IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MUGASHA, J.A., MWAMBEGELE, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 341 OF 2019

RAMADHANI ABDALA @ NAMTULE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ngwembe, J.)

Dated the 13th day of May, 2019
in
Criminal Appeal No. 119 of 2018

.....

JUDGMENT OF THE COURT

16th & 25th November, 2020.

MWAMBEGELE, J.A.:

This is an appeal by the appellant, Ramadhani Abdala @ Namtule, against the decision of the High Court of Tanzania at Mtwara dated 13.05.2019. The matter originates from District Court of Lindi, at Lindi where the appellant was charged with and convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002. The appellant pleaded not guilty to the charge after which a full trial ensued. After the full trial, he was found guilty as charged, convicted and sentenced to serve a thirty years' prison term.

The particulars of the offence part of the charge had it that on 17.04.2018, at Milola "B" within the district and Region of Lindi, the appellant stole cash Tshs. 300,500/=, the property of Somoe Abdala @ Mtuma (PW1) and that immediately before the stealing, he threatened PW1 with a machete in order to obtain the said property.

The appellant's appeal to the High Court was barren of fruit, for Ngwembe, J. dismissed it entirely. Dissatisfied, the appellant has come to the Court on second appeal seeking to assail the decision of the High Court on four grounds of complaint, namely:

1. That the two courts below erred in law and fact in basing the conviction on the identification of the appellant which was made under very unfavourable conditions;

2. That the trial court and first appellate court erred in law in admitting the purported cautioned statement of the appellant without fully satisfying the following issues, namely:

   (a) That the prosecution failed to prove beyond reasonable doubt that the purported cautioned statement was made by the appellant and, if yes, whether it was made voluntary and the appellant was a free agent.

   Alternative to paragraph (a) above:

   (b) Whether the purported cautioned statement of the appellant was taken in conformity with the provision of 57 (3) (a) (i) and

(4) (a) and (b) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002;

3. That the two courts below erred in law and fact in basing the conviction of the appellant on the cautioned statement of the appellant which had not been taken within the statutory four-hour period after his arrest; and

4. That the two courts below erred in law and fact in basing the conviction of the appellant on the identification parade that had been conducted contrary to law and procedure.

However, as put by Mr. Paul Kimweri, the learned Senior State Attorney who appeared for the Respondent Republic, and to our mind rightly so, all grounds except the first, are new grounds and did not feature in the record of appeal. We agree that the record do not bear out that there was admission into evidence of a cautioned statement of the appellant. Neither is there a record in the case on an identification parade being conducted in respect of the appeal. We shall advert to this issue in the course of this judgment.

The story as to what actually transpired is to a larger extent told by PW1 herself. She testified that she was an entrepreneur owning a small restaurant at Milola "B" within the District and Region of Lindi. One day before the incident the subject of this appeal, an unknown person had broken into the restaurant and made away with some property. She thus

made a decision that she would be sleeping in the restaurant to guard her property. She made a makeshift bed therein.

On the night of 17.04.2017, so she testified, a person she later identified to be the appellant, stormed in the restaurant forcing entrance through the door. She was not asleep yet. On asking who was forcing entrance in her restaurant, the appellant was, all of a sudden, already inside wielding a machete which he used to threaten her, demanding money in the process. He also had a torch. The room was also illuminated by a hurricane lamp whose light was intensified by PW1 when the uninvited visitor was pushing the door forcing entrance in the restaurant. PW1 was relieved of Tshs. 300,500/= by the robber after which he ran away from the scene. After that PW1 raised an alarm crying for help.

One of the persons who responded to PW1's alarm was Abdallah Ally Twalib (PW4). Having heard the alarm, PW4 whose house had a solar electric power and his residence was about forty paces from where the alarm was being raised, got out of his house only to see a person he allegedly identified to be the appellant running away from where the alarm was raised. That person disappeared in the cassava field. PW4 went to the scene of crime and told by PW1 that it was the appellant who robbed her.

He also told them that he saw him running away from there and disappeared in the cassava field.

The appellant was arrested on 21.04.2018 by Said Issa Ngumba (PW2). He was taken to the Police where the charge the subject of this appeal was preferred against him. In his testimony, he told the trial court that, at the Police Station, he was told that he stole a pot which was used to prepare soup, a cup and a thermos. He testified that he was surprised that at a later stage a charge of armed robbery was preferred instead. The appellant somewhat maintained this story on appeal as well; that he entered in the restaurant at night and stole the property mentioned above.

The trial court found that the prosecution had proved the case against the appellant to the hilt, found him guilty, convicted and sentenced him in the manner described above.

When the appeal was placed for hearing before us on 16.11.2020, the appellant appeared in person, unrepresented. The respondent Republic appeared through Mr. Paul Kimweri, learned Senior State Attorney. When we asked the appellant to argue his appeal, he did no more than adopt his memorandum of appeal earlier filed and preferred to hear the response of the learned Senior State Attorney after which, need arising, he would make his rejoinder.

Mr. Kimweri kick started by intimating to the Court that the complaints under grounds 2 – 4 did not feature in the record of appeal. He amplified that the gist of the second and third complaints is about a cautioned statement which did not feature at the trial. Likewise, the gist of the fourth ground of appeal is about an identification parade. No identification parade was conducted in the case at hand, he submitted. The learned Senior State Attorney thus implored us to expunge the grounds from the memorandum of appeal. To buttress this course of action, the learned Senior State Attorney referred us to **Abdul Athumani v. Republic** [2004] TLR 151.

On the first ground of appeal, Mr. Kimweri submitted that the appellant was sufficiently identified at the scene of crime by PW1 in the restaurant and by PW4 while running away from the scene of crime and disappeared in the cassava field. He contended that the room was illuminated by a hurricane lamp and that PW1 intensified its light before the appellant gained entrance and that the latter was well known to her. He added that the room was small which facilitated easy illumination and identification of the appellant. On the intensity of light in a small room and how it facilitates easy identification, the learned counsel cited to us **Gozbert Henerico v. Republic**, Criminal Appeal No. 114 of 2015

(unreported). He added that PW4 saw him running away from the scene of crime where PW1 had been crying for help that the appellant had robbed her.

The learned Senior State Attorney submitted further that PW1 named the appellant at the very earliest opportunity; she told PW4 that it was the appellant who robbed him. The fact that PW1 named the appellant as the assailant at the very earliest opportunity and crying for help mentioning his name, is an all assurance that PW1 testified but the truth, he charged.

When we prodded him on the appellant's defence not being considered by the trial court and the first appellate court; the third ground in his petition of appeal to the High Court, the learned Senior State Attorney, relying on **Hussein Idd & Another v. Republic** [1986] T.L.R. 166, admitted that the infraction was fatal. He, however, contended that the prosecution was not to blame as it had accomplished its duty of proving the case against the appellant beyond reasonable doubt. He thus urged us to dismiss the appeal for want of merit.

In rejoinder, the appellant reiterated his story that he did not rob the appellant using a machete. He, however, admitted to have entered into the restaurant of PW1 and stole the items mentioned; a pot used to prepare soup, a cup and a thermos. He stated that he admitted so at the Police

Station but that he was surprised to be charged with the offence of armed robbery. He submitted further that he said so before the High Court on first appeal but that still conviction was sustained.

In determining this appeal, we find it apposite to start with the ground that the appellant's defence was not considered by both the trial and first appellate courts. We do so because, as rightly observed by the High Court in its judgment at p. 62 of the record, if the appellant is believed, the issue of identification will not arise. But before we do that, we think we should first tackle the contention brought to the fore by the learned Senior State Attorney that except for the first, the rest of the grounds of appeal are not reflected by the record of appeal. We have scanned the record of appeal. Having so done, we are at one with the learned Senior State Attorney that indeed, at the trial, no cautioned statement was tendered; the subject of the second and third ground of complaint. Neither was an identification parade conducted; the subject of the fourth ground of complaint. We think the appellant is a victim of some copy and paste inadvertence by whoever prepared the grounds of appeal for him. We thus agree with the learned Senior State Attorney that the second, third and fourth grounds of grievance in the memorandum of

appeal by the appellant should be overlooked. We will thus not consider and determine these grounds.

The complaint by the appellant that his defence was not considered was raised in the High Court as a third ground of complaint in the Petition of Appeal as apparent at p. 47 of the record of appeal. We have keenly read the proceedings and judgment of the trial court as well as that of the High Court on first appeal. Indeed, in a thirteen-page judgment, the trial court never considered the appellant's defence at all. After summarizing the testimonies of witnesses for both parties, the learned trial Resident Magistrate framed the following issues for determination:

> *"1. Whether the event of armed robbery happened at Samoe's kiosk; and*
> *2. whether it was the accused person who actually committed the offence with a machete."*

Thereafter, the learned trial Resident Magistrate reviewed some legal principles that would guide him in his determination. Then he went on to discuss and consider the evidence of PW1, PW2 and PW4 and was eventually satisfied that the incidence of armed robbery took place. He then proceeded to determine the first issue and relied on the evidence of PW1 and PW4 as well as case law to arrive at a conclusion that the

appellant was amply identified at the scene of crime. Nowhere in the judgment was the appellant's evidence considered. That was a fatal error.

The first appellate court somewhat fell into the same error. It did not address itself to the issue whether or not the appellant's defence was considered at the trial. It simply went to consider the appellant's submission on appeal that he did not commit armed robbery but burglary and stealing and dismissed the appellant's submission as an afterthought because such a defence was not raised at the trial. With unfeigned respect to the first appellate Judge, we are afraid he did not dispassionately read the record of the trial court. Had he done that, we respectfully think, he would not have dismissed the appellant's submission as an afterthought. If anything, he would have given him a benefit of doubt. We shall demonstrate.

At the trial, the appellant is recorded in part at p. 24 of the record of appeal, as saying:

> *"... when we got at the station, I was told I was a suspect for stealing properties. I was told [I had stolen] the pot (jungu la supu), a cup and a thermos I denied. The complainant came and stated that I stole those properties. I was surprised to be charged with the offence of armed robbery,*

i.e I robbed the complainant's money. I did not do such a thing."

And in cross-examination the appellant is recorded at p. 25 of the record as saying:

"I know Somoe the victim. I have never had a fight with her. She said I threatened her with the panga and robbed her money. I didn't understand why she imputed on me a serious offence like this. Maybe she hates me. I did not ask her why at first, I was told to steal properties, but later I was charged with armed robbery offence.
I did not ask the police officer who came to testify why the allegation were changed. I know PW4."

As shown above, the trial court drafted one of the issues as whether robbery occurred at the restaurant of PW1. This means that there was a controversy between the parties as to whether robbery occurred at all. We think the evidence at the trial established such controversy; whether it was the items or money which was stolen from PW1 and whether it was robbery, armed robbery or burglary and stealing which was committed. This is cemented by the evidence of PW1 herself who testified as appearing at p. 12 of the record of appeal:

"... on that day I was still there because I was guarding my kiosk because the previous day, my kiosk was broken in and some properties were stolen...."

That testimony finds support in the testimony of PW2 who testified that she went to the restaurant and found "nothing in it". That he was told by PW1 that the appellant threatened her with a machete and took her properties. The Tshs. 300,500/= episode was not told to PW2 by PW1.

On appeal, the appellant maintained the story. What he said on appeal, as appearing at p. 54 of the record of appeal, was simply this:

"My Lord, I pray to rely on my grounds of appeal. My Lord the offence of stealing is correct but armed robbery is not correct. I had no instrument at all when I entered in the house and steal. My Lord what I stole was properties not money at all and I was arrested after 14 days from the date of stealing. I am normal thief not using weapon.

My Lord, I am in this court contesting the conviction and sentence of armed robbery, but I am not opposing the offence of burglary and stealing. That is all."

We have considered the evidence adduced at the trial by both sides and think the prosecution evidence left a lot to be desired. We highly doubt

the occurrence of the robbery, let alone armed robbery. We think, according to the evidence adduced, the trial court should have given the appellant a benefit of doubt and answered the first issue it drafted in the affirmative. That is, it should have found that no armed robbery occurred at the restaurant of PW1 on the night of 17.04.2018. On the contrary, there was evidence from the prosecution that the appellant stole properties of PW1 (not cash) and the appellant did not seriously dispute it. We think the trial court should have entertained the lingering doubts in favour of the appellant and should not have convicted him with armed robbery but with breaking into a building and committing an offence therein and stealing; a cognate and minor offence. The first appellate court should, as well, have held as such.

The first appellate court did not consider the appellant's defence at the trial. As already alluded to above it took it as an afterthought under the pretext that the appellant never said so at the trial. As we have endeavoured to show above, had the first appellate court dispassionately read and considered the record of the trial court, it would not have taken the appellant's story on appeal as an afterthought. That, in our view, was not an afterthought by the appellant but his defence from the outset. Both courts below did not therefore consider the appellant's defence.

The first appellate court, at p. 59 of the record, stated that the appellant admitted to have stolen money without using any instrument. With profound respect to the first appellate Judge, that statement is not backed by the record. We have already reproduced above all what was stated by the appellant at the hearing of the appeal. It is clear, the appellant did not admit to have stolen money but properties other than money.

The above are the reasons why we have stepped into the shoes of the first appellate court and considered his defence and found that it is doubtful if robbery, let alone armed robbery, was committed. We are certain that we are clothed with such jurisdiction – see: **Simon Edson @ Makundi v. Republic**, Criminal Appeal No. 5 of 2017, **Julius Josephat v. Republic**, Criminal Appeal No. 03 of 2017 and **Mzee Ally Mwinyimkuu @ Babu Seya v. Republic**, Criminal Appeal No. 499 of 2017 (all unreported).

In the final analysis, we find some merit in this appeal and partly allow it. The conviction for armed robbery is quashed and the sentence set aside. We convict the appellant of breaking into a building and committing an offence therein and stealing under the provisions of sections 296 (a) and 269 (f) of the Penal Code and substitute the sentence of thirty years

for armed robbery with one under breaking into a building and committing an offence therein and stealing. Considering that the appellant is a youthful first offender aged nineteen at the commission of the offence and has served a prison term of more than two years, the sentence we impose is one that would result into his immediate release from prison unless he is incarcerated there for some other lawful cause.

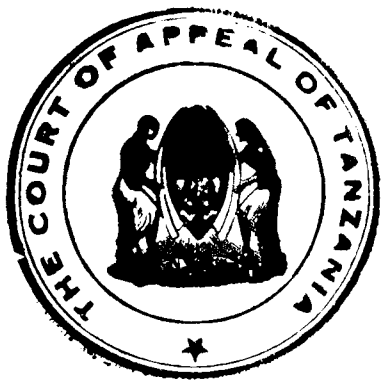
DATED at **MTWARA** this 24th day of November, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 25th day of November, 2020 in the presence of the Appellant in person and Mr. Paul Kimweri, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL