IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: KWARIKO, J.A., SEHEL, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 53 OF 2022

ISMAIL SALIM @ MBELWA ..... 1ST APPELLANT

SALIMU SELEMAN ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT
(Appeal from the decision of the Court of Resident Magistrate of Tanga)

(Kabwe , SRM- Ext. Jur.)

13th April, 2021

in

Criminal Appeal No. 12 of 2020

JUDGMENT OF THE COURT

27th April, & 9th May, 2022

MAIGE J.A.:

At the District Court of Handeni ("the trial court"), the appellants were charged with and convicted of the offence of armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2002 now R.E.2019]. They were each sentenced to thirty (30) years imprisonment. Their first appeal which was heard by the Court of Resident Magistrate of Tanga exercising extended jurisdiction was unsuccessful hence the instant appeal.

It was alleged in the charge sheet that, on 21.10.2017 at Mzeri Village within the District of Handeni in Tanga Region, the appellants did jointly and together, steal 32 cows worth TZS. 18,000,000.00, the property of Mzeri Ranch. Further that, immediately before and after so stealing, the appellants threatened to kill Emmanuel s/o Nzagamba and Viviani s/o Kanyia with a bush knife in order to obtain and retain the said property.

The facts giving raise to this appeal is simple and straightforward. Emmanuel s/o Nzagamba (PW1) and Viviani s/o Kanyia (PW2) were on the material day herein mentioned, in the service of Ovenco Ranch as herdsmen whereas Thabit Waziri (PW3) and Mbwana Kalawe (PW4) were in the services of the same as veterinary doctor and security guard, respectively. Safari Zacharia (PW5) and Salehe Nadi (PW6) were on their part, livestock supervisors.

On the material day at around 16:00 hours, PW1 and PW2 while grazing a flock of cows, were attacked by three armed persons. They fired gun into the air and put them under arrest. PW1 and PW2 managed to identify the appellants as they knew them since 2016. The

second appellant was holding a gun while the first appellant and the other person not known to them were holding a bush knife each. PW1 and PW2 were ordered to sit down and raise their hands. Their hands were tied-up with ropes and their mouths covered with clothes.

When all these were happening, it would appear, PW4 was in the patrol around the ranch. As he reached much closer to the scene of the crime, he was surprised to see the cows scattered and the herdsmen not seen. A short while after, he was able to see PW1 and PW2. They had their hands tied with strings and their mouths covered with clothes. He, therefore, untied the straps on their hands and removed the clothes from their mouths. On asking them as what went on, they disclosed what transpired and named the appellants as the culprits. On enquiry, he discovered that 32 cows were missing.

On being informed by PW4 of the incident, PW3 conveyed the information to PW6. He, together with PW6, tried to find out the missing cows for three days but in vain. The incident was then reported to police. It was on 28th October, 2017 according to F. 5251 Corporal Khalfani (PW7), the police officer who investigated into the crime.

According to PW6, the first appellant was arrested in February, 2018 whereas the second respondent in April, 2018.

In their testimony in defense, the appellants vehemently denied commission of the offence. In addition, the first appellant testified that he could not be at the scene of the crime on the material day as he was seriously sick. He produced, which was admitted as exhibit D1, the relevant medical report.

The trial court having been satisfied with the visual identification evidence of PW1 and PW2 as corroborated by PW3, PW4, PW5 and PW6 convicted the appellants with the offence and sentenced each of them to serve 30 years imprisonment. On appeal to the first appellate court, the conviction and sentence were upheld and the appeal was dismissed in its entirety. Once again aggrieved, the appellants have instituted this appeal.

In the memorandum of appeal, the appellants have enumerated six grounds of appeal which in a nutshell fault the first appellate court for; **One,** holding that the charge against the appellants was proved beyond reasonable; **Two,** failure to note the necessity of taking into

account credibility of witnesses in determining if the appellants were correctly and accurately identified; **Three**, not taking into account the material variance between the charge and evidence; **Four**, not holding that some material witnesses from the prosecution were not called. **Five**, placing reliance on contradictory, inconsistent and uncorroborated evidence in sustaining conviction; and **Six**, not taking into account the defence evidence of the first appellant.

At the hearing, the appellants appeared in persons and were not represented. The respondent was represented by Messrs. Emmanuel Barigila and Winluckly Mangowi, both learned State Attorneys. When invited by the Court to orally argue the appeal, the appellants fully adopted the contents of the grounds of appeal and written statement of the arguments.

For the respondent, Mr. Mangowi who presented the oral submissions, submitted, at the outset that, the fourth and fifth grounds of appeal in so far as they were not raised in the first appeal nor dealt with, are improperly before the Court and should not be considered.

The appellants being laymen had no comment to make rather than leaving the issue for the Court to decide.

On our part, having examined the record, we are in agreement with the learned State Attorney that, the said grounds in as much as were neither raised nor dealt with in the first appeal and they do not raise issues of law, , are unworthy of being considered. We shall, therefore, not take them into account in our judgment. This is in accordance with the principle in **Vedastus Emmanuel @ Nkwaya v. the Republic**, Criminal Appeal No. 519 of 2017 (unreported).

On the remaining grounds of appeal, the appellants, in their written statement of arguments, started with the third ground. Their contention thereon was two-fold. **First,** while the charge upon which the appellants were convicted mentions PW1 and PW2 as the victims of the crime, the original charge filed on 2nd day of February, 2018 mentions PW1 as the only victim. **Second,** while the assertion in the charge is that the appellants used only a bush knife to commit the offence, the proposition in the evidence of PW1 and PW2 is that both the bush knife and gun were used in the process. In the appellants'

view, the afore said discrepancies when considered together with the interval between the commission of the offence and trial, would raise a reasonable doubt if the incident really happened in the way it is narrated by PW1 and PW2 or at all.

On the second ground, the appellants criticized the lower courts in placing heavy reliance on visual identification evidence of PW1 and PW2 without appraising its credibility and probity as the principle in **Waziri Amani v. Republic** [1980] TLR 250 requires.

The appellants assigned four reasons why they believe that the said evidence was incredible and improbable. **One**, the evidence adduced materially differed with the charge. **Two**, it was highly improbable for the persons well known to the victim to commit the offence without any attempt to hide their identities. **Three**, though the appellants were arrested several months after the incident, the prosecution failed to call any witness to testify on their arrest. **Four**, it was highly improbable for some of the prosecution witnesses to attempt tracing the cows in different villages for several days before

interrogating the victims as to how the offence was committed as suggested in the testimony of PW3.

On the sixth ground as to the defence of *alibi*, the appellants faulted the first appellate court in dismissing the same for want of notice and particulars. This, they submitted, was contrary to section 194 of the Criminal Procedure Code [Cap. 20 R.E.2002, now R.E. 2019] which requires the trial court to consider it even if no notice of the intention to make use of it was furnished. The appellants further criticized the trial court for dismissing the defence for want of proof as that would amount into shifting the burden of proof to the appellants which is against the law.

By way of conclusion and perhaps in address of the first ground of appeal, the appellants submitted that, the cumulative effect of the weaknesses pointed out in their submissions in respect of the other grounds, is to raise reasonable doubts which should have been used in favour of them. In their view, therefore, the case was not proved beyond reasonable doubts. They henceforth prayed that the appeal be dismissed with costs.

In his submissions in rebuttal, Mr. Mangowi, learned State Attorney, started with the second ground of appeal. His submission on this point was very brief but precise. He submitted, as the appellants were well known to PW1 and PW2 and the incident happened during day time, there was no room for mistaken identity. To him, the prosecution evidence on visual identification was free from any mistaken identities. The learned State Attorney placed reliance on the case of **Samadu Ramadhani v. the Republic**, Criminal Appeal No. 289 of 2008 (unreported).

On the third ground, while admitting of there being variance between the charge and evidence, it was his submission that, the defect did not render the charge unproved as there was strong evidence from PW1 and PW2 that the appellants had both the gun and bush knife.

On the sixth ground as to failure to consider the defence evidence, it was the learned State Attorney's submission that, the same is misplaced because the first appellant's defence of *alibi* was duly considered and dismissed by the trial court as reflected at page 48 of the record.

On the first ground as to proof of the case beyond reasonable doubt, it was his submissions that, in accordance with the record, all the ingredients of the offence were proved beyond reasonable doubt. Through the evidence of PW1 and PW2, he submitted, the stealing of the 32 cows and the use of weapons to threaten the victim soon before and after the commission of the offence were well proved. He prayed therefore that, the appeal be dismissed in its entirety.

In their oral arguments, the appellants in essence reiterated what are in the written submissions.

Having made a brief account of the feature of the appeal, it is desirable to consider the substance of the same, of course, without departing from the cardinal principle of law that, this being a second appeal, we are not expected to disturb the concurrent factual findings of the lower courts unless we are satisfied that, there has been misapprehension of evidence, violation of some important principles of law occasioning miscarriage of justice. See for instance, The **Director of the Public Prosecutions v. Jaffar Mfaume Kawawa** [1981] T.L.R. 149.

For convenient, we shall start our deliberation with the sixth ground which fault the first appellate court in not taking into account the defence of *alibi.* In his submissions, the learned State Attorney viewed this complaint misplaced as the ground was considered by the trial court and found to be wanting for the reason that, the medical chit exhibited into evidence in the absence of oral account from the doctor who attended the first appellant, did not support the claim that the appellant was too weak to commit the offence. We have duly considered the rival submissions on this point and we are satisfied that the complaint is without merit. We shall account for our finding hereunder.

Under section 194(4) of the Criminal Procedure Act, where the accused intends to rely on the defense of *alibi,* he must give to the court and the prosecution, a notice of his intention to rely on such a defence before the hearing of the case. Section 194 (5) of the Act, envisages a situation wherein the accused has not issued a notice in terms of subsection (4) before the commencement of the trial. It requires the accused to furnish the particulars of the *alibi* at any time before the closure of the prosecution case. The effect of non-

compliance of the above requirements is set out under the provision of subsection (6) thereof. It gives discretion to the trial court to afford such evidence no weight of any kind.

It is now a settled principle of law that, the trial court cannot opt to accord such a defence no weight for want of notice unless it analyzes the evidence and assigns reason for the rejection of the defence. Thus, in **Edson Simon Mwombeki v. the Republic**, Criminal Appeal No. 94 of 2016 (unreported), it was held:

> *"It is settled law that, when the court takes cognizance of alibi of which no notice was given it must analyze it and give reasons for rejecting it "*

As it is express in the judgment of the trial court that the evidence constituting the defence was analyzed and the reasons for the rejection assigned, it cannot be said that, the defence was not considered. The decision being purely based on the discretion of the trial court and this being a second appeal, it cannot be interfered. It is on that account that we dismiss the sixth ground of appeal.

This now takes us to the second ground of appeal which relates to the assessment of the prosecution evidence on the identification of the appellants. It is an elementary position of law that, for eyewitness identification/ recognition evidence to be relied upon, it must be watertight and free from all possibilities of mistaken identity and/ or fabrication. See for instance, **Waziri Amani v. the Republic** (supra) and **Philimon Jumanne Agala @ v. the Republic**, Criminal Appeal No. 187 of 2015 (unreported).

In accordance with the authority in **Nhembo Ndaru v. the Republic,** Criminal Appeal No. 33 of 2005, (unreported), evidence is said to be watertight if it is;

> *"relevant to the fact or facts in issue, admissible, credible, plausible, cogent and convincing as to leave no room for reasonable doubt".*

The issue which we have to consider, therefore, is whether the prosecution evidence on the identification of the appellants was credible, cogent and convincing as to leave no room for any reasonable

doubt. For the reasons which shall be demonstrated gradually as we go along, we are preparing ourselves to answer the question negatively.

As we noted above, the appellants' conviction was essentially based on the evidence of the victims (PW1 and PW2) who claimed to have recognized the appellants because they were known to them since 2016 and the offence was committed during daytime. Though the offence is alleged to have been committed in October, 2017, the first appellant was arrested in February, 2018, being hardly four months from the date of the incident whereas the second respondent was arrested hardly six months after. Of all the prosecution witnesses, it is only PW6 who gave an explanation as to why did it take so long for the appellants to be arrested in the following words:

> *"We did not find the accused persons for long time and the 1st accused arrested on February 2018 while the 2nd accused arrested on April 2018".*

Who arrested the appellants and what led to their arrests, the prosecution evidence is absolutely mute. Besides, there was not adduced any evidence of attempt to trace the appellants or either of

them at their home village or at all. On this, the appellants criticized the two lower courts in placing reliance on the visual identification evidence of PW1 and PW2 without there being evidence from the arresting police. The complaint is not without merit. We think, in the absence of such evidence, the proposition in the testimony of PW1 and PW2 that they identified the appellants and disclosed their identities at earliest possible opportunity cannot be free from reasonable doubts. They being well known to PW1, PW2, PW3 and PW4, PW5 and PW6, it could not take such long for them to be arrested unless there be evidence of abscondment from the village, which was not.

The general assertion in the testimony of PW6 that they did not find the appellants for a long time, is not, in our view, sufficient to establish the proposition. In the circumstance of this case, we think, evidence on how the appellants were arrested was inevitable in linking between their arrest and identification during the incident. We are guided on this with our principle in **Boniface Kundakia Tarimo v. the Republic**, Criminal Appeal No. 351 of 2008 (unreported) to the effect that:

"It is thus now settled that, where a witness who is in better position to explain some missing links in the party's case, is not called without sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only permissible."

More to the point, while the evidence of PW1 and PW2 is such that, both the appellants were armed when they were committing the offence, there is nothing in their evidence to suggest any attempt by the appellants to hide their identity or eliminate the victims. It is highly improbable, as correctly submitted by the appellants, for one to commit an offence against a person well known to him during day time without, as it was in the instant case, hiding his identity. Therefore, in **Julius Maduka @ Shila v. the Republic**, Criminal Appeal No. 322 of 2015 (unreported), it was observed;

"Besides we find it highly improbable that the appellant went to the scene without any attempts to hide his identity to victims who knew him very well."

There is yet another reason why the prosecution story on identification of the appellants is doubtable. Though the prosecution evidence was such that the names of the suspects were disclosed to PW4 soon after the incident who in turn informed PW3 thereon, it is startling that, PW3 took trouble to trace the cows for three days at Simanjiro instead of tracing the appellants at their home village Misima. Thus, in **Omary Athumani @ Magari and Another v. the Republic**, Criminal Appeal No. 398 of 2019 (unreported) where, like in the incident case, the names and residences of the suspects were disclosed at the earliest possible opportunity, the prosecution, instead of tracing them at their village Visiga, they spent much time to trace them at Mlandizi and Mbwawa. The Court made the following observation which we fully subscribe to:

> *"Admittedly, the testimony of PW2 suggests that, after missing the appellants at the scene of the crime on the material date, an attempt was made to trace them at their residential homes but in no avail. The story is nonetheless materially contradictory with that of PW3 who told the trial court that, after missing the bandits at the scene of the crime, they went to*

Mlandizi and Mbwawa to find them out. The question is, if at aii PW1 informed PW2 and PW3 that the appellants were the residents of Visiga, why did they take all troubles to trace them at Mlandizi and Mbwawa?"

It is for the foregoing reasons that, we agree with the appellants that the prosecution evidence on identification of the appellants was neither water tight nor free from mistaken identities or fabrication.

We now pass to the third ground of appeal as to variance between the charge and evidence. The complaint by the appellants, we have noted, is not that the charge sheet was defective but that, the variance renders the evidence incredible and thus incapable of proving the offence beyond reasonable doubt. From the rival submissions, the variance appears not to be in dispute. It is in respect of the weapons used by the appellants to commit the offence. While in the charge the only weapon mentioned is a bush knife, in the evidence of PW1 and PW2, it is asserted that, the appellants made use of the gun as well. As there was no any plausible explanation to rationalize the variance, we agree with the appellants that, the omission affects the credibility and probity of the prosecution evidence.

The above notwithstanding, it is not in dispute that, aside from the charge sheet which initiated the proceedings, the subject of this appeal, there was, on 2nd February, 2018 lodged an initial charge in respect of the same offence which was however against the first appellant alone. Quite unusually, the victim of the offence in the respective charge was only PW1. Remarking on this anomaly, the learned State Attorney submitted that, all that happened because the second appellant was by then yet to be arrested. Come what may, the explanation is extremely wanting. The reason being that, if both PW1 and PW2 were the victims of the offence, it would be highly improbable for the prosecution to assert in the initial charge sheet that, there was only one victim of the crime. In our view, the unexplainable omission to mention PW2 in the initial charge creates a reasonable doubt if the appellants committed the offence.

In the final result and for the reasons as aforesaid, we find that, the case against the appellants was not proved beyond reasonable doubt. The fourth ground of appeal is also with merit. The appeal is thus allowed. We consequently quash the conviction and set aside the

sentence. We order that the appellants be immediately from prison custody unless held there for some other lawful cause.

Order accordingly.

DATED at **TANGA** this 7th day of May, 2022.

M.A. KWARIKO

JUSTICE OF APPEAL

B.M.A. SEHEL

JUSTICE OF APPEAL

I.J. MAIGE

JUSTICE OF APPEAL

This Judgment delivered this 9th day of May, 2022 in the presence of Mr. Ismail Salim @ Mbelwa, the 1st Appellant in person, Mr. Salimu Seleman, the 2nd Appellant in person and Mr. Paul Kusekwa, State Attorney for the respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

R. W. CHAUNGU

DEPUTY REGISTRAR

COURT OF APPEAL