IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., KWARIKO, J.A And MWANDAMBO, J.A.)

CRIMINAL APPEAL NO. 50 OF 2018

MSHEWA DAUDI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Dyansobera, J.)

Dated 5th day of December, 2016

In
DC. Criminal Appeal No. 37 of 2012.

.....

JUDGMENT OF THE COURT

21st & 30th July, 2020

LILA, J.A.:

In the District Court of Kilosa, at Kilosa, the appellant was charged and convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Chapter 16 of the Revised Edition, 2002 (the Penal Code) and was sentenced to a statutory minimum sentence of thirty (30) years imprisonment. His first appeal to the High Court was unsuccessful hence the present second appeal.

It was alleged by the prosecution that; on or about 22nd day of September, 2010 at Malangali Tutani in Kilosa District within Morogoro Region, the appellant did steal a bag of sugar, rice, wheat flour and cigarette total valued at TZS 150,000.00 and immediately before and after such stealing did cut one Abdul s/o Swila by using a bush knife on his right and left hands in order to obtain and retain the said goods.

The appellant refuted the accusations consequent upon which, to prove its case, the prosecution paraded three witnesses. The prosecution evidence was to the effect that; on 22/09/2010 around 01.00 hours PW1, the victim, was asleep in his house. Some unknown activities and voices outside his house awoke him. He went out and found himself face to face with people standing outside his shop. They ordered him to return back inside the house. He flashed a torch onto them only to find that they were not familiar to him. He confronted them and three of them ran away save for one who ordered him to leave. That man took a bush knife and advanced to him. That man's attempt to cut him on the head was unsuccessful as the bush knife fortunately fell on his palm thereby causing some injuries. He managed to get hold of that man while crying for help. Among those who responded to the call was his neighbour one Salum Mageni who, it appears, gave evidence as Salum Omary (PW2). With the

help of PW2, they managed to apprehend the appellant at the scene of the crime. Upon searching him, they found him in possession of a bunch of keys. That man turned out to be the appellant. They took him to the police station. Later on, they inspected the shop and found some items stolen though not in large quantities. PW1 was given a PF3 for treatment and it was tendered in court and admitted as exhibit P1. PW2, in his testimony, endorsed what PW1 had told the court regarding his participation in arresting the appellant. PW2 added that he took the appellant to his compound since he was a chairman. He also stated that around PW1's compound they found wheat flour, cigarette, rice and other items.

On his part, PW3 told the trial court that the appellant was taken to police station with a bush knife, five kilograms of wheat flour and a bunch of keys which he tendered and were collectively admitted as exhibit P2.

In his affirmed defence, the appellant told the trial court that he was, on 21/09/2010 at around 17:00 hours, beaten by people who responded to PW1's call for thief while he was on the way back to his home from Kimamba Railway Station where he had gone to meet his girlfriend one Jalala @ Mwanahamisi. He said he was walking on foot after a motorcyclist had not turned up to collect him as promised after he had parted ways with his lover. He also said at the police station, one Corporal Damas told him

that they are going to fix him by implicating him with a serious offence because of his unacceptable habit of having affairs with their daughters. He tendered a PF3 showing the injuries he sustained and was admitted as exhibit. He claimed that the case is a frame up one and that was the reason why PW1 turned up to testify after a warrant of arrest was issued against him. He wondered why PW1's wife did not testify and also the five kilograms of wheat floor was not tendered as exhibit.

After a full trial, the trial court was satisfied that the appellant was guilty and it proceeded to convict and sentence him to serve a statutory minimum jail term of thirty (30) years.

Dissatisfied, the appellant preferred an appeal before the High Court which was dismissed in its entirety hence this second appeal.

In this appeal, the appellant is seeking to impugn the decision of the High Court through a memorandum of appeal which contains five grounds. The substance of the appellant's complaints may be paraphrased as follows:-

1. The prosecution did not establish all ingredients of the offence.
2. The charge did not disclose the owner of the goods allegedly stolen.
3. PW1 did not identify the stolen items.

4. The prosecution did not prove the case against the appellant beyond reasonable doubt.

The appellant, who was linked with the Court from prison through video facilities, appeared in person and was unrepresented. The respondent Republic had the services of Ms. Christine Joas, learned Senior State Attorney and Ms. Jacqueline Werema, learned State Attorney. In exercising his right to address the Court first and amplify his grounds of appeal, the appellant simply adopted them and urged the Court to consider them and allow his appeal.

For the respondent, Ms. Joas responded to the appellant's grounds of appeal generally. She did not resist the appeal. In substantiating her position, she submitted that according to the evidence on record, the victim of the offence (PW1), did not tell in his testimony that his shop was broken, what items were stolen from therein and the quantities stolen. She further argued that even the items which were allegedly found around his premises (exh. P2) were neither shown to him nor identified by him to be his items stolen from his shop. For those reasons, she argued, theft which is an important element in proving robbery was not established.

In respect of the PF3 (exh. P1), she implored us to expunge it from the record on account of not being read out in court to enable the appellant

understand the substance of its contents. She, in the end, was of the view that the appellant's appeal has merit and urged the Court to allow it and set the appellant free.

We wish to begin by considering the evidential value of the PF3 (exh. P1). After perusing the record of appeal, we entirely agree with the learned Senior State Attorney that its contents were not read out in court after it was cleared for admission as an exhibit. It is settled legal position that the effect of that omission is that the same should be expunged from the record. (See the case of **Robinson Mwanjisi and Others vs Republic** [2003] TLR 218). We, therefore, expunge exhibit P1 from the record as proposed by the learned Senior State Attorney.

Next to be considered is whether the charge disclosed the owner of the stolen items. This is ground two (2) of appeal. We think, this complaint hinges on the contents of the particulars of the offence. To appreciate the nature of the complaint, we take pain to reproduce them. They state thus:-

> *"**PARTICULARS OF OFFENCE**: Mshewa s/o Daudi @ Mbaga on or about 22nd day of September 2010 at Malangali Tutani within Kilosa District in Morogoro Region did steai a bag of sugar, rice, wheat flour and cigarette valued Tsh. 150,000/= and immediately before and after such stealing did cut*

one Abdul s/o Swila by using a bush knife on his right and left hand in order to obtain and retain the said goods."

Apparently, the charge did not expressly state the name of the owner of the stolen items. The appellant's complaint is, to that extent, justified. However, closely examined, the impression one gets from the reading of the particulars of the offence is that violence was used against Abdul Swila (PW1) for the purpose of obtaining and retaining the stolen items. That impression coupled with what PW1 told the trial court in his testimony resolves fully the appellant's complaint. The record, at page 12 and 13, tells what PW1 said in court.

At page 12 PW1 said that:-

"I have a shop at Malangali, also I do farming. On 22/09/2010 around 01:00 hours I was at home sleeping. I was awakened by some voices and activities outside my shop. I went outside and saw some people standing outside my shop...."

PW1 went further to state at page 13 that:-

"When we inspected the shop we found they had already stolen some items but not in large quantity..."

The above evidence sufficiently disclosed whom did the allegedly stolen items belonged. Therefore, the information contained in the particulars of the offence and complimented by PW1's testimony told it all that the allegedly stolen items belonged to PW1. The appellant's complaint is, for that reason, unmerited. [See **Jamali Ally @ Salum vs Republic**, Criminal Appeal No. 52 of 2017 (unreported)]. Ground two of appeal lacks merit and is hereby dismissed.

Grounds one (1), three (3) and four (4) of appeal may be considered under one umbrella. They bear a common complaint that the appellant's conviction was not well founded. In essence they pose a crucial issue whether the prosecution proved the charge against the appellant beyond reasonable doubt.

As alluded to above, the appellant was charged with the offence of armed robbery. Section 287A of the Penal Code, provides;

> *"Any person who steals anything and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons and immediately before or 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."

In view of the above clear provision, to constitute armed robbery, the following ingredients must conjunctively be established:-

(1) *Stealing,*

(2) A person who is said to commit such offence must have been armed with any dangerous or offensive weapon or instrument or is in company of one or more persons and,

(3) Immediately before or after the time of the stealing uses or threatens to use violence against a person whom the robbery is committed.

The issue for determination here is whether, in the present case, the prosecution established and proved all the ingredients of the offence of armed robbery.

We will begin by considering the first ingredient of the offence, that is stealing. According to section 258 (1) of the Penal Code, the term "theft" or "stealing" is defined as follows,

"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other

than the general or special owner thereof anything capable of being stolen, steals that thing".

It is discernible from the above express provision that to prove theft/stealing, the prosecution must establish that something capable of being stolen was actually taken and this evidence must come from either the general or actual owner of the thing stolen. In stealing, the *actus reus* is the taking and the intention to deprive the owner of the thing stolen is *asportation*, that is moving something from its original place to another. Both must be established.

We have above, quoted above what PW1 told the trial court purposely. Such evidence, brief as it is, fell far short of establishing crucial matters in the case. **First**; it did not show that the shop was actually broken into and **second;** and probably most important, it did not show what items were taken from the shop, the quantities and even their value. In the absence of such evidence, it is therefore not easy to say with certainty that the shop was broken into and that PW1, being the owner of the stolen items, was deprived of the said stolen items, thereby constituting "theft" within the above definition of "theft".

The above was not all in respect of the appellant's complaint that the case was not proved beyond reasonable doubt. The record of appeal bears

out that PW2 told the trial court that they found some of the items stolen from the shop around PW1's premises. He named them as being wheat flour, cigarette, rice and other items. He also said that the appellant was found possessing a bunch of keys. He went further to state that both the stolen items and the bunch of keys were taken to police together with the appellant. Such evidence does not find support from PW3 in respect of stolen items as he stated that only five kilograms of flour, without mentioning of what was taken to the police and he tendered them as exhibit P2 collectively. The record is silent as to the whereabouts of the other items alleged in the charge sheet to have been stolen and those which were found near PW1's house. Worse still, PW1 was neither shown them in court nor given description of his alleged stolen items. We are of the view that special marks of those stolen items ought to have been described by PW1. It is now settled that, a detailed description by giving special marks of the alleged stolen items has to be made by the owner before such exhibits are tendered in court. That act lends assurance as to the correctness of the alleged stolen items. [See the decisions of this Court in the case of **Bundala s/o Mahona vs Republic** Criminal Appeal No. 224 of 2013, **Mustapha Darajani vs Republic,** Criminal Appeal No. 242 of 2005 and **Godfrey Lucas vs Republic**, Criminal Appeal No. 151 of

2014 (all unreported)]. In the case of **Mustapha Darajani vs Republic** (supra), this Court held as follows:-

> *".... In such cases description of specific mark to any property alleged stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits."*

In the instant case, no special marks were given by PW1 before the allegedly stolen item (flour) was tendered at the trial court as exhibit. We are of the considered opinion that such a failure is a fatal omission in the prosecution case. That casts doubts on whether the wheat flour tendered in court formed part of the items stolen from PW1's shop.

Given the above circumstances, like the learned State Attorney, we are satisfied that theft as an essential ingredient of the offence of armed robbery was not sufficiently proved. Robbery, let alone armed robbery, cannot be committed without the offence of stealing/theft being committed. It is for this reason, the Court discussing the import of section 285 of the Penal Code in the case of **Stuart Erasto Yacobo vs Republic**, Criminal Appeal No. 202 of 2004, had this to say:

> *"For an offence under Section 285 the prosecution has to adduce evidence to establish the ingredients,*

that is whether actual violence or threat of actual violence was used ***to obtain or retain the thing stolen****. The nature of violence must also be proved. Violence to the person of the complainant is a prerequisite for the crime of robbery. There must be evidence to establish that the accused person used or threatened to use actual violence* ***to obtain or retain the stolen property****."*(Emphasis added)

To say the least, robbery is stealing in which violence is employed by the accused to the person of the complainant so as to obtain or retain the thing stolen. And, armed robbery is committed when the accused who, at or immediately after the time of stealing, is armed with any dangerous or offensive weapon or instrument and uses the same to threaten violence on the person of the complainant or is in company of one or more persons. On that account, where stealing/theft is not proved, like in the present case, the offence of armed robbery cannot stand.

For the foregoing reasons, we entirely agree with the learned State Attorney that the charge was not proved beyond reasonable doubt as complained by the appellant. We accordingly allow the appeal, quash the conviction and set aside the sentence meted on the appellant by the trial court and sustained by the first appellate court. We also order the

appellant be released from prison forthwith unless held therein for any other justifiable cause.

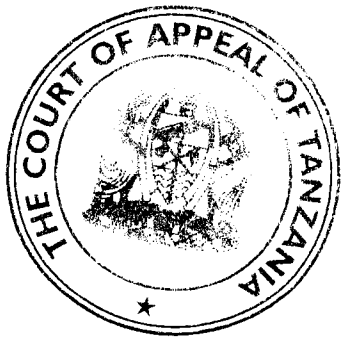
DATED at **DAR ES SALAAM** this 29th day of July, 2020.

S. A. LILA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

The Judgment delivered this 30th day of July, 2020 in the Presence of the Appellant in person-linked via video conference and Ms. Nancy Mushumbusi, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL