

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MMILLA, J.A., SEHEL, J.A., And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 146" B" OF 2017

FAKIHI ISMAILAPPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Mzuna, J.)

dated the 27th day of November, 2014

in

Criminal Appeal No. 39 of 2012

JUDGMENT OF THE COURT

22nd October, & 4th November, 2019

MMILLA, J.A.:

Fakihi Ismail (the appellant), is appealing against the judgment of the High Court of Tanzania, Mtwara Registry, in Criminal Appeal No. 39 of 2012 vide which it upheld the decision of the District Court of Ruangwa in Ruangwa District, in the Region of Lindi. Before that District Court, the appellant was charged with the offence of attempted robbery contrary to section 287B of the Penal Code Cap. 16 of the Revised Edition, 2002. After a full trial,

that court convicted him of that offence and was sentenced to serve fifteen years' imprisonment. As aforesaid, he unsuccessfully appealed to the High Court, Mtwara Registry, hence this second appeal to the Court.

One Mshuza s/o Ramadhani Shedafa (PW3/the complainant), was by 2008 living at Mchangani village in Ruangwa District in the Region of Lindi. Apart from being a shop keeper, he was also operating a business of transporting people with a motor cycle for hire in that area of residence.

On 27.3.2008 at about 7:00 hours, PW3 was visited at his shop by the appellant who hired him to be taken to Chilangalile village at an agreed price of Tzs. 8,000/=, after which they left. On arrival at Chilangalile however, the appellant demanded to be taken to another place beyond the previously agree destination, something which riled PW3 as it was contrary to their bargain. He was forced to stop. Upon that, the appellant produced a knife he had concealed in his pocket and suddenly stabbed PW3 with it in the neck and on the hand, and struggled to dispossess him his motor cycle. A fight between them ensued. As luck would have it,

around that time two people arrived at that area; Mohamed Salum @ Mkwile (PW2), and Julius Ajabu (PW4), who intervened and apprehended the appellant, thus thwarting the latter's endeavor to rob PW3 his motor cycle. The good Samaritans took PW3 and the appellant to the village leadership of Chilangalile, and reported the incident to Selemani Ajali Mbinga (PW1), the village chairman of that village. PW1 called the police who went to that place. The police formally arrested and whisked the appellant away. They subsequently charged him with attempted robbery.

In his defence before the trial court, the appellant protested his innocence. His short version of the matter was that he was framed up. As aforesaid, the trial court did not agree with him, so was the first appellate court which dismissed his appeal, hence this second appeal.

The memorandum of appeal filed by the appellant raised four grounds which may be paraphrased as follows; **one** that, the prosecution side did not prove the case against him beyond the required standard; **two** that, the prosecution did not tender in court his cautioned statement, nor the statement of PW3 (the

complainant) in order to corroborate the evidence of PW1, PW2 and PW4; **three** that, the complainant's PF3 (Exhibit P2) was wrongly relied upon because it was received contrary to the directions under section 240 (3) of the Criminal Procedure Act Cap. 20 of the Revised Edition, 2002 (the CPA); and **four** that, the said PF3 was not tendered by a proper person.

Before us, the appellant appeared in person, unrepresented; whereas Mr. Kauli George Makasi, learned Senior State Attorney, appeared for the respondent/Republic. The appellant elected for the Republic to respond first. We thus invited Mr. Makasi to begin.

To start with, Mr. Makasi informed the Court that he was opposing the appeal. He also claimed that except for the first ground of appeal, the rest of them are untenable. While the second ground is being raised in this Court for the first time, hence the Court lacks jurisdiction to determine it, he contended on the other hand that the third and fourth grounds have been improperly raised because they were deliberated and finally determined in the appellant's favour by the first appellate court. He urged the court to strike them out.

As regards the first ground, Mr. Makasi submitted that the evidence of PW3 laid down the background of what transpired from the beginning up to the point at which the appellant attacked him, and that it was corroborated by that of PW2 and PW4 who appeared at the scene of crime immediately after the appellant assaulted him, thereby frustrating the appellant's plan of robbing him his motor cycle. PW2 and PW4 apprehended the appellant at the scene of crime and took him to the leaders of Chilangalile village. He added that after the appellant was presented to PW1, he pleaded to be pardoned but the latter did not find sense in his plea. On the basis of this, the learned Senior State Attorney submitted that the appeal lacks merit and invited us to dismiss it in its entirety.

On his part, the appellant had nothing substantial to offer apart from lamenting that he was innocent, and therefore we should allow his appeal.

After carefully considering the submissions of Mr. Makasi as against the Record of Appeal, we wish to firstly agree with him that only the first ground of appeal out of those four he raised deserves

to be addressed as the other three are untenable. That ground alleges generally that the prosecution did not prove the case against him to the standard required. We will explain.

Perhaps we should begin by pointing out that we agree with Mr. Makasi that the complaint in the second ground that the prosecution did not tender in court his cautioned statement, nor the statement of PW3 (the complainant) in order to corroborate the evidence of PW1, PW2 and PW4 was not raised before the first appellate court. Since the Court determines appeals from the High Court, it is obvious that it will have no jurisdiction on a ground that was not raised and determined by that court. This has been expressed in a range of cases, including that of **Joseph Njasii v. Republic**, Criminal Appeal No. 330 of 2016 (unreported) in which we relied on the case of **Samwel Sawe v. Republic**, Criminal Appeal No. 135 of 2004 (unreported), where the Court said:-

"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at pages 21 to 23, shows that this ground of appeal by the appellant was

*not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of **Abdul Athuman v. R** (2004) TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on first appeal was raised. The Court held that the Court of Appeal has no such jurisdiction. This ground of appeal is therefore, struck out."*

For that reason, the second ground of appeal is flawed and we strike it out.

The third and fourth grounds, both of which focus on the evidence constituted in the PF3 (Exhibit P2), should not unnecessarily detain us because as submitted by Mr. Makasi, that evidence is no longer an issue since the PF3 was found to have been improperly received and was expunged by the first appellate court. This is borne out of what the first appellate court said at page 35 of the Record of Appeal. At that page, that court said:-

"However, as submitted by Mr. Makasi, the learned State Attorney that the PF3 was wrongly tendered by PW3 instead of the doctor who made it and the court never informed the

appellant his right to require the doctor who made the PF3 to be summoned and make available for cross examination. I agree that this was an anomaly and therefore the document i.e. the PF3 should be expunged from the record. . ."

In the circumstances, it was a misconception for the appellant to re-raise these two grounds; consequently we are constrained to, and we hereby strike them out.

We now turn to the first ground in which, as afore-pointed out, the appellant complains that the prosecution did not prove the case against him beyond reasonable doubt.

As we all know, it is elementary that the burden of proof in criminal cases rests squarely on the prosecution, with no requirement that the accused proves his innocence; and that such proof must be beyond reasonable doubt - See the cases of **Joseph John Makune v. Republic** [1986] T.L.R. 44 and **Mohamed Said Matula v. Republic** [1995] T.L.R. 3. In **Joseph John Makune's** case the Court held at page 49 that:-

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case, no duty is cast on the accused to prove his

innocence. There are a few well known exceptions to this principle, example being where the accused raises the defence of insanity in which case he must prove it on the balance of probabilities. . . ."

In the present matter, the prosecution case rested on the evidence of three witnesses; PW3 who was the victim of the charged crime on the one hand, and on the other hand PW2 and PW4, both of whom were the passersby who rescued the former. PW3 explained how he was approached by the appellant at the time the latter called at his shop to hire him, the discussion they had, and subsequently their journey to Chilangalile village. He also explained the turning point whereby the appellant turned on him, stabbed him with a knife and attempted to rob him of his motor cycle, and how he was rescued by PW2 and PW4, and the fact that the appellant was arrested at the scene of crime.

The evidence of PW3 was corroborated in material particulars by that of PW2 and PW4 who testified in common that during their journey from Matambarare village to Nachingwea via Chilangalile, they saw two persons fighting at the outskirts of Chilangalile village. They said that one of the two persons (PW3) called for

help, upon which they stopped and intervened. They added that PW3, who was injured on the neck and hand, informed them that that other person (the appellant), was the one who injured him in a bid to rob him his motor cycle. In fact, they said, at the time they arrived there, the appellant was holding a knife in his hands. PW2 and PW4 struggled to overpower the appellant and succeeded to apprehend him. They were the persons who took the culprit to the leadership of Chilangalile village and handed him over to PW1.

On his part, PW1 confirmed that the appellant was handed over to him by PW2 and PW4 who were in the company of PW3, and that PW3 had injuries on the neck and hand. After PW3's narration as to what transpired, he resolved to report the incident to police. Of course, PW1 said, the appellant requested to be pardoned, but he told him that it would be proper for him to settle it with the police.

On the face of such strong, straight forward evidence of the prosecution witnesses, we are unable to agree with the appellant that the prosecution did not prove the case against him beyond reasonable doubt. To the contrary, we find that the prosecution

proved its case against him beyond doubt, therefore the appeal lacks merit. In the circumstances, it is dismissed in its entirety.

DATED at **MTWARA** this 1st day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 4th day of November, 2019 in the presence of the appellant in person, unrepresented and Mr. Paul Kimweri learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original



S. J. Kainda
S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL