IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL N0. 308 OF 2018

ALLY SAID @ TOX ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salam)

(Phillip, J.)

dated the 9th day of July, 2018
in
Criminal Appeal No. 301 of 201

JUDGMENT OF THE COURT

20th April & 11th May 2021

MWANDAMBO, J.A.:

Ally Said @ Tox, the appellant, stood charged before the District Court of Kinondoni sitting at Kinondoni with the offence of armed robbery to which he pleaded not guilty. The particulars of the offence alleged that on 26th September 2016, at a place called Manzese Midizini, Kinondoni District, Dar es Salaam Region, the appellant stole a mobile phone make Samsung Galaxy the property of Asma Haji and immediately before and after the stealing, he stabbed the complainant on her face with a knife in

order to obtain and retain the stolen property. The appellant's trial terminated in his conviction on the lesser offence of robbery with violence which earned him a custodial sentence of seven years' imprisonment and 12 strokes of the cane.

The appellant's appeal before the High Court sitting at Dar es Salaam against both conviction and sentences was unsuccessful. That court sustained the appellant's conviction but found the sentence of seven years' imprisonment contrary to law and substituted it with 15 years' imprisonment. Undaunted, the appellant is now before the Court on a second appeal predicated on four grounds of appeal which will become apparent later.

The substance of the evidence on which the trial court found sufficient to support conviction on the offence of robbery with violence was to the following effect. On the evening of 26th September 2016, Asma Haji, the victim of the offence who testified as PW1 was sent by her mother (PW2) to a nearby shop. On her way back home, at about 09.00 p.m., the appellant is said to have stopped PW1 who declined. However, the appellant prevailed and got hold of PW1, engaging her in a conversation for a while asking for her name and residence to which she refused. Within

moments, the appellant is recorded to have unleashed a knife and stabbed PW1 on her face and snatched from the victim a mobile phone, Samsung-Galax. PW1's evidence was that she was able to identify her assailant because he was familiar to her as both were residents of Manzese Midizini area. Besides, the scene of crime was lit by electricity light from nearby houses. Thereafter, PW1 fled home where she broke the news to PW2 naming the appellant as the assailant in the presence of other people who had gathered there. Shortly thereafter, she was escorted to a nearby police station where a PF3 was given for her medical examination. The following morrow; 27th September 2016, PW1 gave a statement at the police station wherein she gave description of the person who had robbed her with the help of street vigilante committee to which PW1 lodged a complaint on what had befallen her. Charton Mohamed (PW3), a member of the local security committee and also a militia man arrested the appellant on 27th September 2016.

The fact that PW1 was injured on the material night was corroborated by Elimunda Samulongo (PW4), a clinical officer who attended her and posted her findings in a PF3 admitted in evidence as exhibit P1. In his defence, the appellant distanced himself from the

accusations attributing his arrest to a vengeance to a fight with militiamen on the material night during which he punched one of them. The appellant refused knowing PW1 though he admitted residing at Manzese Midizini.

As alluded to earlier, the trial court found the evidence by the prosecution insufficient to prove the offence of armed robbery rather robbery with violence contrary to section 285 and 286 of the Penal Code, [Cap 16 R.E. 2002] and convicted him as such followed by the sentences as shown above. The High Court concurred with the trial court except on sentence as aforesaid.

Before us, the appellant faults the first appellate court on the following grounds; **one**, the evidence of visual identification was too weak; **two**, the evidence relied upon to convict the appellant was incredible and unreliable; **three**, the contents of the PF3 (exhibit P1) were not read out after its admission; and, **four,** erroneous conviction on a different offence to which he did not plead without first amending the charge sheet.

The appellant who fended for himself, appeared during the hearing being connected through video link from Ukonga Central Prison. He urged us to consider his grounds of appeal and let the State Attorney to react to his grounds reserving his right to rejoin if such need arose. For the

respondent Republic, Ms. Christine Joas, learned Senior State Attorney entered appearance assisted by Ms. Jacqueline Werema, learned State Attorney supporting the appeal on ground one.

Before addressing the court in support of the appeal, the learned Senior State Attorney suggested to us that grounds 2, 3 and 4 were neither raised and determined by the first appellate court nor did they involve issues of law and so the Court should not entertain them. However, she later on conceded that except for ground two, the rest involved points of law and thus the Court was competent to entertain them. We agreed with the learned Senior State Attorney and let her submit on them except ground two which we are, like her, satisfied that it was not raised and determined by the High Court neither is it predicated on any point of law.

We shall start with ground three in which the appellant contends that the contents of the PF3 were not read. Ms. Joas readily conceded the omission but argued that the appellant's conviction was not predicated on exhibit P1 and so, expunging it will be inconsequential. Having closely examined the record, we cannot, but agree with the learned Senior State Attorney. Mindful of our previous decisions stressing on the duty to read the contents of documentary exhibits after being cleared for admission, we

are satisfied that the omission to have the contents of exhibit PI read out by the witness who tendered after it was cleared for admission was fatal. The upshot of the omission renders the exhibit evidentially worthless and, on the strength of **Robinson Mwanjisi and Three others v. R** [2003] T.L.R 218 and many others we find unnecessary to mention here, we expunge exhibit P1 from the record. That notwithstanding, the expungement of exhibit P1 has no bearing on the appellant's conviction because the record bears us out that neither the trial court nor the first appellate court relied on it to found the impugned conviction.

Next we turn our attention to ground one dedicated to the evidence of visual identification. Ms. Joas supported the appeal relying on our decision in **Mabula Makoye and Amos Shaban v. R,** Cr. Appeal No. 227 of 2017 (unreported) reiterating the principle on the quality of evidence of visual identification required in convicting an accused person. We agree with the principle which is legendary. Nevertheless, and without any disrespect, we are unable to go along with the learned Senior State Attorney on her argument that PW1's evidence was too general to be free from mistaken identity.

In our view, scanty as it is, the evidence on record before us shows that there was no dispute that the appellant was familiar to PW1. She knew him as a person residing in the neighbourhood. There was equally no dispute that the appellant met PW1 and spent some time asking her name to which she refused to offer an answer before attacking her. Immediately thereafter PW1 yelled and returned home where she named the appellant as her assailant. The fact that PW1 named the appellant at the earliest lends credibility to her testimony assuring a positive visual identification consistent with our previous decisions including; **Marwa Wangiti Mwita v. R** [2002] T.L.R. 39. Indeed, by reason of PW1 mentioning the appellant at the earliest opportunity to her mother (PW2) and later to the police, the appellant was arrested by PW3 the following day. For all intents and purposes, PW1's evidence was one of recognition rather than pure visual identification. Under the circumstances, it can hardly be correct to say, as the learned senior State Attorney does, that the threshold for an unmistaken identification was not met. It is for this reason we are unable to endorse her submissions in support of the appeal.

Ordinarily that would have been sufficient to dispose this appeal against the appellant. However, we think the appeal can still be sustained on a different ground to which we now turn our attention.

The appellant was charged with armed robbery c/s 287A of the Penal Code, [Cap. 16 R. E 2002] to which as we said earlier, he pleaded not guilty. It is trite that the offence of armed robbery is not complete unless there is proof of key ingredients namely; stealing facilitated by the use of actual or threat of violence by the perpetrator at or immediately thereafter using any dangerous or offensive weapon or instrument or by the use of or a threat to use actual violence to obtain or retain the stolen property. There is no dearth of authorities in which the Court expressed itself on the ingredients of armed robbery and robbery with violence in numerous cases amongst others, **Fikiri Joseph Pantaleo @Ustadhi v. R,** Cr. Appeal No. 323 of 2015(unreported) in which it was stated:

> *"...we agree with Ms. Mdegela the learned State Attorney over her doubts whether the element of stealing in the offence of armed robbery was proved at all. For purposes of instant appeal, the main elements constituting offence of armed robbery section 287A are first, stealing. The second element is using firearm to*

threaten in order to facilitate the stealing ..." (at page 12).

See also: **Nchangwa Marwa Wambura v. R,** Cr. Appeal No. 44 of 2017 (unreported).

Guided by the above decisions, the question for our consideration and determination is; were the key ingredients of armed robbery proved in the instant appeal?. We are mindful that we are sitting on a second appeal in which, as a general rule, we are bound by the concurrent findings of the two courts below. We can only interfere where if it is plain that in arriving at the concurrent findings, the two court below misapprehended the evidence on record or omitted to consider available evidence or made wrong conclusions on the facts on the evidence occasioning miscarriage of justice. The Court has done so in numerous like cases as this one. See for instance: **Dickson s/o Joseph Luyana & Another v. R,** Cr. Appeal No. 107 of 2005, **Diskson s/o Joseph Luyana & Another v. R,** Criminal Appeal No. 1 of 2015, **Juma Mzee v. R,** Criminal Appeal No. 19 of 2017, Felix **s/o Kichele & Emmanuel s/o Tienyi @ Marwa v. R,** Criminal Appeal No. 159 of 159 of 2005 and **Mbaga Julius v. R, Cr.,** Appeal No. 131 of 2015 cited in **Nchangwa Marwa Wambura v. R** (all unreported).

Having examined the judgments of the first appellate court and the trial court, we take the view that this is a fit case in which the Court sitting on a second appeal has to interfere with the concurrent findings of the two courts below. We shall demonstrate.

The most direct evidence was through PW1 appearing from page 10 to 13 of the accord of appeal. From our examination of the record, that evidence appears to have been too general. PW1 only stated, without more, that she was attacked and her mobile phone- Samsung Galaxy was snatched from her. She not only failed to furnish particulars of her mobile phone distinct from any other mobile phone but also, she could not produce any receipt. In our view, such failure created doubts in the prosecution's case to prove stealing as an essential ingredient in the offence of armed robbery and robbery with violence. We need not cite any authority for the proposition that any reasonable doubt, however slightest in the prosecution's case must be for the benefit of the accused. Accordingly, since there was doubt in the prosecution's case in relation to the proof of stealing, the offence of armed robbery let alone robbery with violence could not stand and sustain conviction against the appellant. Had the two courts below directed their minds properly to PW1's evidence

regarding stealing, they should have found that that evidence was too weak to prove stealing.

In the light of the above discussion, it will be clear that the two courts below misapprehended the evidence on record thereby concurring on an incorrect finding that the prosecution proved robbery with violence and hence the appellant's conviction on that offence in lieu of armed robbery which he was charged with. That means that the offence of armed robbery or that of robbery with violence with which the appellant was convicted was not proved on the standard required in criminal cases; proof beyond reasonable doubt.

Consequently, from our own evaluation of evidence, it is inevitable that the only finding we can make is that there was no proof of stealing and thus the offence of robbery with violence was not proved. The finding we have arrived at compels us to quash the trial court's finding of guilty for the offence of robbery with violence and that of the first appellate court as we hereby do and substitute it with a finding of not guilty. In the premises, a discussion on the propriety of the sentence substituted by the first appellate court which was a subject of the appellant's complaint in ground four has been rendered superfluous.

In the upshot, the appeal stands allowed for a different ground from that supported by the respondent Republic. The net effect is that the conviction is hereby quashed and sentences meted out to the appellant set aside. The appellant shall be released forthwith from custody unless he is held for another lawful purpose.

Order accordingly.

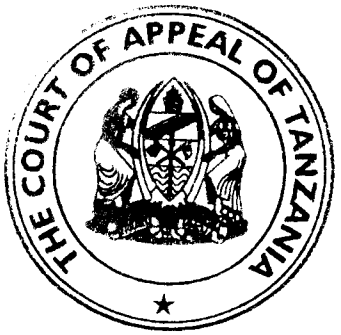
DATED at **DAR ES SALAAM** this 6th day of May, 2021.

S. A. LILA
JUSTICE OF APPEAL

L. J.S. MWANDAMBO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

Judgment delivered this 11th day of May, 2021 in the presence of the Appellant present in person and Ms. Sylvia Mitanto, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL