IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWANGESI, J.A., MWAMBEGELE, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 54 OF 2018

HALFANI MWINSHEHE MBEGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Dar es Salaam)

(Dyansobera, J.)

dated the 2nd day of October , 2017
in
Criminal Appeal No. 409 of 2016

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JUDGMENT OF THE COURT

22nd July & 2nd October, 2020

MWAMBEGELE, J.A.:

The appellant, Halfani Mwinshehe Mbega, was arraigned before the District Court of Morogoro sitting at Morogoro for the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002 (now Revised Edition, 2019). It was alleged in the particulars of the offence that on 23.03.2016 at Mlima Ng'aro area within the Morogoro District of Morogoro Region, he stole one motorcycle make Haojue with Registration No. MC 528 AFH, Chassis No.

LC6PCJK2XE0007504 and immediately before such stealing, he assaulted and injured one Augustino Philipo with a bush knife on his neck in order to obtain the said property. He pleaded not guilty to the charge and, after a full trial, he was found guilty, convicted and sentenced to serve a prison term of thirty years. His first appeal to the High Court on a thirteen-ground petition of appeal, was barren of fruit, for Dyansobera J. dismissed it in its entirety on 02.10.2017, hence this second appeal.

The material background facts to the appeal before us, as gleaned from the record of appeal, are largely told by Philipo Augustino (PW1) and not difficult to comprehend. We shall narrate them here, albeit briefly, as recounted by PW1, to add flavour to this judgment. They go thus: the appellant was a mechanic in a garage which was in the vicinity of the residence of PW1 who operated a bodaboda (a motorcycle used as a taxi); the property of George Salum Said (PW3). PW1 and the appellant were acquaintances; having known each other for about five months back before the incidence.

On 22.03.2016, so PW1 recounted, the appellant hired him so that he could take him to Kingolwira in the outskirts of Morogoro where the former was supposedly to meet some people. They went there but the appellant

could not meet the intended people. On the following day, the appellant called PW1 so that he could take him to Mkuyuni area where he wanted to get some people to help him plant crops in his farm. PW1 took him there where he communicated with some people on the phone. Having spent some considerable time together and hungry, the appellant asked PW1 to go somewhere to buy ripe bananas so that they could eat. The latter went there but there were no bananas to buy. On coming back, the appellant bought some bread and juice which they started to consume. Before PW1 finished his juice, he was once again asked by the appellant to go somewhere else to buy drinking water. PW1 went there leaving behind his juice. He came back after some time but when he resumed taking his juice, he found it with a strange smell. His sixth sense told him not to drink it anymore and, heeding to the instinct, poured it down.

When darkness was around the corner, the appellant asked PW1 to take him to Ng'aro hill. They went there and after some gimmicks in the bush, the appellant told PW1 to stop. The appellant went uphill and after some considerable paces, he told the appellant to leave his motorcycle there and asked him to follow him up there. PW1 obeyed and went thither. There, in a bizarre twist of things, the appellant drew a knife and

stabbed PW1 on his neck with it. In that sudden change of events, PW1 took to his heels, leaving the appellant at the *loqus in quo* who later drove the motorcycle away. The victim sought and obtained help from charcoal dealers in the bush who took him to the roadside at Bigwa so that he could be ferried to the Hospital. In the meantime, the victim phoned Jumanne Shabani Rajab (PW2); his relative who also informed PW3 and they went to Bigwa area together with Ramadhani Msophe and Salum Juma (who did not testify) and took the victim to the Hospital. On the phone, PW1 had told PW2 that the appellant had stabbed him with a knife in his neck and made away with his motorcycle. The appellant was admitted into the Hospital for three days and discharged but, later, he was re-admitted for two more days after which he was re-discharged.

The appellant was arrested on 27.03.2016 by No. G.6409 PC Josephat (PW4) in possession of the motorcycle and after his attempts to settle the matter out of court proved futile, he was charged with the offence of armed robbery, prosecuted and the case concluded in the manner stated hereinabove. His appeal to the Court is comprised in two sets of memoranda of appeal. The first one was lodged in the Court on 22.10.2019; it is composed of seven grounds of appeal. The second one; a

supplementary memorandum of appeal with four grounds, was lodged on 06.07.2020.

When the appeal was placed before us for hearing on 22.07.2020, the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms. Anita Sinare, learned Senior State Attorney and Ms. Salome Assey, learned State Attorney. The appeal was heard through a video conference; a virtual court facility of the Judiciary of Tanzania. When we gave the floor to the appellant to argue his appeal, fending for himself, he simply urged us to adopt the two sets of the memoranda of appeal and asked the Republic to respond after which he would make a rejoinder if need would arise.

Responding, Ms. Sinare consolidated the third, fourth and fifth grounds of the memorandum of appeal with the second ground in the supplementary ground of appeal. The rest of the grounds in both memoranda were argued separately.

Ms. Sinare kick-started with the first ground in the supplementary memorandum of appeal. In this ground, the appellant faults the first appellate court for considering only three grounds of appeal out of the

thirteen grounds of complaints he lodged. Admitting that the first appellate court may appear to have not considered all the grounds of appeal, Ms. Sinare submitted that all the grounds were argued through the general last ground in the memorandum of appeal which was a complaint to the effect that the prosecution did not prove its case against the appellant beyond reasonable doubt. The learned Senior State Attorney contended that the complaint on this ground was unfounded. Alternatively, Ms. Sinare argued, should the Court find that the first appellate court did not consider all the grounds, it should step into the shoes of the first appellate court and consider them because, she argued, that is a non-direction on evidence which, on the authority of **Mussa Mwaikunda v. Republic** [2006] T.L.R. 387, the Court is duty-bound to rectify the ailment.

The gist of the third, fourth and fifth grounds of the memorandum of appeal and the second ground in the supplementary ground of appeal is that the exhibits were wrongly admitted in evidence and not explained by the witnesses after admission and also that the motorcycle (Exh. P2) was never identified in court by the complainant and the victim. On this complaint, Ms. Sinare conceded that the complaint was partly justified,

save for Exh. P2. She submitted that those exhibits were tendered by the prosecutor but that the course was not fatal. She relied on the case of **Said Bakari v. Republic**, Criminal Appeal No. 359 of 2017 (at pp. 16 and 17) to buttress this proposition. With regard to Exh. P1, P3 and P4, she submitted that these were not read after admission. That is a fatal ailment, she argued. The learned State Attorney, therefore, had no qualms if the three exhibits would be expunged. However, the learned State Attorney, was quick to submit that even if these exhibits are expunged, there was ample evidence to support the contents of those exhibits. The contents of Exh. P1 (the Registration Card) and Exh. P4 (the PF3) are found in the testimonies of PW3 and Dr. Fredrick Mbowe (PW8), respectively. As for the contents of Exh. P3 (the cautioned statement), Ms. Sinare contended that all the witnesses testified sufficiently what transpired that the case against the appellant was proved even without the cautioned statement.

The third ground of complaint in the supplementary memorandum of appeal is a complaint by the appellant faulting the first appellate court for convicting him basing on the doctrine of recent possession which, he said, was wrongly applied. Ms. Sinare argued that the first appellate court

addressed itself on the doctrine of recent possession and relied on the case of **Mwita Wambura v. Republic**, Criminal Appeal No. 56 of 1992 (unreported) in which the four essential elements for the applicability of the doctrine were articulated. These elements are: **one**, it must be proved that the property was found in possession of the accused person; **two**, it must be proved that the stolen property was positively identified to be that of the complainant; **three**, it must be proved that the property was recently stolen from the appellant and; **four**, it must be proved that the stolen property constitutes the subject of the charge. Ms. Sinare thus argued that the doctrine of recent possession was rightly applied to convict the appellant.

The fourth ground of the supplementary memorandum of appeal faults the first appellate court for failure to hold that the offence committed was not armed robbery but some lesser offence in that it was not normal for a person to rob his neighbour and call relatives for settling the matter out of court. Ms. Sinare argued that the offence was but armed robbery in the light of the testimony of PW1 who was stabbed by a knife and a motorcycle taken. PW8 confirmed that the wound was caused by a blunt object. That constituted an offence of armed robbery, she argued.

The sixth ground of the memorandum of appeal is a complaint by the appellant that the prosecution evidence was not corroborated. Ms. Sinare argued that the evidence did not need corroboration. The learned Senior State Attorney contended that PW1 recounted the ordeal and was supported by PW2 and PW3 who went to Bigwa area to take him to the Hospital after he told them of the incident. She reiterated that PW1's testimony did not need corroboration but was corroborated anyway. This complaint is unfounded, she contended.

The second ground of complaint in the memorandum of appeal is challenging the first appellate court for assuming that PW1 knew and recognised the appellant as the culprit without identifying him in the dock by not pointing or touching him. Ms. Sinare argued that dock identification was not necessary in the case at hand in that the appellant was known to PW1. She added that despite being known to each other, they were together for two consecutive days. In the premises, the appellant was not a stranger to PW1 and therefore, she argued, there was no need to make any dock identification. This complaint, the learned Senior State Attorney contended, had no merit.

The last complaint by the appellant seeks to challenge the first appellate court that the case against him was not proved beyond reasonable doubt. On this ground, the learned State Attorney reiterated that the appellant and PW1 were together for two consecutive days. Besides, she contended, PW1 knew the appellant some five months back. She went on to submit that the appellant was found in possession of the recently stolen motorcycle.

In view of the above, Ms. Sinare submitted that the case against the appellant was proved beyond reasonable doubt and the first appeal was rightly dismissed and this second appeal should be dismissed as well.

In a short rejoinder, the appellant submitted that he was not given a fair trial in that the first appellate court decided his appeal on only three grounds of appeal leaving aside some ten grounds. As for exhibits, he argued that all were not properly admitted in evidence. Besides, he added, it was not proved that the motorcycle was stolen. He also submitted that the motorcycle was not found in his possession.

With regard to the ground that the offence committed was not armed robbery but any other lesser offence, say, causing grievous bodily harm,

the appellant submitted that the duo had a quarrel over some personal matters. It was not armed robbery as claimed by the prosecution. However, the appellant could not disclose what that personal grievance was. He added that PW1 knew him before but that it was incumbent upon him to identify him in the dock. Regarding the evidence of the victim requiring corroboration, he submitted that such evidence must be corroborated. The evidence of other witnesses was hearsay, he contended.

Given this evidence, the appellant submitted that the case against him was not proved beyond reasonable doubt. He thus prayed that this appeal be allowed and he be released from prison custody.

We shall determine this appeal in the fashion taken by the learned Senior State Attorney. That is, we shall determine the third, fourth and fifth grounds of the memorandum of appeal as well as the second ground in the supplementary ground of appeal together. The rest of the grounds in both memoranda will be determined separately.

In the first ground in the supplementary memorandum of appeal, the appellant faults the first appellate court for determining only three grounds

out of the thirteen grounds in the petition. We have considered the contending arguments by the parties to this appeal. We have also scanned through the record of appeal including the impugned judgment of the first appellate court. We go along with the argument of Ms. Sinare that this complaint is unfounded. It is no gainsaying that the appellant preferred thirteen grounds of appeal in the first appellate court. The record of appeal is also clear at p. 75 that at the hearing of the appeal the appellant implored the court to consider the thirteenth ground of appeal, allow the appeal and set him free. The thirteenth ground of appeal was a general one which stated that the prosecution did not prove the case beyond reasonable doubt. In considering this general ground, the first appellate court touched the grounds on identification which were grounds 1, 8 and 9 and came to the conclusion that it was watertight in terms of the oft-cited **Waziri Amani v. Republic** [1980] T.L.R. 250.

The first appellate court also addressed itself on the ground respecting the doctrine of recent possession; the first ground of appeal in the memorandum of appeal and the third ground in the supplementary memorandum of appeal, and concluded that the trial court came to the right conclusion that the doctrine was rightly invoked in that all the

elements stipulated in the case of **John Ashiraf v. Republic**, Criminal Appeal No. 523 of 2013 and **Mwita Wambura v. Republic**, Criminal Appeal No. 56 of 1992 (both unreported) were complied with.

Having analysed as above, the first appellate court concluded by a finding that the case against the appellant was proved beyond reasonable doubt. In the light of the above discussion, we are of the view that the complaint by the appellant that all grounds of appeal were not considered is unfounded.

We now turn to consider the third, fourth and fifth grounds of the memorandum of appeal and the second ground in the supplementary ground of appeal whose gist is that the exhibits were wrongly admitted in evidence and not explained by the witnesses after admission. We, unlike Ms. Sinare, think the appellant's complaint in these grounds of appeal is justified. Ms. Sinare conceded that the complaint was partly justified, save for Exh. P2, but we think, even Exh. P2 cannot be saved. The record of appeal, at p. 21 shows that it was tendered by the State Attorney. We will let the record speak for itself:

*"**PW4:** The motorcycle is black in colour made HAOJUE with Registration No. MC528 AFH and its sit has a yellow cover*

***State Attorney:** I pray to tender the motorcycle as an exhibit.*

***Accused:** I have no objection.*

***Court:** received and admitted the motorcycle made HAOJUE black in colour with registration No. MC 528 AFH as an exhibit PE2.*

Sgd. Hon. A. Kimaze – RM

13/07/2016"

There is a litany of decisions of the Court which hold that a prosecutor cannot legally play the role of a prosecutor and witness at the same time – see: **Aloyce Maridadi v. Republic**, Criminal Appeal No. 208 of 2016 (unreported) and **Selemani Bakari Makota @ Mpale v. Republic**, Criminal Appeal No.269 of 2018 (unreported); [2019] TZCA 381 at www.tanzlii.org. In **Aloyce Maridadi** (supra), for instance, we relied on our previous decisions in **Frank Massawe v. Republic**, Criminal Appeal No. 302 of 2012 and **Thomas Ernest Msungu @ Nyoka Mkenya**

v. Republic, Criminal Appeal No. 78 of 2012 (both unreported) and observed:

> *"... a prosecutor cannot assume the role of a prosecutor and a witness at the same time. With respect, that was wrong because in the process the prosecutor was not sort of a witness who could be capable of examination upon oath or affirmation in terms of section 198 (1) of the Criminal Procedure Act. As it is, since the prosecutor was not a witness he could not be examined or cross examined."*

The above said, we are positive that the learned State Attorney; the prosecutor of the case the subject of this appeal, was not legally competent to tender the motorcycle as exhibit. It is thus obvious that even Exh. P2 which Ms. Sinare thinks it can be saved, was not properly admitted in evidence.

With regard to Exh. P1, P3 and P4, Ms. Sinare rightly conceded that they were not read after admission. The Court has time and again held that this is a fatal ailment. We have more often than not, pronounced ourselves in a number of decisions that before a document or an object is admitted in evidence, it must invariably pass through the process of

clearing, admitting and **reading out** – see: **Robinson Mwanjisi and Others v. Republic** [2003] T.L.R. 218, **Lack Kilingani v. Republic**, Criminal Appeal No. 402 of 2015 and **Magina Kubilu @ John v. Republic**, Criminal Appeal No. 564 of 2016 (unreported) – [2020] TZCA 1750 at www.tanzlii.org. In **Robinson Mwanjisi** (supra), for instance, we observed:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted before it can be read out. Reading out documents before they are admitted in evidence is wrong and prejudicial."*

We think this is a settled and sound principle of procedure which we are not prepared to depart from in this judgment. On the authorities of **Robinson Mwanjisi**, **Lack Kilingani** and **Magina Kubilu @ John** (supra), we find and hold that for failure to **read out** the exhibits in the case at hand, the exhibits did not pass the test of being introduced in evidence properly. In all the above instances, the Court held that the infraction was fatal and expunged the relevant exhibits from evidence. We shall do the same in the case at hand.

Failure to read exhibits P1, P3 and P4 after admission is not the only ailment that befell them. Like Exh. P2, they were tendered by the State Attorney. For this reason as well, they were not properly admitted into evidence. We thus allow this ground of appeal and expunge all the exhibits tendered in the trial court.

However, even with the foregoing finding, we agree with the learned State Attorney that even without the expunged exhibits, there was ample evidence to support the contents of those exhibits. The contents of Exh. P1 (the Registration Card) are found in the testimony of PW3 and the contents of exh. P4 (the PF3) are found in the testimony of PW3 and Dr. Fredrick Mbowe (PW8). PW8 is the medical personnel who medically examined PW1 and posted the results in the PF3 which has just been expunged.

The second ground of complaint in the memorandum of appeal, as alluded to above, is challenging the first appellate court for assuming that PW1 knew and recognised the appellant as the culprit without identifying him in the dock by not pointing or touching him. We think this complaint by the appellant is misconceived. It was not disputed at the trial that the appellant and PW1 knew each other for five months back and the

prosecution led evidence showing that the duo were together on the material date and the day before. In the circumstances, dock identification was not necessary. We wish to underline here that dock identification is, essentially, for the purpose of corroborating an identification parade – see: **Mussa Elias & Three Others v. Republic,** Criminal Appeal No. 172 of 1993, **Thaday Rajabu @ Kokomiti v. Republic,** Criminal Appeal No. 58 of 2013 and **Said Lubinza & Four Others v. Republic,** Criminal Appeal Nos. 24, 25, 26, 27 and 28 of 2012 (all unreported) cited in **Herode Lucas & Another v. Republic**, Criminal Appeal No. 407 of 2016 (unreported) – [2019] TZCA 318 at www.tanzlii.go.org. In the premises, we find no merit in the complaint under consideration and dismiss it.

The sixth ground of complaint in the memorandum of appeal faults the first appellate court for upholding the decision of the trial court which based its decision on uncorroborated evidence. This ground will not detain us. As rightly submitted by the learned State Attorney, the evidence of PW1 and other prosecution witnesses did not need corroboration. In addition, the appellant was convicted on the strength of other pieces of evidence like the doctrine of recent possession. We dismiss this ground of complaint.

The fourth ground of appeal in the supplementary memorandum of appeal assails the first appellate court for not holding that there was a possibility that the offence committed was not armed robbery but any other lesser offence. The appellant pegs this complaint on the fact that it was not humanly possible for a person to rob his neighbour and take the item he robbed to his home and then call the relatives of the victim for negotiations. This ground of complaint did not feature in the first appellate court. It has surfaced in the Court for the first time. This is therefore an afterthought. It was not incumbent upon the court to venture into whether or not the offence committed was a lesser offence to armed robbery while there was brought evidence proving the offence of armed robbery to the hilt. After all, the appellant did not raise such a defence which would have justified the court to peg any finding to that effect. Without that, we find this as an afterthought and dismiss it.

The seventh and last complaint in the memorandum of appeal seeks to challenge the first appellate court that the case against him was not proved beyond reasonable doubt. In view of the above discussion in which we have found no merit in all the grounds of complaint, except for those

relating to tendered exhibits which we have expunged, we find no merit in this general ground.

The above said and done, we find this appeal wanting in merit. It stands dismissed.

DATED at **DAR ES SALAAM** this 30th day of September, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 2nd day of October, 2020 in the presence of Appellant in person through video conference and Mr. Adolf Kissima, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL