IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 270 OF 2018

SHABANI SAID ALLY.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mtwara)

(Mlacha, J.)

dated the 9th day of July, 2018
in
Criminal Appeal No. 127 of 2016

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JUDGMENT OF THE COURT

1st & 6th November, 2019.

SEHEL, J.A.:

The appellant was charged and convicted with the offence of armed robbery by the District Court of Kilwa at Kilwa, and sentenced to 30 years' imprisonment and eight strokes of the cane. His appeal to the High Court against that decision was unsuccessful. Hence, this second appeal.

The facts leading to his conviction are simple. It was alleged by the prosecution that the appellant on the 20th day of July, 2016 at about 17:45 hours at Jimbiza area within Kilwa District in Lindi Region did steal cash

TZS. 35,000.00, Burundian Francs 34,000.00, two mobile phones make TECNO 8 and Nokia M5 valued at TZS 280,000.00 and 30,000.00 respectively, the property of Philemon Togolai Mshahara and immediately before and after such stealing did threaten the said person by using knife in order to retain the stolen properties.

To prove its case the prosecution paraded a total of five witnesses, namely: Philemon Togolai Mshahara (PW1), G. 2935 PC Alto (PW2), Karim Awadh (PW3), Torcha Haji Mchanganyiko (PW4), and E. 2044 Cpl. Boniface (PW5). The prosecution also tendered two exhibits, namely: Burundian Francs 34,000.00, TECNO 8, and Nokia M5 collectively admitted as exhibit P1; and Black T-shirt and a knife admitted as exhibit P2, collectively.

It was the evidence of PW1 that on that fateful day, he was strolling around Jimbiza Beach when the appellant appeared and tried to befriend him by asking questions. PW1 replied to his questions by disclosing his name and the place he came from. The appellant then warned him that the area was not safe. Upon hearing that, PW1 decided to leave the place but suddenly he was rudely called back by the appellant, and there, with the assistance of a knife directed at his stomach, the appellant robbed from him his wallet that had in it TZS. 35,000.00 and Burundian Francs

34,000.00. He was also forced to part with two mobile phones make Nokia M5 and TECNO C8. PW1 managed to escape. On his way, he met PW2 who was on a motorcycle driven by PW4. PW1 explained to PW2 of what had befallen upon him. He was advised to report the tragedy to a nearby police station, an advice he followed. While at the police station, PW2 appeared in company of the appellant. When searched he was found with the properties stolen from PW1 which the latter identified to be his.

PW2 told the trial court that, on that day he was on duty. At round 18:00 hours when he was heading home, on his way, was stopped by PW1 who narrated to him about the robbery incident. He advised him to report the matter to the police station thereafter proceeded to his home. Upon reaching home, he received information from his neighbour that the suspected culprit had passed by that area. PW2, PW3, and PW4 traced the appellant and luckily they managed to find him.

PW4 on his part testified that on 20th day of July, 2016, he was with Kelvin and thereby came the appellant looking for a motor cycle to hire but PW4 declined to carry him because he was not normal, he was restless. Kelvin was very much suspicious about him. The two decided to call PW2

who immediately responded to the call in company of PW3. The trio traced the appellant and managed to apprehend him.

After he was apprehended, PW2 searched him and was found with a knife on his waist. PW2 and PW3 took the appellant to the police station.

At the police station they found PW5 who was on duty, attending PW1. There at the station, the appellant was searched and found with two mobile phones make Nokia 15 and TECNO C8, Burundian Francs 34,000.00, TZS. 35,000.00, and a knife. The phones had passwords and photos of PW1. PW1 identified the items as his stolen properties.

At the trial court, the appellant denied committing the offence and disassociated himself with the stolen items. He told the trial court that he knew nothing about the properties. He only found them at the counter of the police station. Nonetheless, he admitted to have met PW1 at the beach but added that they were rivals battling over a girlfriend called Farida.

The trial court was satisfied that the appellant stole from PW1 TZS. 35,000.00, Burundian Francs 34,000.00 and two mobile phones make Nokia 15 and TECNO C8, the properties of PW1 and immediately before and after that stealing the appellant threatened PW1 with a knife. It thus

proceeded to convict the appellant with an offence of armed robbery and sentenced him to thirty (30) years' imprisonment with eight strokes of the cane. Dissatisfied with the conviction and sentence, he appealed to the High Court (the first appellate court).

The first appellate court, apart from concurring with the trial court that the doctrine of recent possession was properly applied, it added that there is also evidence of identification which could be the base of the appellant's conviction. His appeal was, thus, dismissed. Still protesting his innocence, the appellant filed a notice of appeal against the dismissal of his appeal that was followed by the Memorandum of Appeal containing three grounds, namely:-

1. That the trial judge erred in law and fact by convicting the appellant because the prosecution failed to prove its case beyond reasonable doubt.

2. That the trial judge erred in law and fact by convicting and sentencing the appellant basing on the weaknesses of the defence case and not on the strength of the prosecution evidence.

3. That the trial judge erred in law and fact for failure to take into account the appellant's grounds of appeal and for not considering the fact that the appellant was not found with the stolen properties.

At the hearing of the appeal, the appellant appeared in person fending for himself; whereas Mr. Abdulrahman Msham, learned Senior State Attorney, assisted by Mr. Emmanuel John, learned State Attorney, appeared to represent the respondent/Republic.

The appellant after adopting his grounds of appeal opted to hear the submission of the learned State Attorney but reserved his right to reply.

It was Mr. John who submitted on behalf of the respondent/ Republic. From the outset, he informed the Court that he was opposing the appeal. He proposed to combine grounds number one and two in his submission as he said they both touch the issue of proof beyond reasonable doubt and that he will argue ground number three on being found with recently stolen goods, separately.

It was Mr. John's argument that the offence of armed robbery which the appellant was charged with and convicted was proved beyond

reasonable doubt because the appellant used a weapon, to wit, a knife to threaten PW1 in order to obtain and retain the properties of PW1. He elaborated that PW1 told the trial court that he was threatened with a knife by the appellant and managed to rob from him his wallet containing TZS. 35,000.00 and Burundian Francs 34,000.00 together with two mobile phones make Nokia M5 and TECNO C8. Immediately after being robbed PW1, saw PW2 who advised him to report the robbery to a nearby police station and while he was at the police station, PW2 appeared with the appellant. The appellant was searched and found with the stolen properties in his possession. Mr. John added that the appellant never cross examined PW1 on his evidence. Relying on the case of **Goodluck Kyando v Republic** [2006] TLR 363 at page 366 that failure to cross-examine a witness leaves the evidence to stand unchallenged, Mr. John strongly maintained that failure of the appellant to cross examine PW1 on his evidence then PW1's evidence stood unchallenged.

He submitted further that the evidence of PW1 was corroborated by the evidence of PW2, PW3, and PW5. He pointed out that even the evidence of PW2 who said that he searched and found the appellant with a knife was not cross-examined by the appellant hence his evidence too

stood unchallenged. Mr. John contended the evidence of PW2, PW3, PW4, and PW5 that when the appellant was searched at the police station was found in possession of PW1's stolen items proved the fact there were stolen properties belonging to PW1. It was concluded by Mr. John that on the strength of the prosecution evidence, the trial court properly convicted the appellant and it did not base its conviction on the weakness of the defence case as alleged by the appellant. He therefore prayed for grounds number one and two to be dismissed.

Concerning ground number three that there was an error by the trial court by convicting the appellant while he was not found with the stolen properties, Mr. John argued that all the prosecution witnesses, namely PW1, PW2, PW3, and PW5 proved that the items which PW1 said were stolen from him were found with the appellant at the time when he was searched at the police station. As such, Mr. John argued, the doctrine of recent possession was correctly applied by the trial court and upheld by the first appellate court. To support his submission, he reffered us to the cases of **Said Ally Majeje @ Rico @ Kadete and 3 Others v. Republic**, Criminal Appeal No. 342 of 2008 and **Omary Said Nambecha @ Nguvu v. Republic**, Criminal Appeal No. 109 of 2012 (both unreported) that held

the doctrine of recent possession applies if it is proved by the prosecution that the stolen property was found in possession of an accused person; that stolen property is positively proved that it belongs to the complainant; it was recently stolen from the complainant; and that it has a reference to the charge laid against the appellant.

The appellant had nothing useful in reply apart from reiterating that he did not commit the offence and that there was no proof in terms of receipt that the properties belonged to PW1.

Having heard the submission of the learned State Attorney and in light of the appellant's grounds of appeal, this appeal can be disposed by combining all the three grounds of appeal because they boil down to one issue, that is, whether the prosecution proved its case against the appellant beyond reasonable doubt. In other words, whether on the basis of the prosecution evidence, the appellant was properly convicted of the offence of armed robbery that was later on upheld by the first appellate court.

We have pointed out herein that the appellant was charged with an offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 RE 2002 (the PC) which reads as follows:

> *"Any person who **steals anything and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or robbery 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 with or without corporal punishment." [Emphasis supplied]*

It follows from the above provision of the law that in order to establish an offence of armed robbery, the prosecution must prove the following:-

1. There must be proof of theft; see the case of **Dickson Luvana v. Republic**, Criminal Appeal No. 1 of 2005 (unreported);

2. There must be proof of the use of a dangerous or offensive weapon or robbery instrument against at or immediately after the commission of robbery.

3. That use of dangerous or offensive weapon or robbery instrument must be directed against a person. See:- **Kashima Mnadi v. Republic**, Criminal Appeal No. 78 of 2011 (unreported).

In this appeal, as rightly observed by the learned State Attorney, the evidence adduced by PW1 was to the effect that while he was at the beach, the appellant approached him and later on threatened him and stole from him his wallet that had in it cash money TZS. 35,000.00 and Burundian Francs 34,000.00. PWI also said the appellant stole his two mobile phones make Nokia M15 and TECNO C8. The stolen items were tendered as exhibit P1, collectively by PW1. It is also glaring from the record the appellant did not cross examine PW1. It is trite law that failure to cross-examine a witness leaves his/her evidence to stand unchallenged- See **Goodluck Kyando v. Republic** (supra).

Furthermore, there is evidence of PW2, PW3, and PW5 who told the trial court that when the appellant was searched he was found in possession of recently stolen properties belonging to PW1 because the mobile phones had PW1's passwords and photos. The stolen properties were also identified by PW1. With that evidence, it is clear that there was

an offence of stealing of properties belonging to PW1. We hold that the first ingredient was proved by the prosecution.

On the use of dangerous weapon, PW1 told the trial court that the appellant threatened him with the knife that was pointed at his stomach. That knife was tendered by PW2 as exhibit P2. The inevitable question that follows is whether a knife is a dangerous weapon as envisaged under section 287A of the PC.

The question we posed is answered in the case of **Michael Joseph v. Republic** [1995] TLR 278 where the appellant therein was charged with an offence of robbery with violence contrary to sections 285 and 286 of the PC. At the trial court, the evidence adduced disclosed that during the commission of the offence a knife was used. The appellant was sentenced to thirty years' imprisonment. On appeal to the High Court, the issue of sentence was raised that it was not properly imposed because the offence did not amount to armed robbery. On further appeal the Court stated, *inter alia*:

> *"Though there is no express and specific definition of what constitutes "armed robbery" it is clear that if a dangerous or offensive weapon or instrument is*

used in the course of a robbery such constitutes "armed robbery" in terms of the law as amended by Act Number 10 of 1989. In this context, the weapons are, in our view, not confined to firearms only, other types of weapons such as knives are also included." (at page 281)

As such, a knife is a dangerous weapon and if used in the commission of robbery then in terms of section 287A, the offence is armed robbery. Apart from the evidence of PW1, there was also the evidence of PW2, PW3 and PW4 who told the trial court that the appellant was found with a knife on his waist after he was searched by PW2. As such the second ingredient was fully established by the prosecution.

The last ingredient is whether there was any person who had been threatened by such dangerous weapon. PW1 testified that before the commission of the robbery, the appellant threatened him with a knife at his stomach. After that threat, the appellant managed to take from PW1 his cash money TZS. 35,000.00, Burundian Francs 34,000.00, and two mobile phones make Nokia M15 and TECNO C8. Thus, the evidence as adduced by PW1 proved the use of threat to PW1.

An akin situation happened in the case of **Mkiwa Nassoro Ramdhani v. Republic**, Criminal Appeal No. 187 of 2013 (unreported) where the Court said:

> *"We do not hesitate to say that the facts reproduced above disclosed the ingredients of the charged offence. As will be recalled, the appellant and his colleague who braved justice in that he was not arrested, assaulted the complainant with sticks and managed to rob his bicycle. See the case of* ***Muraji Seif v. Republic,*** *Criminal Appeal No. 213 of 2005, CAT, Tanga Registry (unreported). Since the facts are clear they used sticks in accomplishing the robbery; also he did this in the company of that other person who was not arrested, that constituted the offence of armed robbery under section 287A of the said Act. That justifies our conclusion that the facts disclosed the ingredients of the charged offence." (at page 11)*

Since the appellant used a knife which is a dangerous weapon against PW1 during the commission of the robbery, then we are satisfied that all ingredients of the offence of armed robbery were proved beyond reasonable doubt by the prosecution. Accordingly, the case against the appellant was proved beyond reasonable doubt by the prosecution.

In the final analysis and for the foregoing reasons, we are of the settled view that there is no basis for us to interfere with the concurrent findings of the courts below. They were entitled the find the prosecution proved its case beyond reasonable doubt. The appeal is therefore without merit and is hereby dismissed.

Order accordingly.

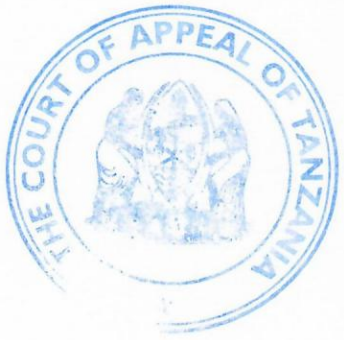
DATED at **MTWARA** this 6th day of November, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The judgment delivered this 6th day of November, 2019 in the presence of the appellant in person, unrepresented and Mr. Abdulrahaman Msham, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL