IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NDIKA, J.A., SEHEL, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 324 OF 2018

1. HASSAN IDD SHINDO
2. MASHAKA JUMA .....APPELLANTS

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court at Mbeya)

(Herbert-SRM-Extended Jurisdiction.)

dated the 25th day of July, 2018
in
DC. Criminal Appeal No. 13 of 2017

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JUDGMENT OF THE COURT

14th & 20th September, 2021

KENTE, J.A.:

Hassan Iddi @ Shindo and Mashaka Juma (hereinafter respectively referred to as the first and second appellants), appeared before the District Court of Kyela where they were charged, along with other six persons who are not parties to this appeal, with two counts namely, conspiracy to commit an offence of armed robbery and armed robbery c/ss 384 and 287A respectively, both of the Penal Code (Cap. 16 R.E. 2002). It was alleged, with regard to the first count that, on 28th March, 2014 at about 3.30 am, the appellants together with the said six persons conspired to commit armed robbery. The said conspiracy is alleged to

have taken place at Kyela Market Square within the township and District of Kyela, Mbeya Region. With regard to the second count, it was particularised that, at the same time and place, the appellants and their co-accused stole Tsh. 2,000,000/= cash, three mobile phones with Airtel Money Phonelines, Tigo-Pesa and M-Pesa all valued at Tsh. 90,000/= and floats (sic) of Airtel Money, tigo-Pesa and M-Pesa valued at Tsh. 950,000/=. The total monetary value of the stolen items is said to be Tsh. 5,004,000/=. It was further alleged that immediately before stealing the said items, the appellants and their co-offenders hit one Adam Mwankuga on the hand with a bar of iron in order to steal the said properties. The appellants and their co-accused pleaded not guilty to the charge but after a full trial, they were found guilty as charged and subsequently convicted.

It is particularly pertinent at this juncture to also put it clear that, while four other persons who were charged along with the appellants were found not guilty and acquitted, the remaining two were convicted of the alternative count of receiving stolen property and sentenced to two years of conditional discharge. For their part, upon conviction, the appellants were each sentenced to three and thirty years imprisonment for the respective two counts.

The evidence that led to the appellants' conviction was briefly to the following effect. On 28th March, 2014 at Kyela Market Square within the township of Kyela, PW1's shop was burgled and several assortments of goods as particularised in the charge were stolen. The news regarding the said incident spread and reached the police whereupon the officer in charge of the Criminal Investigation Department one SP Wenga (PW7) accompanied by some other Police Officers went to the scene of crime in a rush. They found the security guard of the burgled shop lying down. He was bleeding apparently following the injuries he had sustained in the hands of men who were in the pitiless pursuit of money. On the same day at about 6.00 pm, the police managed to arrest the second appellant at Mikoroshini area and he was found in possession of two new phones make Oking and Nokia (exh. P5) which were identified by PW1, to be his property. It is the prosecution case that, upon interrogation, the second accused admitted to have been involved in the said burglary and he also told the police that some items stolen from PW1's shop were hidden at the first appellant's home. Accordingly, the first accused was pursued and arrested. It is further alleged that, a search conducted at the first appellants' home led to the recovery of three other phones which were also identified by PW1 to be his property. Moreover, it is the case for the

prosecution that, upon interview by police, the first appellant admitted the commission of the offence and in consequence, the appellants together with other six persons were charged before the trial court and convicted as stated hereinbefore.

In their defence evidence, the appellants totally denied any wrongdoing. However, as stated above, their vehement denials notwithstanding, they were found guilty and convicted. Their joint appeal to the Court of the Resident Magistrate (Ext. J) the first appellate court, to challenge both conviction and sentence was dismissed in its entirety, hence this appeal.

The appellants are complaining in their joint memorandum of appeal which, in a comprehensible manner, we find necessary to rephrase, thus;

1. The first appellate Court erred in law and in fact to uphold their conviction without taking into account that they were charged under non-existent provisions of the law in respect of the offence of armed robbery.
2. The section under which they were charged, that is section 287A of the Penal Code ceased to exist on 10th June, 2011.
3. The first appellate court erred in law and in fact to uphold the appellants' conviction without taking into consideration that

the ruling on *prima facie* case was defective and not curable by section 388 of the Criminal Procedure Act, Cap 20 R.E. 2019.

4. The first appellate court erred in law and in fact to dismiss the appeal without taking into account that the offence of armed robbery was not proved.
5. The first appellate court erred in law and in fact for dismissing the appeal while the person who was said to have been injured in the course of the robbery did not appear to testify in support of the charge of armed robbery.
6. The first appellate court erred in law and in fact by relying on the cautioned statements i.e. exhibits PE1 and PE2.
7. The evidence of PW1, PW4, PW7 and PW8 was meant to prove the offence of shop breaking and not armed robbery and further that, none of these offences was proven to the standard required by law.
8. The first appellate court erred in law and in fact to dismiss the appeal; the charged offences were not proven to the required standard.

9. The evidence of PW9 was useless as the person who was said to have been injured and treated by him was not called to corroborate his (PW9's) evidence.

10. The first appellate court erred in law and in fact to disregard the appellants' defence evidence.

Whereas the appellants appeared in person before this Court, the respondent/ the Director of Public Prosecutions was represented by Mr. Baraka Mgaya, learned State Attorney. On being invited to expound on the grounds of appeal, the appellants expressed their preference for the learned State Attorney to respond to their grounds of appeal after which they could make rejoinder, if the need arose.

Submitting on behalf of the respondent, and without the least hesitation, Mr. Mgaya conceded to the appeal. With regard to the first, and second grounds of appeal which fault the learned SRM (Ext. Jur.) on the first appeal, for upholding the appellants' conviction for the offence of armed robbery which, according to the appellants, was allegedly predicated on a non-existent provision of the law, the learned State Attorney was of the different view. Notably, at first, Mr. Mgaya had sought to sidestep the first, second and third grounds of appeal but, on being prompted by the Court, he hesitated as if wanting to elaborate and then,

in a single sentence, he told the Court that, the first three grounds of appeal were baseless because section 287A of the CPA was in existence when the appellants were formerly charged in court and that the trial court had complied with the provisions of section 231 of the said Act.

For our part, we find no merit in the first three grounds of complaint. For ease of reference, section 231 (1)(a) and (b) which is relevant to the circumstances of this case provides in no ambiguous terms that:

> *"231.- (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made against the accused person sufficiently to require him to make a defence either in relation to the offence with which he is charged or relation to any other offence of which, under the provisions of sections 300 to 309 of this Act, he is liable to be convicted the court shall again explain the substance of the charge to the accused and inform him of his right-*
>
> *(a)To give evidence whether or not on oath or affirmation, on his own behalf; and*
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> *(b) To call witness in his defence,*
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> *And shall then ask the accused person or his advocate if it is intended to exercise any of the*

above rights and shall record the answer; and the court shall then call on the accused person to enter on his defence save where the accused person does not wish to exercise any of those rights."

With respect, we agree with Mr. Mgaya in his view that, the above quoted provision of the law was duly complied with by the learned trial Magistrate. For, it occurs to us that, the import of s. 231 (1)(a) and (b) of the CPA is, that, upon closure of the prosecution case and if it appears to the court that a sufficient case has been made against the accused person as to require him to make a defence, the court shall once again, explain the substance of the charge to him and thereafter inform him of his rights which are, **one**, to give evidence whether or not on oath or affirmation on his own behalf and **two**, to call a witness or witnesses in his defence. This is the law and that is what the trial Magistrate exactly did in this case as borne out by the Court record at page 72 of the record of appeal. The record clearly shows that, on being satisfied that a prima facie case had been made, the appellants together with their co-accused were duly informed of their right to defend themselves whether or not on oath or affirmation and to call witnesses if any. To our minds, this clearly shows that the trial Magistrate had addressed himself on the mandatory

requirements of section 231(1) (a) and(b) of the CPA and from this, he cannot be faulted. In the result, we find the complaint by the appellants to have no merit and we accordingly dismiss it.

Going back to the first and second grounds of appeal in which the appellants are complaining that they were charged on a provision of the law which was non-existent as it ceased to exist on 10th June, 2011, we accept Mr. Mgaya's brief submission that these grounds, in their totality, are without merit. Notably, in the second count, the appellants were charged with and subsequently convicted of armed robbery c/s 287A of the Penal Code. For the avoidance of doubt, the appellants appeared before the trial court on 9/4/2014. It is inessential here to emphasize that by that time, section 287A of the Penal Code was already in existence following the amendments brought about by the Written Laws (Misc. Amendment) Act No. 3 of 2011. With the above stated legislative background, what then is the legal basis for the complaint by the appellants? With due respect, we take the view that, the appellants' complaint on that aspect has no legal basis and, we accordingly dismiss it.

Before going to the fourth ground of appeal, we wish to dispose of the sixth ground, albeit very briefly. There can be no doubt that, the

complaint by the appellants that the learned Senior Resident Magistrate (Ext. Jurisdiction) had believed that the impugned cautioned statements (Exh. P1 and P2) were made voluntarily, is misconceived. For, it is apparent that, having found the said statements to have been recorded in total violation of the mandatory requirements of section 50 (1) of the CPA, the learned Senior Resident Magistrate went on expunging them from the record. (vide page 152 of the record of appeal). It appears therefore that, perhaps the draftsman of the memorandum of appeal did not take time to study the impugned judgment before he went on to prepare the grounds of appeal, hence the misconception that the two statements were relied upon by the first appellate court in dismissing the appeal.

Another point which Mr. Mgaya took issue with in his submissions in support of the appeal, is the admission into evidence of the statement of one Adam Mwankuga. The record shows that the said Mwankuga could not talk and therefore it seems that, his attendance in court to testify as witness could not be procured without undue delay. On that account, his statement had to be tendered by Detective Corporal Asheri (PW8) in terms of section 34B of the Evidence Act.

The learned state Attorney was quick to point out the fact that, the appellants were not given the opportunity to say if they had any objection to the intended admission of the said statement and that, after it was admitted in evidence, the same was not read out in court to enable the parties to appreciate the nature and implication of the evidence contained therein. Mr. Mgaya referred to the case of in **Robinson Mwanjisi and Three Others v. R** [2003] TLR 218 in support of the proposition that, after a document is admitted in evidence, it must be read out in court to enable the parties to understand and appreciate the kind and implication of the evidence contained in such a document. The learned State Attorney invited us to expunge the said statement from the record, given the above – mentioned short comings.

With due respect, once again, we agree with Mr. Mgaya. Apart from non-compliance with section 34B (2)(d) and (e) of the Evidence Act, we think the number one drawback here is that the statement of the witness who is said to have been at the centre of the robbery incident, was not read out in court after it was admitted in evidence. We find this shortcoming sufficient enough to render the statement inadmissible and we accordingly expunge it from the record.

Next is grounds number four, five and nine which essentially criticise he judgment of the first appellate court upholding the decision of the trial ourt, notwithstanding the fact that, the alleged victim of the armed obbery was not called to testify as a witness in support of the prosecution ase.

We have gone through the evidence on the record and, we are of the espectful view that, indeed the available evidence did not prove the ffence of armed robbery to the standard required by law as we shall hereinafter demonstrate.

The categorical particulars made in the charge indicate that, the appellants used an iron bar to hit one Adam Mwankuga (a security guard) in order to steal the mentioned properties. However, having expunged the statement of Adam Mwankuga (Exh. P8) from the record and as such, there was no any other eyewitness to the alleged robbery incident, it is obvious that the absence of the element of use of a weapon to threaten a person in order to obtain or retain the stolen property as per section 287A of the Penal Code, makes the offence of armed robbery in the present case, unproven. The essence of our reasons for the above finding is contained in our earlier decisions in **Salum Joseph @ Tito and two others v. Republic**, Criminal Appeal No. 131 of 2006 (unreported) and

Yosiala Nicolaus Marwa and others v. Republic, Criminal Appeal No. 193 of 2016 (unreported). Those were both cases where, while interpreting section 287A of the Penal Code, the Court held respectively, that:

> *"It is a rule of law that in a charge of robbery, the nature of violence used on the victim or threat of it, must be specifically mentioned therein and eventually specifically proved by the prosecution."*

And that:

> *"...an important element of the offence of armed robbery is indeed the use of force against the victim for the purposes of stealing or retaining the property after stealing the same."*

In our judgment, in the absence of the evidence showing that violence was used by the appellants against the said Adam Mwankuga, either immediately before, or after stealing the alleged property with a view to obtaining or retaining the same, we are constrained to hold that the offence of armed robbery was not proven. For, it was not sufficient in law, to just allege that the appellants had hit Adam Mwankuga with a piece of iron bar without leading evidence to substantiate the allegations

made. For those reasons, we find merit in the fourth, fifth and ninth grounds of appeal and we accordingly sustain them.

Another disquieting feature in the concurrent decisions of the lower courts is the linking of the appellants with the armed robbery incident relying on the five phones allegedly found in their possession. That is to say, the two courts below had invoked the doctrine of recent possession to find that the appellants were guilty of armed robbery, having been found in possession of the said phones which were recently stolen and, in the absence of any plausible explanation for that possession.

However, it is important to remember that, for the doctrine of recent possession to form the basis of a conviction, it must be established, among other things, that the property has been positively proven to belong to the complainant and the fact that, the accused does not claim to be the owner of the property, does not relieve the prosecution the duty to prove the necessary elements for the doctrine to apply. (**See Mkubwa Mwakagenda v. Republic,** Criminal Appeal No. 94 of 2007 (unreported). And if we may add, it is important to keep in mind that this being a criminal case, the standard of proof required to prove ownership before the doctrine can be invoked, is proof beyond reasonable doubt.

Reverting to the instant case, Mr. Mgaya submitted that the appellants were convicted and their appeal to the first appellate court was dismissed on the basis of the doctrine of recent possession. However, the learned State Attorney challenged the evidence of the complainant one Willy Adam Mwakyusa (PW1) who, according to Mr. Mgaya, did not positively identify three phones (Tecno Model 604, Itel Model 5210 and Itel Model 2020) which he claimed to be his property and which was stolen during the armed robbery incident. The learned State Attorney was of the view that, the two courts below should not have invoked the doctrine in the absence of positive evidence showing that indeed, the phones which were found in the appellants' possession had been stolen from the complainant.

For our part, we think Mr. Mgaya had a valid argument. For the doctrine of recent possession to come into play in the instant case, the phones had to be positively identified to be the property of the complainant. However, there is nothing in the evidence of PW1 indicating how he was able to identify any of the three phones as one of the items which were stolen from his shop during the robbery incident. In our opinion, PW1 should have given evidence explaining to the court, how he was able to know or at least what made him to be sure the said phones

were the ones which were stolen from his shop on the night of the armed robbery incident. Moreover, we are of the respectful opinion that, in view of the seriousness of the offence with which the appellants stood charged and of which they were subsequently convicted, any evidence which was relied upon to support their conviction, ought to have been cogent. A person accused of a grave offence such as armed robbery as the appellants in the present case, must not be convicted on the basis of flimsy and presumptive evidence such as the evidence given by PW1. A mere allegation that the three phones were part of the stolen items from PW1's shop, was in the circumstances of this case, not sufficient, and the conviction of the appellants on that basis, cannot be allowed to stand.

As for the eighth ground of appeal which challenges the learned Senior Resident Magistrate of the first appellate court for upholding the appellant's conviction for the offence of conspiracy to commit armed robbery, Mr. Mgaya was very brief. He submitted that, where a major offence is charged and eventually proven as it was the case here, it was improper for the prosecution to charge the two offences consecutively.

Without hesitation, we agree with the learned State Attorney. Indeed, there was a great deal of superfluous charges against the appellants which suggests that perhaps, the prosecution had intended to

lay a wider trap against them. On that procedural anomaly, we can only refer to our decision in the unreported case of **Steven Salvatory v. Republic**, Criminal Appeal No. 275 of 2018 where the Court held that, the offence of conspiracy cannot stand where the actual offence has been committed. Similarly in the case of **John Paulo Shida v. Republic**, Criminal Appeal No. 335 of 2009 (unreported), this Court observed that:

> *"It was not correct in law to indict or charge the appellants with conspiracy and armed robbery in the same charge because, as already stated, in a fit case, conspiracy is an offence which is capable of standing on its own."*

In our respectful opinion, in the light of the abovestated position of the law, we think the learned Senior Resident Magistrate of the 1st appellate Court, had no legal justification to uphold the appellants' conviction for conspiracy to commit armed robbery an offence which as we have said, was not only superfluous but also which was not proven after the prosecution failed to lead evidence showing that the appellants had met and agreed to commit the said offence.

Needless to say, in view of what we have held hereinabove, we find the complaint by the appellants in the eighth ground of appeal that their

defence evidence was not considered by the lower courts to sound rather redundant. We desist, from considering it.

All said and done, we find the appeal to have merit and we accordingly allow it. The appellants' conviction for the two offences is hereby quashed and the sentences meted out on them are set aside. We order for their immediate release from prison unless otherwise retained for some other lawful cause.

It is so ordered.

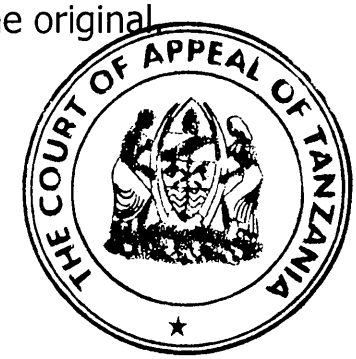
DATED at **MBEYA** this 18th day of September, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered on this 20th day September, 2021, in the presence of appellants in person and Mr. Davice Msanga, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



H. P. NDESAMBURO
DEPUTY REGISTRAR
COURT OF APPEAL