IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 30 OF 2019

ASAJILE HENRY KATULE .....1ST APPELLANT

FREDY JOHN MWASHUYA .....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Mbeya)

(Ngwembe, J.)

dated the 26th day of November, 2018
in
Criminal Appeal No. 110 of 2018

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JUDGMENT OF THE COURT

22nd November,& 8th December 2021

MWANDAMBO, J.A.:

The District Court of Mbarali at Rujewa, tried and convicted Asajile s/o Henry @ Katule (first appellant) and Fred s/o John @ Mwashuya (second appellant) of the offence of gang armed robbery contrary to section 287C of the Penal Code [Cap. 16 R.E. 2002- now R.E. 2019]. Upon such conviction, it meted to each of the appellants a sentence of thirty years' imprisonment. The appellants' appeal to the High Court sitting at

Mbeya did not succeed and hence this second and final appeal to this Court.

The appellants' arraignment and their ultimate conviction and sentence was triggered by a complaint made by Sunile Dutt s/o Chari (PW1), who was, at the material time an employee of Kapunga Rice Project Farm in Mbarali District, alleging that, on 05/05/2015 at about 07:20 a.m., two persons robbed him of several items including mobile phones of different makes, driving licence, a bag containing clothes and cash in different amounts and currencies including; Indian Rupees, United States Dollars, Tanzania Shillings.

The case for the prosecution during the trial was that: two men alleged to be the appellants gained ingress in the house where PW1 resided, dragged him to his bed room and stole from him at gun point the mentioned items and disappeared. Soon thereafter PW1 made a report to the local government authority leadership and later the police. A search was mounted which resulted into the arrest of the second appellant in possession of a bag containing clothes and cash identified later on to be the same one robbed from PW1 that very morning. The items found from the second appellant were listed in a certificate of seizure admitted at the

trial as exhibit PE 14. In the course of interrogation by No. G1009 DC Athuman (PW9), the second appellant recorded a cautioned statement (exhibit PE 17) allegedly confessing that he participated in the commission of the robbery in collaboration with the first appellant which facilitated his arrest later in the day at a place called Mswisi aboard a saloon car enroute to Mbeya town. It was also the case for the prosecution that upon his arrest, the first appellant was found in possession of three mobile phones of different makes recorded in a certificate of seizure(exhibit PE 15). Later in the day, the first appellant was interrogated by No. E 4210 DCPL Gozbert (PW7) who also recorded his cautioned statement (exhibit PE 16).

Subsequently, the appellants were arraigned and stood trial before the District Court charged with the offence of gang armed robbery contrary to section 287C of the Penal Code to which they pleaded not guilty. The appellants' case in defence was that they were not properly identified by PW1 as the culprits who stormed into his house on the material date but arrested on mere suspicions and forced through torture to confess to the offence they did not commit. In particular, the second appellant denied having been identified by PW1 who claimed that he had been an employee of Kapunga Rice Project.

After the trial involving nine witnesses for the prosecution and two for the defence, the trial court found overwhelming evidence to sustain the charge upon being satisfied that such evidence proved beyond reasonable doubt that the appellants were properly identified as the persons who committed the offence on the material date. Apart from the evidence of identification through PW1, the trial court found sufficient evidence to invoke the doctrine of recent possession having been satisfied that the items stolen from PW1 on the material date were all found in possession of the appellants a few hours later evidenced by two certificates of seizure admitted in evidence as exhibits PE 14 and PE 15 and duly identified by PW1, the owner. Moreover, the trial court found the case against the appellants sufficiently proved through their cautioned statements taken in the process of interview confessing the commission of the offence.

On appeal, the High Court sitting at Mbeya dismissed the appellants' appeal in which they challenged their conviction and sentence. Their appeal before the first appellate court was predicated on four grounds but essentially boiling into two main complaints namely; failure to consider defence evidence and that the conviction was grounded on weak prosecution evidence which did not prove the case beyond reasonable

doubt. The learned first appellate judge (Ngwembe, J.) concurred with the trial court that, the appellants were positively identified as the persons who stormed into PW1's house and robbed from him several items which were later on found in possession of the appellants. As to the complaint against the failure to consider the appellant's defence, the learned first appellate judge found no substance on it being satisfied that the trial court considered their defence. The learned judge also concurred with the trial magistrate that the confessional statements (exhibits PE 16 and PE 17) were properly relied upon in grounding conviction, so was the invocation of the doctrine of recent possession. He thus dismissed their appeal and hence the instant appeal upon a joint memorandum of appeal predicated on five grounds of complaint.

In essence, the memorandum of appeal raises complaints against the first appellate court that it erred in sustaining the appellant's conviction and sentences on the grounds, namely; **one,** the evidence by the prosecution did not prove the case beyond reasonable doubt; **two**, the trial court did not analyse the evidence properly and ignored the defence evidence; **three**, the evidence of PW1 was irregularly received through an interpreter who did not take oath; **four**, the conviction was grounded on

weak identification evidence; and, **five**, the chain of custody was unaccounted for.

At the hearing of the appeal, the appellants appeared in person fending for themselves. They urged the Court to consider their grounds of appeal and let the respondent Republic to respond reserving their right to rejoin should such need arise.

Mr. Njoloyota Mwashubila, learned Senior State Attorney, appeared for the respondent Republic resisting the appeal. To start with, the learned Senior State Attorney took issue with grounds three, four and five in the memorandum of appeal contending that such grounds were new on which the Court lacked jurisdiction according to the dictates 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). However, upon reflection, Mr. Mwashubila conceded that ground four involved an issue of law and thus justiciable by the Court. We agree with Mr. Mwashubila that the complaint in ground three regarding the interpreter in relation to PW1's evidence was not canvassed as one of the grounds of appeal for determination by the first appellate court and so that court did not determine it. So was ground five. For all intents and

purposes that the two grounds have been raised by appellants as afterthoughts and, unless they are based on points of law, the Court is barred from determining them. The Court has reiterated its stance against entertaining new grounds not involving points of law in many of its previous decisions. See for instance, our decisions in **Selemani S/o Mussa @ Vitus v. R.** Criminal Appeal No. 7 of 2019 in which the Court referred to its previous decisions in **Hassan Bundala v. R.** Criminal Appeal No. 385 of 2015, **Godfrey Wilson v. R.** Criminal Appeal No. 168 of 2018, **Florence Athanas @ Ali and Emmanuel Mwanandenje v. R.** Criminal Appeal No. 438 of 2016, **Festo Domician v. R.** Criminal Appeal No. 447 of 2016 and **Lista Chalo v. R.** Criminal Appeal No. 220 of 2017 (all unreported). See also: **Mohamed Musero v. R.** [1993] T.L.R 290.

We shall do alike in this appeal in relation to ground three. Nevertheless, we do not agree with the learned Senior State Attorney in relation to the complaint in ground five involving the integrity of chain of custody of the items seized from the appellants few hours after the robbery incident. We say so because it appears to us that the complaint is premised on the integrity of the chain of custody of the exhibits, subject of the charge resulting in their conviction. In the premises, we shall retain

ground five and determine it together with the rest except ground three which is hereby discarded.

Mr. Mwashubila began his submissions with ground two in which the appellants are faulting the first appellate court for sustaining conviction in a case in which the trial court did not consider their defence. The learned Senior State Attorney found no substance in this ground and pointed out that the appellants' defence was duly considered as reflected at page 78 of the record of appeal. Apparently, the appellants had nothing to rejoin in this ground.

As we stated in **Mkulima Mbagala v. R.** Criminal Appeal No. 267 of 2006 (unreported), a judgment of the court must be based on an objective evaluation of the evidence of both the prosecution and defence. After all, a finding that the case against the accused has been proved beyond reasonable doubt presupposes that the trial court subjected the prosecution evidence to scrutiny against that of the defence. The learned first appellate judge had occasion to consider this ground of complaint and satisfied himself that the trial court considered the appellants' defence. We respectfully agree with him having scanned the trial court judgment at pages 77 and 78 of the record of appeal.

Our examination of the record of appeal shows that the appellants' defence was that they did not commit the offence they were charged with and challenged the prosecution evidence of identification. Likewise, they contended that they were forced to sign the certificates of seizure as well as the cautioned statements. The trial court rejected their defences as reflected at page 78 of the record of appeal and the first appellate court concurred with that finding at page 103 of the record of appeal when addressing ground one in the petition of appeal. In the upshot, like the first appellate court, we find no merit in ground two and dismiss it which takes us to ground four.

The appellants' complaint in ground four relates to identification evidence. It is contended by the appellants that the first appellate court strayed into an error in sustaining conviction founded on weak evidence of identification. Mr. Mwashubila had four arguments in reply. **One,** the incident occurred in the morning affording favourable conditions for a positive identification. **Two,** the second appellant was familiar to PW1 as he was one of the employees of Kapunga Rice Project Farm. **Three,** the first appellant was named by the second appellant as the person with whom he participated in robbing PW1. **Four,** the appellants were arrested

shortly after the incident in possession of the items stolen from PW1. From the above, the learned Senior State Attorney urged the Court to dismiss this ground for lacking in merit.

In his rejoinder, the first appellant contended that the evidence of identification was unsatisfactory because; **one**, he was not named to anybody but was arrested on mere suspicion linked with confusion on his name; **two;** PW1 did not describe his physical appearance including the clothes he wore, **three;** he was tortured in an effort to extract confession in the crime he never committed, **four;** the properties alleged to have been stolen were not properly identified by the owner through receipts.

For his part, the second appellant discounted the evidence of PW1 in relation to his familiarity with PW1 by reason of his employment with Kapunga Rice Project Farm and thus properly identified by PW1. He contended further that no identification parade was conducted and finally, his objections to the admission of exhibits particularly the certificate of seizure and the cautioned statement were not considered.

From our examination of the record of appeal, we note that the line of arguments faulting identification before the first appellate court is different from what was canvassed by the appellants in this appeal. All the

same, the first appellate court considered the appellants' complaint against the evidence of identification and subjected it to the criteria set by case law, notably, **Waziri Amani v. R.** [1980] TLR 250 and found the evidence was watertight and properly relied upon by the trial court to ground conviction. The record shows that the trial court subjected the evidence by the prosecution on identification against the appellant's defence and agreed that such evidence was watertight considering that the incident took place at around 07:20 a.m. when there was sunlight favouring a positive identification.

What emerges from the foregoing is that the two courts below concurred on a finding of fact in relation to the sufficiency of evidence of identification. That being the case, this Court sitting as a second appellate court has no power to interfere with the concurrent finding of fact by the two courts below. The Court can only do so where it is evident that such concurrent findings resulted from misapprehension, misdirection and non direction of the evidence or omission to consider available evidence. See: **Felix s/o Kichele and Another v. R.** Criminal Appeal No. 159 of 2005, **Julius Josephat v. R.** Criminal Appeal No. 03 of 2017 and **Juma Mzee v. R.** Criminal Appeal No. 19 of 2017 referred in **Josephine s/o Daniel** @

Sikazwe v. R. Criminal Appeal No. 519 of 2019 (all unreported). Since there is no complaint that the concurrent findings of facts were vitiated by any of the grounds listed above, we are satisfied that the two courts below rightly concurred in their finding that the evidence of identification was water tight to found conviction. In consequence, we dismiss ground four for lack of merit.

Next, we shall consider ground one and five conjointly. Mr. Mwashubila did not address the Court on ground five on the complaint against the integrity of chain of custody understandably so because he took the view that it was new and not involving a point of law. His submissions on ground one raising a complaint that the case against the appellants was not proved beyond reasonable doubt were premised on three aspects. **One,** the evidence of identification placing the appellants at the scene of crime. **Two,** the doctrine of recent possession whereby the properties stolen from the victim (PW1), were found shortly thereafter in possession on the appellants who had no plausible explanation on how they obtained them. On this, the learned Senior State Attorney cited our decision in **Hassan Rashidi Gomela v. R.** Criminal Appeal No. 271 of 2018 (unreported) for the proposition that where a stolen property is found

in possession of an accused person with no valid explanation how it came into his hands, he is taken to be the thief of such property. **Three**, the learned Senior State Attorney argued that besides, the prosecution proved its case relying on the appellants' cautioned statements (exhibit PE 16 and PE 17) in which they confessed to have participated in the gang armed robbery on the material date. He thus implored the Court to uphold the conviction entered by the trial court and sustained by the first appellate court.

In their rejoinder, the appellants contended that the cautioned statements were extracted through torture and so there was no proper confession capable of proving the offence against the appellants.

It is evident from the record of appeal that the first appellate court considered this general ground in some detail and came to the conclusion that the case against the appellants was proved to the hilt. Sustaining the trial court's decision, the learned first appellate judge considered the evidence of identification and found it to be watertight. We have already held that the two courts below rightly concurred in finding that the appellants were positively identified to be the culprits. **Secondly,** like the trial court, the first appellate court found sufficient evidence supporting the

invocation of the doctrine of recent possession upon being satisfied that the certificate of seizure (exhibit PE 14) indicated that the second appellant was found in possession of eight different items including driving licence of PW1, cash in different currencies and amounts; Indian Rupees included, one big bag brown in colour and a small one containing different clothes. On the other hand, the first appellant was also found in possession of three mobile phones of different makes as reflected in the certificate of seizure (Exhibit PE15).

It will be recalled that contrary to the appellants' contention regarding admission of the exhibits, like other exhibits, the certificate of seizure (exhibit PE14 and PE 15) was admitted without any objection from the appellants. The first appellate court rejected the appellants' contention on the discrepancies in the recording and spelling of the seizure certificates as fanciful which did not shake the prosecution evidence citing an excerpt from the judgment of Lord Denning in **Miller v. Minister of Pensions** [1947] 2 All. ER 372.

Thirdly, with regard to the cautioned statements (exhibits PE 16 and PE 17), again, the first appellate court discussed their admission at some length properly playing the role of a first appellate court of evaluating the

evidence on record and came to a firm conclusion that they were voluntarily taken and properly admitted in evidence against the appellants. With respect, we have not seen reason to warrant our interference with the concurrent findings of the two courts below that the appellant's case was proved beyond reasonable doubt and so their conviction was well founded. The complaint raised in this appeal against the voluntariness of the cautioned statements and their admission before the trial court is misconceived considering the evidence on record that the statements were recorded within the prescribed period in pursuance of section 50 and 51 of the CPA as found by the first appellate court at pages 14 and 15 of its judgment (at pages 107 and 108 of the record of appeal).

It will be clear by now that the appellants' complaint against the integrity of the chain of custody is, but misplaced. Much as it was not a ground of appeal before the High Court, the learned first appellate judge alluded to it at page 105 of the record of appeal and found that the same was intact. At any rate, had it been otherwise, it would not have any bearing on the appellants' conviction in the light of the cautioned statements. Consequently, we find no merit in grounds one and five and dismiss them.

In the event, the appeal is found to be devoid of merit and we dismiss it in its entirety.

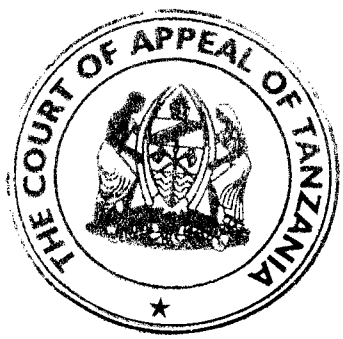
DATED at **MBEYA** this 3rd day of December, 2021

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 8th day of December, 2021 in the presence of the appellants in person linked via video conference at Luanda Prison and Ms. Sara Anesius, Senior State Attorney for the respondent/Republic, appeared through video linked at High Court Mbeya, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL