IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., KOROSSO, J.A., And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 449 OF 2019

DANIEL JOHN MWAKIPESILE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Mbeya)
(Mongella, J.)

dated the 23rd day of September, 2019
in
Criminal Appeal No. 2 of 2019
.....

JUDGMENT OF THE COURT

21st & 28th September, 2022

MWAMBEGELE, J.A.:

The appellant Daniel John Mwakipesile was arraigned in the District Court of Mbarali sitting at Rujewa for the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002. The particulars of the offence had it that, on 12.02.2017 at about 16:00 hrs at Mkwajuni area, within Mbarali District in Mbeya Region, he did steal cash Tshs. 550,000/= the property of Faiza Danford and immediately before and after the time of stealing, he used a knife to threaten the said Faiza Danford in order to obtain and retain the stolen amount. He pleaded not guilty to

the charge after which a full trial ensued. The prosecution called five witnesses to prove the charge and, at the end of the day, he was found guilty, convicted and sentenced to a prison term of thirty years.

The story which preceded the appellant's arraignment is to the following effect. Faidha Msengi (PW1) is an entrepreneur involved in buying paddy and selling rice at a profit. On 12.02.2017 at about 10:00 in the morning, she received a phone call from a person who identified himself to her by a single name of Dan telling her that there was paddy for sale at Mangululu, Rujewa. The caller asked her to go and inspect if she could buy the same. The caller insisted that she should go with money so that they could complete the transaction if she would be interested to buy the said paddy. PW1 went there, disembarked at Mtambani area as directed and met the appellant who was well known to her before. They used to meet at Ubaruku area. However, the appellant could not take PW1 to the paddy seller immediately as he said he (the seller) would be joining them shortly. They walked together to the direction of BM Guest House, where the appellant entered leaving PW1 outside. In the Guest House, the appellant met Bahati Joseph Chambaka (PW2), the Guest House attendant. He asked for a room but there was no room available as all were occupied. The

appellant asked a favour from PW2 so that he could use the backyard of the Guest House to negotiate a business with PW1. The appellant was beckoned by PW2 to go inside to meet the appellant. However, PW1, initially, refused. She later agreed having been told that they are not going to meet in a room but at the backyard of the Guest House. PW1 went there. She asked the appellant the whereabouts of the paddy seller and the appellant told her that he was on his way. PW2 went outside leaving behind PW1 and the appellant in the backyard of the Guest House conversing.

After a short while, PW2 heard PW1 crying for help. She rushed there together with Eliza Timotheo (PW3), her sister-in-law with whom she was having a talk outside the Guest House. Alas! they saw the appellant wielding a knife and holding PW1 by the scruff of her neck. They were flabbergasted and ran away outside to seek help, raising an alarm in the process. In the meantime, the appellant escaped through the back door after robbing PW1 of her Tshs. 550,000,000/=.

The matter was reported to the Police and the appellant was arrested at Ubaruku area. In his defence, he simply dissociated himself from the accusations levelled against him. He stated in defence that he was arrested

on 09.02.2017 on allegations that he was having an affair with a wife of an unnamed policeman. That the arresters told him that, for his making amorous advances at the policeman's wife and actually having an affair with her, they would teach him a lesson by framing him with a criminal charge.

The trial court believed the prosecution's story from the five witnesses and that it proved the case against the appellant to the hilt. The trial court thus found him guilty, convicted and sentenced him in the manner already alluded to above. He was not happy with the conviction and sentence. His first appeal to the High Court was found to be barren of fruit as Mongella, J. upheld the decision of the trial court as well as the sentence imposed on him.

Undaunted, the appellant has come to this Court on second appeal seeking to assail the decision of the High Court on seven grounds of grievance. However, these grounds may be condensed as follows; that, **one**, the case against him was not proved beyond reasonable doubt; **two**, his defence was not considered; **three**, PW1 was not credible; **four**, the mobile phone service providers should have been called to verify if the phone used to communicate with PW1 was the appellant's; **five**, the evidence on a

knife alleged to have been used in the commission of the offence was hearsay as it was not tendered in evidence; **six**, the appellant was not reminded of the charge before passing judgment; and **seven**, the prosecution evidence was contradictory.

When the appeal was placed before us for hearing, the appellant appeared in person, unrepresented. The respondent had the services of Ms. Atufikye Roda Ngole, learned Senior State Attorney. When we asked the appellant to argue his appeal, he asked the learned Senior State Attorney to first respond to his grounds of appeal, after which, need arising, he would make a rejoinder submission.

Responding, Ms. Ngole expressed her stance at the very outset that the respondent supported the appellant's conviction as well as the sentence imposed on the appellant. In her arguments, Ms Ngole consolidated grounds four and five as well as grounds one and seven. The rest of the grounds were argued separately.

The learned Senior State Attorney kick-started with ground two in her response. She submitted that the appellant's defence was considered and that the appellant in one of his grounds of appeal complained that the trial

court erred in relying on the detention register to convict him. The High Court considered the defence and agreed with him and finally expunged the detention register from the record. She submitted that the first appellate court made that finding after it appraised the evidence afresh and made its own finding. She referred us to our unreported decision in **Prince Charles Junior v. Republic**, Criminal Appeal No. 250 of 2014 in which, at p. 8 of the typed judgment, we expressed that role on a first appeal. The learned counsel thus urged us to dismiss this ground of complaint.

On the third ground of complaint that PW1 was not credible, the learned Senior State Attorney argued that the witness was credible in that his narration of the story was quite consistent. She submitted that the appellant was very well known to her as they used to meet at Ubaruku on several occasions and the appellant did not dispute it. In the premises, she contended, there was no need to be accompanied with another person on their way to the Guest House as the appellant would like to convince the Court. She thus implored us to dismiss this ground as well.

Grounds four and five were argued together. These comprise a complaint of not calling mobile phone service providers to prove that the

number allegedly ending with the figure 69 which was used to converse with PW1 on the fateful day was indeed the appellant's and that evidence regarding the knife was hearsay as it was not tendered in evidence. Ms. Ngole admitted that indeed the mobile phone service providers were not called to testify and the knife was not tendered in evidence. However, the learned Senior State Attorney was quick to argue that even without doing so, the prosecution proved the case against the appellant to the required standard in that there were eyewitnesses; PW2 and PW3 who saw him holding PW1 by her neck armed with a knife and manhandling her in the backyard of the Guest House. There were other witnesses; Evance Edward Mjengwa (PW4) and Mkude Ignas Msasi (PW5) who saw the appellant and PW1 going the direction of the Guest House and later they saw him running away from there, she argued. The learned Senior State Attorney referred us to our decision in **Mashaka Juma @ Ntatula v. Republic**, Criminal Appeal No. 140 of 2022 (unreported) in which we observed at p. 20 that failure to tender an exhibit does not mean that the witnesses who testify on such an exhibit are not telling the truth. She was of the stance that the complaints in the two grounds of appeal are without merit and urged us to dismiss them.

Responding to ground six; the complaint that the charge was not reminded to the appellant before passing the judgment, Ms. Ngole contended that the complaint had no substance at all as there is no law that dictates that requirement. She added that the charge was read over to the appellant as appearing at p. 3 of the record of appeal, he was asked to, and did plead. The charge was again read over to him during the Preliminary Hearing to which he again pleaded. That was enough and made the appellant aware of the charge levelled against him, as such, she submitted, there was no legal requirement that it should again be read over to him before passing the judgment. This ground of appeal was also without merit and, she submitted, it should also be dismissed.

Grounds one and seven were argued last. She argued that the case for the prosecution was not marred with any contradiction and that the case against the appellant was proved beyond reasonable doubt.

On the totality of the foregoing, the learned Senior State Attorney implored us to dismiss the appeal.

In a short rejoinder, the appellant did not have much to submit. He simply asked the Court to consider his grounds of appeal in their entirety

and, having so done, be pleased to allow the appeal and release him from prison.

In determining this appeal, we shall follow the course taken by the learned Senior State Attorney. That is, by considering grounds four and five as well as grounds one and seven together. The remaining grounds will be considered separately.

In the second ground of appeal, the appellant seeks to assail the first appellate court for upholding the decision of the trial court which did not consider his defence. We have read the judgments of the two courts below and, having so done, we do not think the complaint by the appellant in this ground of appeal has any justification. If anything, the trial court considered the appellant's defence adequately. At pp. 36-37 of the record of appeal, the trial court considered the appellant's defence with respect to, especially, the detention register and the knife allegedly used to threaten PW1. The trial court made a finding that in view of the detention register which was tendered in evidence and admitted as Exh. PE1, the appellant had not yet been arrested on the day the offence is alleged to have been committed. The trial court also made a finding that the knife was not tendered in

evidence because the appellant ran away with it when he fled from the scene of the crime. The first appellate court also analysed the appellant's defence and, as rightly put by the learned Senior State Attorney, found as a fact that the detention register was wrongly admitted in evidence and wrongly relied upon by the trial court and, at the end of the day, expunged it. Thus, the complaint that the appellant's defence was not considered also arose in the first appellate court. The learned first appellate Judge, at page 67, observed:

> *"I have read the judgment of the trial court and found that, the trial magistrate considered the evidence adduced by both sides and came to the conclusion that the appellant committed the offence he stood charged."*

The defence evidence was thus considered by the trial court and the first appellate court rightly so found. For the avoidance of doubt, the evidence on the knife was not hearsay as the appellant would have us believe. If anything, as already stated, the testimonies of PW2 and PW3 were not hearsay but those of eyewitnesses. We agree with the learned Senior State Attorney that this complaint in the second ground of appeal is without merit. We accordingly dismiss it.

We now turn to consider ground three which is on the credibility of PW1. We do not think the determination of this ground will detain us. As rightly put by the learned Senior State Attorney, the narration of events by PW1 was quite consistent. Besides, the victim's evidence is supported by the rest of the witnesses. PW2 and PW3 are eyewitnesses who saw the appellant and PW1 arrive at BM Guest House where the appellant could not secure a room and, in its stead, used the backyard of the Guest House to bargain the price of the paddy. After a short while, they heard PW1 crying for help. They rushed thither only to find the appellant got hold of PW1 by the scruff of her neck while wielding a knife. Astonished, they ran outside the Guest House shouting for help after which the appellant escaped through the back door.

The appellant was also seen by PW4 and PW5 together with PW1 heading the direction of BM Guest and actually she conversed with them and was very well known to them. PW4 even conversed with her and that she told him that the appellant wanted to sell her paddy. The two witnesses saw the appellant and PW1 enter the Guest House and after some time had passed, PW4 saw the appellant running away from the Guest House. The

two witnesses went to the Guest House only to be told that the appellant had robbed PW1 of her Tshs. 550,000/=.

The two courts below found as a proved fact that PW1 was but a credible witness. The first appellate court, relying on our unreported decision in **Alex Wilfred v. Republic**, Criminal Appeal No. 144 of 2015, observed at p. 57 of the record of appeal, rightly so in our view, that the credibility of a witness is within the empire of the trial court and an appellate court cannot meddle with it unless there are compelling circumstances to do so. We see no reasons in this appeal to meddle with the finding of fact by the two courts below that PW1 was a witness of truth.

With the foregoing discussion, we do not find anywhere to peg any idea that PW1 was not credible. We find this ground lacking in merit and dismiss it.

Grounds four and five seek to challenge the High Court for upholding the decision of the trial court while the mobile phone service providers were not called to testify to verify that the mobile phone number used to communicate with PW1 was actually the appellant's. We do not think this complaint has any justification at all. The fact that the mobile phone or

number belongs to the appellant or not, is a nonissue in view of the overwhelming evidence of the five prosecution witness discussed above when determining the third ground of appeal. That is, the finding that the mobile phone number belonged or did not belong to the appellant had no value addition to the determination of the guilt of the appellant. The finding would be the same irrespective of any answer to the question. Of course, we are aware that the law requires the prosecution to call material witnesses to prove a case against an accused person, failing which entitles the court to draw an inference adverse to the prosecution – see: our decision in **Azizi Abdallah v. Republic** [1991] T.L.R. 71, **Omary Hussein @ Ludanga and Another v. Republic**, Criminal Appeal No. 547 of 2017 and **Wambura Marwa Wambura v. Republic** Criminal Appeal No. 115 of 2019 (both unreported), to mention but a few. We have already stated above that a witness from the mobile phone service providers was not relevant to the proof of the charge against the appellant, for his evidence would not have made any substantial value addition to the prosecution evidence.

The second limb seeks to challenge the prosecution for not tendering in evidence the knife which was allegedly used to threaten PW1, as an

exhibit. The first appellate Court addressed this question as well. At p. 62 of the record of appeal the first appellate court observed:-

> *"... it is not always that exhibits have to be brought in court to prove an offence. The act of not tendering a weapon in court does not amount to failure on the prosecution side to prove the case beyond reasonable doubt. The prosecution can still be able to prove a case of armed robbery even without tendering the weapon used in court, especially when the weapon is nowhere to be found, but there is some other evidence connecting the accused to the crime charged."*

We endorse this exposition by the first appellate court as a correct position of the law in our jurisdiction. The Court has pronounced this position of the law in a number of its decisions, one of them being **Mashaka Juma @ Ntatula** (supra) cited to us by the learned Senior State Attorney. In that case, some physical objects were not tendered in evidence and the appellant raised a complaint to that effect in the grounds of appeal. In responding to the complaint, we made the following observation at p. 20 of the typed judgment:

"... failure to tender those objects did not render or did not mean that the witnesses who testified on such exhibits were not credible.... Despite the fact that the said objects were not tendered in court, there was ample evidence from PW1, PW2, PW8 and PW10 incriminating the appellant ..."

In the case at hand, there was ample evidence from eyewitnesses; PW2 and PW3 who saw the appellant with a knife while committing the robbery as well as from PW4 and PW5 who saw the appellant and PW1 enter BM Guest House and PW4 saw the appellant running away from the Guest House. The fact that the eyewitnesses; PW2 and PW3, saw the appellant with the knife while committing the offence coupled with the evidence of PW1 herself and that of PW4 and PW5, we are satisfied that, even without the alleged knife being tendered in evidence, there was ample evidence to incriminate the appellant to the hilt. That is to say, failure to tender the alleged knife notwithstanding, there was ample evidence from the five prosecution witnesses to implicate the appellant with the commission of the offence. Grounds four and five are also without merit and dismissed.

Next for consideration is ground six which is a complaint to the effect that the appellant should have been reminded of the charge before

pronouncing judgment against him. The learned Senior State Attorney submitted that this is not a requirement of the law. She is right. So far as we are aware, there is no law which requires that the charge must as of right be read to an accused person before a judgment against him is pronounced. It might be a good thing to do but it is not a legal requirement. In the premises, the first appellate court cannot be faulted for upholding the decision of the trial court which was pronounced without reminding the appellant of the charge. This ground is also without merit and is dismissed.

The last two grounds to be argued were the first and seventh. Ground one is a general complaint that the prosecution did not prove the case against the appellant beyond reasonable doubt and the last one is a complaint that the first appellate court erred in confirming the judgment of the trial court while there was contradictory evidence of the prosecution witnesses. We start with the second limb. We have not been able to comprehend the appellant's complaint with regard to the grievance on contradictory evidence of the prosecution witnesses. Unfortunately, the appellant did not at all address us on this point. For our part, we see no material discrepancy in the evidence of the prosecution, except for some minor ones here and there which normally occur due to frailty of human

memory. We have held in a number of our decisions that due to frailty of human memory, discrepancies which are on details are excusable - see: **John Gilikola v. Republic**, Criminal Appeal No. 31 of 1991, **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017, **Deus Josias Kilala @ Deo v. Republic**, Criminal Appeal No. 191 of 2018 and **Marceline Koivogui v. Republic**, Criminal Appeal No. 469 of 2017 (all unreported). In **Issa Hassan Uki** (supra) we subscribed to the statement of the law by the High Court of Tanzania in **Evarist Kachembeho & Others v. Republic** 1978 LRT No. 70 as depicting the correct statement of the law in our jurisdiction. In **Evarist Kachembeho**, the High Court (Mnzavas, J. - as he then was) observed:

> *"Human recollection is not infallible. A witness is not expected to be right in minute details when retelling his story".*

We think this is still a good statement of the law. We subscribed to it in **Issa Hassan Uki** (supra) and reiterate so in this judgment.

We find the complaint that the prosecution evidence was discrepant as lacking in substance as well. We also dismiss it.

While we conclude, we wish to quickly address the complaint fronted by the appellant at the hearing of the appeal on the names of the victim. While we agree with the appellant that the victim is named as Faiza Danford in the charge sheet, she testified as Faidha Msengi, we are reluctant to entertain this complaint for two main reasons; **first**, it is surfacing for the first time in this appeal. It was not at issue in the trial court, neither was it one in the first appellate court. **secondly**, as it did not surface in the two courts below, it was not decided upon. As it is not a matter of law, we refrain from entertaining it. In **Elisa Mosses Msaki v. Yesaya Ngateu Matee** [1990] T.L.R. 90 this Court held that it will only look into matters which came up in the lower court and decided; not on which were not raised nor decided by neither the trial court nor the High Court on appeal. The logic behind this stance is not far to seek. We think it is encapsulated in the fact that a court cannot be faulted on something it did not decide. This is also the import of rule 72 (2) of the Tanzania Court of Appeal Rules, 2009 which dictates on mandatory terms that a memorandum of appeal shall set forth *"the grounds of objection to the decision appealed against specifying, in the case of a first appeal, the points of law or fact and, in the case of any other appeal, the points of law,* ***which are alleged to have been wrongly decided****"* – see

also: **Gandy v. Gaspar Air Charters Ltd.** (1956) 23 EACA 139 and **Melita v. Sailevo Loibanguti** [1998] T.L.R. 120. It is in this spirit that we refrain from entertaining the appellant's complaint on the names of PW1.

The sum total of the foregoing discussion is that we find and hold that the prosecution proved the case against the appellant to the required standard; that is, beyond reasonable doubt. This appeal is therefore arid of merit. It is dismissed entirely.

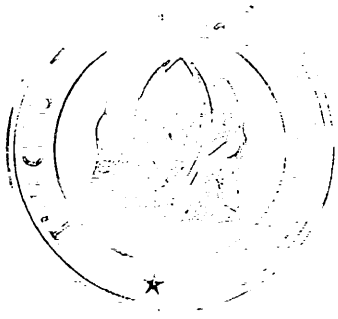
DATED at **MBEYA** this 27th day of September, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered on this 28th day of September 2022 in the presence of the appellant in person, unrepresented and Ms. Imelda Aluko, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL