IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: MKUYE, J.A., LEVIRA, J.A. And GALEBA, J.A.)

CRIMINAL APPEALS NOS. 68, 69, 70 AND 71 OF 2021

REUBEN RICHARD ..... 1ST APPELLANT

MABULA MANOTA ..... 2ND APPELLANT

NASSORO MKANDALA ..... 3RD APPELLANT

LULANGILA NDAMA ..... 4TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of High Court of Tanzania at Tabora)

(Bahati, J.)

dated the 11th day of December, 2020

in

Criminal Appeals Nos. 25, 26, 27, 28, 29 of 2019

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JUDGMENT OF THE COURT

22nd September & 6th October, 2023

LEVIRA, JA.:

This is a second appeal against the decision of the High Court of Tanzania at Tabora (the first appellate court) in DC Criminal Appeals Nos. 25, 26, 27, 28 and 29 of 2019. In the said decision, the first appellate court upheld the decision of the District Court of Nzega at Nzega (the trial court) where the appellants and another person, not a party to this appeal, one Emmanuel Juma were jointly and together, charged with two counts of

armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E. 2002 now R.E. 2022] (the Penal Code) and upon a full trial, they were convicted and sentenced to thirty years imprisonment.

The prosecution alleged that on 21st November, 2017 at different times around 01:30 and 02:15 hours, respectively at Nzega Ndogo Village within Nzega District in Tabora Region, the appellants stole cash TZS. 650,000.00 from Magambo Ngimba and TZS. 100,000.00 from Joseph Mlongwa @ Alexander, whereas immediately before, during and after such stealing, they used various offensive weapons including a gun to threaten the victims in order to obtain and retain the said properties.

Briefly, the prosecution evidence was led by six witnesses and three exhibits were tendered. In his evidence, Magambo Ngimba, PW1 testified that on the material night his house was invaded by five robbers. The first appellant was armed with a gun and others were having clubs. They tied him with a piece of cloth and demanded money while beating him. Eventually, they took a total of TZS. 360,000.00 from his house. However, the robbery was not over. They turned to his wife one Maria Mayunga (PW3) and started beating her. She gave them TZS. 300,000.00. Thereafter, they ordered PW3 to take them to her husband's (PW1's) shop, which she obeyed. From the shop they stole vouchers worth TZS. 46,000.00. PW1

testified further that he identified the appellants as the electric lights were on, they stayed in his house for about 20 minutes, he lives with the appellants in the same village and thus he knew them even before that date. PW1 informed the police about the incident.

In her evidence, PW3 also stated that she knew the appellants before the incident as they were living in the same community for many years. She mentioned their names while touching each one of them. As to what happened, she gave a similar testimony as that of PW1. She added that when she saw the robbers beating her husband (PW1), she told them that some of the money was at their shop and that is when they ordered her to take them there. She went with the second and third appellants. At the gate of her house, she saw the first appellant holding a firearm. PW3 testified that she recognized the appellants because there was sufficient electrical light and the whole incident inside the house took about 30 minutes. Also, when they arrived at the shop, the second appellant switched on the lights and ordered her to show where the money, cigarette and mobile phone vouchers were kept. She told them that she did not know.

At this point they ordered her to take them to their neighbour's (PW2) house. Upon arriving there, they locked her in the toilet and fired out two shots. They accomplished their mission and left PW3 in the toilet. The wife

of PW2 one Cecilia Alex (PW4) opened the door for PW3. Later, the police arrived at the scene of crime.

PW2 testified that he knew all the appellants as they used to live together at Nzega Ndogo for about three years. On the material day at about 02:00 hours, he saw the first appellant and his fellow (who is not a party to this appeal) entering his house and the first appellant was holding a firearm. Other persons he saw when the gate to his house was opened by the robbers, were the second and third appellants who were armed with clubs. He added that, although it was in the night, there was electrical tube lights which helped him to see the robbers. PW2 raised alarm and Mashaka Issa (PW5) came to their rescue.

PW4, the wife of PW2 also testified that she knew all the appellants as they lived together in the same village and she mentioned their names. On the fateful night, she saw them entering their house and the fourth appellant ordered her to give them money. But, PW4 said she had no money, so he started beating her up with a club which he was armed with and the third appellant had a machete which he used to beat up PW4 with its sides. The second appellant looked around the house and found a total of TZS. 100,000.00, which he took. Thereafter, the appellants and PW4 went to PW4's shop. While on the way, they were flashed by the full lights of a

car which was coming towards their direction. With this light, PW4 managed to see the first appellant with a firearm. When they arrived at the shop, PW4 opened the door, however one of them said time was up and thus they all ran away. She concluded that, she recognized the appellants through the aid of tube lights outside and inside the house.

On his side, Mashaka Issa (PW5) testified that, he responded to PW2's alarm. While on his way close to the scene of crime, he was flashed with a light by someone who asked him where he was going. He told him that he was responding to the alarm raised to offer a help. That person called him to get closer and when he got there, he found three people who apprehended him. He recognized the second appellant as the person who called him. Some people came out of the house of PW2. He recognized them to be the first appellant and another person. Those people started hitting him with clubs on various parts of his body until he lost consciousness. According to PW5, he recognized those people because at the house of PW2 there were solar light and tube lights which were on and those people were familiar to him as they were living in the same village. PW5 together with other three victims were taken by police patrol vehicle to Zogolo Dispensary for treatment where they were attended by a clinical officer, one Emmanuel Balele (PW6). However, since PW5 was unconscious,

he was referred to Nzega District Hospital. PW6 filled in the PF3's of PW1, PW4 and PW3 which were admitted as exhibits P1, P2 and P3, respectively.

In their defences, all the appellants denied the charge. They advanced a common defence that, they were arrested because they responded late to a communal alarm ("mwano") at the village meeting.

As intimated above, the trial court having analysed the evidence, found the appellants guilty, convicted and sentenced them to thirty years imprisonment. Aggrieved by the decision of the trial court, the appellants unsuccessfully appealed to the High Court, hence, the present appeal. Each appellant presented his own memorandum of appeal, which in essence, is a replica of each other's memorandum. For the purpose of this appeal, we consolidated the appellants' appeals and the following are their grounds of appeal:

1. *That, there was noncompliance of section 214 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E. 2019] as no reason was assigned why Hon. S. B. Nsana-RM could not proceed with the trial of the appellants necessitating Hon. G. N. Barthy-RM to take over.*
2. *That, the two courts below erred in law to convict and sentence the appellants without considering that there was no evidence led by the prosecution on whether the arrest of the appellants had anything to do with the commission of the offence.*

3. *That, there was a misdirection on the evaluation of the evidence on record by the two courts below which occasioned injustice on the part of the appellants in that, the witness who allegedly identified the appellants did not name them to the first person they met in the aftermath of the incidence in the earliest time possible and that, that person (if any) did not testify in court.*

4. *That, the appellants were not positively identified at the scene of crime to be "particep criminis."*

5. *That, the case for the prosecutions was not proved against* the *appellants beyond reasonable doubt as required by the law.*

At the hearing of the appeal, the appellants appeared in person, unrepresented, whereas the respondent Republic had the services of Mr. Winlucky Mangowi, learned State Attorney. The appellants adopted their grounds of appeal and preferred to hear first a reply from the learned State Attorney as they reserved their right of rejoinder.

Upon taking the floor, Mr. Mangowi outrightly opposed the appeal and argued the grounds of appeal seriatim.

Regarding the complaint in the first ground of appeal that there was noncompliance with section 214 (1) (a) of the Criminal Procedure Act [Cap 20 R.E. 2002 now R.E. 2022] (the CPA), for failure of the successor magistrate (G. N. Barthy-RM) to assign the reasons as to why she took over

the proceedings from the predecessor magistrate (S.B. Nsana-RM), Mr. Mangowi admitted that indeed, there was noncompliance. He submitted that the record of appeal shows from page 12 of the record of appeal that the evidence of PW1 was recorded by Hon. Nsana, RM, but the rest and the judgment was composed by Hon. Barthy, RM. He submitted further that this defect has a resultant effect of quashing conviction. However, he said, the Court has already put in place factors to be considered before quashing conviction. **First**, the conviction must be shown that it was vitiated by noncompliance with section 214 (1) (a) of the CPA; and **second**, it has to be shown that the appellant was prejudiced as the proceedings were taken over by another magistrate before arriving to a conviction.

He argued, that the appellants in the present appeal have just said that the said provision was not complied with without explaining how and to what extent they were affected by either injustice or miscarriage of justice by that act of change of magistrates. Failure to explain, he further argued, amounts to failure by the appellants to meet the two criteria. He cited the case of **Tumaini Jonas v. Republic**, Criminal Appeal No. 337 of 2020 (unreported), where the Court having considered the circumstances of the case, held that the irregularity of noncompliance with section 214 (1) (a) of the CPA is curable under section 388 (1) of the CPA. Mr. Mangowi urged us

to find that the first ground of appeal has no legs to stand on and dismiss it. All the appellants had nothing to rejoin in respect of this ground of appeal.

Without taking much time on this ground, we agree with the submission by Mr. Mangowi in respect of the current position as far as noncompliance with section 214 (1) (a) of the CPA is concerned. We note that the appellants had nothing material to add to their grounds of appeal. Apart from complaining about noncompliance with that provision, none of them stated whether they were prejudiced. In the circumstances, we are unable to gauge and find a justification as to why we should depart from the established current position. We observed from the record of appeal that initially, the appellants' case was handled by Hon. Nsana, RM who on 24/05/2018 recorded the evidence of PW1. However, on 05/07/2018 Hon. Barthy, RM took over and recorded the evidence of PW2 and the rest till judgment with no apparent reason(s) advanced on the record as per the requirement of the law under consideration. Having considered circumstances of this case, we find that the irregularity of noncompliance with section 214 (1) (a) of the CPA is curable under section 388 of the CPA. As a result, the first ground of appeal fails.

Mr. Mangowi's response to the second ground of appeal where the appellants challenge their convictions and sentences on the ground that the

prosecution failed to lead evidence to prove whether their arrest had anything to do with the commission of the charged offence, was that, PW1, PW2, PW3 and PW4 testified that they identified the appellants on the material day at the scenes of crime and they knew them before the incident. Therefore, he said, it was not an identification by a stranger but recognition. He referred us to pages 12, 13, 14, 16, 17 of the record of appeal where PW1 stated that he identified the appellants whom he knew before by the aid of lights which were on, and they spent more than 20 minutes together in his house. As regards the testimony of PW2 who also identified the appellants by the aid of tube lights, he referred us to pages 16 and 17 of the record of appeal; and for PW3 and PW4, he referred us to pages 18, 20, 21, 22 and 23 of the record of appeal. In short, he said, it is obvious that the victims identified the appellants whom they knew very well before the incident. He cited the case of **Masamba Musiba @ Musiba Masai Masamba vs Republic,** Criminal Appeal No. 138 of 2019 (unreported), in which the Court stated that in the circumstances where appellants were recognized as they were known before the incident by the witnesses, it cannot be said that there was mistake in their identification.

Mr. Mangowi insisted that, in the matter at hand the witnesses said that there was sufficient light, they spent time together and they knew the

appellants before the incident. PW3 when cross examined at page 20 of the record of appeal said that, there were lights all over, so they identified them. At page 14, PW1 said that he called the police and when they arrived at the scene, he told them that he identified the appellants. He argued that, the fact that the appellants were identified at the scene of crime, and were named to the police and identified at the dock connects them to the incident. It was his submission that the arrest of the appellants at the gathering was clear evidence that they were identified, named to the police and finally, arrested. Therefore, he said, the second ground of appeal is baseless.

In rejoinder, the first appellant questioned as to why the police officer who arrested him was not called to testify. The second appellant admitted that he was arrested at the gathering that responded to the alarm ("mwano"), but he questioned why the village chairman and police were not called to testify. According to him, the case was fabricated against them. Just as the first and second appellants, the third appellant also questioned why the police who arrested them and the village chairman were not called to testify. He urged us not to consider the submission by the State Attorney. The fourth appellant also shared the story of other appellants. He admitted to have been arrested at the gathering with other appellants together with

other people who are not parties to this case. He added, that while at the gathering ("mwano") concerning the robbery incident which had happened, police who were passing by saw them and asked as to what was happening. By that time, the fourth appellant and his fellows were at the middle of the gathering because they were late to respond. The said police ordered them to board the police vehicle, sent them to the police and later were arraigned before the court. He said, the case was framed against them and thus urged us to set them free.

We have carefully considered the submissions by the parties and the entire record of appeal. The second ground of appeal invites us to determine the connection between the arrest of the appellants and the offence with which they were charged, convicted and ultimately sentenced. It is undisputed fact that on the fateful night the complainants in this case were robbed. The record of appeal shows that the prosecution witnesses, PW1, PW2, PW3 and PW4 recognized the people who invaded them on the material day. We agree with Mr. Mangowi that, the source and intensity of light, familiarity of the appellants with the victims, proximity between them, duration of time they spent together and steps taken during and after the incidents, all these prove that the arrest of the appellants had connection with the armed robbery incident which had occurred. To say the least, even

the appellants in their rejoinder ended up asking why the police who arrested them and the village chairman were not called to testify. We wish to point out, that the fact that those people were not called to testify by itself does not mean that the appellants were not arrested in connection with the offence with which they were charged. We are aware of the position of the law that there is no specific number of witnesses who are required to prove a fact but what matters is the weight of evidence – see: section 143 of the Evidence Act [Cap 16 R.E. 2019] and the case of **DPP v. Ngusa Keleja @ Mtangi and Charles Mtokambali,** Criminal Appeal No. 276 of 2017 (unreported). Equally, we are alive to the fact that failure of the prosecution to call material witness may lead the court to draw adverse inference against the prosecution, that if that witness could be called, he could have given evidence against them. All the same, circumstances of the present case do not suggest that the police officer and the village chairman were key witnesses. This we say because the villagers, appellants inclusive, were gathered because of the incident which had happened. In due course, it happened that the appellants were arrested, a fact which they do not deny. This has a connection with the identification by recognition which was made by the victims of the incidents. We therefore do not find merit in this ground.

The complaint in the third ground of appeal was that the witnesses who allegedly identified the appellants did not name them to the first person they met in the aftermath of the incident in the earliest time possible, and that person (if any) did not testify in court. Mr. Mangowi responded to this ground of appeal by referring to PW1's evidence at page 13 of the record of appeal where he only said that, he called police officers and when they arrived at the scene of crime, they found him at the gate. It was the argument of Mr. Mangowi that PW1 did not say that he met any other person except the police who arrived at the scene. He agreed that those police officers were not called to testify.

Despite that, he argued that even though they were not called to testify, there is no specific number of witnesses who are required to testify as per section 143 of the Evidence Act, but the question is whether failure to call them could lead to adverse inference to be drawn. It was his submission that failure to call those witnesses did not affect prosecution case due to the following reasons: **First**, the appellants were recognized as they were known even before the incident, they were arrested and taken to the court, they were not suspected. **Second**, the people who were informed by PW1 that the appellants were the ones who committed the offence could not give different evidence from that of PW1, so there was no need to call them and

the prosecution evidence was not shaken. He concluded by urging us to find this ground of appeal to be baseless and dismiss it.

As discussed in the second ground of appeal, the appellants insisted that the police officers to whom the incident was reported and the village chairman were not called to testify and hence injustice on the part of the appellants. In criminal law, it is upon the prosecution to prove its case beyond reasonable doubt. Conviction of accused person (s) depends on the weight of prosecution evidence and not on the weakness of defence – see: **DPP v. Ngusa Keleja @ Mtangi and Charles Mtokambali** (supra). The prosecution in the current case called a total of six witnesses and tendered exhibits to prove its case. Four among the witnesses who were called to testify gave direct evidence on how the offence was committed by the people who were familiar to them. The courts below were satisfied, as we do, that identification of the appellants at the scene of crime was proper.

We agree with the submission by Mr. Mangowi that despite the fact that those people were not called to testify, the prosecution discharged its duty of proving the case beyond reasonable doubt. Failure to call those people, in our considered opinion, did not occasion miscarriage of justice as the appellants did not state on how they were or prosecution case was affected. The prosecution had a duty, which they discharged, to call

witnesses who are material to their case - see: **Abdallah Kondo v. Republic**, Criminal Appeal No. 322 of 2015 (unreported). Therefore, having considered the circumstances of this case, we do not find any reason why we should draw adverse inference to the prosecution for not calling the police who arrived at the scene of crime after being informed by PW1 about what had happened. This ground of appeal is, as well, unmerited.

Responding on the fourth ground of appeal, Mr. Mangowi submitted that the appellants' complaint that, they were not positively identified at the scene of crime was addressed in the second ground of appeal. He indicated that PW1, PW2, PW3 and PW4 knew the appellants well before the incident. He cited the case of **Masamba Musiba @ Musiba Masai Masamba (Supra)** where the Court held that, where the accused is well known to the witnesses, they are extremely unlikely to mistake them. He went on to submit that at page 15 of the record of appeal PW1 stated that, he identified the appellants by electrical lights which were on and they spent about twenty minutes. That was enough for PW1 to recognize people who he knew before the incident. PW2 stated at page 17 of the record of appeal that he knew the third appellant by name Nassoro and recognized him because there was sufficient light at the scene of crime. Likewise, PW3 testified that she identified the appellants because there was sufficient light

and she spent about 30 minutes with them at page 14 of the record of appeal. At page 24, PW4 said that she identified the appellants because there were tube lights outside and inside the house. Apart from that, added Mr. Mangowi, at page 23 of the record of appeal, PW4 when cross examined insisted that they were invaded by the appellants with bare faces and the tube lights were on. In summary, Mr. Mangowi submitted that all the appellants were recognized at the scene of crime. Therefore, the fourth ground of appeal is weak and thus, he urged us to dismiss it.

We have extensively delt with the issue of identification while resolving the second ground of appeal. We agree with Mr. Mangowi's submission in respect of the identification of the appellants at the scene of crime. We are satisfied that the circumstances under which the appellants were identified left no possibility of mistaken identity. Particularly, in this case where the identification was by recognition – see: **Charles Nanati v. Republic,** Criminal Appeal No. 286 of 2017 (unreported). Guided by our decision above, we hold, as the courts below, that the appellants were positively identified at the scene of crime.

Submitting in respect of the fifth ground of appeal, Mr. Mangowi stated that the offence with which the appellants were charged is armed robbery. For this offence to be proved, two elements have to be established.

First, that there was dangerous weapon; **second**, that the said weapon was used to threaten and after threatening theft occurred. He cited the case of **Fikiri Joseph Pantaleo @ Ustaadhi v. Republic**, Criminal Appeal No. 323 of 2015 (unreported) in which elements of armed robbery were expounded.

He submitted further that both the ingredients of the offence were proved. Regarding offensive or dangerous weapon, he said, PW1 at page 13 of the record of appeal stated that he saw the first appellant holding a gun. Also, PW2 at page 16 of the record of appeal stated that he saw Reuben (the first appellant) holding firearm, Nassoro (the third appellant) and Mabula (the second appellant) holding clubs. At page 18 of the record of appeal, PW3 testified that she saw the appellants holding clubs and at page 22 of the record PW4 said that, she recognized Nassoro (the third appellant) who was holding "sululu" and Reuben (the first appellant) holding firearm. Mr. Mangowi submitted that, by this evidence, appellants had offensive or dangerous weapons. So, the first element was proved.

Regarding the second element that the weapons were used to threaten, he referred the testimonies of PW1 and PW2 at page 13 of the record of appeal. PW2 stated at the third paragraph that the robbers told him that if at all he could raise alarm, they could slaughter him. Mr.

Mangowi went on to state that all victims, PW1, PW2, PW3 and PW4 proved that money was stolen and the appellants threatened them to obtain that money. Therefore, he submitted that the charge against the appellants was proved beyond reasonable doubt. He thus prayed for this ground of appeal to be dismissed.

In respect of the fifth ground of appeal, Mr. Mangowi submitted that the prosecution proved their case against the appellants beyond reasonable doubt and hence, the appeal has no merit. He urged us to dismiss it and sustain the appellants' convictions and sentences. On their part, the appellants insisted that the prosecution did not prove the case beyond reasonable doubt. Therefore, they prayed that their appeal be allowed.

In determining this ground of appeal, we are guided by our previous decision of **Fikiri Joseph Pantaleo @ Hustaadhi** (supra) cited to us by Mr. Mangowi, in which, we restated the main elements of the offence of armed robbery under section 287A of the Penal Code. We agree with Mr. Mangowi's submission that PW1, PW2, PW3 and PW4 were able to prove that the appellants invaded them while armed with a gun, a bush knife and clubs. These are among the offensive or dangerous weapons. From the house and shop of PW1 and PW3, they managed to steal TZS. 650,000.00 and PW2 and from PW4, they stole TZS. 100,000.00. In the circumstances,

we are satisfied that the prosecution proved the charge of armed robbery against the appellants beyond reasonable doubt. Therefore, we do not find any reason to interfere the concurrent findings of facts by the trial and first appellate courts. Consequently, we dismiss the appeal in its entirety.

DATED at **TABORA** this 6th day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Judgment delivered this 6th day of October, 2023 in the presence of the 1st, 2nd 3rd and 4th appellants in person, and Mr. Magonza Charles, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the Original.

THE COURT OF APPEAL OF TANZANIA

S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL