IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KWARIKO, J.A. And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 422 OF 2017

1. PAULO ALOYCE @ MTANA
2. NYAMWAGA MUSSA ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

(Appeal from the judgment of the High Court of Tanzania at Mwanza)

(Bukuku, J.)

dated the 12th day of July, 2016
in
Criminal Appeal No. 261 of 2016

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JUDGMENT OF THE COURT

2nd & 8th July, 2021

NDIKA, J.A.:

The appellants, Paulo s/o Aloyce @ Mtana and Nyamwaga s/o Mussa, challenge the decision of the High Court of Tanzania at Mwanza (Bukuku, J.) affirming their conviction and sentence for thirty years imprisonment for the offence of armed robbery contrary 287A of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019). The prosecution had alleged at the trial before the District Court of Musoma District at Musoma that the appellants on 24th January, 2016 at Mutex Factory area within the District and Municipality of

Musoma in Mara Region stole TZS. 11,000.00 in cash and one TECNO 726 cellphone handset valued at TZS. 100,000.00, the property of one Mbela s/o Ndaki and immediately before or after such stealing they used a knife to threaten him so as to obtain or retain the said property.

The testimonies of the prosecution witnesses, knitted together, present the following narrative: in the morning of 24th April, 2016 around 9:30 hours, PW1 Mbela Ndaki, a Form VI student at Musoma Technical Secondary School, was walking back to school from church. As he approached the Mutex Factory area, two youthful thugs accosted and mugged him at a knifepoint. He was relieved of his wallet containing TZS. 11,000.00 in cash as well as one TECNO cellphone handset. Then and there, the thugs took to their heels as he frantically screamed out loudly for help and, within a while, several people including PW2 Shabani Salum and PW5 Nora Moga responded to the alarm. PW1 and other pursuers gave chase, subdued and apprehended the thugs who turned out to be the appellants. The appellants were later handed over to the police who were called to the scene of the crime.

According to PW2, while working with his wife on their cassava field a few paces from the scene of the crime, he saw PW1 having what seemed

like a normal interaction with two youths but suddenly he heard him screaming out loudly for help as the two youths started running from the scene towards his farm. He recalled to have joined the chase which culminated in the arrest of the two gangsters. There was further evidence from PW5 who told the trial court that she saw PW1 running after the appellants as they passed by her home with PW1 was shouting that the appellants had robbed him. She also testified that she witnessed the appellants' arrest after a hot pursuit.

Two police officers, No. G.6869 DC Peter (PW3) and No. G.5212 DC Domician (PW4), separately interrogated the appellants in the course of which they recorded their respective cautioned statements (Exhibits P.2 and P.3). By those statements, it was alleged, the appellants confessed to the charged offence.

In their respective defences, the appellants denied liability as hard as possible. On the part of the first appellant, he testified that he was one of the persons that responded to PW1's distress call as he was going to a nearby shop to buy bread. While there, the chasing party descended upon him mistaking him for one of the robbers even though he was not found with any of the stolen items. He was beaten up and then handed over to the

police. The second appellant put up a similar line of defence. He said he was mistaken for one of the robbers as he came near the scene of the crime while he was on a fishing expedition. He was apprehended, beaten up and knocked unconscious before he was handed over to the police.

The trial court (Hon. R.B. Maganga, SDM) convicted the appellants of the charged offence relying on PW1's evidence, which he found to be credible. He also pegged the conviction on the cautioned statements (Exhibits P.2 and P.3) by which the appellants confessed to the crime. As hinted earlier, the trial magistrate imposed on each appellant the mandatory term of thirty years' imprisonment spiced with corporal punishment. In addition, each appellant was ordered to pay TZS. 200,000.00 to the victim as compensation.

On the first appeal, the High Court rightly expunged the two cautioned statements on the ground that they were recorded after the expiry of the basic period of four hours in violation of section 50 of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019). Still, the learned first appellate Judge upheld the appellants' convictions having concurred with the trial court that the evidence adduced by PW1, PW2 and PW5 sufficiently established the charged offence.

In this appeal, the first appellant has filed eight self-crafted grounds of complaint while his co-appellant raised three grounds of appeal. On the whole, the said grounds raise the following complaints: **one**, that the charged offence was not proven beyond reasonable doubt; **two**, that the evidence adduced by PW1, PW2 and PW5 was contradictory and unreliable; **three**, that the arresting police officer was not produced as a witness to testify on the manner of the arrest; **four**, that failure to call the locality's ten cell leader whose home was twenty-eight metres away from the scene of the crime was fatal; **five**, that the allegedly stolen items were not produced at the trial without any explanation; and **six**, that the impugned convictions were based on the weakness of the defence rather than the cogency of the prosecution case.

Before us, the appellants prosecuted their appeal in person via a video link from Butimba Central Prison where they sojourned. They adopted their grounds of appeal and urged us to let the respondent address us first on the grounds of appeal, reserving their right to rejoin at the end of the respondent's submissions, if need be.

Ms. Revina Tibilengwa, learned Senior State Attorney, teamed up with Ms. Lilian Meli, learned State Attorney, to represent the respondent. It was

Ms. Meli who took up the mantle and addressed us on the grounds of appeal. In her submissions, she stoutly opposed the appeal mainly on the contention that the impugned convictions were firmly grounded on properly evaluated evidence on record. Starting with the issue of identification and arrest of the appellants, she did not agree with the appellants' claim that they were mistakenly identified and arrested at the scene. She argued that there was no chance of mistaken identity as the incident occurred in the morning around 9:30 hours in broad daylight and that the appellants were arrested after a hot pursuit shortly after fleeing the scene of the crime. The victim's evidence on that aspect, she added, was sufficiently corroborated by the accounts of PW2 and PW5 who adduced, from their own vantage positions, on how the appellants were chased and apprehended not far from the scene of the crime. To bolster her submission, she cited our decision in **Mabula Makoye and Another v. Republic**, Criminal Appeal No. 227 of 2017 (unreported).

As regards the alleged inconsistency in the accounts of PW1, PW2 and PW5, the learned State Attorney was emphatic that there was no discernible incongruity in the testimonies. She argued that each witness gave a consistent account tallying with the testimonies of the other witnesses on

how the continuous chase and apprehension occurred after the robbery incident. However, after being probed by the Court regarding PW2's account at page 11 of the record of appeal that the victim's wallet containing TZS. 11,000.00 in cash was recovered from the appellants upon their apprehension, she conceded that the said account contradicted PW1's response in cross-examination at page 10 of the record of appeal that the stolen property was never recovered. Still, it was her contention that the discrepancy was of no moment and that the failure to tender the wallet in the evidence was not fatal to the prosecution case. In this regard, she supported the first appellate Judge's finding in her judgment, at page 63 of the record of appeal, that the failure to produce the stolen items at the trial was not fatal.

The learned State Attorney urged us to find it baseless the complaint that the arresting officer was not produced at the trial to address the court of first instance on the manner of the appellants' arrest. She said that it was in the evidence that the appellants were subdued and apprehended the pursuers notably PW2, who, at page 11 of the record of appeal, is shown to have personally effected the apprehension and then prevented the mob from lynching the appellants. In the same vein, the learned State Attorney posited

that the failure to produce the ten cell leader whose residence is shown in the sketch map (Exhibit P.1) to be close to the scene of the crime was inconsequential because it was not suggested that he witnessed the incident. In any event, she added, the prosecution had the discretion to determine which witnesses to produce at the trial as in terms of section 143 of the Evidence Act, Cap. 6 R.E. 2002 (now R.E. 2019) ("the EA") there is no particular number of witnesses in any case required for the proof of a particular fact.

Coming to the question whether the charged offence was proven beyond peradventure and whether the conviction was premised on the weakness of the defence as opposed to the strength of the prosecution case, Ms. Meli contended that the evidence on the record sufficiently established the gravamen of the charged offence. She submitted while PW1's account, which was believed by the courts below, proved stealing of his property by the appellants, it also established the involvement of a dangerous weapon in form of a knife as well as the threat of use of that weapon on PW1 to facilitate the stealing. She added that PW1's account was materially supported by PW2 and PW5. Relying on **Mabula Makoye** (*supra*), she insisted that the failure to produce at the trial the stolen property was not

fatal to the prosecution especially in view of the fact that the stolen cellphone was not recovered.

The first appellant, in a brief rejoinder, wondered why the stolen items were not tendered as exhibits if at all the appellants were arrested right after the incident occurred. He bewailed that the case had all hallmarks of a frame up. On the part of the second appellant, he argued that it was unlikely for the robbery to have lasted as long as five minutes as alleged by PW1. We understood him to mean that five minutes was too long and thus, PW1 must have lied to the court. Like his co-appellant, he wondered why the prosecution failed to tender as exhibits the stolen items if at all the appellants were arrested not far from the scene of the crime.

We have examined the record of appeal and taken account of the contending submissions and the authorities relied upon. This being a second appeal, in terms of section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, our mandate is mainly to deal with issues of law, not matters of fact.

From the contending submissions, we think that the appeal turns, in the main, on whether on the evidence on record the charged offence was

proved beyond reasonable doubt. In dealing with this main issue, we are enjoined to examine not only the credibility, reliability and cogency of the evidence adduced by PW1, PW2 and PW5 but also the weight of the defence evidence.

Ahead of addressing the above issue, we think we should express at once our agreement with Ms. Meli's submission on the appellants' complaint that the arresting police officer and the ten cell leader were not produced at the trial as prosecution witnesses. Apart from the appellants failing to explain the indispensability of the said persons' evidence, we do not find on the evidence on record if they were material witnesses. In our view, the manner of the appellants' apprehension after the hot pursuit was fully explained by PW1, PW2 and PW5. As rightly submitted by Ms. Meli, the appellants were actually apprehended by PW2 who also stated that he restrained the mob from attacking the appellants until the police arrived at the scene and picked the appellants. In addition, the evidence does not suggest that the ten cell leader witnessed the fateful incident. Ms. Meli is, therefore, right that the prosecution, in view of their discretion in terms of section 143 of the EA determine which witnesses to produce at the trial, cannot be faulted for not calling the two persons as witnesses.

Adverting to the main issue as fleshed out above, we would right away endorse Ms. Meli's submission that as found by the courts below there was no chance of the three identifying witnesses having mistaken the appellants for robbers as the incident occurred in the morning around 9:30 hours in broad daylight and that the appellants were arrested not far from the scene of the crime after a hot pursuit. Apart from the victim's evidence on how he was robbed of his property, his account on how the appellants were continuously chased from the scene and apprehended was materially corroborated by the accounts of PW2 and PW5. PW2 adduced as to how from the vantage position at his field he watched the incident as it unfolded. He related as to how he joined the chase and restrained the mob from lynching the appellants after they had been subdued and apprehended. Subsequently, they ceded the appellants to the police. On the part of PW5, she testified as to how she saw the appellants being chased and she promptly joined the pursuers. She witnessed the appellants' arrest and their handing over to the police.

Our decision in **Mabula Makoye** (*supra*), cited to us by Ms. Meli, is on all fours with the instant matter as the appellant in that case was arrested red-handed while running away from the scene of the crime. We held, in

that case, that it was sufficiently incriminating that the appellant was arrested in a paddy field close to the scene of the crime after a hot pursuit. We took the same stance in **Mbaruku s/o Hamisi and Four Others v. Republic**, Consolidated Criminal Appeals No. 141,143 & 145 of 2016 & 391 of 2018 (unreported), where we cited our decision in **Joseph Munene and Another v. Republic**, Criminal Appeal No. 109 of 2002 (unreported), to reaffirm that the issue as to whether the appellant was identified cannot arise where, after committing an offence, the appellant is arrested after a continuous hot pursuit. It would be instructive, we think, to excerpt our holding in **Joseph Munene** (*supra*):

> *"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...."*

See also our decisions in **Stephen John Rutakikirwa v. Republic**, Criminal Appeal No. 78 of 2008; **Nikas Desdery @ Oisso v. Republic**, Criminal Appeal No. 18 of 2013; and **Anthony Jeremia Sorya v. Republic**, Criminal Appeal No. 52 of 2019 (all unreported).

Coming to the alleged inconsistency in the testimonies of PW1, PW2 and PW5, we agree with the learned State Attorney that while the said testimonies appear to fit neatly together, there is an apparent discrepancy between PW1 and PW2's testimonies on whether the stolen wallet was recovered or not. While PW1 adduced that the stolen property was not recovered, PW2 is shown at page 11 of the record of appeal to have adduced that the victim's wallet containing TZS. 11,000.00 in cash was recovered from the second appellant:

> *"I asked the bandits about those properties, they removed a wallet but they said the Tecno mobile phone was lost, and we opened the wallet and found there was TZS. 11,000.00 cash and a student's identity card ...."*

Unfortunately, the incongruity was not addressed by the courts below. We are, therefore, enjoined to carefully examine this issue to determine if there was any misapprehension of the evidence by the courts below. Our

further scrutiny of the record at pages 11 and 12 of the record of appeal confirmed the alleged discrepancy is clearly beside the point. At page 12 of the record of appeal, lines 1 and 2, it is clear that PW2 indicated that even though the wallet had initially been recovered from the second appellant and its contents verified, it was eventually lost at the scene presumably due to the chaos caused by the mob who were attacking the appellants:

> *"... it was the second accused who had the wallet which contained TZS. 11,000.00 cash and* ***it was lost at the scene.****"*[Emphasis added]

Since according to PW1 and PW2 the stolen property was not recovered, the prosecution cannot be blamed for not producing at the trial any of the stolen items. Such non-production cannot be fatal to the prosecution case because it was fully justified. In **Julius Billie v. Republic** [1981] TLR 333, the High Court (Samatta, J., as he then was), having noted that the prosecution had failed to produce in evidence the stolen head of cattle that had been recovered, held that non-production of a thing which is the subject-matter of court proceedings goes only to the weight and not to the admissibility of the evidence concerning or relating to it. We hasten to remark that the court in that case did not lay down or restate any principle

of law requiring the tendering of the stolen goods or the offensive weapon as a precondition for establishing the guilt of an accused person. Whether or not the prosecution must tender such items depends, on the whole, upon the circumstances of the case. We would reiterate that in the instant case, the prosecution could not tender the stolen items because they were not recovered.

In view of the foregoing discussion, we are of the settled mind that the appellants' convictions were firmly grounded upon properly evaluated evidence. Given the circumstances, we find no cause to interfere with the concurrent findings of fact by the courts below based on the testimonies of the three identifying witnesses (PW1, PW2 and PW5) found to be credible and reliable as they clearly had no reason to set up the appellants. In the premises, the prosecution case that the appellants robbed the victim by employing armed violence on him and were arrested after a hot pursuit overwhelmed and outweighed the appellants' common defence that they were mistaken for the actual muggers. Consequently, the appellants' contention that they were convicted on account of the weakness of their defence, not the strength of the prosecution case, is bereft of merit.

In fine, we find the appeal totally unmerited as none of the grounds of appeal had any substance. Accordingly, the appeal stands dismissed it in its entirety.

DATED at **MWANZA** this 7th day of July, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 8th day of July, 2021 in the presence of the Appellants in person linked via video conference at Butimba Prison and Mr. Hemed Halidi Halifani, Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.

G. H. Herbert
DEPUTY REGISTRAR
COURT OF APPEAL