ZUBERI BAKARI v. REPUBLIC

COURT OF APPEAL OF TANZANIA AT TANGA

(Lubuva, Nsekela and Kaji, JJ.A.)

CRIMINAL APPEAL No. 109 OF 2003

(From the judgment of the High Court of Tanzania at Tanga, Longway, J., dated 14 April 2003, in Criminal Case No. 49 of 2001)

Criminal Law – Robbery with violence – Evidence of use or threat of actual use of violence to steal or retain stolen property is essential – Section 285 of the Penal Code.

Criminal Practice and Procedure – Conviction – Substitution of conviction – Charge of robbery with violence but evidence supports assault occasioning bodily harm and no theft – Power of court to substitute conviction for lesser offence.

On 4 February 2000 the complainant had gone to the shop of the appellant to purchase maize flour in the company of a friend. The complainant entered the shop and found the appellant in the shop which was lit by a hurricane lamp. The complainant had TZS. 25 000. As he took out the money the appellant cut him with a *sime* on the left hand as a result of which the complainant dropped the money and ran away. On being asked by his companion who had been standing outside why he was running the complainant replied that the appellant had wounded him. The matter was first reported to the chairman of the village but there was no mention of the money. Later it was reported to the police who arrested the accused and charged him with robbery with violence for which he was tried in the District Court but was convicted of armed robbery. He was sentenced to thirty years' imprisonment with corporal punishment. Aggrieved he appealed against both conviction and sentence to the High Court where he lost. He then appealed to the Court of Appeal on the ground that the ingredients of the offence of robbery had not been proved. The Senior State Attorney did not support the conviction stating that the evidence did not establish that the appellant stole the

money or any property of the complainant. The evidence supported a conviction of assault causing actual bodily harm.

Held: (i) To constitute the offence of robbery there must be evidence that violence was used for the purpose of taking the property or retaining it;

(ii) In the present case there was no evidence that any money had been stolen or taken by the appellant but only established that the appellant had assaulted the complainant.

Appeal allowed

Mr Mulokozi, for the Respondent

Cases referred to:

(1) *Leonard Raphael v. Republic,* Court of Appeal, Criminal Appeal Number 4 of 1992 (unreported)

(2) *Waziri Amani v. Republic* [1980] T.L.R. 250

(3) *Omari Masunguru and others v. Republic* [1970] HCD n. 213

Statutory provision referred to:

(1) Penal Code Chapter 16, sections 285, 286 and 241

JUDGMENT OF THE COURT

(Dated 23 March 2004)

Nsekela, J.A.: This is a second appeal by the appellant Zuberi Bakari. In the District Court of Lushoto District, the appellant was charged with the offence of robbery with violence contrary to sections 285 and 286 of the Penal Code but was convicted of armed robbery and was sentenced to thirty years imprisonment with corporal punishment. The appellant was aggrieved by both the conviction and sentence imposed upon him and appealed to the High Court where the appeal was dismissed in its entirety, hence the appeal to this court. Before us, the appellant appeared in person, unrepresented whereas Mr J.

Mulokozi, learned Senior State Attorney appeared for the respondent Republic.

The appellant filed six grounds of appeal which can conveniently be grouped into two categories although they are closely related. In grounds of appeal 1, 5 and 6 the appellant is challenging both the lower court's findings that the ingredients of the offence of robbery had been proved beyond all reasonable doubt. The complaint in the remaining grounds of appeal is to the effect that there was no theft of TZS. 25 000 from PW1, Emmanuel s/o Faustin.

The appellant was the owner of a shop selling various commodities including maize flour. On the 4 February 2000, at about 7.30 pm., PW1, Emmanuel s/o Faustin, was sent by his father, PW4, to purchase maize flour from the appellant's shop. He was accompanied by Guga Mndolwa, PW2. PW1 alleged that he had with him TZS. 25 000 in bank notes. The appellant was in the shop which was lit by a hurricane lamp. PW2 stayed outside about five paces away while PW1 entered the shop. As PW1 was taking out the money, strangely enough, the appellant pounced on him and cut him on the left hand with a "sime". The money he had dropped to the ground and PW1 ran away. He was followed by PW2, who all this time was outside the shop. On being asked by PW2 as to why he was running away, PW1 replied that the appellant had wounded him. They proceeded on to report the matter to the village Chairman (PW3) and PW1's parents. PW1 then went to Soni dispensary where he received medical treatment as per exhibit P1. PW3, Amiri Hassani, confirmed in his evidence that PW1 accompanied by PW2 reported the incident to him on the 4 February 2000 at about 7.40 pm. He saw the cut wound and applied some kerosene oil to it.

The appellant in his defence did not say anything at all on the events that happened on the 4 February 2000. Instead he narrated what had happened to him on the 13 February 2000 which is of course irrelevant to this appeal. Equally, the appellant's wife, Sabitina w/o Zuberi could not recall any event happening at the shop on the 4 February 2000.

Mr Mulokozi, learned Senior Attorney, declined to support the conviction and sentence meted out to the appellant. He submitted that the evidence of PW1, PW2, PW3 and exhibit P1 indicated that PW1 had been wounded. The evidence did not establish that the appellant stole any money or property belonging to PW1. The learned Senior State Attorney was of the view that the available evidence supported a conviction for assault causing actual bodily harm.

It will be recalled that the charge laid against the appellant alleged robbery with violence contrary to sections 285 and 286 of the Penal Code. Section 285 provides as follows:

> 285. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed "robbery".

Section 285 above gives the basic definition of the offence of robbery. The offence is not committed unless it is established that the appellant used or threatened to use any actual violence to obtain or retain the stolen property or to resist its being stolen or retained. This important element of the offence was underscored by this court *Leonard Raphael Richard Mohamed v. Republic* (1). There must be evidence that violence was used for the purpose of taking the property or retaining it. Unfortunately, both courts below did not address themselves to this vital ingredient of the offence. They concentrated on the question of the identification of the appellant, omitting in the process, to discuss whether or not the appellant stole TZS. 25 000 from PW1 by use of violence. The first appellate judge in the course of her considered judgment had this to say:

> As to linking the appellant with the offence charged, firstly it is the unfaulting identification of the appellant who had been observed to have been alone in the shop when PW1 entered the shop. Soon after the incidence the appellant was missing when he reappeared he exhibited worry...

In all, I agree with the respondents argument that the conviction was supported by evidence and therefore properly entered for the offence of armed robbery.

On our part, we have no quarrel with the identification of the appellant as the culprit who injured PW1 that evening. There was ample evidence to justify that finding and the guidelines in *Waziri Amani v. R.* (2) T.L.R. 250 at page 252 were observed by the trial magistrate. Robbery is an aggravated form of theft or stealing and therefore the elements of theft must be present in order to make out a charge of robbery. PW1 testified that after the appellant had attacked him, the money dropped down and he ran away. PW2, who had accompanied PW1 to the shop followed him and asked him what had happened to him. In reply, PW1 did not say anything about the money he had having been stolen. When both of them reported the incident to PW3, the village chairman, there was no reference to any money being stolen during the incident. There is therefore a vital missing link of theft of TZS. 25 000 by the appellant– a necessary ingredient in the offence of robbery. The conviction was also unsatisfactory for another reason. To constitute the offence of robbery, there must be evidence that violence was used for the purpose of taking the property or retaining it. (See: *Omari s/o Masunguru and others v. R.* (3). Both the courts below did not examine this aspect. Needless to say, there is no such evidence on the record. There is however sufficient evidence that the appellant inflicted the injuries sustained by PW1 as shown in Exhibit P1, the medical examination report.

From our discussion of the evidence it is therefore apparent that the prosecution did not establish the offence with which the appellant was charged with, namely, robbery with violence. We are of the settled view that both the courts below erred in finding that such an offence was established beyond all reasonable doubt. It is our considered view that the offence which was proved was the letter offence of assault occasioning actual bodily harm.

A We therefore allow the appeal and quash the conviction for armed robbery for which the appellant was ultimately convicted of and substitute thereof a conviction for the offence of assault occasioning actual bodily harm contrary to section 241 of the Penal Code. The sentence
B of thirty years imprisonment is quashed and set aside. The offence of assault occasioning actual bodily harm attracts a maximum sentence of five years imprisonment. The appellant was convicted by the District Court on the 20 June 2000 and by now he has served close to four
C years. We are of the view that this period is sufficient punishment for the offence he committed.

We therefore reduce the sentence to such term as will result to his immediate release unless otherwise held for some other lawful
D cause. The compensation order against him is also quashed and set aside.

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