IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 98 OF 2020

HAJI SAID SELEMAN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Morogoro)

(Tiganga, PRM, Ext. Jur.)

dated the 17th day of January, 2020
in
Criminal Appeal No. 6 of 2019

JUDGMENT OF THE COURT

18th & 24th February, 2022

KEREFU, J.A.:

This appeal stems from the decision of the Resident Magistrate's Court of Morogoro where the appellant, Haji Said Seleman was charged with and convicted of armed robbery contrary to section 287A of the Penal Code, [Cap. 16 R.E. 2002], now R.E.2019 (the Penal Code). It was alleged that on 2nd December, 2017 at Masimba area, Pemba Ward within Mvomero District in Morogoro Region, the appellant robbed one Mangoyi Moshoine TZS 1,600,000.00, a bush knife and club and immediately before such robbery, the appellant assaulted the said Mangoyi Moshoine with a

panga on various parts of his body in order to obtain the said properties. Upon conviction, the appellant was sentenced to thirty years imprisonment.

What led to the arraignment and conviction of the appellant, as obtained from the record of the appeal, is briefly as follows. Mangoyi Moshoine (PW1), the victim, testified that he was residing together with the appellant at Masimba Village and they were long-time friends. PW1 said that he was a pastoralist who used to purchase and sell cattle through auction and the appellant used to hire his land for cultivation of crops.

PW1 went on to state that, on 1st December, 2017 the appellant told him that he had a friend at Lusele area who was selling cattle. Thus, PW1 and the appellant agreed to go to Lusele, on the next day, to buy the said cattle. PW1 testified further that he planned to buy seven herds of cattle as he had TZS. 1,600,000.00. PW1 said that, on the next day, he went to the appellant's house to start their trip. While on their way, the appellant asked him if he had the money with him and he responded in the affirmative. Then, the appellant demanded to be shown the money so that he could count them, but PW1 refused. PW1 said that the appellant insisted to be shown the money but again PW1 refused and changed his mind of going to purchase the said cattle and thus decided to return to Masimba Village.

PW1 added that, the appellant told him about other possible places to buy cattle and that they agreed to visit the said places on the next day.

PW1 testified further that, upon reaching at the cross roads, the appellant went away but he came back suddenly and cut PW1 on his head and chin three times by using a machete. PW1 stated further that he lost energy and fell down and that was when the appellant searched him and robbed his money TZS 1,600,000.00, stick, knob stick and a double-edged knife and went away. It was PW1`s evidence that he called his brother one Kimorowai Petro (PW2), through a mobile phone, who went and took him to Kibati Hospital where he was treated by Dr. Joseph Flugence (PW6) after they had obtained a PF3. PW6 filled the PF3 to that effect and the same was admitted in evidence as exhibit P2.

PW1's account was supported by PW2 who testified that at the scene of crime he found PW1 lying down on the ground his head was open and his chin was swinging. That, PW1 told them that he was cut with a machete by the appellant. The incident was then reported to Costa Peter Ruben (PW3), a Ward Executive Officer who went to the scene of crime and then to the appellant`s home where he found his wife who told him that the appellant had left with PW1 since morning. PW3 called the

appellant via a mobile phone and asked him on why he assaulted PW1 and he replied that it was *satan* who forced him to do that act. PW3 testified further that the appellant informed him that he was at Turiani and when he asked him to come to his office, the appellant told him that he was scared of being killed by the citizens.

Shortly after receiving that information, PW3 sent Kasimu Sufian (PW4) the militiaman to Turiani to arrest the appellant. PW4 testified that, with the support from the villagers they managed to arrest the appellant while still in possession of a machete. The appellant was thus handled over to the Police Officer one D. 63000 SGT Hamis (PW5) who investigated the case. The said machete was admitted in evidence as exhibit P1.

In his defence, the appellant admitted that on the fateful date he agreed to have escorted PW1 to buy cattle but PW1 changed his mind on the way and he suddenly started to speak in the Masai language which the appellant could not understand. The appellant added that, PW1 became furious and started to beat him on his head and shoulders with a stick and cut him on his hand with his long double-edged knife. He said that he ran away, but was arrested by a militiaman and taken to the Police. The appellant denied to have committed the offence.

Having heard the evidence of both sides, the trial court found PW1's evidence truthful and credible, that it linked the appellant to the offence he was charged with. It was the further finding of the trial court that the evidence of PW1 was supported by that of PW2, PW5 and PW6. Thus, the appellant was found guilty, convicted and sentenced as indicated above.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. Still aggrieved, the appellant has preferred the present appeal. In the Memorandum of Appeal, the appellant raised seven grounds of appeal which can be conveniently paraphrased into the following grounds of complaints; **first**, that, the first appellate court failed to re-evaluate the evidence on record thus, failed to observe that the case reported to PW2, PW3 and PW5 was not robbery but an assault; **second**, that, the appellant's conviction and sentence was based on incredible evidence of PW1; **third**, that, the first appellate court failed to observe that there is no evidence from the arresting or re-arresting officers to suggest that the appellant was found with the alleged stolen money; **fourth**, that, the first appellate court failed to note that there is nowhere in the record that the appellant agreed to have committed an act of robbery but he seems to

have agreed to have quarreled with the victim and inflicted injuries on him; **fifth**, that, the first appellate court failed to draw an adverse inference on the appellant's conduct of surrounding himself by militia and the village chairman. That, if he had robbed the victim, he would not have picked the chairman's call; **sixth,** that, after expunging exhibit P1 from the record, there was no evidence left to prove the charge laid against the appellant; and **seventh,** that, the case against the appellant was not proved to the required standard.

At the hearing of the appeal, the appellant appeared in person whereas the respondent Republic was represented by Mr. Apimaki Patrick Mabrouk, learned Senior State Attorney assisted by Mr. Michael Ng'hoboko and Ms. Ellen Masului, both learned State Attorneys.

Having adopted the grounds of appeal, the appellant opted to initially hear the response of the learned State Attorneys while reserving his right to rejoin, if need to do so would arise.

In response, Mr. Mabrouk from the outset, stated that the respondent Republic was in support of the conviction and sentence imposed on the appellant by the trial court and upheld by the first appellate court. He then submitted that, after going through the grounds of

appeal, he discerned that the first, second, third, fourth, fifth and sixth grounds are all new as they were neither raised nor determined by the first appellate court. The learned Senior State Attorney argued that, it is a settled position, that this Court will only consider and determine matters which were deliberated and determined by the first appellate court. On that account, he implored us not to entertain the said grounds, unless they involve points of law.

As regards the seventh ground, Mr. Mabrouk disputed the appellant's claim that the prosecution case was not proved to the required standard. It was his argument that both, the trial court and the first appellate court properly analyzed and re-evaluated the evidence on record and found that the prosecution had managed to prove the case beyond reasonable doubt. To clarify on this point, Mr. Mabrouk referred us to the testimony of PW1 found at pages 7 to 9 of the record of appeal and argued that, PW1's evidence sufficiently proved the offence of armed robbery as he laid down the background of what transpired from the beginning up to the point at which the appellant attacked and cut him on his head and chin by using a machete and then robbed his money and other properties.

He argued that, pursuant to the provisions of section 287A of the Penal Code, ingredients for the offence of armed robbery which are supposed to be proved are; (i) proof of theft (ii) use of dangerous or offensive weapon, and (iii) threat or use of the said dangerous or offensive weapon against the victim for purposes of stealing or retaining the property after stealing the same.

It was his strong argument that the evidence of PW1 sufficiently established all the three ingredients thus proved the case against the appellant to the required standard. He further argued that, the testimony of PW1 was corroborated by PW2 who went to the scene of crime immediately and found PW1 lying down with wounds and PW4 who arrested the appellant while still having a machete in his possession. It was his further argument that, the evidence of PW1, PW2 and PW4 was not controverted as the appellant did not cross-examine them on those aspects. To buttress his proposition, he cited the case of **Damian Ruhele v. Republic,** Criminal Appeal No. 501 of 2007 (unreported). Finally, the learned State Attorney stressed that the prosecution case was proved beyond reasonable doubt and urged us to dismiss the appeal for lack of merit.

In rejoinder submission, the appellant did not have much to say on what was submitted by the State Attorney other than submitting on other matters which were not supported by the record. He lamented that he was innocent and therefore urged us to allow his appeal and set him free.

On our part, having carefully considered the grounds of appeal, the submissions made by the parties and examined the record before us, we wish to begin with the point raised by Mr. Mabrouk pertaining to the first, second, third, fourth, fifth and sixth grounds of appeal urging us to disregard them because they are new and were not canvassed by the first appellate court. Having examined the said grounds, we readily agree with him that the said grounds are new and should not have been raised at this stage. Pursuant to the provisions of section 6 (1) and (7) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019], this Court is mandated to hear appeals from the High Court or court of the Resident Magistrate with extended jurisdiction on matters canvassed before them and determined by such courts. The Court has pronounced itself on that aspect in a number of cases. See for instance the cases of **Abdul Athuman v. Republic** [2004] TLR 151, **Samwel Sawe v. Republic,** Criminal Appeal No. 135 of 2004 and **Yusuph Masalu @ Jiduvi v. Republic,** Criminal

Appeal No. 163 of 2017 (both unreported). Specifically, in Samwel Sawe (supra), the Court stated that: -

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at pages 21 to 23 shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman v. R*** *(2004) TLR 151 the issue on* ***whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that, the Court of Appeal has no such jurisdiction.*** *This ground of appeal is therefore struck out." [Emphasis added].*

Being guided by the above authority, we will not entertain the first, second, third, fourth, fifth and sixth grounds of appeal as they rise issues of facts which were not canvassed and decided upon by the first appellate court.

As regards the seventh ground on the appellant's complaint that the prosecution did not prove the case against him to the required standard, we wish to start by stating that, as properly argued by the learned State

Attorney, the offence of armed robbery is a creature of section 287A of the Penal Code. The said section provides that: -

> *"Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or robbery instrument, or is in company of one or more persons, and at or immediately before or immediately after the time of stealing uses or threatens to use violence to any person, commits an offence termed armed robbery and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."*

It is clear from the above provision that, to prove the offence of armed robbery, the prosecution must establish that, there was an act of stealing; that, at or immediately after the said stealing the perpetrator was armed with any dangerous or offensive weapon or instrument and that, he used or threatened to use actual violence to obtain or retain the stolen property. Discussing ingredients of armed robbery in **Shabani Said Ally v. Republic,** Criminal Appeal No. 270 of 2018 (unreported) the Court stated that: -

> *"It follows from the above position of the law that in order to establish an offence of armed robbery, the prosecution must prove the following: -*

1. *There must be proof of theft; see the case of* ***Dickson Luvana v. Republic,*** *Criminal Appeal No.1 of 2005 (unreported);*
2. *There must be proof of the use of dangerous or offensive weapon or robbery instrument against at or immediately after the commission of robbery;*
3. *That, use of dangerous or offensive weapon or robbery instrument must be directed against a person; see* ***Kashima Mnadi v. Republic,*** *Criminal Appeal No. 78 of 2011 (unreported)."*

In the case at hand, the prosecution case rested on the evidence of PW1, PW2, PW3, PW4 and PW6. PW1, the victim of the charged crime, apart from testifying that he was familiar to the appellant as they were until the material date living together in the same village and were long-time friends, he also explained on how the appellant approached him on 1st December, 2017 and told him that he had a friend at Lusele area who was selling cattle. That, they then agreed to go to Lusele, to buy the said cattle. Specifically, at pages 8 to 9 of the record of appeal PW1 testified that: -

"On 2/12/2017, I went to his home residence. I have Tshs 1,600,000/=, the stick, knob stick and the double-edged knife. I wanted to purchase 7 herds of cattle. While we were on the way, he asked me on whether I have the money or

not. I replied that I have the money and that is why I told him to go and purchase the herds of cattle. The accused told me to show up the said money so as to count them. I refused, we then proceeded with the journey. Shortly, the accused started saying that he is not sure whether I had the money or not. I decided to change my mind of going to purchase the cattle. We started coming back. When we arrived at the cross road, he told me to plan other places to go so as to purchase the cattle. We agreed that we shall go to other places on the next day. While seated, the accused person stood and went away. I thought that he was going for a short call. When he came back, ***he cut me on my chin and head three times. He was using the machete.*** *I lost energy as a result I felt down.* ***The accused searched me and took my money Tshs. 1,600,000/=. He took also my stick, knobs stick, and long double-edged knife. The accused then fled away."*** *[Emphasis added].*

In addition, PW2, who went to the scene of crime immediately after the incident testified at page 10 of the same record that: -

"When we arrived, ***we found that he was cut with machete at his chin and he was iied on the ground. His head was open and his chin was swinging. He toid us that he was cut by the accused person.*** *We picked him to hospital."*

Then, PW4 who arrested the appellant, while still holding a machete, testified at page 13 of the same record that: -

> *"While we are proceeding finding him, I received a call from the villagers that they have seen the accused while fledging away. I went towards their direction where as we managed to arrest person while holding the said machete... I handed over the said machete to the Ward Executive Officer (PW3)."*

Furthermore, in his defence found at page 20 of the same record, the appellant testified that: -

> *"On the fateful day, we agreed with the victim that I have to escort him on the auction of purchasing cattle. He came at home early in the morning. We started the journey at 06:00 hours. While on the way, the victim told me to come back. He refused to proceed with the journey so, he started speaking Masai language of which I did not understand. He became furious, thereafter, he beats me with the stick on my head... he inflicted a wound into my hand and beat me with the stick into my shoulder."*

Then, upon cross – examination, the appellant at page 21 of the same record testified that: -

> *"It is true that I inflicted a cut wound to the victim but it was a bad luck."*

It is common ground that both lower courts, evaluated and re-evaluated the above evidence and made similar findings that the prosecution had managed to prove the case against the appellant beyond reasonable doubts. Having revisited the entire evidence on record, we are satisfied that both lower courts adequately evaluated the evidence on record and arrived at a fair conclusion.

It is also on record that, the appellant did not cross-examine PW1, PW2, PW3, PW4 and PW6 on those aspects. As argued by the learned State Attorney, it is trite law that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted it and will be estopped from asking the court to disbelieve what the witness said, as the silence is tantamount to accepting its truth. We find support in our previous decisions in **Cyprian Athanas Kibogoyo v. Republic,** Criminal Appeal No. 88 of 1992 and **Hassan Mohamed Ngoya v. Republic,** Criminal Appeal No. 134 of 2012 (both unreported). In the circumstances, we see no reason to differ with the lower courts' concurrent findings in respect of the evidence adduced by the prosecution witnesses. It is therefore our settled view that there is no fault in the factual findings of

the two courts below for this Court to interfere. In the circumstances, we find the seventh ground of appeal to have no merit.

In the event, we find the appeal devoid of merit and it is hereby dismissed in its entirety.

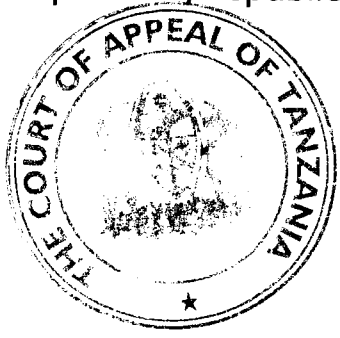
DATED at **DAR ES SALAAM** this 23rd day of February, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 24th day of February, 2022 in the presence of appellant in person linked via video conference at Ukonga Prison and Ms. Dhamiri Masinde, 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