

IN THE HIGH COURT FOR ZANZIBAR

HELD AT VUGA

CRIMINAL APPEAL NO. 14 OF 2011

FROM ORIGINAL CRIMINAL CASE NO 62 OF 2010 OF REGIONAL COURT

BUNDALLA KHAMIS MASANJA APPELLANT

VERSUS

D.P.P. (SMZ)..... RESPONDENT

DATE OF LAST ORDER: 16/11/2011

DATE OF JUDGEMENT: 30/11/2011

JUDGMENT

HON. OMAR O. MAKUNGU, CJ

The appellant, Bundalla Khamis Masanja was convicted of robbery contrary to sections 285 and 286 (1) of the Penal Act, No. 6 of 2004. He was sentenced to three years imprisonment by the Regional Magistrate court. He now appeals against both conviction and sentence. It has been alleged that on 8th June, 2010 at 11.15 pm at Mbuzini in the Western District in the

Urban West Region the appellant intimidated one Monica Basili to stab her with a knife before stealing there bags and one radio. The appellant all the times denied the charge.

In this appeal, the appellant was unrepresented while Mr. Slim Said, learned State Attorney argued for the Republic.

The appellant had nothing much to say before me only prayed for his grounds of appeal written in the memorandum of appeal to be considered. He raised four grounds of appeal to be considered by this court.

Mr. Slim, learned State Attorney for the respondent submitted that the Regional Magistrate did not error in his decision by admitting the evidence of PWI who is minor and who was not sworn before the court. He contended that PWI was 12 years and he was able to state the truth before the court. He argued farther that it is right for PWI to give her evidence without making voire dire test . He based his arguments on section 118 (1), and (2) of he Evidence Decree, Cap. 5.

Mr. Slim concluded by saying that evidence adduced before the trial court are watertight from PWI who is eye witness to PW5 and there was a good chain of evidence of those witnesses. Therefore this appeal should be dismissed and the conviction and sentence should remain as they are.

After going through the proceeding of this case, I noticed that the appellant was charged with the offence of robbery but the whole evidence of the prosecution witnesses proved the offence of stealing. In order to commit the offence of robbery one must commit two minor offences, assault and stealing. In this case no evidence which proved the assault. The only evidence is that of PWI which reads:

"I thought it was my father, so I called him father!

Father! And Bundalla told me be silent! If you

will make noise I will cut you"

This piece of evidence alone cannot establish the offence of assault because the type of weapon was not mentioned. Even when the appellant was arrested it was not established that he had any weapon like knife or

panga. Therefore the evidence of PWI was not collaborated by any other evidence of other witness in this aspect.

I realised also that the trial Magistrate himself in his Judgment when convicted the appellant convicted him with a different offence. He clearly said and I quote.

"The case before this court is that accused Bundalla broke the house of PW2 Basil and steal three bags and radio. The stolen bags and radio was found at a place where the accused was asleep".

From above observation it is clear that the trial Magistrate erred in convicting the appellant with the offence of robbery as charged. The prosecution, in my opinion, failed to prove that offence and instead the prosecution managed to prove the offence of stealing.

I therefore, set aside the conviction of robbery under sections 285 and 286 (1) and (2) and substitute therefore the one of stealing contrary to sections

267 (2) and 274 of the Penal Act, 2004. I set aside the sentence of 3 years and substitute therefore the one of one year imprisonment.

The appeal against sentence succeed to the above extent.

(Sgd) OMAR O. MAKUNGU, CJ

30/11/2011

COURT:

This Judgment was delivered before the appellant and Mr. Moh'd Khamis State Attorney for DPP.

(Sgd) OMAR O. MAKUNGU, CJ

30/11/2011

The right of appeal is hereby explained.

(Sgd) OMAR O. MAKUNGU, CJ

30/11/2011

I certified that this is true copy of the original.

Sgd.GEORGE J. KAZI

REGISTRAR

HIGH COURT-ZANZIBAR