IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

CORAM: MWAMBEGELE, J.A. FIKIRINI, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 334 OF 2019

PRISCUS FILEX MASSAWE @ MMASAI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Moshi)

(Mkapa, J.)

dated the 02nd day of August, 2019

in

DC. Criminal Appeal No. 32 of 2018

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JUDGMENT OF THE COURT

18th & 29th August, 2023

MWAMPASHI, J.A.:

The appellant, Priscus Filex Massawe @ Mmasai, stood charged before the District Court of Rombo at Mkuu with two counts namely; armed robbery, contrary to section 287A and sexual harassment, contrary to section 138D (1), both of the Penal Code [Cap. 16 R.E. 2002; Now R.E. 2022] (the Penal Code). After a full trial, the appellant was acquitted of the second count but was found guilty of the first count on armed robbery. He was thus, duly convicted and sentenced to serve a period of thirty (30)

years in prison. His first appeal to the High Court was dismissed hence the instant second appeal to this Court.

It was alleged on the count of armed robbery that on 20.01.2017 at about 13:00 hours at Kisale Village within the District of Rombo in Kilimanjaro Region, the appellant stole Tshs. 100,000/= the property of one Catherina Talama Kaserwa. It was further alleged that immediately before and after the stealing, the appellant threatened the said Catherina Talama Kaserwa by a knife in order to obtain and retain the said property.

In a bid to prove the charge against the appellant, the prosecution lined-up a total of five witnesses while the appellant was a sole witness in his defence. The star witness for the prosecution was the complainant, Catherina Talama Kaserwa who testified as PW1. Her testimony was to the effect that on the material day, she had just left her home and was on her way to cut grasses for feeding her goat when, at about 13:00 hours, the appellant who is her neighbour, appeared from behind and using his hands he closed her eyes. The appellant demanded to be given money but PW1 offered him a goat because she had no money. That offer was declined by the appellant. Thereafter, the appellant who was wielding a knife took PW1 in her house and forced her to lie on the bed. He then took off his and her underpants and attempted to penetrate her but he could not. Having failed

to penetrate her and while threatening her with the knife, the appellant took PW1 to the kitchen, demanded to be given money and that is when PW1 gave him Tshs. 100,000/= she had hidden and buried underneath the kitchen floor.

It was further testified by PW1 that after she had been forced to give the money to the appellant, she managed to free herself from the appellant. She got out of the house through the backdoor while screaming and raising an alarm. People responded and came to her rescue but it was after the appellant had escaped. Thereafter, she was assisted to report the case to her ten-cell leader Bernard Ndumasu Shirima (PW2) and then to the police. Finally, PW1 told the trial court that while at the police station the appellant appeared and was put under arrest. When asked by the appellant in cross-examination, PW1 denied to have ever accused the appellant of stealing her solar panel.

According to PW2, PW1 who is his neighbour, as it was for the appellant, reported the case to him at 16:00 hours. She complained that the appellant had attacked and attempted to rape her. PW2 reported the case to the Village Chairman one Mr. Aloyce Elias Mroso (PW3) who referred PW1 to the police station. Another witness was A. 7185 P/C Abdul of Mashati Police Post who testified as PW5 telling the trial court that on

the material date at about 19:50 hours, he was at the police post when the appellant and PW1 appeared. PW1 complained that the appellant had attempted to rape her. He searched the appellant and found him with a knife with a blue handle. There was also evidence from G.4410 D/C Oliasi (PW4) which was to the effect that the case was assigned to him for investigation on 24.01.2017. He interrogated the appellant who was in custody as well as PW1 and was satisfied that the appellant had robbed PW1 of her Tshs. 100,000/=. PW4 did also testify that the knife the appellant threatened PW1 with during the robbery in question was handed over to him by Cpl. Elisamehe. The said knife was tendered in evidence by PW4 as exhibit P1.

In his sworn defence evidence, the appellant distanced himself from the offence in question. He stated that on the material day at about 12:00 noon, he was at Kisale Kitangara harvesting avocados when one Jackson borrowed his cell phone and ran away with it. He went to report the case to the police station where he was surprised when he was put under arrest on accusations that he had harassed and robbed PW1. In his defence, the appellant did also complain that PW1 had, at one time, accused him of stealing her solar panel.

As we have alluded to earlier, after a full trial, the trial court made a finding that the prosecution had managed to prove beyond reasonable doubt that the appellant robbed PW1 of her Tshs. 1000,000/=. The appellant was thus duly convicted of the offence and sentenced to serve a period of thirty (30) years in prison. Aggrieved, the appellant appealed to the High Court but his appeal was dismissed in its entirety.

Still aggrieved by the dismissal of his appeal by the High Court and undaunted, the appellant has preferred this appeal predicated upon five (5) grounds of complaint paraphrased as follows; **one**, that the two lower courts erred in concurrently finding that the case against him was proved to the hilt, **two**, that he was not positively identified at the scene of crime, **three**, that PW1's evidence was not corroborated and further that she delayed in reporting the case to PW2 and PW3, **four**, that the knife (exhibit P1) was wrongly admitted in evidence and **five**, that the first appellate court was biased when it held that he confessed to have committed the offence while there was no such evidence on record to that effect.

When the appeal came before us for hearing, the appellant appeared in person unrepresented. On the other side, the respondent Republic had the services of Ms. Cecilia Mkonongo, learned Principal State Attorney,

assisted by Ms. Sabitina Mcharo and Mr. Henry Chaula, both learned State Attorneys.

Upon being invited to amplify his grounds of complaint, the appellant sought to adopt his grounds of appeal and opted to let the learned State Attorneys respond to the grounds of appeal. He, however, reserved his right to rejoin should a need to do so arise.

Taking the floor first for the Republic, in response to the grounds of complaint, was Ms. Mkonongo who began by expressing the stance that the Republic was opposing the appeal. She then argued that the appeal is baseless because the case against the appellant was proved beyond reasonable doubt as the law requires. On the complaint that the appellant was not positively identified at the scene of crime, it was contended by Ms. Mkonongo that, PW1 positively identified the appellant because the conditions prevailing at the scene of crime were favourable for positive identification. She argued that the appellant was well known to PW1, the offence was committed during day time, the incident took a considerable period of time and also that PW1 named the appellant to PW2 at the earliest possible opportunity. To cement her argument that the appellant was positively identified at the scene of crime by PW2, she placed reliance on the decisions of the Court in **Waziri Amani v. Republic** [1980] T.L.R.

250 and **Chacha Jeremiah Murimi and 3 Others v. Republic,** Criminal Appeal No. 551 of 2015 (unreported). When probed by the Court on what was the earliest possible opportunity for PW1 to have named the appellant between the point when the people responded to the screams and alarm made by PW1 and when she reported the case and named the appellant to PW2, Ms. Mkonongo insisted that the earliest possible opportunity was when PW1 reported and named the appellant to PW2.

Having argued against the 2nd ground of appeal on identification, Ms. Mkonongo passed the ball to Ms. Mcharo who tackled the remaining grounds of appeal. On the ground of complaint that PW1's evidence was not corroborated, it was argued by her that, in law, PW1's evidence required no corroboration to support the conviction. She submitted that besides the said position of the law, the evidence on record show that the testimony of PW1 was corroborated by the evidence from PW2 and PW3 to whom PW1 reported and complained that she had been robbed by the appellant. All in all, it was insisted by Ms. Mcharo that PW1's evidence was reliable and credible such that it could stand alone and support the conviction. She also cited the case of **Goodluck Kyando v. Republic** [2006] T.L.R. 363 arguing that PW1 was entitled to credence and further that under section 143 of the Evidence Act [Cap. 6 R.E. 2022] (the Evidence Act) no particular number of witnesses is required to prove a fact.

As to the complaint that the people who responded to PW1's screams and alarm by rushing to the scene of crime were not called as witnesses, it was Ms. Mcharo's stand that those people were not material witnesses because they did not witness the offence being committed.

Regarding the complaint that the knife (exhibit P1) was wrongly admitted in evidence, it was readily conceded by Ms. Mcharo that, the knife ought not to have been admitted in evidence because it was not properly seized from the appellant. She thus urged us to expunge it from the record. Notwithstanding the said concession, it was strongly argued by Ms. Mcharo that even in the absence of exhibit P1 in evidence, there was still enough evidence from PW1 that in committing the offence in question, the appellant used a knife to threaten her. Ms. Mcharo did also concede to the fifth ground of appeal regarding the complaint that the High Court held that the appellant confessed to have committed the offence. She contended that the finding by the High Court that the appellant confessed to have committed the offence was not supported by the evidence on record. However, it was pointed out by her that the conviction was not based on any confession but on other pieces of evidence.

Finally, it was submitted by Ms. Mcharo that the case against the appellant was proved to the hilt because all necessary ingredients of the

offence were proved beyond any reasonable doubt. She explained that there was enough evidence to prove that the appellant stole Tshs. 100,000/= from PW1 and that in the process of so doing, the appellant threatened PW1 with a knife. In support of her argument, Ms. Mcharo referred us to the case of **John Madata v. Republic**, Criminal Appeal No. 453 of 2017 (unreported).

For the above given reasons and arguments, Ms. Mcharo urged us to dismiss the appeal.

In his brief rejoinder, the appellant insisted that he did not commit the offence and that the case against him was not proved to the required standard. He reiterated his defence story that PW1 framed the case against him because at one time she accused him of stealing his solar panel. He further argued that he had gone to the police station to report his case against one Patrick only to be surprised when he was put under arrest on accusations that he had robbed and raped PW1. He thus, prayed for the Court to find that the case against him was not proved and for the appeal to be allowed.

We have carefully heard and considered the arguments for and against the appeal. We have also passed through and examined the record. Having done so, we find that the appeal can be conveniently, and

sufficiently determined on a single and general ground contained in the first ground of appeal, that is, whether the case against the appellant was proved beyond reasonable doubt.

In the light of the above posed issue, we propose to preface our deliberations by restating that one of the cardinal principles in criminal justice is that in criminal trials, the duty to prove the case against the accused person is always on the prosecution. It is also an elementary principle of criminal law that the standard in proving the charge in criminal cases is beyond reasonable doubt. The prosecution is duty bound to prove not only that the offence in question was committed but also that it was committed by the accused person. Further, it is common ground that the accused person must not be convicted because of his weak defence but rather on the strength of the evidence led by the prosecution proving that he committed the offence he is being charged with. See - **Antony Kinanila and Another v. Republic,** Criminal Appeal No. 83 of 2021 (unreported).

Guided by the above principles, we are now all set to begin our deliberations. To begin with, are grounds 4 and 5 regarding exhibit P1 and the High Court's conclusion that the appellant confessed to have committed the offence, which, as we have alluded to earlier, have been conceded by

the learned State Attorneys. We agree with the learned State Attorneys that exhibit P1 ought not to have been tendered and received in evidence not only because the way and the manner it was seized is dubious, as argued by the learned State Attorneys, but also due to the fact that the said exhibit was not properly identified by PW1 to have been the same knife the appellant was allegedly armed with, at the scene of crime. As the learned State Attorneys, have implored us, exhibit P1 is hereby expunged from the record.

As on the complaint that the High Court erred in holding that the appellant confessed to have committed the offence, we again agree with the learned State Attorneys that the ground of complaint has merit. In its judgment, at page 51 of the record of appeal, the High Court, when discussing the ground of appeal on identification of the appellant at the scene of crime, found it established that the appellant surrendered himself to the police and further that he confessed to have committed the crime. The same remark is repeated at page 56 of the record of appeal where it is again stated that the appellant confessed to have committed the crime. As it has been complained by the appellant and conceded by the learned State Attorneys, the finding that the appellant confessed to have committed the crime is not supported by the evidence on record. There is nowhere in the evidence on record where the appellant confessed to have committed the

offence. We agree that the said finding by the High Court was a conjecture not based on evidence. The 5th ground of appeal is therefore meritorious.

Notwithstanding the concession to the above two grounds of complaint, it was the argument by the learned State Attorneys that even without exhibit P1, which has been expunged from the record, still there was enough evidence from PW1 proving that she was robbed of her Tshs. 100,000 by the appellant and that a knife was used to threaten her. It was also argued that the erroneous finding by the High Court that the appellant confessed to have committed the offence is a non-starter because the conviction was not based solely on that finding but rather on other pieces of evidence. The solidity and validity of these arguments from the learned State Attorneys will be tested in the course of determining the remaining grounds of complaint which, as we have earlier alluded to, are going to be dealt with under the single issue, that is, whether the case against the appellant was proved beyond reasonable doubt as the law requires.

Having carefully considered the evidence on record, particularly from PW1 and the appellant's disassociation from the crime with his gravamen defence that the case was a frame-up resulting from prior misunderstandings between him and PW1, we hasten to remark, without beating around the bush, that the answer to the above posed issue, is in

the affirmative. There are some reasonable doubts in the prosecution evidence which render the case against the appellant fall short of proof beyond reasonable doubt. We will explain.

First and foremost, it is our considered view that based on the appellant's denial to have committed the offence and on the whole circumstances surrounding the instant case, it was the duty of the prosecution to prove beyond reasonable doubt not only that the appellant was positively identified at the scene of crime but also that the alleged robbery was really committed. The intimation by the appellant, when cross examining PW1, that PW1 was harbouring grudges against him because she had once accused him of stealing her solar panel, cast a reasonable doubt not only on the prosecution case that the alleged robbery was committed but also that it was committed by the appellant.

In her evidence PW1 claimed that she was forced by the appellant to unearth her Tshs. 100,000/= she had buried in the kitchen but the case investigator (PW4) did not bother to visit the scene of crime and see if really there was any evidence to that effect. Further, it was PW1's testimony that in the course of the alleged robbery she screamed and raised an alarm and that some people came to her rescue. Surprisingly, not even one of the alleged people was called as a witness to substantiate

PW1's claim that the robbery in question was really committed against her and that she told them that it was committed by the appellant. Again, while the robbery in question was allegedly committed at 13:00 hours it took PW1 three solid hours till at 16:00 hours for her to report to the ten-cell leader and neighbour, that is, PW2. There is no explanation why it took her that long to report the alleged robbery to PW2 who the evidence show is her neighbour. When all these are considered, and bearing in mind that the appellant's defence was that no robbery was committed against PW1, we find the case by the prosecution that the robbery in question was committed, heavily shaken.

Having doubted the credibility of PW1 on the question whether the alleged robbery was really committed against her as above demonstrated, the following question, assuming that the robbery was committed, is in regard to whether it was the appellant who committed it. The issue here is whether the appellant was identified at the scene of crime. While we agree with the learned State Attorneys that in the instant case the prevailing conditions were favourable for positive identification, we still find that, under the circumstances of the instant case, that fact alone was not enough to prove that it was the appellant who committed the alleged robbery against PW1. In the case of **Jaribu Abdallah v. Republic** [2003] T.L.R. 271, the Court stated that:

> *"...In matters of identification, it is not only enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is not a guarantee against untruthful evidence".*

It is also a settled position in matters of identification that the ability of a witness to name a suspect at the earliest possible opportunity, is an all-important assurance of his reliability. Further, a delay or a complete failure to do so casts doubts that the witness had positively identified the offender. See - **Marwa Wangiti Mwita & Another v. Republic** [2002] T.L.R. 39 and **Swalehe Kalonga @ Sale v. Republic**, Criminal Appeal NO. 16 of 2001 (unreported). In the instant case, the earliest possible opportunity PW1 was supposed to name the appellant as the one who had committed the alleged robbery against her, was when the people came to her rescue after responding to her screams and alarm. With respect, we do not agree with the learned State Attorneys that the earliest possible opportunity was when PW1 reported to PW2, three hours after the alleged robbery had been committed. Since there is no evidence that PW1 named the appellant to the said people, her evidence, not only that she had positively identified the assailant to have been the appellant but also that the alleged robbery was committed, remain heavily impacted.

Finally, the failure to call any of those people who allegedly rushed to the scene following PW1's screaming and alarm, as witnesses, entitles the Court to draw an adverse inference against the prosecution. See - **Esther Aman v. Republic**, Criminal Appeal No. 69 of 2019 (unreported). The evidence show that the said people were PW1's neighbours but no explanation was given why they could not be called as witnesses. While we agree with the learned State Attorneys that under section 143 of the Evidence Act, there is no particular number of witnesses the prosecution is required to call in proving its case, we still emphasise that under the circumstances of the instant case, the said PW1's neighbours were material witnesses whose testimony was needed to support the prosecution case against the appellant. As we have pointed above, if called as witnesses, the said neighbours, could have verified PW1's claims that the alleged robbery was really committed against her and also that PW1 named the appellant as the one who had committed the alleged robbery. The need to call as witnesses, persons to whom a victim of a crime claims to have described or named an accused person the victim allegedly identified at the scene of crime was emphasized by the Court in its decision in the case of **Yohana Chibwingu v. Republic,** Criminal Appeal No. 117 of 2015 (unreported) that:

> *"... in every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of that description are matters of highest importance of which* ***evidence ought to be given first, of course by the person who gave the description, or purports to identify the accused person and then by the person to whom the description was given".***
>
> [Emphasis added]

In the event, for the reasons we have endeavoured to give above, we find that there were reasonable doubts in the prosecution case not only on the claim that the alleged robbery was committed against PW1 but also on the accusation that, if the robbery was committed, it was the appellant who committed it. As we have held, times without number, in our previous decisions including in **Aziz Abdallah v. Republic** [1991] T.L.R. 71 and **Shilanga Bunzali v. Republic**, Criminal Appeal No. 600 of 2020 (unreported), doubts cast in the prosecution case always are resolved in favour of the appellant. The prosecution evidence in support of the case against the appellant failed to prove the case beyond reasonable doubt as required by the law.

That said, we find the appeal meritorious and allow it. We quash the conviction of the appellant and set aside the sentence imposed against him. We further order that the appellant be released from prison forthwith unless he is being held for any other lawful cause.

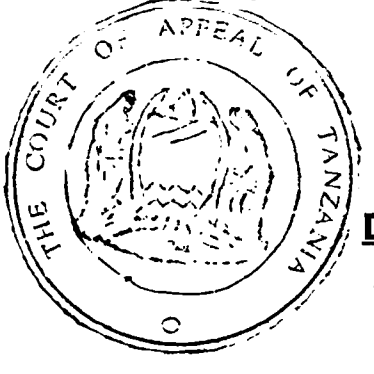
DATED at **MOSHI** this 28th day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 29th day of August, 2023 in the presence of the Appellant who appeared in person and Mr. Innocent Exavery Ng'assi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL