by the appellant in this appeal, but we think, they can safely be summarized to four grounds, namely: -

- (1) That, the identification was not proved without avoiding mistaken identity.*
- (2) That, the prosecution failed to specify the weapon used.*
- (3) That, nothing was seized as a stolen property.*
- (4) There is nothing connecting the appellant with the offence charged against him.*

At the hearing, the appellant, who appeared in person had nothing to submit apart from what he has complained in his grounds of appeal.

On his part, Mr. Hashim Ngole, learned Senior State Attorney for the respondent Republic who supported the appeal opted to argue the appeal generally. He started by showing his concern on the credibility of the prosecution's case.

Firstly, he said, there is a problem as to why the prosecution took about three months from 1-11-2009 when the alleged incident of armed robbery occurred to 16-2-2010 when the charge sheet was framed and the appellant was sent to court for the first time. The learned Senior State Attorney, added that taking such a long time to send the appellant to answer his charge in court create doubt as to what the

appellant was doing in the custody of police all that time. He said, that may lead to a presumption that the appellant was in police custody for another offence other than this one. He said, the record is silent as to why there was such a long delay before the appellant was charged.

Secondly, the learned Senior State Attorney submitted that, there is also a doubt as to how could the appellant have committed the offence of armed robbery while he was in the custody of police. He said, the record shows that in his defence the appellant testified that on 1-11-2009 at around 4.30 p.m he was in the police custody. Therefore, how could the appellant have committed such a crime while he was in police custody since 4.30 p.m. on that day when the crime of armed robbery occurred.

Thirdly, Mr. Hashim Ngole, further submitted that there is a contradiction between the evidence of PW1 who did not say that there was a crowd of people at the scene of crime whereas PW2 F. 5123 PC Subira said that he broke through the wall of people and got hold of the appellant and the other person managed to escape with some belongings of PW1. The learned Senior State Attorney wondered how the second person escaped in the presence of such a wall of people surrounding him. The learned Senior State Attorney said, that create doubt as to who was a truthful witness, between PW1 and PW2.

Fourthly, Mr. Hashim Ngole added that, there is an omission found in the charge sheet, to the effect that some of the looted properties were not mentioned as stolen properties in the particulars of offence. Whereas when PW1 mentioned a shirt and shoes when he testified as among the looted

properties. In support of his argument, he cited to us the decision of this Court in the case of **William Lengai v. The Republic**, Criminal Appeal No. 203 of 2007 (unreported), where this Court found that such an omission as fatal on the part of the prosecution's case.

Finally, the learned Senior State Attorney urged us to find that, with all those doubts which remain unanswered, that makes the prosecution's case not to have been proved beyond reasonable doubt. He then prayed to give such benefit of doubt to the appellant. For that reason, he urged us to allow the appeal and set the appellant free.

The appellant had nothing to submit in response to what has been stated by the learned Senior State Attorney.

On our part, we totally agree with the learned Senior State Attorney to the effect that there are several doubts which have not been resolved yet. The record does not show that the prosecution's case has given answers to those doubts pointed out by the learned Senior State Attorney.

Firstly, we agree with Mr. Hashim Ngole that the omission not to have a clear answer as to why there was such a long delay to charge the appellant. The record shows that the incident occurred on 1-11-2009, but the appellant remained in police custody until 16-2-2010 when he was sent to court to answer his charge for the first time. We think, three months is a very long time to remain without being charged. Such a delay in charging the appellant not within reasonable time is a serious and fatal omission on the part of the prosecution's case leading to watering-down the credence of their case. For that reason, we agree with Mr. Hashim

Ngole that such a delay in charging the accused (appellant) creates doubt to the credence of prosecution's case.

Secondly, we also agree with the learned Senior State Attorney that there are doubts as to how could the appellant who was in police custody have committed the offence outside the police station while he was still in police custody. As earlier pointed out, in his defence, the appellant claimed to have been in police custody on 1-11-2009 since 4.30 p.m, whereas he was alleged to have committed the offence of armed robbery on that date at 7.30 p.m. We too agree with Mr. Hashim Ngole, that a person who is police custody cannot be taken to have committed a crime while he is still in police custody. The record is silent as to how the appellant escaped in the hands of police custody and went to commit a crime charged against him. We are of the opinion that, that raises doubt which has remained without an answer.

Thirdly, it is true and we agree with the learned Senior State Attorney that there was a contradiction between the evidence adduced by PW1 and that of PW2 as to whether there was a crowd of people at the scene of crime. That raised doubt as to who between the two prosecution witnesses was truthful and credible. In the case of **Maloda William and Another v. R**, Criminal Appeal No. 256 of 2006 (unreported), this Court held that: -

"...the credibility of each witness in a case ought to be dispassionately assessed..."

In the instant case, it seems no proper assessment was tested to the credibility of PW1 and PW2. There was no cogent reason given on who among the two witnesses to be truthful. For that reason, we agree with Mr. Hashim Ngole that the said doubt concerning contradictions between PW1

and PW2 remained without proper findings of fact as to who was an honest witness.

Lastly, we agree that, the charge sheet did not state in its particulars of the offence that a shirt and shoes were part of the looted properties whereas PW1 testified that he was looted Tshs. 20,000/=, trousers, shirt and shoes. As pointed out, in the case of **William Lengai** (*supra*), this Court stated as follows: -

"The charge sheet did not state in its particulars of offence that the sandals and beans were part of the looted property. We find it a fatal omission on the part of the prosecution case thus laying credence to the defence averments".

In the instant case, we too are of the same view that the omission is fatal as items like a shirt and shoes mentioned by PW1 in his testimony were not listed in the particulars of offence as part of the looted items. It remain to be doubtful whether those items not listed in the particulars of offence were among the properties the appellant was alleged to have looted from PW1. For that reason, we agree with Mr. Hashim Ngole that the said doubt was not resolved by the prosecution case.

In the event, as pointed herein above, there are several doubts which have remained without being answered by the prosecution in this case.

For that reason, we have no other option but to give the benefit of those doubts to the appellant. Hence, we accordingly allow the appeal, quash and set aside the conviction and the sentence. The appellant is to be released forthwith otherwise lawfully detained in custody.

DATED at TABORA this 20th day of September, 2013.



M. S. MBAROUK
JUSTICE OF APPEAL

W. S. MANDIA
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

A handwritten signature in black ink, consisting of several loops and curves, positioned above the name of the Deputy Registrar.

Z. A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL