

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

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

CRIMINAL APPEAL NO. 33 OF 2003

HONORATH JOHN LYIMO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the conviction of the High Court of Tanzania
at Moshi)**

(Mchome, J.)

dated the 12th day of November, 1999

in

Criminal Appeal No. 26 of 1999

JUDGMENT OF THE COURT

18 September & 4 October, 2006

KIMARO, J.A.

The appellant was convicted of armed robbery contrary to sections 285 and 286 of the Penal Code Cap. 16 Vol. I of the revised laws. He was sentenced to a thirty years term of imprisonment. Aggrieved, the appellant appealed to the High Court at Moshi. His appeal was dismissed in its entirety, hence this second appeal.

A brief account of the case will be helpful.

On 6/07/1997 at 4.30 p.m. PW1, a taxi driver by then, was hired by the appellant and two other persons for a trip to Majengo Masuki grocery. The motor vehicle used as a taxi by PW1 was a saloon car, toyota corolla, with registration number TZB 6666. It was the property of PW2. After the trio were through with their purchases at Majengo Masuki grocery, PW1 who was kept waiting was asked to take them to Shanty town for other purchases. PW1 was again kept waiting. When they were through, they again required PW1 to take them back to town. It was at this time the motor vehicle was robbed at gun point.

PW1 was offered immediate assistance and managed to chase the motor vehicle until they reached a point where any further pursuit was terminated because of fear of the threats from the appellant and his accomplices.

The matter was reported to the police who mounted a search for the motor vehicle which was found abandoned. The Police Officers who were in search of the motor vehicle were PW3 and PW4. PW1 had also accompanied them.

Following a search which was conducted in the motor vehicle, a porch was found which had a driving licence No. 1125000 Class C issued at Mwanza in the name of the appellant and his photograph. There was also his NCCR Mageuzi Membership Card No. 427969. In addition to the two items which were admitted in court as exhibits P2 and P3 respectively, there was a piece of paper which had house telephone numbers of one Dr. Lyimo of K.C.M.C. Hospital. It was telephone calls using the numbers and house visits to Dr. Lyimo which assisted the Police to arrest the appellant and charged him.

The trial court based its conviction on the Driving licence and the NCCR Mageuzi Card which were found in the robbed motor vehicle. It ruled out any doubt on any mistaken identity of the appellant because the robbery was committed during broad day time. The trial court took into consideration the time which PW1 spent with the appellant from the time he was hired to the time of the commission of the offence. In addition, the trial court also considered the identification of the appellant by PW1 at the identification Parade and the voluntary caution statement of the appellant made to the police which was admitted as exhibit P5.

The trial court rejected the defence of alibi of the appellant that he was at Dodoma when the offence was alleged to have been committed. Consequently as already indicated, the appellant was convicted and sentenced.

The appellant filed a memorandum of appeal containing seven grounds which basically amount to four grounds. Apparently the first and third ground are the same. In these two grounds the complaint is that the appellant was tried twice on cases founded on the same facts. In the second ground the appellant complained of failure by the prosecution to bring evidence of the search which was conducted at his residence in Dar es Salaam and Moshi. The appellant complained of the admissibility of his confession made to the Police Officer as his third ground and his last ground was that he was convicted on evidence which required corroboration.

During the hearing of the appeal the appellant was unrepresented. Mr. Kaduri, learned Principal State Attorney, appeared for the respondent Republic.

The appellant informed the Court that he had additional grounds of appeal but they turned out to be a repetition of the grounds of appeal filed. He had nothing useful to add. He prayed that his appeal be allowed.

As pointed out, this is a second appeal which originated from the District Court of Moshi. For such appeals the principle is that the Court rarely interferes with concurrent findings of facts by the lower courts, except where there are mis-directions and non-directions on the evidence by the first appellate court. In **Director of Public Prosecutions vs Jaffari Mfaume Kawawa** [1981] TLR 149 at page 153 the Court stated:-

This is a second appeal brought under the provisions of section 5 (7) of the Appellate Jurisdiction Act, 1979. The appeal therefore lies to this Court only on a point or points of law. Obviously this position applies only where there are no mis-directions or non-directions on the evidence by the first appellate court. In cases where there are mis-directions or non-directions on the evidence a court is entitled to look at the relevant evidence and make its own finding.

This principle was repeated in very recent decisions of this Court. (See **Goodluck Kyando v. R** CAT Criminal Appeal No. 118 of 2003 (Mbeya) (unreported) and **Musa Mwailunda v. R** CAT Criminal Appeal No. 174 of 2006 (Mbeya) (unreported)).

In the first ground of appeal the appellant raised the question of *autrofois acquit* under section 137 of the Criminal Procedure Act 1985. He submitted that prior to being charged with the offence of armed robbery he was charged in Criminal Case No. 1088/97 and the case was withdrawn after four prosecution witnesses had given their testimony. He argued that the subsequent charge of armed robbery would not lie because it amounted to being charged twice with the same offence.

Supporting the conviction and sentence, Mr. Kaduri, learned Principal State Attorney for the respondent Republic conceded that the appellant was charged with Criminal Case No. 1088/97 but he said the case was withdrawn by the prosecution before the closure of the prosecution case.

The position taken by Mr. Kaduri would appear to be the correct one because even the appellant's submissions in the trial court show that Criminal Case No. 1088 of 1997 was withdrawn under section 98 of the Criminal Procedure Act, 1985. Given this position, it follows that the appellant has a wrong understanding of the consequences which follow when a withdrawal of the case by the prosecution is made before the closure of its case. Under the provisions of section 98 (a) of the Criminal Procedure Act, 1985 such a withdrawal discharges the accused person but it does not bar subsequent charges of the same or similar nature on the accused person.

The issue of *autrofois acquit* raised by the appellant falls under section 137 of the Criminal Procedure Act 1985. The appellant could take the advantage of the plea of *autrofois acquit*, if Criminal Case No. 1088/97 reached a finality and he was acquitted. Criminal Case No. 1088/97 did not reach finality. Section 137 of the Criminal Procedure Act, 1985 provides:-

"137 Any person who has been charged with an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set

aside not be liable to be tried again on the same facts for the same offence.

The circumstances under which the plea of *autrefois* convict can be invoked were well elaborated in the case of **R v. Msusa s/o Ally** [1987] TLR 190. It is under similar circumstances that a plea of *autrefois* acquit can be invoked. See also the decision of the Court in the case of **Issa Athumani Tojo v. R** Criminal Appeal No. 54 of 1996 (Dar es Salaam) (unreported).

Under the circumstances explained above the plea of *autrefois* acquit raised by the appellant is totally misconceived in this appeal. This ground therefore, has no merit.

On the remaining grounds of appeal the appellant could not point out any specific mis-direction or non-direction made by the first appellate court. He just mentioned generally that there was no eye witness from the scene of crime although the offence was committed in broad day light. He also said that the person who rendered assistance to PW2 to chase the motor vehicle robbed was not summoned as a witness.

Mr. Kaduri's response was that the appellant's conviction was basically founded on the search which was conducted in the motor vehicle wherein his driving licence which had his name and photograph as well as a membership card of NCCR Mageuzi Political Party were recovered. These are the items which enabled the police to know the name of the appellant and then traced him. If there was any other search conducted in his residence it was not the basis of his conviction. Likewise, PW1 was an eye witness to what took place at the scene of crime. There was no necessity for bringing other witnesses from outside the scene of crime. At any rate it was to decide which witnesses would suffice to prove their case. In criminal cases the burden lies on the prosecution to prove the guilt of the appellant beyond all reasonable doubt. The proof is not dependant upon the number of witnesses summoned to testify (See **Goodluck Kyando v. R** (supra) and section 143 of the Evidence Act, 1967).

The district court made a finding that the testimony of PW1 on how the robbery took place and his subsequent identification of the appellant at the identification parade eliminated doubts on the identity of the appellant. A further finding was that the driving licence of the appellant and his NCCR Mageuzi Membership Card

which were recovered from the motor vehicle which was robbed sufficiently corroborated the evidence of PW1. The same finding was made in respect of the caution statement of the appellant. He admitted the commission of the offence and gave detailed account of how it was planned and executed. The evaluation of evidence by the District Court led to the finding that the prosecution had proved the charge of armed robbery against the appellant beyond all reasonable doubt. The High Court upheld the findings of the District Court. We can hardly fault the learned judge on first appeal.

For these reasons we find no strong and compelling reasons for interference with the concurrent findings of the courts below. The appeal is dismissed in its entirety.

DATED at ARUSHA this 4th day of October, 2006.

D. Z. LUBUVA
JUSTICE OF APPEAL

E.M.K. RUTAKANGWA
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

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



(S. M. RUMANYIKA)
DEPUTY REGISTRAR