`IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CRIMINAL APPEAL NO. 494 OF 2020

DANIEL MAGOKO ..... 1ST APPELLANT

WANGWE MONIKO ..... 2ND APPELLANT

MASIAGA MARU ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)

(Mlacha, J.)

dated the 29th day of July, 2020

in

HC. Criminal Appeal No. 18 of 2020

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JUDGMENT OF THE COURT

14th February & 28th November, 2022

MASHAKA, J.A.:

The District Court of Ilala sitting at Kinyerezi, convicted the appellants for the offence of armed robbery, contrary to section 287A of the Penal Code. They were sentenced to thirty years' imprisonment and to pay the victim compensation of TZS. 1,013,000/=. Aggrieved by both conviction and sentence, they unsuccessfully appealed to the High Court, hence this second appeal.

It was alleged by the prosecution that on 21st September, 2018 at Mbonde area within Ilala District in Dar es Salaam Region, the appellants along with two others who are not parties to this appeal stole cash money amounting to TZS. 430,000/=; two mobile phones make Samsung G7 and TECNO valued at TZS. 540,000/= and 30,000/= respectively and one wrist watch valued at TZS. 13,000/=, the properties of Khalfan Ramadhan and immediately before or after the stealing, the appellants threatened him with a bush knife and club to obtain and retain the said properties. The appellants pleaded not guilty to the charge.

After full trial, the appellants were found guilty, convicted and sentenced to thirty years' imprisonment. In addition, they were ordered to compensate the complainant. Their appeal before the High Court was dismissed, hence this appeal.

In proving the case, the prosecution relied on five witnesses as follows: On 21st September, 2018 Khalfan Ramadhani (PW1) the victim of the armed robbery filed a complaint at the Chanika Police Post against the first and second appellants and one Mtika alleging that, they sold him a plot of land that did not belong to them, hence obtaining money by false pretences. PW1 who was accompanied by two police officers and Adam Ramadhani (PW2), his brother went to Mbondole area to arrest the

alleged suspects. Upon their arrival but before the arrest, the first and second appellants and thirteen others threatened the police officers, PW1 and PW2 with sticks, clubs and machetes as a result, the police officers and PW2 ran away from the scene and left PW1. The appellants and others attacked PW1 with machetes, sticks and clubs causing him grievous harm and stealing the various items previously mentioned. Among those who attacked him, PW1 identified the appellants. PW1 further testified that the appellants sold three plots of land for TZS. 1.5 million, 1.6 million and 1 million respectively to his brother (PW2) which were not their properties.

Supporting the evidence of PW1, PW2 stated that they reported at the Police Station complaining against that the appellants obtaining money by false pretences and were assigned police officers to investigate and arrest the suspects. PW2 stated that upon their arrival at Mbondole, they saw the appellants and others fleeing from the area and thereafter returned armed with machetes to prevent the arrest of the suspect. After running away for his safety together with the police officer from afar, PW2 witnessed the first and second appellants assaulting his brother (PW1) with machetes while the third appellant had stones. The appellants robbed PW1 during the assault and disappeared. PW1 was taken to Chanika Police

Station where a PF3 was issued and sent to Chanika Hospital for treatment.

Consequently, the first appellant was arrested on 27th October, 2018 and the third appellant was arrested on 13th October, 2018. The second appellant surrendered to the police on 29th September, 2018 after being informed to do so by the complainant. In his evidence, PW2 stated that the charges of obtaining money by false pretences were pending at the Primary Court.

Inspector Fortunatus Masasi (PW5) conducted an identification parade on 4th November, 2018 where PW1 identified the first and third appellants and the Identification Parade Register (PF 186) was prepared and signed by the appellants as well as PW5 and PW1. Following this evidence, the appellants were arraigned and tried by the trial court for the said offence.

The appellants fended for themselves denying any involvement in the commission of the charged offence. The first appellant raised the defence of alibi that on the material date he was in Morogoro though admitting the fact that there was a misunderstanding over the plots he sold to PW2. The second appellant, asserted that he sold a plot of land to

PW2 which had no encumbrances and the prosecution evidence did not connect him to the offence. The third appellant claimed that he was arrested on 10th October, 2018 in connection with a boundary dispute and on 26th November, 2018 he was joined with others he did not know and they were eventually arraigned together on a charge of armed robbery which he denied to commit.

Upon examination and scrutiny of the prosecution and defence evidence, the trial court was satisfied that the offence of armed robbery was proved beyond reasonable doubt. It convicted and sentenced them accordingly. On appeal, the conviction, sentence and order of the trial court were upheld.

Still undaunted, the appellants lodged two memoranda of appeal; the substantive memorandum of appeal containing five grounds of appeal lodged on 13/10/2020 and the supplementary memorandum of appeal which comprised of three grounds lodged on 19/11/2020. We have consolidated the two memoranda of appeal raising the following paraphrased ***eight*** grounds of appeal condensed as follows; **one,** the High Court erred in upholding the appellants' conviction based on doubtful evidence of PW1 and PW2 which was not corroborated by the police officers present at the scene of crime; **two,** the essential ingredients of

the offence were not established; **three**, the PF3 (exhibit P1) was admitted contrary to section 240(3) of the Criminal Procedure Act, (the CPA); **four**, failure by the first appellate court to properly re-evaluate and appreciate the defence evidence of alibi raised by the first appellant; **five**, failure by the first appellate court to consider fourteen grounds of appeal among the sixteen grounds raised in the petition of appeal; **six**, that the first appellate court erred by not cogitating and analysing the evidence adduced by prosecution witnesses resulting in erroneous findings; **seven**, the first appellate court erred by relying on irregular identification parade conducted by the police; and **eight**, failure by the first appellate court to consider the contradictions and lack of coherence in the evidence of the prosecution witnesses.

At the hearing of the appeal, the appellants appeared in person, fending for themselves. The respondent Republic had the services of Ms. Gloria Mwenda, learned Senior State Attorney assisted by Ms. Theresia Mtao, learned State Attorney.

When we invited the appellants to amplify their grounds of appeal, they simply adopted the two memoranda of appeal and their written statement of arguments filed earlier in support of the appeal. They

implored the Court to consider the grounds of appeal and to set them free.

The appellants began with grounds one, two, six and eight in which the appellants argued them conjointly in their written statement of arguments as intimated above. They submitted that section 3 (2) (a) and section 110 (1) and (2) of the Evidence Act, provides that he who alleges must prove beyond reasonable doubt. They argued that there is no cogent evidence laid by the prosecution to prove that PW1 was robbed on the material date, hence leaving doubts whether the armed robbery was committed as alleged. They amplified that the record shows that PW1 went to Chanika Police Post on 21st September, 2018 accusing the appellants for obtaining money by false pretences and when he later returned to Chanika Police Post, a PF3 was issued without any explanation and the record is silent on why the previous accusations were not brought before the court. Arguing further, they stated that there is no evidence adduced by PW1 that the offence of armed robbery was ever reported before the Chanika Police Post and the only evidence is the PF3 which was issued to PW1 on the 21st September, 2018.

On the alleged contradictions and lack of coherence between PW1, PW2 and PW4 in respect of the names and the number of police officers

who accompanied PW1 and PW2 to Mbondole to arrest the appellants, PW1 had testified that they were accompanied with two police officers named Hussein and Lazaro together with PW2 while PW2 stated that they went with one police officer who ran away from the scene of crime. PW4, the investigator of the case testified that PW1 and PW2 went to the Chanika Police to get assistance to arrest the appellants who obtained money from them by false pretences were escorted by a police officer named DC Hamis and MG *(militia guard)* Hussein. They concluded that, these contradictions and incoherence show that no robbery was committed and the prosecution failed to prove its case beyond reasonable doubt.

At the onset, Ms. Mwenda resisted the appeal and submitted that grounds one, two and six and eight of appeal were baseless. Regarding ground one, Ms. Mwenda submitted that the first appellate court based its decision on the evidence of PW1 and PW2 who were at the scene of crime. Further, she argued that it was not mandatory for the prosecution to call the two police officers as they did not witness the incident because they had ran away from the scene leaving behind PW1. Therefore, not calling them to testify did not in any way affect the prosecution case.

The learned State Attorney conceded the complaint in ground eight regarding contradictions and coherence but argued that they were too minor to affect the prosecution case. She stressed that contradictions are normal due to human error caused by lapse of memory among prosecution witnesses who were at a crime scene. Ms. Mwenda concluded that the evidence relied upon t convict the appellants proved the offence of armed robbery beyond reasonable doubt and implored the Court to dismiss this ground.

Firstly, we will determine the procedural issues raised by the appellants commencing with grounds one and eight conjointly and later grounds two and six conjointly. The essence of this complaint is the failure by the prosecution to summon the police officers who were present at the scene of crime to corroborate the evidence of PW1 and PW2 which they challenge. In terms of section 143 of the Evidence Act, there is no specific number of witnesses required to prove a certain fact. The prosecution is at liberty to summon any number of witnesses whom they think have material evidence. Such discretion however, is not absolute. We held in **Bashiri John v. Republic**, Criminal Appeal No. 486 of 2016 (unreported) that a court can draw an adverse inference against the prosecution only when it is satisfied that a material witness who is well

versed with the necessary information connected to the commission of the offence is not summoned without assigning good reasons.

In this appeal, the two police officers claimed by PW1 and PW2 to have accompanied them to arrest the appellants were not summoned to testify and no reasons were assigned for the failure by the prosecution. They were crucial witnesses who could have added evidential value to the prosecution evidence on the commission of the offence. According to the evidence of PW2, he and the police officers fled from the crime scene leaving behind PW1. Though PW2 was observing the incident from a distance, he could not see when PW1's items were stolen from him as there were many people who were attacking him. We are of the considered view that had the police officers testified, they would have cleared the contradictions and corroborated the evidence of PW1 and PW2. Therefore, the evidence raises doubts as to whether the appellants committed the offence as alleged.

Further, it was the submission of the appellants that the evidence of PW1, PW2 and PW4 was contradictory regarding the names of the police officers who accompanied PW1 and PW2 to Mbondole area. PW1 stated that on the material day, he was accompanied by two police officers namely; Hussein and Lazaro. PW2 had a different version that there was

only one police officer who escorted them called Hussein. Again, the evidence of PW4 was at variance with that of PW1 and PW2. According to him, he was informed that on the fateful day, PW1 and PW2 were escorted by DC Hamis and MG Hussein (militia guard). It is therefore clear that the evidence of the three witnesses was contradictory and inconsistent. It is well established that contradictions by any particular witness or among witnesses cannot be avoided in any particular case. However, in evaluating them, the court has to decide whether the contradictions are minor or go to the root of the matter. (See **Twalaha Ally Hassan v. Republic**, Criminal Appeal No.127 of 2019 and **Dickson Elia Nshambwa Shapwata & Another v. Republic**, Criminal Appeal No. 92 of 2007 (both unreported)).

In this appeal, the contradictions on the names and the number of the officers who accompanied PW1 and PW2 to arrest the first appellant cannot be said to be minor. It was necessary for one of the officers to testify as they were assigned to accompany PW1 and PW2 to adduce evidence on what actually transpired at the crime scene that fateful day whether an offence of armed robbery was committed.

The failure by the prosecution to field such an important witness without explanation would have prompted the courts below to draw an

adverse inference against the prosecution. In the case of **Boniface Kundakira Tarimo v. Republic,** Criminal Appeal No. 350 of 2008 (unreported) when considering a similar matter, the Court stated that: -

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

In our respectful view, the above noted contradictions were material and prejudicial to the prosecution case. We are of the settled view that had the trial and the first appellate courts properly considered and scrutinized the entire evidence on record, they would have found that such evidence was not watertight. The complaint is merited and we accordingly allow grounds one and eight of appeal.

Another complaint raised in ground three of appeal relates to admission of PF3. The appellants submitted that exhibit M1 was admitted in contravention of section 240(3) of the CPA. The appellants' complaint is on the omission by the trial magistrate to inform them their right to call the doctor who examined PW1 pursuant to the requirements of section 240 (3) of the CPA. They argued that the trial magistrate was bound to

explain to them their right to have the medical doctor summoned to testify on exhibit M1.

Ms. Mwenda conceded this ground that there was non – compliance with section 240 (3) of the CPA after exhibit M1 was admitted in evidence. There is merit in this complaint.

It was imperative on the trial court that once exhibit M1 was admitted in evidence under section 240 (1) of the CPA to inform the accused persons their right to cross-examining the medical witness who prepared it - see **Sprian Justine Tarimo v. Republic**, Criminal Appeal No. 226 of 2007 (unreported). We agree that the admission of exhibit M1 contravened the mandatory requirements of section 240(3) of the CPA. The appellants were not addressed on their rights if they would prefer the medical doctor who examined PW1 and prepared exhibit M1 should be summoned for cross examination. Since the exhibit was admitted in contravention of the law, it lacks evidential value and it is liable to be discarded from the record - see **Petro Andrea v. Republic**, Criminal Appeal No. 108 of 2009 (unreported). It is thus expunged from the record.

In ground four, the appellants argued that the first appellate court failed to properly re-evaluate and appreciate the defence evidence

particularly the defence of alibi raised by the first appellant but was not considered by the trial court. As gleaned from page 52 of the record of appeal in his defence, the first appellant claimed that he travelled to Morogoro on 20/09/2018 and returned to Dar es Salaam on 23/09/2018. He further stated on the morning of 26/10/2018 he was arrested by the Police from his home and taken to the Chanika Police Station. He claimed during cross examination that the reason leading to his arrest was a misunderstanding on a plot of land he sold to PW2 for TZS. 1,000,000/=.

In reply, learned Senior State Attorney conceded that the first appellant's defence was not considered by the first appellate court because it was not a ground of appeal before it. However, she claimed that the trial court considered the defence evidence finding that it did not raise any doubt in the prosecution case.

It is not disputed that the defence evidence, in particular, the defence of alibi raised by the first appellant was not considered by the trial and first appellate courts. As gleaned at page 67 of the record of appeal, the trial court stated:

> *"The defence evidence does not raise any doubt in the prosecution case because time of arrest and time of alleged reporting at the police station of*

the accused persons is different from the time of the incident aiieged by the prosecution".

We are fully aware that an appellate court can step into the shoes of the first appellate court to consider and re-evaluate the first appellant's defence on the authority of section 4 (2) of the Appellate Jurisdiction Act - see also, **Felix Kichele and Another v. Republic,** Criminal Appeal No. 159 of 2005 (unreported). Section 194 (4) (5) and (6) of the CPA, stipulates that: -

"(4) Where an accused person intends to rely upon an alibi in his defence, he shall give to the court and the prosecution notice of his intention to rely on such defence before the hearing of the case.

(5) Where an accused person does not give notice of his intention to rely on the defence of alibi before the hearing of the case, he shall furnish case for the prosecution is closed.

(6) Where the accused raises a defence of alibi without having first furnished the prosecution pursuant to this section, the court may in its discretion, accord no weight of any kind to the defence".

According to section 194 (4) and (5) of the CPA, the first appellant was required to give a notice to the court and the prosecution that he

intended to rely on the defence of alibi before the prosecution case commenced or closed, which he failed to do so. Needless to say, failure to give notice of the defence of alibi does not exempt the court from taking cognizance of such defence as clearly stipulated by section 194 (6) of the CPA. The trial court has discretion to take cognizance of such defence and accord no weight of any kind to such defence. The Court has said so in its previous decisions including **Charles Samson v. Republic** [1990] T.L.R. 39 in which the Court held that failure to take cognizance of such defence was a fatal irregularity to the appellant's conviction. As the trial court did not take cognizance of the first appellant's defence of alibi, we find the complaint is merited and allow ground four of appeal.

It was the appellants' contention in ground five that the first appellate court failed to consider the sixteen grounds of appeal raised in their petition and the findings of the High Court from the record of appeal were based on only three grounds concerning the credibility of prosecution witnesses, visual identification and failure to summon crucial witnesses, while the remaining grounds were not determined. Ms. Mwenda reasoned that it was correct that the findings were on two grounds as argued by the Republic having reduced them as they were

repetitive and proper as the first appellate court also directed itself to the two grounds which were adequately re-evaluated. She urged the Court to dismiss this ground.

It is instructive, we think, to reiterate what we stated in **Malmo Montage Konsult AB Tanzania Branch v. Margret Gama,** Civil Appeal No.86 of 2001 (unreported) that:-

> *"In the first place, an appellate court is not expected to answer the issues as framed at the trial. That is the role of the trial court. It is; however, expected to address the grounds of appeal before it. Even then, it does not have to deal seriatim with the grounds of appeal as listed in the memorandum of appeal. It may, if convenient, address the grounds generally or address the decisive grounds of appeal only or discuss each ground separately".*

In **Simon Edson @ Makundi v. Republic**, Criminal Appeal No. 5 of 2017 (unreported), we held that:

> *".....the appellate court is bound to consider the grounds of appeal presented before it and in so doing, need not discuss all of them where only a few will be sufficient to dispose of the appeal. It is*

also necessary for the first appellate court to re-evaluate the evidence on record before reaching to its conclusion."

In this appeal, we note that the first appellate court did not address and determine the grounds of appeal separately or generally. It is worthy to note that though the High Court did not have to address all grounds seriatim, it was bound to address the decisive grounds or discussed them generally without skipping the fundamental complaints raised by the appellants. Apparently, the first appellate court fell into the trap of not addressing the grounds advanced by the appellants and instead, it focused on the two grounds which the learned State Attorney argued without reevaluating the whole evidence adduced by both the prosecution and the defence at the trial and make its own conclusion

With respect, we find that, there was a misdirection on the part of the first appellate court. Under the circumstances the impugned judgment fell far below the required standard. This ground is merited and we allow it.

Ground seven of appeal is based on a complaint that the identification parade was wrongly prepared showing that two witnesses identified the appellants at the same time in one identification parade and the identification parade register exhibit M2 was not read out aloud in

court after admission in evidence. The appellants argued that the record shows that the appellants and PW1 and PW2 knew each other as PW1 had bought a plot of land from the appellants and it came to his knowledge later that the plot of land did not belong to the appellants. Further, they argued that PW1 registered a complaint at Chanika Police post against them that they obtained money by false pretences, therefore there was no need of conducting the identification parade for a witness to identify an assailant whom he knew before the incident. They urged the Court to expunge exhibit M2 from the record as it was worthless and its admission in evidence was unprocedural. In response, Ms. Mwenda supported the contention that conducting the identification parade was not proper as PW1 knew the appellants and their names, hence it was uncalled for. She urged the Court to disregard the evidence of improper identification parade and allow this ground of appeal.

It is trite law that an identification parade would only be conducted if the appellants were strangers to the victim. It is not conducted when a culprit is known and familiar to the identifying witness - see **Shamir John v. Republic**, Criminal Appeal No. 166 of 2004 and **Martin Misala v. Republic** Criminal Appeal No. 428 of 2016 (both unreported). In this appeal, it is evident that the appellants were well known to PW1 and PW2

before the incident as there were allegations that the appellants obtained money by false pretences from PW1 and PW2 by selling plots of land which did not belong to them. In view of that fact, there was no reason for conducting the identification parade. We therefore, disregard exhibit M2 as it has no evidential value and we allow ground seven.

Now going to grounds two and six of appeal, the appellants submitted that the essential ingredients constituting the offence of armed robbery were not established and proved by the prosecution. It was argued also that, there were contradictions among PW1, PW2 and PW4 on a no complaint of an offence of armed robbery reported to the Chanika Police station by the complainants.

In rebuttal, Ms. Mwenda argued that the ingredients of section 287A of the Penal Code is stealing and use of weapons to threaten or inflict harm on the victim which was explained by PW1 on how he was attacked by the appellants before stealing his items. He identified them because he knew the appellants prior to the date of incident. She emphasized that PW1 was a credible witness and his evidence clearly proved the offence beyond reasonable doubt against the appellants. In relation to the expunged exhibit M1 from the record, Ms. Mwenda contended that the

evidence of PW1 was enough as he described and showed his injuries during trial.

In terms of section 287A of the Penal Code, it is the duty of the prosecution to establish beyond reasonable doubt that one, there was an act of stealing, two, that at or immediately after the stealing the perpetrators were armed with dangerous or offensive weapon or instrument and three, they used or threatened to use actual violence to obtain or retain the said stolen property - see **Fikiri Joseph Pantaleo @ Ustadhi v. Republic,** Criminal Appeal No. 323 of 2015 (unreported).

Having examined the evidence on record, starting with the ingredients of theft, the evidence of PW1 left a lot to be desired. The law provides that for the offence of theft to be proved there must be established that something has been unlawfully and permanently taken from its owner. Section 258 (1) of the Penal Code which defines theft provides thus:-

> *"A person who fraudulently and without claim of right takes anything capable of being stole, or fraudulently converts to the use of any person other than the general or special owner thereof anything capable of being stolen, steals that thing."*

In his evidence, PW1 stated that he was robbed two mobile phones, a wrist watch and cash during the robbery incident, however the prosecution evidence is lacking as to whether the items ever existed. PW1's testimony was not sufficient as he failed to furnish particulars of his mobile phones and the wrist watch. He did not produce any receipt or other documentary evidence as proof of ownership or possession of the items. In **Ally Said @Tox v. Republic**, Criminal Appeal No. 308 of 2018 (unreported), the Court held that failure to furnish particulars of things alleged to have been stolen create doubts in the prosecution's case in proving stealing which is an essential ingredient in the offence of armed robbery and robbery with violence.

Further, there was a delay in arresting the appellants and no explanation was given by the prosecution. The incident occurred on 21/09/2018 while the first respondent was arrested on 27/10/2018 by the Police from his home and taken to the police station, the second respondent surrendered to the Police on 29/9/2018 and the third respondent was arrested on 13/10/2018. The two courts below misapprehended the evidence on proof of the charge as the prosecution failed to prove the offence beyond reasonable doubt hence grounds two and six of appeal are merited.

In the final analysis, we allow the appeal, quash the conviction and set aside the sentence. Ultimately, we order that the appellants be set at liberty immediately, unless otherwise held for lawful causes.

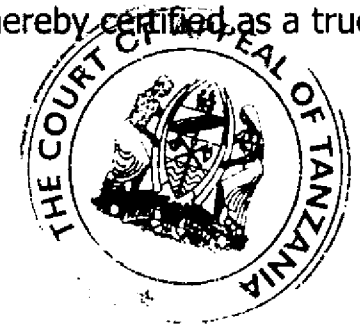
DATED at **DAR ES SALAAM** this 23rd day of November, 2022.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 28th day of November, 2022 in the presence for the 1st, 2nd and 3rd Appellants in person and Mr. Ramadhani Kalinga, learned Senior State Attorney, for the Respondent/ Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL