

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

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And JUMA, J.A.)

CRIMINAL APPEAL NO. 155 OF 2011

MWAKANI SHEHE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Mmilla, J.)

**dated the 24th day of August, 2011
in
Criminal Appeal No. 30 of 2011**

JUDGMENT OF THE COURT

10th & 12th June, 2013

JUMA, J. A.:

The appellant, Mwakani Shehe, was convicted by D.D. Komba, the Principal District Magistrate of the District Court of Mbarali at Rujewa. This conviction came after he was jointly tried together with Athanas Mlalilwa for the offence of Armed Robbery contrary to section 287A of the Penal Code as amended by the Written Laws (Miscellaneous Amendments) (No.

2) Act, 2004 (Act No. 4/2004). However, Athanas Mlalilwa, the 2nd accused, was acquitted by the trial court. Particulars of this offence allege that on 13th October 2007 at about 20.00 p.m. at Ukwaheri village in Mbarali District, the two accused stole shs. 5,200,000/= from the complainant PW1 Isack Galahenga, and used a *panga* to slash the owner in order to obtain and retain this money which they had stolen.

The trial court heard and recorded evidence from a total of three prosecution and three defence witnesses including the appellant who gave sworn evidence denying the charge. At its conclusion, the trial Principal District Magistrate found that the evidence presented by the prosecution had proved the offence against the appellant but not against the 2nd accused. The trial magistrate proceeded to convict the appellant and duly sentenced him to serve thirty (30) years in prison. The trial court in addition ordered the appellant, after serving his term in prison, to also pay the complainant Tshs 5,200,000/= which he was found to have stolen, and a compensation of Tshs. 400,000/=.

Following his conviction and sentence, the appellant filed his first appeal to the High Court of Tanzania at Mbeya. By the judgment delivered on 24th August 2011, that court of first appeal (B.M. Mmilla, J.) dismissed the appellant's appeal for want of merit. Still aggrieved the appellant has lodged this second appeal with its total of eleven grounds of appeal. At the centre of these grounds, is the appellant's complaint why Mr. Athanas Mlalilwa with whom he was charged, was acquitted on the same evidence which convicted him.

The factual background to this second appeal has been clearly set out in the judgments of the trial and the court of first appeal. The complainant, Isack Galahenga (PW1) was then a livestock trader, selling and buying cattle. The complainant knew the appellant with whom he had in the past transacted with in the business of buying and selling of cattle. One day the complainant recalls how he received a call from the appellant informing him that the appellant's father had twenty heads of cattle for sale. Later in the evening the complainant, together with PW2 Saliki

Lushanga, Mwakani Shehe (the appellant) and Athanas Mlalilwa (the appellant's co-accused) set out on a journey to inspect the cattle and agree on the purchasing price. While on the way, the complainant and his friend Saliki Lushanga (PW2) testified that the appellant and Athanas Mlalilwa set upon the complainant. They attacked him with a stick and a knife. He lost consciousness. When he recovered his consciousness he found himself in the mission hospital at Chimala. He realized that he had lost his Tshs. 5,200,000/=. Saliki Lushanga testified that it was the appellant who begun the attack before Athanas Mlalilwa joined in the attack of the complainant. Saliki Lushanga ran away but later returned, only to find the complainant still unconscious. He called a vehicle which took the complainant to hospital. Both the appellant and Athanas Mlalilwa, denied the allegation.

Before us, the appellant was not represented by any learned counsel. He had nothing to say except placing his total reliance on his grounds of appeal. The respondent Republic was represented by Ms Lugano Mwakilasa, the learned State Attorney. Ms Mwakilasa had at first opposed

the appeal claiming that the evidence of the complainant (PW1) and that of his friend, Saliki Lushanga (PW2) who also witnessed the incident, proved beyond reasonable doubt the guilt of the appellant. However, when we asked why Athanas Mlalilwa was acquitted over same evidence which convicted the appellant, Ms Mwakilasa relented, finally supported this appeal describing the evidence against the appellant to be unsafe to sustain his conviction.

As we said earlier, this is a second appeal. We have through several of our decisions reminded ourselves to be slow or cautious in interfering with findings of fact by the trial and court of first appeal. In those rare occasions when this Court interferes concurrent finding of facts by courts below, it does so if there are, any misapprehension of evidence or misdirection or non-directions on the evidence, or there is any miscarriage of justice or a violation of some principle of law (see for example- **DIRECTOR OF PUBLIC PROSECUTIONS V JAFFARI MFAUME KAWAWA (1981) TLR 149; CRIMINAL APPEAL NO. 178 OF 2004,**

**DANIEL NGURU AND OTHERS V REPUBLIC (unreported); and
CRIMINAL APPEAL NO. 235 OF 2006, 1. JUMA SAIDI 2. PAULO
DAVID, 3. VINCENT LAMECK, 4. MAZENGO CHATI and 5. HAMISI
SAIDI VS THE REPUBLIC (unreported).**

We shall proceed to ask ourselves whether in the present appeal there are circumstances which call for our interference by fresh evaluation of the evidence in order to arrive at our own conclusions on matters of facts. With due respect, the appellant has a well founded reason to complain over the differential way the evidence of the complainant (PW1) and his friend Saliki (PW2) was treated by the trial and the first appellate courts. The two courts below, believed the evidence of PW1, who testified that while they were on their way to see the cattle, it was the appellant (1st accused) who had began to assault him. That Athanas Mlalilwa (2nd accused) joined in the assault, by holding the complainant down while the appellant continued beating him up. The two assailants used a knife to attack the complainant. The two courts below similarly believed the

corroborating evidence of Saliki Lushanga (PW2), who witnessed the attack before running away. PW2 confirms that the appellant and Athanas Mlalilwa both beat up the complainant and a knife was used.

Oddly enough, Mr. Komba, the Principal District Magistrate did not in his judgment, explain how the same evidence of PW1 and PW2 and could convict the appellant and at the same time also acquit Athanas Mlalilwa, the 2nd accused. Without so much as showing the basis of his conclusion that same evidence can convict and acquit, the Principal District Magistrate said:

"In finality, I find the 1st accused is guilty as charged as prosecution had proved the offence against him to standard required. Hence, under section 235 of CPA this court convicts the 1st accused one Mwakani s/o Shehe as charged. However, I findthe prosecution had failed to prove the offence against the 2nd accused one Athanas Mlalilwa to the standard required. Be it the case, under the same section this court find him

not guilty and he is acquitted.” [Page 33 of the record of appeal]

Unfortunately, this differential treatment of evidence escaped the attention of the first appellate court when Mmilla, J. (as he then was) agreed with Ms Catherine Gwaltu the learned State Attorney, that the evidence of the complainant (PW1) and that of Saliki (PW2) was so strong and cogent that the appellant could not claim that the case against him was not proved beyond reasonable doubt. We are obviously wondering on second appeal, why this same evidence should carry more weight as against the appellant and to be of lesser probative value when referring to the 2nd accused. The two courts below should have clarified why the same evidence should both acquit a 2nd accused and convict the appellant during same trial. The way the trial court treated the evidence of PW1 and PW2 affected the reasonableness and fairness of the judgment of that trial court towards the appellant. We cannot but conclude that the trial court and by extension the first appellate court erred in law by according different weights to the relevant evidence of PW1 and that of PW2. This amounts to

misapprehension of evidence warranting this Court to interfere with concurrent finding of facts by the two courts below.

The way the incident of armed robbery was brought to the attention of the police is another aspect of the evidence which is of concern to us. The evidence of the eye witness, Saliki Lushanga (PW2) contradicts in material particulars, the evidence of detective Sergeant Venance (PW3) who was the first police officer at the scene of crime. According to Saliki Mshanga, he had to run away when the appellant and the 2nd accused begun assaulting the complainant. But he returned shortly thereafter, and carried the unconscious complainant to his (PW2's) friend's house. From there he made a call and a car came up to take the accused to Rujewa Police Station. Then he took the complainant to Chimala Hospital.

PW3 gave a materially different account to the effect that he went at the scene of crime and found two people who had been seriously injured. PW3 took the two victims to police station supplied them with PF3 and they

went for treatment at Chimala Hospital. The police Sergeant mentioned two seriously injured people. But in his eye-witness account, PW2 mentioned only the unconscious complainant. In addition, PW2 and PW3 gave a different account on how the appellant and the 2nd accused were linked to the attack of the complainant.

According to the police officer (PW3), it was after the two seriously injured people had recovered, when they returned to police station and mentioned their assailants. That is when the police moved in to arrest the appellant and the 2nd accused. Yet, Saliki (PW2) in his evidence claimed that he had already reported to the police that he saw the appellant attacking the deceased while the 2nd accused was also assisting in the attack. Both the trial court and the first appellate uncritically accepted the evidence of PW2 and PW3. The two courts below did not address themselves to the contradictions in the evidence of these two material witnesses. This Court has often emphasized that it is the primary duty of trial courts to resolve or explain contradictions in evidence whenever they

appear (see- **MOHAMED SAID MATULA V. REPUBLIC** (1995) TLR 3;
CRIMINAL APPEAL NO. 262 OF 2009, JOHN JOSEPH @PIMBI VS.
THE REPUBLIC (unreported).

In addition to the problem of differential treatment of evidence, we think that contradictions in the evidence of PW2 and PW3 went to the root of the case against the appellant and creates doubts as to whether the case against the appellant was proved beyond reasonable doubt on the basis of the evidence whose cogency was doubted by the trial court leading to the acquittal of Athanas. Such doubt should have been resolved in favour of the appellant. That is why we are convinced even the Republic did not bother to appeal against the acquittal of Athanas.

In the upshot, having considered the matter as above, we find merit in the appeal, which we hereby allow. Meanwhile, we order that the appellant to be forthwith released from prison unless otherwise lawfully held.

DATED at MBEYA this 11th day of June, 2013.

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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




P.W. Bampikya
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL