IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: LILA, J.A., LEVIRA, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 497 OF 2019

JAFFARY SAIDI MWALIMU ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Arufani, J.)

dated the 4th day of October, 2019

in

Criminal Appeal No. 74 of 2019

.....

JUDGMENT OF THE COURT

1st & 7th June, 2021

LILA, J.A.:

The appellant was arraigned before the District Court of Liwale at Liwale on a charge constituting armed robbery and causing grievous harm. The later offence was charged in the alternative. He was convicted with the offence of armed robbery and sentenced to serve a jail term of thirty (30) years imprisonment and was acquitted of the alternative count. He was aggrieved but his appeal to the High Court was unsuccessful hence the present appeal.

The nature of the findings to be destined calls for the need to recite the charge as was laid at the appellant's door. It is couched thus:-

"1st Count

STATEMENT OF THE OFFENCE

ARMED ROBBERY, Contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002] as amended by Act No. 3 of 2011

PARTICULARS OF THE OFFENCE

JAFARY SAID MWALIMU in the night 4th day of July, 2018 at Nangano village within Liwale District in Lindi Region stole a sack containing simsim valued at Tshs. 30,000/= the property of ABEID MOHAMED KAUKA and ***at or immediately after such stealing was armed with a bush knife which he used to cut ABEID MOHAMED KAUKA in order to obtain or retain the said sack containing simsim.***

'IN THE ALTERNATIVE'

2nd COUNT

STATEMENT OF THE OFFENCE

CAUSING GRIEVIOUS HARM, Contrary to section 225 of the Penal Code [Cap. 16 R.E. 2002]

PARTICULARS OF THE OFFENCE

JAFARY SAID MWALIMU in the night 4th day of July, 2018 at Nangano village within Liwale District in Lindi Region unlawfully did cause grievous harm to ABEID MOHAMED KAUKA by cutting him with a sharp object on the left cheek and occasioning him serious injuries." (Emphasis added).

The factual setting leading to the present appeal is simple. Abeid Mohamed Kauka (PW2) and his wife were peasants. It was harvesting season when the incident subject of this appeal happened. They had obtained two and a half (2½) sacks of simsim. The two sacks were in the farm near a hut in which they stayed. On 4/7/2018 at night time around 23.00hrs PW2 and his wife were in the hut. PW2 heard sound of a man going to where they were. He got out for a check as to what was it. He saw a man running from his farm with a sack of simsim in a white sulphate bag. PW2 made a chase and that man threw down the sack and proceeded running. PW2 pursued that man so as to arrest him while calling for help. A short while later, the two held each other and, in the course, that man who later turned out to be the appellant, cut PW2 with a machete three times on his face near the left cheek and on his hands. Among the people who turned up to the call for help was Bakiri Mohamed Kauka (PW3) who found

PW2 and the appellant holding each other and there was a machete and a simsim bag. PW2 told PW3 that the appellant was stealing his simsim. PW3 and other people who had gathered at the crime scene including PW2's wife took PW2 and the appellant as well as the simsim and the machete to the Nangano Village Office. The appellant was arrested instantly. PW2 was later sent to Liwale District Hospital for treatment and was admitted for five days. Fredrick Elitoly Nyura (PW1), a Medical Doctor Grade II, attended PW2 and later filled a PF3 which he tendered as Exhibit P1. PW2 tendered the machete and the sack of simsim and were admitted as exhibits P2 and P3, respectively. The appellant was taken to Liwale Police Station and was received by WP 12460 PC Furaha who told the trial court that the machete and simsim were also taken to police and she issued a PF3 to PW2 so that he could be taken to hospital for treatment. She identified exhibits P2 and P3 in court.

In his affirmed defence, the appellant denied robbing the simsim sack from PW2 and he linked his arrest and being so charged with the long standing quarrel with PW2. Explaining, he said, during the harvesting season he took PW2's mobile phone after which PW2 went to his residence and not only assaulted him, but also wanted to revenge. That he reported

the matter to his boss and the Village Executive Officer (VEO) and, as a consequence, PW2 was condemned to work for free for his boss.

As regards what happened on the material date, the appellant claimed that while he was on the way to his mother's residence, he met PW2 who was armed with a club with which he beat him twice causing injuries to him. That, he used a panga he had to cut PW2 in his efforts to defend himself. While still at the crime scene, he went further explaining, PW3 who is PW2's brother, turned up to assist PW2. Later, he said, so as to implicate him, a simsim bag was taken there by the two from PW2's house. Thereafter, he was arrested and taken to police station. In cross-examination, he admitted that the panga tendered as exhibit (exhibit P2) belonged to him and is the one he used to cut PW2 in defending himself.

After scrutinizing the evidence presented, the trial court found the charge established and proceeded to convict the appellant with the offence of armed robbery and sentenced him as shown above. However, it acquitted him of the alternative offence of causing grievous harm.

The first appellate court, in dealing with the appeal, found all the elements of the offence of armed robbery as were outlined in **Fikiri Joseph Pantaleo vs Republic**, Criminal Appeal No. 323 of 2015

(unreported), were proved. Reference was made to PW2's evidence and the corroboration by PW3. Failure by the appellant to cross-examine PW3 and scantly doing so to PW2, was taken, in terms of the Court's pronouncement in **Issa Hassan Uki vs Republic**, Criminal Appeal No. 129 of 2017, to connote acceptance of the facts narrated by the two witnesses. The appellant's claim that the whole story was fabricated, was dismissed on account of the trial court's finding on credibility, it being the one vested with exclusive mandate to determine as was stated in **Shaban Daudi vs Republic**, Criminal Appeal No. 28 of 2000 (unreported). It was also satisfied that the appellant's defence evidence, as was insisted in **D. R. Pandya v. R**. [1957] EA 336 and **Iddi Shabani @ Amasi v Republic**, Criminal Appeal No. 111 of 2006 (unreported), was duly considered hence dismissed the appellant's contention to that effect.

Aggrieved, the appellant has approached this Court seeking to fault both courts below on a five point memorandum of appeal. Central complaints in those grounds is that; **one**, the charge was not proved beyond reasonable doubt as required by law; **two**, that exhibits P1 and P2 were improperly admitted into evidence; **three**, the doctor who prepared the PF3 (exhibit P1) is different from the one who tendered it; **four**, the

defence evidence was not considered and **five**, that PW1, not being the one who filled exhibit P1, was not competent to tender it as exhibit.

Appearing in person before us at the hearing of the appeal, the appellant simply adopted his grounds of appeal and urged us to allow the appeal based on them. The respondent Republic was represented by Mr. Abdulrahaman Mshamu, learned Senior State Attorney who was assisted by Ms. Eunice Makala, learned State Attorney. They vehemently resisted the appeal.

Responding to the grounds of appeal, Mr. Mshamu first attacked the 3rd ground of appeal contending that it was not first canvassed before the High Court or a subordinate court exercising extended jurisdiction. It being a new ground and not a legal point, the Court is barred from entertaining it in terms of section 4(1) of the Appellate Jurisdiction Act, Cap. 141, R. E. 2002 (now R. E. 2019). He urged us to disregard it.

Mr. Mshamu also dismissed the appellant's complaints in the 2nd ground of appeal. In that ground the appellant's complaints are directed to admissibility of exhibits P1 and P2. The complaints are that exhibit P1 (a PF3) was tendered by PW1 and P2 (a panga) was tendered as exhibit by PW2 who were not competent witnesses to do so. Mr. Mshamu took the view that PW1, a Medical Doctor who examined PW2, filled exhibit P1 and

also identified it in court by his handwriting and signature on it, was a competent witness to tender it. As for exhibit P2, he argued that the same was left by the appellant at the scene after cutting PW2 and that PW2 identified it in court as being the one used to cut him. On that account, he submitted, PW2 qualified to tender it.

Responding in respect of the 4th ground, the learned Senior State Attorney contended that the appellant's complaint that his defence evidence was not considered is baseless. He referred us to pages 22 to 24 of the record of appeal where, he argued, the defence evidence was considered in details and found unable to cast doubt on the prosecution case. He urged the Court to dismiss it.

In respect of the 5th ground of appeal, Mr. Mshamu conceded that the name of the Doctor who filled the PF3 (exhibit P1) seems to be different from that of PW1. But he attributed that difference with the manner the trial magistrate recorded the name of the Doctor (PW1) when he was recording his particulars before taking his evidence. He submitted that the name of the Doctor as reflected in exhibit P1 is "Mijula" while his particulars at page 5 of the record read "Nyura". He contended that the learned trial magistrate got wrong the name of PW1 when he introduced himself which is a human error. That difference, in his view, does not

justify holding that the doctor who testified as PW1 is different from the one who filled the PF3 (exhibit P1). He accordingly urged us to find the complaint unmerited.

Mr. Mshamu then reverted to the 1st ground of appeal in which the appellant complained that he was wrongly convicted because the charge was not proved beyond reasonable doubt. He maintained that armed robbery is proved when there is commission of theft involving actual violence by use of lethal weapon before or at the time of stealing so as to obtain the thing stolen and or after the time of stealing so as to retain the same. He referred to the evidence by PW2, who said, while in his hut he heard a person moving and on a follow up he saw somebody carrying a sack of simsim and upon chasing him, that person, who later on turned out to be the appellant, threw it down and continued to run. To Mr. Mshamu, that was sufficient to prove *asportation* and the taking of the simsim without his authority proved intent to deprive him of the same permanently which is a necessary provable ingredient in stealing. By such evidence, he concluded, the offence of stealing was complete. To make it armed robbery, Mr. Mshamu argued that the appellant used a panga (exhibit P2) to cut PW2 on the face near the cheek and hands hence there was use of a lethal weapon. He added that such evidence was corroborated by PW3 who

went to the scene in response to the call for help by PW2 and found a simsim sack, a panga and PW2 already injured. The evidence by the two witnesses, he argued, was not challenged by the appellant by cross-examination which, in terms of our Court's pronouncement in the case of **Goodluck Kyando v. R** [2006] TLR 363, is taken that he accepted it to be true. In addition, he argued, PW2 pursued the appellant without losing sight until they held each other and he was cut by the panga and PW2, soon thereafter, named the appellant to PW3 as his thief something which added credence to his testimony in accordance with our decision in **Marwa Wangiti Mwita and Another v Republic** [2002] TLR 39. More so, Mr. Mshamu argued, the appellant, in his defence, did not dispute using the panga (Exhibit P2) in cutting PW2 and being arrested at the crime scene. Like the trial magistrate, he argued, such evidence further strengthened the prosecution case against the appellant.

In rejoinder, the appellant just urged us to consider reducing the sentence meted on him.

The epicenter of this appeal, in our view, is whether on the facts on record, the appellant committed the offence of armed robbery. In resolving the issue, we shall consider the merits of the grounds of appeal in the manner the learned Senior State Attorney argued.

We shall start with the complaint in the 3rd ground of appeal. Mr. Mshamu considered it as new and the Court is enjoined to disregard it. Admittedly, this is a tricky issue. For the Court to justly resolve it, it is obligated to compare the grounds raised before the High Court or a subordinate court exercising extended jurisdiction and those raised before the Court so as to ascertain, **first**, if that ground is really new. **Secondly**, the Court has to satisfy itself that that ground does not raise a legal issue. In the event the findings in the two issues are positive, then, in terms of sections 4(1) and 6(7)(a) of the Appellate Jurisdiction Act, Cap. 141 R. E. 2019 (the AJA) read together with Rule 72(2) of the Tanzania Court of Appeal Rules, 2009 (the Rules), the Court lacks mandate to entertain it. We are fortified in that position by our pronouncement in **Galus Kitaya vs Republic,** Criminal Appeal No. 196 of 2015 where we made reference to our earlier decision in **Nurdin Mussa Wailu vs. Republic**, Criminal Appeal No. 164 of 2004 (both unreported) in which we stated that:-

> *"...usually the Court will look into matters which came in the lower courts and were decided. It will not look into matters which were neither raised nor decided either by the trial court or the High Court on appeal."*

Our serious examination of the appellant's grounds of appeal before us and those he raised before the High Court as reflected at page 33 of the record, have satisfied us that the complaint raised in the 3rd ground is new. It is also factual because it touches on evidence regarding whether the one who tendered it was in the list of the witnesses. In view of the firm legal position stated above, we are barred from entertaining it. We accordingly disregard it as was rightly prayed by the learned Senior State Attorney.

In the 2nd ground of appeal, the appellant complained that PW1 and PW2 were not competent persons to tender exhibit P1 (PF3) and P2 (a panga), respectively. In resolving this complaint, we think, we should expound the relevant guidance on persons who may tender exhibits in court during trial. In **The DPP vs. Mirzai Pirbakhsh @ Hadji and Three Others**, Criminal Appeal No. 493 of 2016 (unreported), this Court listed the categories of people who can tender exhibits in court. It stated thus:-

> *"A person who at one point in time possesses anything, a subject matter of trial, as we said in **Kristina Case** is not only a competent witness to testify but he could also tender the same. It is our view that it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit therefore is whether the witness*

has the knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."

[see also **Zabron Masunga and Another Vs. Republic** Criminal Appeal No. 232 of 2011 (unreported)].

In the instant case, as rightly argued by Mr. Mshamu, PW1, a Medical Doctor examined PW2, filled exhibit P1 and also identified it in court by his handwriting and signature on it. As for exhibit P2, the same was left by the appellant at the scene after cutting PW2 and that PW3 saw it there and he identified it in court as the very same weapon used to cut him. On those accounts and on the authority above, PW1 and PW2 were competent witnesses to tender exhibits P1 and P2, respectively. This complaint lacks merit and is dismissed.

The appellant's complaint in the 4th ground is that his defence evidence was not considered. We entirely agree with the learned Senior State Attorney that this complaint is baseless. The proceedings at pages 22 to 24 of the record of appeal plainly contradict the appellant's assertion.

Thereat, the record bears out, the defence evidence was exhaustively dealt with by objectively considering it in relation to the prosecution case and, finally, it was found that it could not shake the prosecution case. As an elaboration, the appellant's defence evidence that he cut PW2 in the verge of defending himself, the learned trial magistrate considered it and found the prosecution evidence through PW2 and PW2 more credible. Also the issue of stealing simsim, the appellant's defence that it was taken there just to fix him, was considered and found unable to jiggle the evidence by PW2 and PW3. We are satisfied that this complaint is devoid of merit. It is dismissed.

The name of the Doctor reflected in exhibit P1 as "Mijula" and that reflected when his particulars were recorded at page 5 which read "Nyura" forms the root of the complaint in the 5th ground of appeal. Much as it is true, as conceded by Mr. Mshamu, that the two names are different, we are inclined to agree with him that the problem was occasioned by the trial magistrate who recorded the personal particulars of PW1. It is hard to disagree with Mr. Mshamu that it is easy for one who mishears the name "Mijula" to record "Nyula". These are human errors which are prone to happen due to varied physical or hearing impairment or oversight. Further,

given the nature of the evidence led by PW1 we entertain no doubt that PW1 is the same Doctor who filled the PF3 (Exhibit P1). This ground fails too.

Lastly, we shall consider the 1st ground of appeal and in the due course we shall answer the question whether or not, on the facts, the appellant committed the offence of armed robbery. To appreciate the nature of the appellant's complaint in this ground and for ease reference, we reproduce just a part of that ground which we find relevant for our deliberation as hereunder:-

> *"1. That both Court erred in law and facts by convicting the Appellant and upholding both conviction and sentence while the offence was not proved beyond reasonable doubt as required by law.*
>
> - ***The offence was not proved beyond reasonable doubt if it was Armed Robbery*** *as per [according to] section 287A of the Penal Code [Cap. 16 R.E. 2002] as Amended by Act No. 3 of 2011.*
> - ***According to evidence of PW2 the alleged victim*** *of the [edings and Pg of the Judgment)]* ***the alleged bush knife was not used in order to obtain nor retain the aiieged stolen sack containing simsim*** *[Pg of the proceeding]* ***PW2 claimed when he*** *[PW2]*

was chasing the appellant already the appellant had left the sack of the simsim seeds so that he could escape and after leaving the such PW2 proceeded with the chase and that's when PW2 claimed the appellant beated *[sic]* ***him with the alleged Panga in his face near the cheek, through this testimony it is clear the alleged Panga was never used to obtain nor retain the alleged sack of simsim seeds since already the appellant had left the alleged sack of simsim and only used the Panga to avoid arrest****. It was not proved if the appellant was armed with the alleged bush knife by the time of committing the alleged offence this is also supported by evidence of PW5 who claimed that PW2 was injured by the appellant in the process of arresting him (Pg 7 of the proceedings)."* (Emphasis added).

In the determination of the above issue, we start with appreciating the fact that, apart from PW2 and the appellant, there was no other eyewitness to the robbery incident. PW3 was clear that, on arrival at the crime scene, he found PW2 and the appellant holding each other and PW2 was already injured. On the other hand, as hinted above, the appellant did not dispute cutting PW2 with the panga. He claimed to have done so in the process of defending himself. Both courts below objectively weighed the

whole evidence and were of the concurrent finding that the appellant stole the simsim bag from PW2's farm and he cut PW2 with a panga. It is trite law that where courts below make concurrent findings of fact, a second appellate court should not interfere with those findings as made by courts below – see **The Director of Public Prosecutions vs Jafari Mfaume Kawawa (1981)** TLR 149. However, where the findings of the courts below are based on misapprehension of the evidence leading to wrong conclusions of fact and therefore cause miscarriage of justice, a second appellate court is entitled to interfere, take the position of the trial court and assess the evidence so as to arrive at a proper finding [see the **Jafari Mfaume** case (supra) and also **Auzebia Nyenzi v. Republic,** Criminal Appeal No. 336 of 2008 see also **Salim Mhando v. R.** (1993) TLR 170]. We have examined the record and we see no reason to fault the courts below on the two findings of fact and, on that point, we agree with Mr. Mshamu.

As shown above, the appellant was convicted with the offence of armed robbery. We are now required to answer the question whether the evidence on record justified his conviction on that offence. We are, therefore, compelled to revisit the law and evidence on record.

In terms of the provisions of section 287A of the Penal Code, and we need not to cite an authority on this, to prove armed robbery, it must be

established that there was actual personal violence or threat caused by use of a lethal weapon to a person on whom robbery was committed in order to obtain or retain the thing stolen. Armed robbery as an offence, therefore, cannot be committed where actual violence is not targeted towards the purpose of obtaining or retaining a stolen thing.

The question we ask ourselves is, was the above the case in the present case? The telling of PW2 unfolds, in details, the occurrence prior to PW3's arrival at the crime scene. To dispel any possibility of distortion, we find it apposite to reproduce the kernel of PW2's testimony as reflected at page 6 of the record of appeal. He is recorded to have said:-

> *"On 4/7/2018 in the night around 23:00 hrs I was resting in my farm with my wife one Farida Mohamed Kambanga and we had 2 and ½ sacks of Simsim in the same farm already to be transferred to the market. At such time I heard sound of a man and a thing coming. When I look upon I saw a man with a sack of simsim running away from my farm.* ***I chased against him and he left a sack of simsim so as he could escape arrest. I chased against him whereas he beat me with a panga three times in my face near left cheek and my hands.*** *Then the machete was left. I was making alarm to ask for assistance. Then my wife and other*

people came there and help to arrest the accused. The panga was the property of accused here. When those people and militia police they managed to see the panga, then we were taken to village office and I was unconscious. Accused was arrested on the spot to village office of Nangano. VEO directed the militia police to send me to dispensary. I was only given first aid. Then he attended me to some extent but advised to be referred to Liwale District Hospital with assistance of the medical officer who attended me there."(Emphasis added).

With respect to the learned Senior State Attorney, we disagree with him that the facts disclosed the offence of armed robbery. It is plain, as per PW2 that "***I chased against him and he left a sack of simsim so as he could escape arrest. I chased against him whereas he beat me with a panga three times in my face near left cheek and my hands.***"It seems clear to us that the appellant threw the simsim sack and continued to run and PW2 also continued to chase him until when PW2 got hold of the appellant and thereby he got cut with a panga by him. The cutting done to PW2 by the appellant cannot, in the circumstances, be linked with the appellant's intention to obtain or retain the stolen simsim bag. Instead, as stated by PW2, the panga was used by the appellant to resist arrest. This is more so because, even after cutting PW2 the appellant

did not attempt to take the simsim sack. In all, the offence of armed robbery, on the facts, cannot stand.

Having so found, the fact remains that the appellant took the simsim sack from the appellant's farm and had it not for being chased and arrested, he would have permanently deprived PW2 of it. That evidence, no doubt, established the offence of stealing or theft.

In the circumstances, we are satisfied that both courts below misapprehended the substance of the evidence on record and the law on armed robbery as a result of which they arrived at a wrong finding of guilt of armed robbery. That occasioned injustice to the appellant. We are, therefore, entitled to interfere with the concurrent findings of both courts below and come up with our own finding.

Consequently, we allow the appeal and hereby hold that the offence of armed robbery was not proved. The evidence proved theft. We accordingly quash the appellant's conviction for the offence of armed robbery and set aside the sentence meted by the trial court and sustained by the High Court. Instead, we substitute for it with a conviction with the offence of theft contrary to sections 258(1) and 265 of the Penal Code which is a cognate and minor offence to the offence of armed robbery. We

accordingly sentence the appellant to serve four (4) years imprisonment and the same takes effect from the date he was first convicted and sentenced by the trial court, that is to say the sentence to be counted to have started from 2/7/2019.

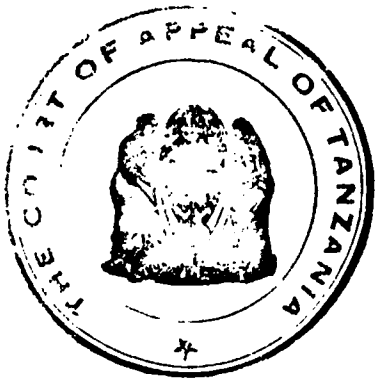
DATED at **MTWARA** this 4th day of June, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 7th day of June, 2021 in the presence of the Appellant in person and Mr. Kauli George Makasi, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL