**Isdori v Serikali ya Mapinduzi Zanzibar**

**Division:** Court of Appeal of Tanzania at Zanzibar

**Date of ruling:** 31 October 2003

**Case Number:** 145/02

**Before:** Mroso, Munuo and Nsekela JJA

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**Summarised by:** A Mwanzia

*Crime – Robbery with violence – Identification – Witness giving general descriptions of suspects –*

*Whether such evidence sound to establish identity beyond doubt – Sentence – Judge taking judicial*

*notice of prevalence of offence of robbery with violence and enhancing sentence as a result – Whether*

*proper – Judgment – Duty of presiding officer to analyse and evaluate evidence – Section 276(1) –*

*Criminal Procedure Decree (Chapter 14).*

**JUDGMENT**

**Mroso, Munuo and Nsekela JJA:** In criminal case number 212 of 1998 in the Regional Court at Vuga within Zanzibar, the present Appellant, Edwin Isidor Elias, was charged with the offence of robbery with violence clause 258 and 259(1) of the Penal Decree of Zanzibar (Chapter 13) as amended by section 2, schedules 1 and 2 of Act number 2 of 1991. It was alleged that on 11 August 1998 at about 12:10pm at Kilimani area in Urban District within Zanzibar, the Appellant, Edwin Isidor Elias, threatened one Arafa Saleh Hemed with a knife thereby seizing her golden necklace valued at TShs 100 000. He was convicted and sentenced to three years’ imprisonment. Subsequently the Appellant unsuccessfully lodged criminal appeal number 9 of 2000 in the High Court of Zanzibar, before Dourado J who enhanced the three years’ imprisonment sentence to ten years’ imprisonment giving rise to this second appeal against the conviction and sentence. The complainant, Arafa Saleh Hemed, testified as PW1. She stated that on the material afternoon she took her six visitors from Arabia to the Kizingo beach at Kilimani area for recreation. Her sister-in-law, PW2 Zena Salum Jaffar, accompanied the visitors. While taking pictures, two suspects stormed into the group. The Appellant allegedly threatened PW1 with a knife whereupon he seized a golden chain from the neck of the complainant and ran away with it. PW2 Zena Salum Jaffar, deposed that he could not hear the words the Appellant uttered to PW1 but she saw him snatch the necklace and speedily escape with it. Both eye witnesses visually identified the Appellant because they used to see him around the area. After the robbery, PW1 reported the matter at Madema police station. With the assistance of PW3 Mbarak Salum, PW1 was able to trace and arrest the Appellant whereafter he was charged with the offence of robbery with violence. In this appeal, Mr *Mbwezeleni*, learned advocate, represented the Appellant. The Respondent, the Revolutionary Government of Zanzibar, was represented by Mr Abdulhakim *Ameir*, Learned State Attorney. The learned advocate for the Appellant filed four grounds of appeal namely that: “1. The Learned Judge erred in law in deciding the appeal without making his own evaluation of the facts of the case against the grounds raised in the appeal before him.

2. The Learned Judge erred in law in determining the appeal based on the findings of the RM’S Court while the same was reached on contradictory and weak evidence on the part of the prosecution witnesses.

3. The Learned Judge erred in law in dismissing the appeal basing on the RM’S findings while the same was reached contrary to the normal procedure as RM’S findings were reached without analysing the so called evidence before the court.

4. That the Learned Judge erred in law in enhancing the punishment on the Appellant without a proper legal base for the same”. Mr *Mbwezeleni* faulted the judgment of the Learned Judge in that it does not qualify to be called a judgment because it lacks analysis and evaluation of the evidence adduced at the trial which evidence was also not analysed or evaluated by the Learned trial Regional Magistrate. The Learned Judge failed to comply with the provisions of section 276(1) of the Criminal Procedure Decree of Zanzibar, the learned advocate for the Appellant contended, because the said judgment does not contain a point or points for determination, reasons for the decision or the decision itself. He criticised the Learned Judge and the trial Magistrate for failing to address and resolve contradictions relating to the time and date of the commission of the robbery and the date of the arrest of the Appellant which were inconsistently deposed to by the two eye witnesses namely PW1 Arafa Saleh Hemed and PW2 Zena Slum Jaffa. Mr *Mbwezeleni* further contended that the identification of the suspect who seized the complainant’s necklace was doubtful for want of specification. He cited the case of *Mhando v Republic* [1993] TLR 170 and *Mfaume v Republic* [1981] TLR 167 in which the Court upset convictions because the identification of the suspects was weak coupled with the fact that the trial court and the appellate Judge had neither evaluated the evidence nor resolved contradictions in the prosecution evidence. On the propriety of the sentence, the learned advocate for the Appellant criticised the Learned Judge for unilaterally enhancing the three-year sentence imposed on the Appellant by the trial court to ten years on the wrong premise of taking judicial notice of the prevalence of the crime of robbery with violence, which, Mr *Mbwezeleni* asserted, is rarely committed in Zanzibar. The Learned State Attorney, Mr Abdulhakim *Ameir*, supported the conviction but not the enhancement of the sentence. He conceded that the judgment of the Learned Judge contravened the provisions of section 276(1) of the Criminal Procedure Decree which is why this Court has to step into the shoes of the courts below, evaluate the evidence and determine the case on merit. The Learned State Attorney dismissed the minor discrepancies relating to time and dates because they do not go to the root of the case and are thus not of any materiality. He pointed out that in his sworn defence, the Appellant admitted that he was at the Kizingo beach around 1:00pm which means that he had the opportunity to commit the robbery and did indeed rob the complainant of her golden chain as alleged by the two eye witnesses, PW1 Arafa Saleh Hemed and PW2 Zena Salum Jaffar. As for the sentence, the Learned State Attorney found no aggravating factors or justification for enhancing the sentence to ten years’ imprisonment considering the low rate of robbery with violence in Zanzibar. Taking grounds 1, 2 and 3 together, we are in agreement with both learned counsel that the judgment of the Learned Judge contravened the provision of section 276(1) of the Criminal Procedure Decree (Chapter 14) which states: “276 (1) Every such judgment shall, except as otherwise expressly provided by this Decree be written by the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.In the present case, the Learned Judge determined the appeal vaguely and generally as follows: “Judgment The learned RM based his finding on adequate facts. I am not prepared to upset his finding. The conviction will stand. As regards sentence, the court must take judicial notice of prevalence of such offences. Zanzibar relies on tourism and bandits like Edwin Isidore turn tourists away, The court will not allow this. I am therefore increasing (*sic*) from three years to a sentence to one of 10 years. Let this be a lesson to others who may be tempted to enrich themselves. Dated this 29 August 2000. W Dourado J” As illustrated by the above general judgment, the same contains, as submitted by the Appellant’s advocate, no point or points for determination, the reasons for decision and the decision itself. In other words the above sentences do not constitute a judgment under the provisions of section 276(1) of the Criminal Procedure Decree of Zanzibar (Chapter 14) for they simply supported the judgment of the trial court instead of analysing and evaluating the evidence adduced at the trial. Faced with a similar situation, the Court, in the case of *Mhando v Republic* [1993] TRL 170 at 174 interfered with the findings of the trial court and observed: “As it will be noticed, we have taken the unusual step in this appeal of interfering with the concurrent findings of fact made by the two courts below. On a second appeal to this Court, we are only supposed to deal with questions of law. But this approach test on the premise that the findings of fact are based on a correct appreciation of the evidence. If as in this case both courts completely misapprehend the substance, nature and quality of evidence, resulting in an unfair conviction this Court must in the interest of justice intervene. In the High Court the Learned Judge approached the case globally forgetting that the Appellant was charged with two counts which had to be considered separately. The consequence of this approach was that the Learned Judge failed to analysed the evidence touching on each count, this led him to make general statements which cannot be supported by the evidence in support of each count. In a case in which a similar problem arose, *DPP v Kawawa* [1981] TLR 148 this Court held at page 153. The next important point for consideration and decision in this case is whether it is proper for the Court to evaluate the evidence afresh and come to its own conclusion in matters of fact. This is a second appeal brought under the provisions of section 5(7) of the Appellate Jurisdiction Act 1979. The appeal therefore lies in this Court only a point or points of law. Obviously this position applies only where there are no misdirections or non-directions on the evidence, a court of second appeal is entitled to look at the relevant evidence and make its own findings of fact”. Like in *Mhando*’s case, in this case the courts below did not analyse or evaluate the evidence which is why we have to interfere with findings of the trial court. We think the Learned State Attorney rightly submitted that the minor inconsistencies relating to dates and time of the commission of the robbery and the arrest of the Appellant are not of any substance because the complainant’s golden necklace was snatched by a suspect at the Kizingo beach at Kilimani area on 11 August 1998 in the afternoon which incident the complainant reported at Madema police station on the same day. The issue for determination in this appeal is whether the two eye witnesses, PW1 and PW2, properly identified the Appellant as the person who committed the suspected robbery. We are of the view that the identification of the Appellant was doubtful. One, when the complainant testified on the aspect of identification she stated: “we were invaded by some young persons these people were not new to us as sometimes I was seeing them. I know them by their faces, and in this Court there is only one who is in the dock”. Then in cross-examination by the Appellant, PW1 stated: “I know you just on the street, ... it is you who took my neck chain”. During re-examination, PW1 stated: “I was living at Kilimani and I was seeing the accused person”. On her part, PW2 Zena Salum Jaffar had the following to say on the identification of the suspect who robbed the golden necklace of the complainant: “Later came two young boys, who passed through (*sic*) us three times, later those people came and grabbed the neck chain of my sister in law when she was taking pictures, then this people went in speed, ... we shouted and then we returned home and my sister in law went to the police station. I know those boys one is fat, tall and black, and one was short and slim. Among the two, one is present, he is in the dock”. When cross-examined by the Appellant PW2 stated: “I do see you on several parts around the urban town. I do not know where you are living. I have no special job in town ... I was not very near but I managed to see what you were doing. We were six”. From the above extracts from the testimonies of the two eye witnesses, we are of the settled view that the general description of the suspects being tall, fat and black or short and slim, could fit may other young boys. We observed the Appellant at the hearing and found it difficult to fit him in the category of tall, fat and black or short and slim persons. In that regard, we find that the evidence of the two eye witnesses did not establish the identity of the Appellant without doubt considering that the golden necklace was snatched when the complainant was busy taking pictures and as PW2 Zena Salum Jaffar, the other eye witness stated, she was not within a close range: “I was not very near but I managed to see what you were doing”. In the light of the above, we allow grounds 1, 2 and 3 of the appeal. With regard to ground four of the appeal, there is no material on the record to indicate that the offence of robbery with violence is rampant or that it has interfered with tourism in Zanzibar. On the contrary, the Learned State Attorney conceded to the contention of the learned advocate for the Appellant, that the Learned Judge wrongly took judicial notice of an alleged prevalence of the crime of robbery with violence because such offences are rarely committed on this island. On judicial notice, we find it pertinent to refer to Law Lexicon, the *Encyclopedia Law Dictionary* 1997 edition at 1015 which defines judicial notice as “the notice which a judge will take of a fact without proof. Acceptance by court for the purpose of a case of the truth of certain notorious facts without requiring proof”. The record shows that the prosecutor indicated that the Appellant was a first offender and prayed that the Appellant be given a sentence “which will deter and reform the accused not to repeat the same”. The Learned trial Magistrate sentenced the Appellant “to go into an education centre for a period of three years without corporal punishment”. As it is the prosecutor wanted the Appellant to get a punishment which would facilitate his reform. As the Learned State Attorney concede that the offence of robbery with violence is rarely committed, the Learned Judge’s reliance on judicial notice based on the prevalence of the said crime, was, to put it mildly, a false alarm at the moment. We have no facts to enable us to take judicial notice of the prevalence of the crime of robbery with violence in Zanzibar. Nor do we have facts to enable us to say that the said crime has interfered with tourism. Hence we allow ground four of the appeal. For the reasons stated above, we quash the conviction and set aside the sentence. The Appellant should be released forthwith unless detained for other lawful cause. We accordingly allow the appeal. For the Appellant:

*H Mbwezeleni*

For the Respondent: