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. 20 OF 2018

KELVIN PROJECT ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Arufani, J.)

dated the 31st day of July , 2017
in
Criminal Appeal No. 11 of 2016

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JUDGMENT OF THE COURT

17th July & 4th August, 2020

MWAMBEGELE, J.A.:

The District Court of Morogoro sitting at Morogoro convicted the appellant Kelvin Project of the offence of robbery with violence contrary to sections 285 (1) and 286 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 16.10.2014 at SUA Secondary School within Morogoro District in Morogoro Region, the appellant did steal one mobile phone make Itel valued at Tshs. 150,000/= and cash Tshs. 1,300/= the properties of one Abdallah Ismail. It was further alleged that immediately before such

stealing he used actual violence by assaulting and injuring the said Abdallah Ismail with his fists and kicks on the mouth and right hand in order to obtain the said properties. He pleaded not guilty. After a full trial, he was found guilty, convicted and sentenced to a prison term of fifteen years. He was also ordered to compensate the said Abdalah Ismail Tshs. 2,000,000/=. His first appeal to the High Court was dismissed hence this second appeal premised on seven grounds of complaint. However, the seven grounds are summarised in the seventh one which is a complaint that the case against the appellant was not proved beyond reasonable doubt.

The appeal was argued before us on 17.07.2020 through a video conference; a facility of the Judiciary of Tanzania. The appellant appeared in person, unrepresented at Ukonga Prison and the respondent appeared in the Court through Mr. Yusuph Abood and Ms. Esther Chale, learned State Attorneys.

At the hearing, the appellant, in the submissions in chief, did no more than adopting his seven grounds comprised in the memorandum of appeal he lodged on 13.02.2018. After that, he opted to let the adversary side respond and reserved his right to rejoin, need arising.

Responding, Mr. Abood, at first, premising his arguments on the general ground by the appellant that the prosecution's case was not proved beyond reasonable doubt, supported the appellant's conviction and the sentence imposed on him. However, amidst his arguments in support of the conviction and sentence, the learned State Attorney changed the goalposts arguing that the conviction was not deserved because the mobile phone, the subject matter of the charge, was not properly identified thereby making the conviction of the appellant unfounded. He thus had no qualms if the appeal would be allowed and the appellant set free.

Given the response by the learned State Attorney, the appellant, for obvious reasons, simply rejoined that his appeal should be allowed and that he should be set free.

On our part, having perused the record of appeal and considered the submissions of the parties in the light of the evidence on record, we think both are quite in the right track in stating that the conviction of the appellant was not deserved. It is apparent in the record before us that the appellant allegedly robbed Abdallah Ismail (PW1) and was arrested a short while later in possession of the supposedly stolen item. However, as rightly put by the learned State Attorney, the stolen item was not

sufficiently identified by the alleged owner; PW1. In his testimony, PW1 was very casual. He simply testified that the appellant robbed his mobile phone. We would let his testimony paint the picture. He testified in chief:

> *"You honour, I know the accused. I saw him on 16/10/2014 at the graduation ceremony of Sokoine College. The accused person stole my money and mobile phone but before he did so, he assaulted and injured me, he managed to take my mobile phone. Your honour, I pray to tender the mobile phone as exhibit."*

Then PW1 went on to tender the mobile phone which was admitted into evidence as exhibit without any objection from the appellant. Then he went on to testify:

> *"Your honour, my brother came and arrested the accused. I reported the issue to the police and I was given a PF3 and went to the hospital for treatment."*

That was all the star witness for the prosecution could testify in his testimony in chief. The prosecution case, for obvious reasons, was not advanced further in cross-examination and re-examination. Before admission into evidence, the appellant never gave any description of the

allegedly stolen mobile phone. Neither did he do that after its admission into evidence as exhibit to verify how the same was his property. No distinct marks were identified. Not even its make. Neither did any witness for the prosecution identify any distinct marks in the exhibit. Not even its make. Christina Guntramu (PW2) and Peter Nicco (PW3) who, allegedly, were at the scene of crime and witnessed the incident and arrest, did not advance the prosecution's case further. Their testimonies were as casual as PW1's. Neither did the prosecution lead substantial evidence through its last witness; WP 5631 Detective Corporal Pendo (PW4); a police officer who was in charge of investigating the case. PW4 never made any reference to the mobile phone, let alone its make. This investigation police officer testified only on how she gave the complainant a PF3 which was admitted in evidence as Exh. P2 and how she jotted down the appellant's cautioned statement in which, she testified, he did not confess to have committed the offence.

It is our considered view that the prosecution case in the present case did not meet the minimum threshold of proving the case in criminal cases; that is, beyond reasonable doubt.

We have held in our decisions, time and again, that in cases of this nature, a complainant is legally bound to identify a stolen item conclusively; not generally. We stated so in, for instance, **Jackson John v. Republic**, Criminal Appeal No. 515 of 2015 (unreported) in which the stolen item was a motorcycle which had no special marks and no plate numbers and the complainant purported to identify it by colour. We held that identification of the motorcycle by colour alone was not enough. In another case; **Vumilia Daud Temi v. Republic**, Criminal Appeal No. 246 of 2010 (unreported), when confronted with an akin situation, we relied on our previous decision in **David Chacha and 8 Others v. Republic**, Criminal Appeal No. 12 of 1997 (also unreported) in which we held:

> *"It is a trite principle of law that properties suspected to have been found in possession of accused persons should be identified by the complainant conclusively. In a criminal charge it is not enough to give generalized description of the property."*
>
> [See also **Abdul Athuman @ Anthony v. Republic**, Criminal Appeal No. 99 of 2000 and **Ally Zuberi Mabukusela v. Republic**, Criminal Appeal

No. 242 of 2011; both unreported decisions of the Court.]

There is another disquieting aspect in the present case; PW1 just said the mobile phone belonged to him but did not tender any receipt, or any documentary evidence, to verify that he indeed owned the same. What we have before us is just an averment from him that the allegedly stolen mobile phone belonged to him; without any tangible proof. It is our view that this is yet another dint in the prosecution's case which this Court puts to inquiry.

As already alluded to above, we think it will be legally unsafe to let the conviction of the appellant stand. The case for the prosecution was casually presented as to render the conviction of the appellant largely unsafe. We are at one with the parties to this appeal that the prosecution's case left a lot to be desired as to sustain the conviction and sentence meted out to the appellant. We think this appeal is meritorious.

The above said, we agree with the learned State Attorney for the respondent Republic as well as the appellant that the case against the latter was not proved beyond reasonable doubt. This appeal, basing on discussion above, is meritorious and, therefore, must succeed. In the

premises, we quash the conviction of the appellant and set aside the sentence meted out to him. The compensation order is also set aside. We, consequently, order that the appellant Kelvin Project be released from prison forthwith unless otherwise lawfully held for some other offence.

It is so ordered.

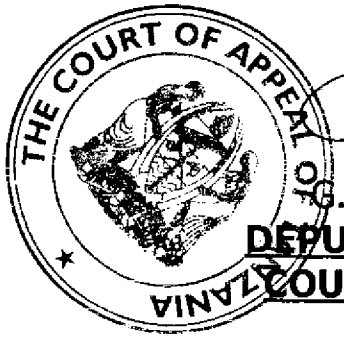
DATED at **DAR ES SALAAM** this 30th day of July, 2020.

S. S. MWANGESI
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The judgment delivered this 4th day of August, 2020 in the presence of Appellant appeared in person through video conference and Ms. Grace Lwila, learned State Attorney appeared for the Respondent/Republic is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL