

**IN THE COURT OF APPEAL OF TANZANIA
AT MOSHI**

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 577 OF 2019

IMMANUEL ADAM APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the Decision and Order of the High Court of Tanzania
at Moshi)**

(Mpepo, SRM, Ext. Juris.)

dated the 4th day of August, 2019

in

DC. Criminal Appeal No. 3 of 2013

JUDGMENT OF THE COURT

26th & 29th September, 2023

MUGASHA, J.A.:

In the District Court of Moshi at Moshi, the appellant was arraigned and convicted of armed robbery. It was alleged that, on 9/4/2013 at Msaranga area within the municipality of Moshi In Kilimanjaro Region, the appellant stole a handbag; two mobile phones make Samsung valued at TZS.420,000.00 and cash money TZS. 26,000.00all total valued at TZS. TZS. 446,000.00 the property of Ruth Nzota. It was further alleged that, immediately before and after such stealing, the appellant threatened the victim with a knife in order to

obtain or retain the stolen properties. He was sentenced to a jail term of thirty years imprisonment. His first appeal was unsuccessful, hence the present appeal.

A factual account underlying the appellant's conviction is to the effect that: Ruth Nzota who testified as PW1 was a student at Masoka College. On the fateful day at 13:00 hours, while on the way from her sister's residence to the college she was grabbed by a certain man alleged to be the appellant who threatened her with a knife and ordered her to surrender a wallet which contained two cells and she obliged. She also surrendered TZS. 26000.00 and she was ordered to leave while the bandit took to his heels. PW1 raised an alarm which was heeded to by those who assembled and started to chase the bandit who was apprehended.

PW2 and PW3 who took part in chasing the bandit, told the trial court that upon his arrest, the bandit was found with a bush knife and a wallet. Consequently, the bandit and PW1 were taken to the police where PW1 entrusted a wallet, cell and the bush knife to the police. According to investigator who testified as PW2, the appellant was taken

to the police by Samaritans along with a big bag, a big knife, and cosmetics. The items were collectively admitted as exhibit P1.

On the other hand, the appellant denied the accusations levelled against him. He told the trial court that, on the fateful day while on the way home from his shamba, he was stopped by three boys who had mistakenly believed that he was the one who was seen running away. He claimed to have been tortured and taken to the police. He contended that, the prosecution account was not in harmony on the stolen items given that, the items mentioned by PW1 were different from those exhibited at the trial. Thus, in a nutshell, the case for the appellant was to the effect that he was wrongly prosecuted. Nonetheless, the trial court below was impressed by the prosecution account and as earlier stated convicted the appellant as charged. This was sustained by the High Court and before the Court; the appellant has preferred the present appeal on the following six points of grievance:

- 1. That, the first appellate Court erred in law and fact in upholding the appellant's conviction on the count of armed robbery despite there being no elements establishing the offence.*
- 2. That, the learned SRM with extended jurisdiction, erred in law and fact in upholding the appellant's conviction based on*

the caution statement which was recorded out of time prescribed by sections 50 and 51 of the CPA.

- 3. That, the learned SRM with Ext. jurisdiction erred in law and fact in convicting the appellant based on Exhibit P1 but failed to note that they were not described by PW2 before being tendered in Court as an exhibit.*
- 4. That, the first appellate Court erred in law and fact in basing the appellant's conviction on exhibit P1 but failed to note that no serial numbers were given by the complainant.*
- 5. That, the Courts below, erred in law and fact in basing the appellant's conviction on weak, inconsistent, incredible, uncorroborated, and unreliable evidence from the prosecution witnesses which lacked corroboration.*
- 6. That, both the trial and the first appellate Court grossly erred in law and fact in convicting the appellant but failed to note that this was not a chase and arrest case, if it could have been so, then the second alleged cell phone could have been recovered.*

At the hearing, the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms. Revina Tibilengwa, learned Principal State Attorney alongside with Ms. Eliainenyi Njiro, learned Senior State Attorney.

The appellant adopted the memorandum of appeal without more, and opted to initially hear the submissions of the learned Senior State Attorney. He reserved the right to rejoin if need arises. On her part, from the outset, Ms. Njiro supported the appeal on ground that the charge was not proved to the hilt. She began her submission by amplifying the ingredients of the offence of armed robbery which entail: stealing and using an offensive weapon to threaten the victim in order to retain the stolen items and that every ingredient must be proved. In this regard, she submitted that, given the variance between the charge and the prosecution evidence on the stolen items, the ingredient of stealing was not proved. On this, she pointed out that, whereas the charge shows that the allegedly stolen items were a handbag, two mobile phones make Samsung and cash money TZS. 26,000.00; PW1 recalled to have handed over to the bandit a wallet which had two cells and money TZS. 26,000.00. Yet, she added, those items do not feature in the list of items tendered as exhibit P1 which were a knife, cosmetic, cell and a bag which are different from those mentioned by PW1 and are not listed in the charge.

Thus, it was Ms. Njiro's submission that, as stealing was not proved, the charge of armed robbery was not proved beyond reasonable

doubt against the appellant. With this submission, Ms. Njiro urged us to allow the appeal and set the appellant at liberty.

The appellant had nothing useful to rejoin apart from pleading with the Court to set him at liberty.

We have considered the submission of the learned Senior State Attorney, the record before us, and the appellant's complaint in ground one. We think its determination is sufficient to dispose of the entire appeal and shall give our reasons after scrutinizing the evidence. However, we shall accordingly be guided by the rule that the Court in a second appeal sparingly interferes with the concurrent findings of fact by the courts below save where there is a misapprehension of the evidence or a principle of law resulting into an improper conviction occasioning miscarriage of justice.

In the ground under discussion, the appellant faults the first appellate Court for upholding his conviction while the ingredients of the offence were not proved. As correctly submitted by Ms. Njiro, the elements constituting the offence of armed robbery under section 287A of the Penal Code are stealing and using a firearm to threaten the victim in order to facilitate the stealing. See: **NCHANGWA MARWA**

WAMBURA VS. REPUBLIC, Criminal Appeal No. 44 of 2017 (unreported). Since the charge is the foundation of the trial and the basis upon which the prosecution case hinges, it is incumbent on the prosecution to adduce sufficient evidence to substantiate the allegations contained in the charge or else, the allegations remain unsubstantiated rendering the charge not proved beyond reasonable doubt.

In the present case, the listed three items alleged to have been stolen from PW1 according to the charge were, a handbag; two mobile phones make samsung; and TZS. 26,000.00. Similar items feature in the facts which were read out at the preliminary hearing. While it was expected that the prosecution would lead evidence to support the charge, that was not the case. Instead, the prosecution had a different account. The victim told the trial court that after being attacked, she handed over to the appellant a wallet which had two cells and TZS. 26,000.00. Yet, the investigator F 2659 D/CPL ISSA PW2, recounted that the stolen items taken to the police were a cell, a bag, a big knife and cosmetics which were collectively tendered as exhibit P1. With such a variance between charge and the prosecution account which was contradictory, besides, the evidence not supporting the charge, what was stolen from PW1 cannot be ascertained.

Moreover, it is trite law that the claimant should make a description of special marks on an item before it is shown to him and admitted as an exhibit as this is the only way it can ascertain that the identification of the items is without blemishes. In the case at hand, besides the appellant making a generalized description which was not sufficient, she fell short of giving distinctive description or rather demonstrating any unique features or marks on the items ahead of the same being shown to her and being tendered in court so as to establish that the stolen items belonged to her.

In the premises, with such discrepant prosecution evidence where the prosecution failed to prove stealing and ownership of the stolen items, the charge of armed robbery was not proved beyond reasonable doubt. In this regard, had the two courts below scrutinized the evidence on record, they would not have grounded the conviction of the appellant and this is what made us to re-evaluate the evidence and subject it to scrutiny.

In view of what we have demonstrated, the charge of armed robbery was not proved beyond reasonable doubt and the appeal is merited. Given that the ground under discussion suffices to dispose of

the appeal, we shall not determine the remaining grounds of appeal. Thus, the appeal is merited and we allow it. We quash and set aside the conviction and sentence and order the immediate release of the appellant unless held for other lawful cause.

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

S. E. A. MUGASHA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 29th day of September, 2023 in the presence of the Appellant in person and Ms. Bertina Tarimo, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.




D.R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL