IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 536 OF 2019

ABDULAZIZ OMARY ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Dar es Salaam Registry at Dar es Salaam)

(Masabo, J.)

dated the 13th day of November 2021

in

Criminal Appeal No. 342 of 2018

.....

JUDGMENT OF THE COURT

4th July, & 22nd November, 2022

KOROSSO, J.A.:

Abdulaziz Omary, the appellant, was arraigned in the District Court of Kinondoni, at Kinondoni charged with the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E. 2002, now R.E. 2022]. The charges were founded on allegations that on 12/4/2017 at Kimara area, within Ubungo District, Dar es Salaam Region, he did steal one rear headlamp valued at Tshs. 700,000/=, 2 site mirrors valued at Tshs. 600,000/=, seat cover valued at Tshs. 100,000/= and 2 power windows valued at Tshs. 300,000/=. All items valued Tshs. 1,700,000/=.

That the items were parts from a motor vehicle make Toyota Verossa with Registration No. T 845 CHT (the vehicle), the property of Salmin Mfinanga. It was further alleged that immediately before and after stealing the items, he stabbed Salmin Mfinanga with a screwdriver on the upper left side of the eye to obtain and retain the stolen properties.

To prove its case the prosecution side presented 5 witnesses namely; Salmin Juma Mfinanga (PW1), Ramadhani Idd Pandukila (PW2), Emmanuel Towo (PW3), P6006 DC Lukumay (PW4) and Dr. Imelda Mtweve (PW5). In addition, six exhibits were tendered and admitted into evidence. On the side of the defence, the appellant who was the sole witness, categorically denied the offence charged.

What we have gathered from the record of appeal as expounded by the witnesses for the prosecution is that PW1 lived at Mbezi Kimara area in a wall-fenced house and usually parked his motor vehicle within the compound of his house. PW1 adduced evidence that on 12/4/2017 around 2.00 hours while asleep inside his house, he and his wife were woken up by the barking from the neighbour's dogs. PW1 decided to look at what was going on outside, and relying on the electric bulb at the fence, peeped through the window. Allegedly, while peeping, he saw the doors and bonnet of his vehicle were open. Soon after, he saw three people

surrounding his vehicle which prompted him and his wife to raise an alarm for help. Thereafter, he rushed outside toward his motor vehicle. He saw two of the bandits running and they managed to jump out through the wall fence. PW1 managed to hold on to one of the bandits, the appellant, who was trying to climb over the wall fence. While holding on to the appellant, the appellant using a screwdriver attacked him on his face and legs. During the scuffle between PW1 and the appellant, some of the neighbours who heeded the call for help arrived at the scene and assisted PW1 in apprehending the appellant. Thereafter, the Police were notified and soon after they arrived at the scene of the crime.

PW1 testified that various spare parts of his motor vehicle had been stolen during the incident. The items stolen included the seater covers, power windows, side mirror and 1 rear lamp. The rear small window was wrecked. Subsequently, PW1 went to the police station where his statement was recorded and he was handed a PF3 to take to the hospital for treatment of his injuries. At the hospital, PW1 was medically examined and treated by PW5, who also stitched his cut wounds. PW5 tendered the PF3 related to PW1's injuries which was admitted as exhibit P6.

PW2 evidence was on how he had heeded the alarm call from PW1's house, and on arrival there found some other neighbours and had

witnessed the filling of and signed on the warrant of seizure. PW4, a police detective went to the crime scene soon after the police were informed, found the appellant there, and prepared a certificate of seizure which was tendered and admitted as exhibit P2.

The appellant (DW1) categorically denied the charges against him. His defence was that on the fateful day at 20.30 hours, having left the house of his boss at Mbezi Kimara, on his way back home to Buguruni area, he met five men who beat him, and he fainted. When he regained consciousness, he found himself at the hospital and he was later put into police custody upon his arrest. He contended that he was unaware of the offence he was charged with.

The trial court, having heard the prosecution and defence sides, held that the case against the appellant was proved, thus convicted and sentenced him to serve thirty (30) years imprisonment. Dissatisfied, he unsuccessfully appealed to the High Court. Still unperturbed he knocked on the doors of the Court on 11/04/2022 lodging a memorandum of appeal with 10 grounds, which compressed and paraphrased give rise to the following grievances that fault the decision of the High Court: **One**, failure to consider the defence of the appellant. **Two**, the propriety of giving weight and relying upon the PF3 (exhibit P6) in the conviction of

the appellant despite having been admitted un-procedurally. **Three**, the propriety of relying on the unaffirmed testimony of DW1 contrary to the provisions of the Criminal Procedure Act [Cap 20 R.E. 2002, now R.E. 2022] (the CPA) and the provisions of the Oaths and Statutory Declaration Act [Cap 34 R.E. 2002, now R.E 2019] (the Oaths Act). **Four**, the propriety of giving weight to the retracted and repudiated cautioned statement (exhibit P3), even though it was recorded un-procedurally by PW4 and beyond the time prescribed by law. **Five**, Reliance on the evidence of the stolen items, exhibits P4 and P5 while the chain of custody was not proved by the prosecution witnesses. **Six**, reliance on the evidence of prosecution witnesses PW1, PW2 and PW3 which was full of discrepancies and contradictions, especially on the visual identification of the appellant. **Seven**, failure of the prosecution to prove the case beyond a reasonable doubt.

At the hearing of the appeal, the appellant appeared in person, unrepresented and Ms. Cecilia Shelly, learned Principal State Attorney assisted by Mr. Tumaini Maingu Mafuru, learned State Attorney represented the respondent Republic.

When called upon to amplify his grounds of appeal, the appellant started by adopting all the grounds found in the memorandum of appeal.

He then informed us that he had nothing to add except to pray for the sentence imposed to be set aside and for him to be set at liberty. Additionally, he sought leave of the Court to allow the learned State Attorney to submit first on the appeal and retained the option to reply thereafter if the need was to arise.

Ms. Shelly who had commenced by resisting the appeal, however, upon further reflections, in the midst of her submissions, changed gears and supported the appeal, conceding having discerned some serious irregularities in the proceedings that are incurable under section 388 of the CPA. Essentially, the learned Principal State Attorney argued on the following points in support of her position. **One**, that the trial and first appellate courts failed to analyze the defence evidence, which was improper and undoubtedly, the anomaly prejudiced the appellant. She cited the case of **Abdallah Seif v. Republic**, Criminal Appeal No. 122 of 2020 (unreported), to reinforce her position. She prayed the Court to step into the shoes of the first appellate court and analyze the defence. She urged the Court to be inspired by its holding in **Nganu Joseph and Mnene Kapiko v. Republic**, Criminal Appeal No. 172 of 2019 (unreported).

Two, doubts in the evidence of the prosecution arising from the discrepancies in the testimonies of the witnesses from the stage of the appellant's arrest to his arraignment. She argued that the available evidence on record leaves a lot of questions unanswered on the issue. The said instances include the fact that while PW1 stated he had apprehended the appellant at the crime scene, on the part of PW2 and PW3, neighbours, who had arrived to assist upon an alarm call, their evidence was unclear on circumstances surrounding the appellant's arrest. PW2 and PW3 stated that upon arrival at the crime scene, the gate was opened by PW1's wife and they saw PW1 struggling with the appellant holding each other. They also saw PW1's hand bleeding. PW1's wife was not called to testify. At the same time, PW1 stated that the stolen items were in a black bag belonging to the appellant. Both PW2 and PW3 said they saw the stolen items in a bag held by the appellant. The other aspect of the evidence which raises doubts according to the learned Principal State Attorney was the fact that the certificate of seizure which was admitted as exhibit P2 was not read aloud in court upon being admitted. She asserted that this anomaly should prompt the Court to expunge it. She contended further that the same fate be accorded to the cautioned statement (exhibit P3) of the appellant apart from the fact that it was

recorded two days after his arrest which was beyond the prescribed time vide section 50 (1)(a)(b) and (2) of the CPA, upon being admitted into evidence, it was also not read aloud in court as reflected in the record of appeal pages 37 and 55. The learned Principal State Attorney contended that these cast doubts on the prosecution evidence.

Three, the record reveals that during the inquiry into the voluntariness of the appellant's cautioned statement, the appellant was not affirmed prior to his testimony being recorded. This she argued is a fatal error rendering his evidence during the inquiry to be improperly recorded and thus vitiating the inquiry. According to the learned Principal State Attorney, once the conduct of the said inquiry is found to be irregular, it means the cautioned statement was also improperly admitted and will be liable to be expunged. Ms. Shelly argued that in the absence of the cautioned statement the prosecution evidence is greatly weakened. She thus concluded that in view of the highlighted incurable irregularities, the prosecution evidence on record cannot be said to have proved its case beyond reasonable doubt against the appellant. She concluded urging the Court to quash the conviction, set aside the sentence and set free the appellant.

Taking into account the submissions by the learned Principal State Attorney, the appellant had nothing much to submit as a rejoinder except to express support of Ms. Shelly's submissions and left the destiny of his appeal in the hands of the Court.

Having heard the submissions from both sides, gone through the cited authorities and the record of appeal, in determining the appeal, we shall start with ground one and then proceed to address ground seven conjointly with the other five remaining grounds.

In ground one, the appellant essentially faults the trial and first appellate court for failure to properly consider and analyze his defence in the process of determining his conviction. Ms. Shelly conceded to this anomaly, however, prayed that the Court step into the shoes and analyze the defence evidence accordingly. We have gone through both judgments of the trial and first appellate courts, and we agree with the learned Principal State Attorney that both courts failed to properly analyze the defence case.

On the part of the trial court, whilst the evidence of the appellant was summarized as found at pages 84 and 85 of the record of appeal, when analyzing the two issues for consideration in determining the case,

made minimal reference to the defence evidence and did not analyze it but ended by rejecting the appellant's story. The first appellate court which was expected to undertake its duty of reanalyzing the evidence afresh, equally failed to do so, and thus without doubt the complaint by the appellant is justified. The failure of both the trial and first appellate courts to consider and analyze the defence evidence is contrary to the restated position alluded by this Court in various decisions. The Court has consistently emphasized that courts must have proper consideration of the evidence for the defence and balance it against that of the prosecution to determine which case is more cogent. For this stance see, **Elias Steven v. Republic** [1982] T.L.R. 313; **Leonard Mwanashoka v. Republic**, Criminal Appeal No. 226 of 2014, **Mkulima Mbagala v. Republic**, Criminal Appeal No. 267 of 2006 and **Venance Nkuba and Another v. Republic**, Criminal Appeal No. 425 of 2013 (all unreported).

We, therefore find justification in the complaint of the appellant in the first ground of appeal.

In view of our above finding, the issue pending is what are the consequences of the exposed irregularity? The Court has previously traversed on a similar issue before in several cases such as **Julius Josephat v. Republic,** Criminal Appeal No. 3 of 2017, **Joseph**

Leornard Manyota v. Republic, Criminal Appeal No. 485 of 2015, **Abdallah Seif v. Republic** (supra) and **Felix Kichele and Another v. Republic**, Criminal Appeal No. 159 of 2005 (all unreported). In the latter case, it was held:

> *"As already pointed out, the fact that both courts below in the present case did not consider the defence case is, in our view, a misapprehension of evidence and entities us to intervene in an endeavor to put matters in their proper perspective."*

On that basis, fortified by various decisions of this Court cited above, we accept the invitation by the learned Principal State Attorney to step into the shoes of the first appellate court and do what it omitted to do and thus consider the defence case in the course of dealing with the next ground of appeal.

At this juncture, we find it most appropriate to consider the last ground of appeal on whether the prosecution proved their case beyond reasonable doubt and in the process in effect, also address the rest of the grounds. In the circumstances, the issue for our consideration and determination is whether the evidence on record was sufficient to prove the offence of armed robbery against the appellant.

Having scrutinized the record of appeal, we are constrained to agree with both the appellant and the learned Principal State Attorney that the prosecution failed to prove their case beyond reasonable doubt. We are fortified with the stated position for the following reasons. **First**, some exhibits such as the certificate of seizure (exhibit P2) and the cautioned statement of the appellant (exhibit P3) were not properly admitted into evidence. Exhibit P3 was admitted after an inquiry was conducted to investigate on whether it was made and if it was voluntary. Indeed, as submitted by the learned Principal State Attorney, the appellant's testimony, being a moslem, was procured without an affirmation. Section 3 of the Oaths and Statutory Declaration Act states:

> *"3. Every court shall have the authority, itself or by an officer duly authorized by it in that behalf, to administer an oath or affirmation to any person whom it may lawfully examine upon oath or affirmation."*

Furthermore, section 198(1) of the CPA, mandatorily requires all evidence in criminal trials to be taken on oath or affirmation, essentially meaning without such, it is as if there was no evidence taken or recorded.

In the present case, the appellant was not affirmed prior to his evidence being recorded, and thus a mandatory requirement of the law

was contravened. We therefore hold that this is not a minor infraction, and it renders the appellant's evidence in the inquiry invalid. The same is disregarded as was done in **Juma Hamad v. Republic**, Criminal Appeal No. 141 of 2014 (unreported). Notwithstanding disregarding the evidence of the appellant during the inquiry, exhibit P3 cannot stand as it was recorded after the expiry of the period set by the law as conceded by Ms. Shelly. We thus disregard it in determining the sufficiency of the evidence on record.

Second, even though the certificate of seizure was admitted into evidence as exhibit P2, its contents were not read aloud in court. There are various decisions of the Court reiterating the importance of reading out documents aloud upon being admitted into evidence. These include, **Lack Kilingani v. Republic**, Criminal Appeal No. 402 of 2015 (unreported) and **Robinson Mwanjisi and Three Others v. Republic** [2003] T.L.R. 216. In the latter case, the Court when discussing the omission, held:

> "*Even after the admission the contents of the cautioned statement and PF.3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way; to fully appraise the appellant of facts*

he was being called upon to accept as true or reject as untruthful."

Plainly, the position is that reading out to the accused person upon an exhibit being admitted into evidence is a way to appraise the accused of the contents to enable him/her to utilize them effectively to prepare and strengthen his or her defence. Having found that in the instant case, there was omission to read aloud the contents of exhibit P2, we henceforth disregard it in our deliberations.

Third, with regard to the chain of custody of the exhibits of the stolen items (P4) and motor vehicle Toyota Verossa Reg. No. T845 CHT (exhibit P5), the learned Principal State Attorney correctly conceded that the available evidence on record did not address all the important elements required to establish that the handling of the said exhibits was not compromised. The appellant denied having been found with the seized items, stating that he was arrested by unknown people while enroute to go home and thereafter was unaware where he was taken. The Court in **Iluminatus Mkoka v. Republic** [2003] T.L.R. 245, emphasized the need for a court to know in whose custody exhibits tendered during the trial were kept. In **Mussa Hassan Barie and Albert Peter @ John v. Republic**, Criminal Appeal No. 292 of 2011, the Court

referred to the case of **Paulo Maduka and Others v. Republic,** Criminal Appeal No. 110 of 2007 (both unreported), particularly, emphasized the essential need for chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. We are alive to the fact that recent decisions of this Court have recognized that oral evidence can prove chain of custody, the position has been restated in various cases including **Alberto Mendes v. Republic**, Criminal Appeal No. 473 of 2017 (unreported), where it was held:

> *"In resolving the Issue of chain of custody, we wish to point out that each case wili depend on the prevailing circumstances. We are aware that there are circumstances where the evidence of witnesses is sufficient to prove the chain of custody without any paper traii."*

This position is also reflected in **Kadiria Said Kimaro v. Republic,** Criminal Appeal No. 301 of 2017, **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 and **Deus Josia Kilala @ Deo v. Republic,** Criminal Appeal No. 196 of 2018 (all unreported), among others.

In the instant case, PW4 adduced evidence of his presence at the crime scene soon after the incident was reported to the police on

12/4/2017 and how he seized the various items tendered and admitted in court. However, in his evidence, he did not provide any information on where the seized items were stored until when they were produced in court. No other witness testified on the handling of exhibits P4 and P5, thus the chain of custody of the two exhibits was not established. There was neither evidence on where the seized items were taken, stored and controlled after seizure nor a linkage established on circumstances leading to being produced in court. Therefore, undoubtedly the complaint by the appellant as conceded by the learned Principal State Attorney has merit.

Fourth, we entirely agree that the evidence on the date of commission of the crime, arrest and arraignment of the appellant in the trial court leaves unanswered questions. Whilst PW1, PW2, PW3 and PW4 stated that the alleged incident occurred on 12/4/2017, the appellant testified that he had lost consciousness after being grabbed by people he did not know thus not clear of the circumstances of his arrest. PW4 stated that when he arrived at the scene of crime, he saw that the appellant was also injured, evidence which essentially was supported by that of PW2 and PW3. PW4 stated further that the stolen items were in the black bag. What is mind-boggling is that if the appellant was arrested on 12/4/2017 as testified by most of the prosecution witnesses, why was he arraigned

in court on 5/6/2017; almost two months later after his arrest? There is also the fact that in the record of appeal, at the time of arraignment the appellant was charged with a bailable offence and not armed robbery, and he was granted bail accordingly. If the evidence is that he was arrested at the scene, why not charge him with armed robbery directly?

Fifth, the allegations of the appellant having been found with the bag carrying the stolen items was only testified by PW1. The other witnesses, PW2 and PW3 stated that they saw a black bag but did not allude to the contents therein. Indeed, PW4 stated that he only saw lamps in the bag. Therefore, there was no clarity on the contents of the said bag alleged to have stored stolen items or whether it belonged to the appellant since there was no other evidence to connect him with it as none of the witnesses including PW1 testified to have seen him holding the said black bag. The fact that the certificate of seizure which contains a list of the alleged seized items will not be accorded any value, having disregarded it, the said evidence against the appellant is left hanging. That said, when all the above is considered, together with the delay of his arraignment in court, it leaves doubts on whether he was really apprehended at the crime scene on the alleged date. His evidence explaining how he was apprehended remains unchallenged by the prosecution evidence. The

doubts created on the evidence related to the appellant's arrest and being found with stolen items must favour him.

It is well settled that in criminal cases, the burden of proof lies on the prosecution, and it does not shift to the accused as provided for under section 3(2) of the Tanzania Evidence Act [Cap 6 R.E. 2002, now R.E 2022]. The accused's duty is only to raise doubts in the evidence as discussed in the case of **Tafifu Hassan @ Gumbe v. Republic**, Criminal Appeal No. 436 of 2017 (unreported).

Cumulatively, we are of the view that all the anomalies, contradictions and lacuna in the prosecution case lead to the conclusion that the prosecution evidence failed to measure up to the requisite standard and left sufficient doubt which ought to have been determined to the benefit of the appellant as held in **Mohamed Said Matula v. Republic** [1995] T.L.R. 3 and **John Glikola v. Republic**; Criminal Appeal No. 31 of 1999 (unreported).

In the circumstances, we find merits in the appellant's complaints in the second, third, fourth, fifth, sixth and seventh grounds of appeal. In the result, we agree with Ms. Shelly who supported the appeal on the argument that the prosecution case was not proved beyond reasonable doubts.

For the foregoing reasons, the appellant's appeal succeeds. We quash the conviction, set aside the sentence, and order his immediate release from prison unless he is otherwise lawfully held.

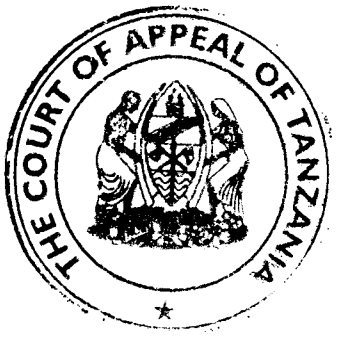
DATED at **DAR ES SALAAM** this 18th day of November, 2022.

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered on this 22nd day of November, 2022 in the presence of appellant in person vide video link from Ukonga Prison and Genes Tesha, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL