IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: KILEO, J.A., MBAROUK, J.A., And MASSATI, J.A.)

CRIMINAL APPEAL NO. 141 OF 2015

1. MAJID HUSSEIN MBORYO
2. TIN DISMAS @ MDIYA
3. IBRAHIM RASHID **.....APPELLANTS**

VERSUS

THE REPUBLIC..... ..... RESPONDENT

(Appeal from the decision of the High Court at Dodoma)

(Makuru J.)

Dated 4th day of August, 2013
in
Criminal Appeal No. 31 of 2012

JUDGMENT OF THE COURT

9th &11th June, 2015

MBAROUK, J.A.:

On the 9th July, 2012, the District Court of Kondoa sitting at Kondoa in Criminal Case No. 174 of 2011 convicted the appellants with the offence of armed robbery contrary to section 287A of the Penal Code. Each of the appellants was sentenced to thirty (30) years imprisonment. Dissatisfied, the appellants unsuccessfully appealed to the High Court where

their appeal was dismissed in its entirety, hence they have preferred this second appeal.

In this appeal, each appellant preferred his own memorandum of appeal, but we are of the opinion that their complaints boil down into three main grounds, namely:-

(1) That, the identification was not watertight.

(2) That, the confession statements (Exh. P.E. and P.E.2) were wrongly used by the trial court and the first appellate court in convicting the appellants.

(3) That, the case against the appellants was not proved beyond reasonable doubt.

Before we go to the analysis of the grounds of appeal, we have opted to examine briefly what transpired at the trial court which led the appellants to be convicted as charged. At the trial court, the gist of the prosecution's case was to the effect that, on 21-09-2011 at night while Monica d/o Theodori (PW1) was asleep she heard the door of her house

being broken. When she woke up in an effort to find out what happened, she saw the 1st appellant who happened to be her village mate. PW1 was able to identify him with the aid of a torch light. Thereafter, PW1 testified to have been beaten with a stick, which resulted into her right hand being broken. PW1 further testified that in the process her properties were stolen. She then said that the appellants took to their heels after she raised an alarm for help. Good Samaritans positively answered her call and appeared to help her. Thereafter, the matter was reported to the street chairman and the 1st appellant was immediately arrested by the villagers and he confessed before the street chairman and he named the 2nd and 3rd appellants to have been in his company in the commission of that offence.

Whereas D. 7347 D/cpl. Kichonge (PW3) testified that the 1st and 2nd appellants confessed before him that they were responsible in the commission of the offence as it appears in their cautioned statements tendered in Court as Exh. PE.1 and PE.2 respectively.

In their defence, the 1st appellant denied to have committed armed robbery, because they were not armed with any weapon when the offence was committed, hence it was a mere theft and not armed robbery. The 1st appellant further claimed that he remained outside and it was the 2nd and 3rd appellants who entered inside. As regards the 2nd appellant, he categorically denied to have committed the crime, instead he implicated the 1st and 3rd appellants. As for the 3rd appellant, he claimed to have been asleep when traditional militia unlawfully arrested him at his house and sent him to police station without any cause. He further claimed that, he was maliciously named by the 1st appellant who committed the offence with the 2nd appellant. He then prayed to be acquitted.

At the hearing of the appeal the appellants appeared in person un-presented whereas Mr. Marcelino Mwamnyange, learned Senior State Attorney represented the respondent/Republic.

The appellants had nothing to elaborate on their grounds of appeal understandly so being lay persons. They opted to respond later after the learned Senior State Attorney's reply to the grounds of appeal.

On his part, Mr. Mwamnyange from the outset indicated to support the appeal. **Firstly,** he submitted that the evidence of visual identification was not watertight. He said that torch light was used by another person hence could not have helped PW1 to have correctly identified the appellants. Mr. Mwamnyange added that, PW1 testified that the incident was reported to the street chairman, but he was not called to testify. He also submitted that, even the villagers who responded to the alarm made by PW1 were not called to testify. In discrediting the evidence of Paul Joseph Anthony (PW2), the learned Senior State Attorney submitted that, even if PW2 claimed to have identified the 1st appellant when he was beating PW1 but the guidelines for correct identification were not met as no intensity of light was

described and no distance which enabled him to identify the 1st appellant was disclosed.

Secondly, Mr. Mwamnyange initially claimed that the cautioned statements of the 1st and 2nd appellants were wrongly used by the trial court, but when he was probed by the Court, he admitted that the same were properly tendered at the trial court.

Thirdly, the learned Senior State Attorney further submitted that, the case was not proved beyond reasonable doubt. He substantiated his claim by submitting that, the chain of custody of the stick tendered as Exh. PE. 5 which was used to beat PW1 was broken. Also, he submitted that, in the trial court's judgment there were words which have been added without any proof that they were said by PW1. For example, part of the judgment found at page 44 of the record shows that PW1 named the suspects to the citizens who responded to her alarm. But, the learned Senior State Attorney submitted that the testimony of PW1 at the trial

court never showed that she named the suspects to the citizens. The learned Senior State Attorney also claimed that the appellants' defence was not considered by the trial court. For example, he said the 3rd appellant's defence found at page 38 of the record was not considered and that of the defence of the 1st and 2nd appellant's was not considered too.

For those reasons, Mr. Mwamnyange urged us to allow the appeal, quash the convictions and set aside the sentences.

In their rejoinder submission, the appellants reiterated that they have not committed the offence charged against them and urged the Court to consider that they are not conversant with legal technicalities, therefore the Court should properly consider the appeal so that justice is seen to be done.

After having carefully gone through the record of appeal and the submissions made by the learned Senior State Attorney we have reached to a conclusion that taking into account the cautioned statements of the 1st and 2nd

appellants tendered as Exh. PE.1 and PE.2 without any objection from the 1st and 2nd appellants and which the same have not been repudiated or retracted by those appellants in their defence, we are of the opinion that the appellants have committed the offence as per their admission in their cautioned statements. For example, the 1st appellant clearly stated in his cautioned statement as follows:-

> "*.....nakumbuka kuwa mnamo tareh 21-09-2011 majira kati ya saa 20:00 za usiku nikiwa nyumbani (kwetu) kwangu walifika watu wawili ambao ni TINI s/o DISMAS pamoja na IBRAHIM s/o RASHID na kunishawishi kuwa twende tukaibe nyumbani kwa MONICA s/o TEODORI hapo kijijini mimi nilikubaliana nao na kuondoka kuelekea kwa huyo na fimbo mkononi, tulipofika kwa MONICA s/o TEODORI saa 02:00 usiku tulichukua jiwe kubwa na kupiga mlango hadi kuvunjika na kufunguka, wakati mama huyo anataka kutoka nje ili akimbie nilimpiga mkono wa kulia na kuvunjika. Ndipo tukaanza kuiba sabuni ya unga kiroba kimoja ilikuwa imefunguliwa,*

viberiti baada ya kufanya unyanga'anyi huo tuliondoka hatua chache ndipo tulisikia mayowe...."

Also the 2nd appellant stated in his cautioned statement as follows:-

".....ninamfahamu MONICA s/o THEODORI kuwa ni mkazi wa kijiji cha Loo pia anafanya biashara ya duka pamoja na kuuza pombe za kienyeji nakumbuka kuwa mnamo tarehe 21-09-2011 saa 20:00 mimi nikiwa na mwenzangu IBRAHIM s/o RASHID tulienda nyumbani kwa MAJID s/o HUSSEIN MBORYO na kumshauri kwenda nyumbani kwa MONICA s/o THEODORI kwa nia ya kuiba, wakati wa kwenda tuiikuwa na fimbo mikononi ilifika saa 02:00 za usiku tulienda kwa huyo mama na kuvunja mlango kwa kutumia jiwe kubwa hatimaye mwenzetu MAJID s/o HUSSEIN @ MBORYO alimpiga mkono wa kulia , hatimaye tulipora mfuko mmoja wa sabuni ya unga pamoja na viberiti ndipo tulianza kukimbia tulisikia nyuma yetu mayowe yakipigwa na kila mmoja kukimbia zake...."

From that admission made by the 1st and 2nd appellant in their cautioned statements without being repudiated or retracted, we are forced not to agree with the learned Senior State Attorney that this appeal has merit. We are very much aware that the burden of proof is always on the prosecution and it is a trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his defence. However, as observed by this Court in the case of **Mohamed Haruna @ Mtupeni and Another v. Republic,** Criminal Appeal No. 259 of 2007 (unreported) that:

> *..."the very best of witnesses in any criminal trial is an accused person who freely confesses his guilt."*

In the instant case apart from the fact that the 1st and 2nd appellants did not repudiate or retract their confession in their cautioned statements, but even at their trial the 1st appellant at page 35 of the record testified that:

"I did not commit armed robbery ***because we were not armed with any weapons"***

(Emphasis added)

According to section 287A of the Penal Code, it state as follows:

> ***"Any person who steals anything****, and at of immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is* ***in company of one or more persons, and at or immediately before or immediately after the time of the stealing uses or threatens to use violence to any person, commits an offence termed 'armed robbery'*** *and on conviction is liable to imprisonment for a minimum term of thirty years or without corporal punishment."*

(Emphasis added)

Also the record shows at page 35 when the 1st appellant was cross examined by the prosecution he was quoted to have said:

"..... No weapons used to commit theft, this is a mere theft and not armed robbery. I was found in the bush. I told them that the offence was committed by the second and third accused."

We are of the view that, all that amounts to confession. Hence, taking into account that the very best witness is an accused person who confesses his guilt, we find no merit in this appeal. We are also of the opinion that, for that reason alone we can dispose of the appeal.

In the event, the 1st and 2nd appellant's appeal is hereby dismissed in its entirety. However, on the other hand, unlike the 1st and 2nd appeal. Since the 3rd appellant was only implicated by the confessions of his co accused persons and since, in terms of section 33(2) of the Evidence/Act such evidence requires corroboration, and since we have found no such corroborative evidence, we find merit in the 3rd appellant's appeal as there is no sufficient evidence to connect him with the commission of the offence in this case. We therefore allow his appeal, quash his conviction and set

aside the sentence imposed on him. Hence, the 3rd appellant should be released forthwith unless he is held for any other lawful cause.

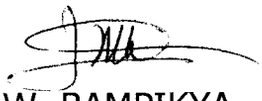
DATED at **DODOMA this** 10th day of June, 2015.

E.A. KILEO
JUSTICE OF APPEAL

M. S. MBAROUK
JUSTICE OF APPEAL

S.A. MASSATI
JUSTICE OF APPEAL

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



P.W. BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL