IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: JUMA, C.J., NDIKA, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO 52 OF 2019

ANTHONY JEREMIA SORYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Hon. L. Mansoor, J.)

dated the 16th day of November, 2018

in

Criminal Appeal No. 138 of 2017

JUDGMENT OF THE COURT

10th & 15th June, 2020

JUMA, C.J.:

This is a second appeal by the appellant, ANTHONY JEREMIA SORYA. It originates from the District Court of Dodoma at Dodoma in Criminal Case No. 206 of 2016 (J.M. Karayemaha-RM) where the appellant was convicted of the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2002 as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2011. Following his conviction, the appellant was sentenced to serve thirty (30) years in prison.

The Particulars of the Offence alleged that on 24th August 2016, at Uhindini area within the Municipality of Dodoma in Dodoma Region, the appellant stole Tshs. 12,000,000/= the property of Mehar Singh @ Virdi, and immediately before the stealing, he was armed with pepper spray, which he sprayed on the face of Mehar Singh in order to harm his eyes and obtain the said cash.

The complainant, Mehar Singh Virdi (PW1), was 79 years old when he testified before the trial District Court of Dodoma on 3rd March, 2017. He described his profession as a building contractor. His company was at that time based near National Insurance building along Lindi Avenue in Dodoma Municipality. Around 11:00hrs on 24th August 2016, PW1 and his driver headed to the main branch of the CRDB Bank to cash a cheque of Tshs. 12,000,000/=. After cashing the cheque, he placed the money in a bag and they headed back to the office.

As their vehicle was arriving at the office premises, PW1 saw two people opposite his office standing beside a motorcycle. One of them walked to where their vehicle had stopped. He stood very close by his car, and suddenly sprayed substances into his eyes, blurring his vision. He fell down outside the car. His brother, heard the noise, and rushed out to help

him. PW1 could hardly see when his brother rushed him to Aga Khan Hospital. It was only later on while still in hospital, where he learnt that it was pepper spray that had been sprayed onto his face, which momentarily blinded him.

Meanwhile, as the robbery was taking place, an army officer from the Tanzania Peoples Defence Forces (TPDF), corporal Daniel John Msungu (PW2); was driving a military vehicle nearby. He was able to witness the drama which was unfolding before his eyes. His suspicions were aroused further when he saw a Sikh (*Singa Singa*) being felled down by a black African. His suspicions heightened when he saw blood on the fallen Sikh's face.

Just as PW2 was alighting from the car he was driving, the motorcyclist saw PW2's army uniform, and decided to speed off on his motorcycle, leaving his colleague at the scene. At that same time, bystanders were already surrounding the gangster shouting, "thief", "thief". As the crowd swelled, the gangster picked a big khaki envelope and began to run away from the scene. The crowd, including PW2, gave chase over several nearby streets.

Rashid Harold Mlangwa (PW3) who was an employee of PW1 was inside the office, he too rushed out when he heard shouts of a thief being pursued. He joined the chase and in the capture of the thief who wore blue jeans.

As people were catching up with the gangster, he devised a ruse of throwing money from the envelope, and the chasing crowd rushed to collect the flying money. PW2 and others finally arrested the runaway gangster. PW2 found the appellant still in possession of a spray bottle and returned him back to the scene of crime. PW2 was soon joined by an off-duty traffic police officer, E. 9443 CPL Mwindadi (PW5).

PW5 was at that time visiting his friend, at a nearby street when he heard shouts of "Thief! Thief!". He ventured out. He saw many people picking up money scattered all over the road. He soon learnt that PW1 had been robbed and PW2 had already arrested a suspect. The two officers, PW2 and PW5, took the suspect to a nearby shop to protect him from the mob. PW5 phoned the police who arrived shortly thereafter in a police patrol car. Out of the Tshs. 12,000,000/= the complainant had earlier collected from the CRDB Bank, only Tshs. 1,200,000/= remained.

After hearing the evidence of six prosecution witnesses, the appellant was placed on his defence. In his sworn testimony, he denied the offence. At the time of his arrest, he lived at Kitelela village near Dodoma and that day he visited Dodoma Municipality because he wanted to send Tshs. 1,400,000/= to his wife to pay school fees. Before sending the money at nearby *Tigo Pesa* shop, he used some of the money to drink tea at a joint known as "Master Pub". He said that as he was walking towards the *Tigo Pesa* shop, a TPDF officer (PW2) accosted and stopped him. He asked this officer if there was any problem. The officer told him that he was a suspect.

Because PW2 was in uniform, he obeyed when he was ordered to sit down. According to the appellant, four other people had been stopped by the same officer, and ordered to sit down to be searched. Before he was searched, he took Tshs. 1,000,000/= from his pocket and handed over to the officer. He also handed over another Tshs. 35,000/=. They were soon joined by a police officer in civilian clothes. The police officer took him directly to the Dodoma Central Police Station.

The trial court considered two main issues; whether it was the appellant who committed the offence of armed robbery, and whether the

prosecution evidence proved the case beyond reasonable doubt. The trial court reached a conclusion that the prosecution evidence proved beyond reasonable doubt that it is the appellant who robbed the complainant and was armed with a pepper spray when he did so.

Aggrieved by his conviction and the sentence of thirty years imprisonment, the appellant filed an appeal in the High Court which principally complained about the way the trial court relied on uncorroborated and contradicting prosecution evidence to convict him.

The High Court at Dodoma (Mansoor, J.), in dismissing his appeal concluded that the evidence levelled against the appellant at the trial court pointed at the appellant's guilt and negated every hypothesis of his innocence.

Aggrieved by the decision of the High Court to dismiss his appeal, the appellant filed a second appeal to this Court.

In this Court, the appellant filed his first set of Memorandum of Appeal on 1st June 2020 containing seven grounds of appeal. Four days later on 5th June 2020, he filed a Supplementary Memorandum of Appeal with ten grounds of appeal. The seventeen self-crafted grounds of appeal may be summarised as boiling down to the following complaints; he was

aggrieved that evidence adduced by the prosecution witnesses did not prove the offence of armed robbery beyond reasonable doubt. He was further aggrieved that the two courts below had relied on contradictory evidence of prosecution witnesses, and also on evidence of exhibits, which were tendered without following the procedure. Apart from complaining that the two courts below had convicted him against the weight of prosecution evidence, the trial and first appellate courts failed to consider his defence evidence.

At the hearing of this appeal, the appellant appeared in person and remotely by video linking the Court with Isanga Central Prison. Principal State Attorney, Ms. Neema Mwanda, Senior State Attorney Grace Komba and State Attorney Ms. Diana Lukondo appeared in Court to represent the respondent Republic. The appellant adopted all his seventeen grounds of appeal and urged us to let the respondent's learned counsel address us first on his grounds of appeal.

Ms. Diana Lukondo stood up for the respondent Republic to oppose the appeal and to support the appellant's conviction and sentence. On the issue of identification, the learned State Attorney did not agree with the appellant that he was mistakenly identified as the armed robber who had

stolen money from PW1. She referred us to the evidence of the TPDF officer (PW2), who had chased the appellant and arrested him. She also referred us to the evidence of an off-duty traffic police officer (PW5), who saw the appellant being chased and arrested and how he participated in returning the appellant back to the scene of crime. Ms. Lukondo further referred us to the evidence of the complainant's employee (PW3) who, after hearing noises from outside, joined the crowd chasing up the appellant. That it was PW3 who grabbed the appellant's shirt felling him down to the ground. Learned State Attorney submitted that all these witnesses were consistent in their descriptions of the colour of trousers which the appellant wore during the chase, and his subsequent arrest. She pointed out that from the evidence of PW2, PW3 and PW5 on what they saw during that broad daylight, identification of the appellant could not be mistaken. In urging us to find that the identification was watertight, she pointed out that PW2 and PW5 had spent much time with the appellant while waiting for a police patrol car to arrive.

To support her stand that the appellant was arrested at the scene of crime and he was sufficiently identified, Ms. Lukondo referred us to our

decision in **JUMA ALLY MWERA V. R.,** CRIMINAL APPEAL NO. 548 OF 2016 (unreported).

Ms. Lukondo regarded as baseless, the complaints that prosecution witnesses had contradicted the other prosecution witness as to how much money was actually stolen, and whether the stolen money was in a bag or in an envelope. She submitted that these were minor inconsistencies which did not shake the evidence of the banker (PW4) who testified that the complainant had cashed his cheque for Tshs. 12,000,000/= and that money was put in the envelope. PW4's account was supported by PW2, PW3 and PW5 who saw the appellant fishing out money from an envelope, and throwing out the money to the chasing crowd.

The fact that the complainant stated that the money was in a bag, she submitted, does not exclude that the envelope could have been placed inside a bag while being moved from the bank to the office.

On another ground of appeal, Ms. Lukondo readily conceded the appellant's complaints that the proper procedure of first reading out documents before their exhibition as evidence was not followed with respect to the medical report (PF3) on medical examination of the complainant (exhibit P1). She was however quick to point out that

expunging of this exhibit will not affect the probity of the oral evidence of the complainant who testified on the extent of injuries he sustained during the armed robbery. To support this line of submission, Ms. Lukondo cited the case of **SELEMAN MOSES SOTEL @ WHITE V. R.,** CRIMINAL APPEAL NO. 385 OF 2018 (unreported) where, although the document evidencing medical examination of a ten-year old victim of rape was expunged, there was oral evidence of the medical officer who testified to prove sexual penetration.

Regarding the complaint over a non-existent date of "248" which had appeared on the face of the cheque which PW1 had cashed Tshs. 12,000,000/=, the learned State Attorney argued that proper date is 24/8/2016. She added that a typing mistake of putting "248" is a very minor issue which does not take away the overwhelming evidence that PW1 had cashed the money which was stolen by the appellant during an armed robbery.

Ms. Lukondo rejected complaint by the appellant that the prosecution case was not proved beyond reasonable doubt against the appellant and she also rejected the complaint that the appellant's defence was not considered. She submitted that the evidence of PW2, PW3 and PW5

supported the evidence of the victim of the armed robbery (PW1) that it was the appellant, who had assaulted PW1 and stole his money before he was chased down and arrested. According to the learned State Attorney, there is also evidence that the appellant threw money he had stolen to the crowd, and some of the stolen money was found his possession. She referred us to page 102 of the record where the learned trial magistrate weighed and considered the appellant's defence.

Ms. Grace Komba, learned Senior State Attorney took over to address the complaint that pepper spray (exhibit P3), was not seized properly from the appellant; and that PW2, who seized it did not tender it, nor was this item shown to the appellant. The learned Senior State Attorney disputed this claim, pointing out that the appellant was arrested by PW2 after a chase. And there is evidence of the appellant raised his hands in surrender and proclaimed that he did not carry fire arms but had only the pepper spray bottle which he handed over to PW2.

Ms. Komba further submitted, that PW2 was a military officer who could not prepare a Seizure Certificate at the time when the appellant was surrounded by a mob which was baying for his blood. That is why PW2

later handed the pepper spray bottle over to off-duty police officer (PW5) who arrived at the scene soon thereafter.

Ms. Komba submitted that the confusion over the colour of the bottle is minor as the trial court had rightly observed. She urged us to follow a decision of this Court in **DEOGRATIUS DEEMAY GURTU V. R.,** CRIMINAL APPEAL NO. 553 OF 2016 (unreported), to the effect that minor contradictions should not be allowed to affect the substance of the evidence. And this substantive evidence, according to the learned Senior State Attorney, is that when the appellant was arrested, he was found possessing a pepper spray bottle.

The appellant, in reply, reiterated all his grounds of appeal and asserted that the learned State Attorneys have not answered his complaints. He wondered why the complainant chose a private hospital, Aga Khan Hospital, over Government Hospital for treatment. He still insisted that he was mistakenly identified. He wondered why, several people who had earlier been listed as witnesses, like Stanley Shibuda (the shopkeeper whose shop was used to keep the appellant safely from the crowd); were not called to testify. He also questioned why the pepper spray bottle was not sent to the Government Chemist to determine its

chemical composition. All these, according to the appellant, prove that the prosecution was hiding the truth of the fact that he was mistakenly identified. He maintained, there is doubt if the complainant was in first place robbed of any money at all.

Having considered the record of appeal, the submissions by the learned State Attorneys and the appellant and authorities they relied upon to support their respective positions, it remains for us to determine the appeal. This being a second appeal, in terms of Section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141 our mandate is mainly concerned with issues of law, not matters of fact.

From submissions on the grounds of appeal, two issues of law call for our determination. Firstly, is the failure to consider the appellant's defence. Secondly, is whether the concurrent finding on identification of the appellant at the scene of crime was based on misapprehension of evidence.

With regard to the first issue, failure to consider the appellant's defence is an issue of law with constitutional significance of denial of the appellant's right to be heard. In his first appeal to the High Court the appellant's ground number six of appeal concerned the failure by the trial

court to consider his defence. Upon our perusal of the record we are convinced that the trial magistrate lived up to the duty of a trial court to weigh and evaluate the entire evidence including that of the appellant on his defence.

On the other hand, the first appellate Judge did not demonstrate how it re-heard the evidence which the appellant testified in his defence. The first appellate court stated only that: *"All the grounds of appeal having been addressed, the charge against the appellant stands duly proved."* We think on the issue of failure to consider appellant's defence, which was raised as a distinct ground of appeal, the High Court should have lived up to its duty to subject the appellant's evidence to a fresh re-evaluation and come to first appellate own conclusion.

All is not lost at this stage because we can step into the shoes of the first appellate court to address the appellant's complaint that his defence evidence was not considered. Looking at the evidence before the trial court, we agree with the learned State Attorneys that the learned trial magistrate properly and adequately weighed the evidence presented by the defence. Learned State Attorneys are correct to support the trial magistrate's finding that the prosecution evidence overwhelmed and

outweighed the defence evidence. The appellant's complaint that his defence was not considered lacks merit.

On issue of identification, the two courts below concurred in the findings that the complainant (PW1) was robbed during broad daylight in a busy street of Dodoma. The courts below also concurred with the evidence of PW2 and PW3, who were among the large crowd of people chasing the appellant as he was throwing stolen money around to distract the crowd from closing down on him. The courts below are on common ground that after that hot pursuit, the appellant was arrested.

On our part, we see no reason to interfere with the concurrent finding of facts to the effect that the appellant was arrested following a hot pursuit immediately after he had committed the offence, which was witnessed by PW1 and PW2. PW2 gave chase, and was joined by PW3 leading up to the appellant's arrest.

Furthermore, there is concurrence of facts that after being chased down, the appellant was found in possession of pepper spray which he had used in robbing the complainant. PW2 apprehended and managed to hold onto the appellant, and returned the appellant back to the scene of crime.

In **NIKAS DESDERY @ OISSO VS. R.,** CRIMINAL APPEAL NO. 18 OF 2013 (unreported), the appellant therein had been arrested red-handed at the scene of crime. The Court was in no doubt that the element of stealing was proved beyond reasonable doubt. The Court referred to the statement it made earlier in **STEPHEN JOHN RUTAKIKIRWA VS. R.,** CRIMINAL APPEAL NO. 78 OF 2008 (unreported) where the appellant was arrested at the scene of crime raised a complaint that he was not properly identified at the scene of crime: -

> *"In the present case, even if there was darkness,* ***the appellant was grabbed by and struggled with the complainant, and was arrested at the scene by PW2 and PW3; and immediately taken to the police****. If there was any need of corroboration, we would readily find it in the appellant's own admission in his testimony that he was within the vicinity at that time (****See RUNGU JUMA v R*** *(1994) TLR. 176. We also find no substance in this complaint."* [Emphasis added].

The Court had another occasion in **MBARUKU SO HAMISI & OTHERS VS REPUBLIC** (CONSOLIDATED CRIMINAL APPEALS NO.141,143 & 145 OF 2016 & 391 OF 2018) [2019] TZCA 266; (30

AUGUST 2019) TANZLII to make it clear that, the issue of whether the appellant was identified cannot arise where, after committing an offence, the appellant is arrested after continuous hot pursuit. The Court followed its earlier decision in **JOSEPH MUNENE AND ANOTHER V. REPUBLIC**, CRIMINAL APPEAL NO. 109 OF 2002 (unreported) and stated:

> *"PW1 and PW3 said they were robbed at around 17:30 hours, the sun at that time had not yet set, it was a broad daylight. They said immediately, after they were robbed by the appellants, they started to chase the appellants with their car and in that pursuit police officers, PW4, PW5, and PW6 joined the pursuit where they managed to arrest all appellants. Thus, there was a hot pursuit of the appellants from when they robbed PW1 and PW3 up to when they were apprehended by PW4, PW5 and PW6...."*

On the weight of settled position of the Court, the appellant's complaint that his identification at the scene was not watertight is not sustainable. The issue of visual identification not does arise in the circumstances of this appeal where, in broad daylight, the appellant after committing the crime of armed robbery, was hotly pursued and arrested at the scene of crime.

In the upshot, we find no reason to interfere with concurrent findings of fact by the trial and first appellate courts. We find no merit in this appeal. Consequently, we dismiss it in its entirety.

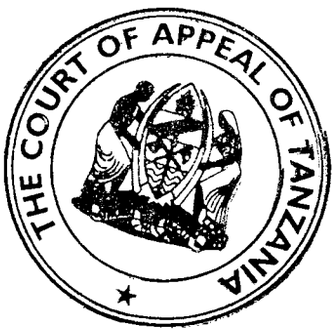
DATED at **DODOMA** this 13th day of June, 2020.

I. H. JUMA
CHIEF JUSTICE

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered on 15th day of June, 2020 in the presence of the Appellants in person and Mr. Aldo Mkini, Senior State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



K. D. MHINA
REGISTRAR
COURT OF APPEAL