IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: LILA, J.A., MWANDAMBO, J.A., And FIKIRINI, J.A.)

CRIMINAL APPEAL NO. 307 OF 2018

JOSHUA JOSEPH @ PAULO .... APPELLANT

VERSUS

THE REPUBLIC .... RESPONDENT

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

(Mwaimu, J.)

dated the 18th day of February, 2016

In

Criminal Appeal No. 48 of 2015

....

JUDGMENT OF THE COURT

23rd September & 6th October, 2022

MWANDAMBO, J.A.:

The appellant Joshua Joseph @ Paulo was charged with and convicted of the offence of armed robbery before the District Court of Karatu at Karatu. The particulars of offence alleged that on 9/10/2013 at about midnight at Karatu Township area within Karatu District, Arusha Region, the appellant stole one mobile phone make Tecno worth TZS 35,000.00 and cash TZS 200,000.00 the property of one Gasto Raphael and immediately before such stealing, he used a sharp instrument; an

iron bar in order to obtain and retain such property. The appellant denied involvement in the said incident.

The facts which led to the appellant's arraignment were that, on the evening preceding the incident, Gaston Raphael (PW1) and the appellant had met at a place called Manyara Garden for pleasure during which, PW1 bought the appellant a beer at his request. It transpired later on that, they were both proceeding back to the same direction Kwa Autuu and so they left in company. At some point along the way, three people who happened to be the appellant's friends joined them towards the destination but a short while later, the appellant went to a shop where he bought cigarette and some alcoholic drinks to each and parted company with them. To PW1's surprise, the appellant and his friends followed him. After a short distance, the appellant was said to have kicked PW1 from behind and fell him down, grabbed his neck and the trio used an iron bar to beat him. In the process, the assailants managed to snatch from PW1 a mobile phone make Tecno and a wallet containing TZS 200,000.00.

Whilst the three people took to their heels, PW1 managed to contain the appellant and after raising an alarm, two security guards (PW2 and PW3) from a nearby placed surfaced and arrested him and

thereafter sent him to the police. According to PW2, earlier on, he had heard someone screaming for help and upon going to the scene, he found PW1 heavily bleeding but holding the appellant who he knew well as a person from the place he was guarding. According to Teresphory Hillary (PW3) who accompanied PW2 to the scene of crime the appellant was found holding an iron bar and stone in his hands but without any of the stolen items. In his defence, the appellant did not deny having met PW1 in the evening preceding the incident or having bought him and his friends some drinks. However, he claimed that after leaving the place, PW1 followed them with the intention of taking away a girl friend who resisted and screamed for help resulting into people gathering and beating him before he was taken to the police.

The trial court satisfied itself that, the prosecution evidence sufficiently proved the offence to warrant a finding of guilt and it accordingly convicted the appellant as charged followed by the mandatory sentence of 30 years imprisonment. The appellant's appeal before the first appellate court was premised on three grounds of appeal faulting the trial court for; **one**, failure to scrutinize evidence which had glaring contradictions, **two**, failure to evaluate the evidence of PW1, PW2 and PW3 thereby arriving at a wrong decision and; **three**, wrongful

conviction grounded on weak evidence which did not prove the charge beyond reasonable doubt. The High Court (Mwaimu, J.) found no merit in any of the grounds and dismissed the appeal. It did so after being satisfied that, contrary to the appellant's complaints, the evidence for the prosecution proved that it is him in the company of 3 other people who attacked PW1 and snatched his phone and wallet before the trio disappeared and thereafter the appellant was arrested by PW2 and PW3 at the scene of crime. In effect, the first appellate court concurred with the trial court on the finding of guilt with the inevitable outcome of dismissing the appellant's appeal which aggrieved him, hence this second and final appeal.

The appellant has preferred four grounds of appeal. Ground one and three are new, they were not canvassed before the High Court and determined as such. All the same, as these grounds are based on points of law, we shall determine them and conveniently so, ahead of the rest.

Ground one alleges that the appellant's trial and ultimate conviction was predicated upon a defective charge. The complainant in ground three is that there was a variance between the charge sheet and the evidence in relation to the place where the offence was committed

which necessitated amendment of the charge under section 234 of the Criminal Procedure Act (the CPA).

The appellant who fended for himself during the hearing of his appeal urged the Court to consider his grounds together with the written arguments lodged earlier on and allow the appeal. We treated the handwritten notes titled "*Waheshimiwa Majaji, Naomba kufafanua sababu zangu za rufaa kwa hoja kama ifuatavyo*" as equivalent to a written statement of his arguments lodged in terms of rule 74 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules).

The essence of the appellant's complaint in ground one is that whereas the charge sheet alleged that PW1 was robbed of a mobile phone make Tecno and TZS 200,000.00, PW1's evidence was that he was robbed of the mobile phone, wallet, documents and cash TZS 200,000.00. According to him that rendered the charge fatally defective. Although he did not say so expressly, the appellant appear to have meant to invite the Court to nullify the trial, quash conviction and set aside sentence which would result into his release if we find the charge indeed defective.

Ms. Akisa Mhando, learned Senior State Attorney who teamed up with Ms. Eunice Makala and Tonny Kilomo, both learned State Attorneys

resisted the appeal on behalf of the respondent Republic. The learned Senior State Attorney argued grounds one and three conjointly notwithstanding absence of arguments from the appellant in ground three.

Whilst conceding the variance between the charge and evidence in relation to the stolen items, the absence of value of the said items, Ms. Mhando contended, and rightly so in our view, that in view of PW1's consistent testimony that the assailants snatched from him a mobile phone and TZS 200,000.00 did not matter to the accusations against the appellant. In other words, the failure to mention a wallet in the charge sheet did not have any effect on the offence of armed robbery the appellant stood charged with and convicted as long as the key ingredients of the offence under section 287A of the Penal Code were disclosed and evidence led to prove them as it were. On the other hand, as to the place, the charge sheet indicated that the offence was committed in Karatu Township. The appellant's arrest at the scene of crime immediately thereafter within Karatu township militates against his complaint considering that he admitted having met PW1 moments before the offence and indeed PW2 and PW3 arrested him being held by

PW1. Accordingly, we find no merit in these two grounds of appeal and dismiss them.

Next on ground two which is dedicated to the alleged contradictions in the testimonies of the prosecution witnesses. Apparently, the appellant said nothing in support of this ground which is substantially the same as ground one in the petition of appeal before the first appellate court. All the same, Ms. Mhando argued that no such contradictions existed as claimed but variance between the charge and evidence which had no effect on the conviction. We respectfully agree with the learned Senior State Attorney in view of our determination of ground one above. In our view, failure by PW1 to state the value of his stolen mobile phone in his evidence did not amount to any contradiction considering that PW1 was consistent that the assailants snatched his mobile phone together with cash TZS 200,000.00. There was no suggestion that the mobile phone was an item incapable of being stolen thereby affecting the existence of the essential ingredients of the charge of armed robbery.

In any case, as the learned first appellate judge did, we have found no contradictions in the evidence of the prosecution witness which would have gone to the root of the case thereby diluting it to the

appellant's benefit. We similarly find no merit in this ground and dismiss it which takes us to the last ground.

The appellant's complaint in ground four is that the charge against him was not proved to the required standard. Ms. Mhando pointed out that since the charge involved armed robbery, the prosecution was bound to prove act of stealing, use of dangerous or offensive weapon or robbery instrument immediately before or after stealing or use of threat or actual violence in order to obtain or retain the stolen property in line with section 287A of the Penal Code underscored in the Court's decisions in **Kisandu Mboje v. Republic**, Criminal Appeal No. 353 of 2018 (unreported) reiterating the position taken in **Shabani Said Ally v. Republic**, Criminal Appeal No. 270 of 2018 (unreported) citing **Dickson Luvana v. Republic**, Criminal Appeal No. 1 of 2005 and **Kashima Mnandi v. Republic**, Criminal Appeal No. 78 of 2011 (both unreported).

From the submissions by Ms. Mhando, we agree, like the High Court did that, PW1 sufficiently proved the act of stealing of his mobile phone and cash in the hands of four people, the appellant included, who used threat and force armed with robbery instrument, an iron rod which was found with the appellant by PW2 upon PW1's cry for help. As

to who was responsible, we also agree with the learned Senior State Attorney that, though there was no direct evidence of the use of the robbery instrument by the appellant and the fact that the stolen items were not found in the appellant's possession, we are satisfied that the appellant was properly charged as the actual offender in terms of section 22 (1) (a) of Penal Code which provides:

> *"When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely:-*
>
> ***(a) every person who actually does the act or makes the omission which constitutes the offence."***

The appellant was properly identified by PW1 as one of the perpetrators of the offence and indeed, he was arrested at the scene of crime immediately after the commission of the offence holding an iron rod and stone. We note that the two courts below appear to have not taken into account the appellant's defence. However, exercising our power to step into the shoes of the High Court and having examined the appellant's defence alleging that his arrest at the scene of crime was in connection

with a fracas between PW1 and him over a girlfriend, we have come to the firm view that that defence was too remote to arise any doubt in the overwhelming prosecution evidence. No doubt the appellant did not wish to pursue it before the High Court and this Court. Consequently, we find no merit in ground four and dismiss it.

That said, the appeal is destitute of merit and we dismiss it in its entirety.

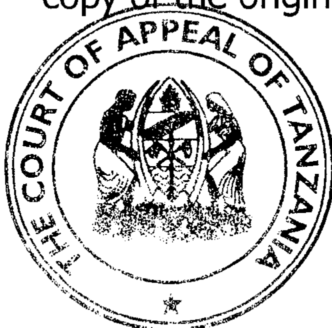
DATED at **ARUSHA** this 4th day of October, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2022 in the presence of the Appellant in person and Ms. Eunice Makala, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL