IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: WAMBALI, J.A., KENTE, J.A. And KHAMIS, J.A.)

CRIMINAL APPEAL NO. 245 OF 2021

ERICK MATHIAS @ YAULIMWENGU.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Bukoba at Bukoba)

(Luambano, SRM Ext. Jur.)

Dated the 17th day of March, 2021

in

Criminal Appeal No. 4 of 2021

JUDGMENT OF THE COURT

6th & 13th December, 2023

KENTE, J.A.:

The appellant Erick Mathias alias Yaulimwengu, together with his co-accused namely, Barnabas James (who was the first accused in the trial court) appeared before the District Court of Biharamulo where they were jointly charged with, among others, three counts of armed robbery contrary to section 287A of the Penal Code, Chapter 16 of the Revised Laws. The two were alleged to have been involved in a spate of robbery incidents that rocked the Vodacom Telecommunication Boaster Station at Kaniha village in Biharamulo District, Kagera Region in the months of July and August, 2019.

The particulars alleged in support of the first robbery incident which happened on 21st July, 2019 were that, during the night time, the appellant and Barnabas James stole sixteen cells signal boosters (make Northstar) valued at TZS 17,100,000.00 the property of Vodacom Company and that, immediately before or after stealing, they used bush knives and sticks to threaten one Pascal Masato with a view to obtaining and retaining the stolen properties.

With regard to the second count, it was particularized that, on 6th August, 2019 during night hours, the duo robbed four cells signal boosters (make Northstar) valued at TZS 4,400,000.00 the property of Vodacom Company and, that after the said theft, they used bush-knives and sticks to threaten their next victim one, Yohana Charles.

Eleven days later, the appellant and his colleague allegedly struck again. This time, on 17th August, 2019, they allegedly took from the same company seventeen boosters of the same make valued at TZS 17,100,000.00 after threatening their last victim, one Rugina Tago with bush-knives and sticks as a means of obtaining from him and retaining the stolen items.

The appellant and his co-accused as might be expected, pleaded "not guilty" to the charge. However, after a full trial, they were found guilty, convicted and awarded the mandatory sentence of thirty years

imprisonment for each count which were however, ordered to be served concurrently.

The appellant was aggrieved by the convictions and sentences and he appealed to the High Court (sitting at Bukoba) where the appeal was transferred to the Court of the Resident Magistrate at Bukoba to be heard by Mr. Luambano, a Senior Resident Magistrate with Extended Jurisdiction.

After considering the evidence presented before the trial court, unlike the learned State Attorney who appeared for the respondent Republic and did not object to the appeal, the learned Senior Resident Magistrate was satisfied that the prosecution had managed to prove the appellant's guilt beyond reasonable doubt. He thus went on dismissing the appeal in its entirety for want of merit. Undaunted, the appellant appealed to this Court.

In his memorandum of appeal, the appellant advanced seven grounds of complaint which we shall however, conveniently narrow down to one and that is, the most important question arising out of this appeal. That is whether or not, the prosecution case was proved to the required standard to warrant the appellant's convictions.

At the hearing of the appeal, like in the lower courts, the appellant appeared in person fending for himself. On the other hand, the respondent Republic was represented by Ms. Edith Tuka, Ms. Matilda Assey and Mr. Kanisius Ndunguru, learned State Attorneys.

Both Ms. Assey and Mr. Ndunguru who started addressing the Court on behalf of the respondent Republic after the appellant opted to speak in response to whatever the State Attorneys would say in reply to his appeal, very properly in our view, and as we shall later on demonstrate, did not support the appellant's convictions and sentences. In the circumstances, they went to the great length in their submissions and implored us to allow the appeal and acquit the appellant on the grounds that the charges levelled against him were not proved to the required threshold.

Submitting in support of the appeal which, as stated earlier on, the respondent Republic did not oppose, Ms. Assey begun by taking us through the ingredients that must exist to create the offence of armed robbery under section 287A of the Penal Code. To refresh our minds, the said ingredients can simply be put together and defined as the use of force against the victim for the purposes of stealing or retaining the property after stealing the same.

Elaborating and expressing the respondent's misgivings of the verdict of the two lower courts, Ms. Assey submitted in the first place that, all victims of the alleged armed robbery, were not called as witnesses to testify to the fact that indeed, at the material time, they were threatened by the appellant and his co-accused. The case of **Yosiala Nicholaus Marwa v. Republic,** Criminal Appeal No. 193 of 2016 [2019] TZCA 147 (9 April 2019, TANZLII) was referred to us in support of the proposition that, in a charge of robbery, the nature of violence used on the victim, or threat of it, must be specifically mentioned therein and eventually proved by the prosecution.

With regard to stealing, the learned State Attorney contended that while the charge refers to Vodacom Company as the owner of the stolen cells, no witness from the said company appeared to testify before the trial court with a review to proving the said ownership.

Dealing with the claim that, immediately before and after stealing, the appellant and his colleague threatened the victims of their transgression in order to obtain and retain the stolen property, Ms. Assey was very brief. She argued that, no evidence was forthcoming from the prosecution to show that the appellant and his accomplice had used bush knives and sticks to terrorize their victims and cause them to yield to their pressure.

Another shortcoming in the prosecution case which Ms. Assey found disquieting, is the material variance between the charges and the evidence led in its support. On this point, the learned State Attorney had in mind and indeed her misgivings are borne out by evidence of Emmanuel Nangole (PW1) who told the trial court that, the security guards who were on duty and were threatened by the appellant and his co-accused in respect of the three counts were respectively, Stephano Thomas (on 21st July, 2019), Thobias Kakuru and Yohana Masanja (on 6th August, 2019) as well as Thobias Kakuru, Stephano Thomas and Yohana Masanja (on 17th August, 2019).

We should mention at this juncture that, from the above evidence, it is plainly clear that, the testimony of PW1 was materially at variance with what was alleged in the particulars of the offence in support of the first, second and third counts which referred to the victims of the appellant's alleged robbery as respectively, Pascal Masato, Yohana Charles and Rugina Tago. Based on the foregoing shortcomings, it was Ms. Assey's conclusion that, the case against the appellant was not proved beyond reasonable doubt.

During his turn, Mr. Ndunguru pointed out that, the documentary exhibits tendered and admitted as evidence in support of the prosecution case (the certificates of seizure i.e. Exhs. P1 and P4,) were not read out

to the appellant as required by law. Moving forward, the learned State Attorney submitted that, as if that was not bad enough, all exhibits were tendered by the Public Prosecutor contrary to the established practice. The learned State Attorney referred to our earlier decision in the case of **Tito Makazi v. Republic**, Criminal Appeal No. 532 of 2017 [2021] TZCA 437 (27 August 2021, TANZLII) where we held categorically that, a prosecutor is not competent to tender exhibits as he cannot be both a prosecutor and a witness at the same time. Given the above stance of the law, Mr. Ndunguru's prayer was certainly that, we discard all the exhibits tendered in support of the prosecution case. The learned State Attorney concluded that, all in all, the appellant's guilt was not proved to the required standard.

On our part, we side with the learned State Attorneys, without demur. As summed up by Ms. Assey, the evidence led in support of the prosecution case fell far short of proving the offence of which the appellant was convicted. For, in terms of section 287A of the Penal Code, a person is said to have committed armed robbery if it is shown that, that person stole anything capable of being stolen and that, either immediately before during or after such stealing, he threatened the victim or victims by any arm or offensive weapon in order to obtain or retain the stolen property. Given the facts and circumstances obtaining in this case, rather

than relying, on the evidence of PW1 which was more or less hearsay, establishing that the appellant and his co-accused had used bush knives and sticks to threaten their victims in order to obtain and retain the stolen cells, these were the facts which must have necessarily been attested to by the security guards themselves who were on duty on the fateful days and, this was for the prosecution to prove beyond reasonable doubt.

That, PW1 learnt about the stealing on the previous nights sometimes after occurrence of theft and that none of the security guards who were the victims of the robbery appeared before the trial court to testify, are the facts that are beyond question. No explanation was given ieave alone a plausible one, to explain away the failure by the prosecution to call all those witnesses whose evidence was very crucial so far as it relates to almost all ingredients of the offence of which the appellant was convicted. In the circumstances, we are in no doubt that, in view of what we held in the case of **Aziz Abdalla v. Republlc** [1990] T.L.R. 71, had the trial and the first appellate courts addressed themselves to this glaring dereliction of duty by the prosecution side, they would have drawn an adverse inference against the prosecution case regarding the appellant's alleged use of threats and arms immediately and after stealing with the aim of obtaining and retaining the stolen property. Speaking in the same vein, as correctly submitted by Ms. Assey, the prosecution ought to have

as well called a witness from Vodacom Company to attest to the fact that, indeed the stolen items were the property of the said company. Stepping into the shoes of the first appellate court, and going by the applicable law, we find that the unexplained failure to summon the victims of the robbery and a witness from Vodacom Company had a serious adverse effect to the case by the prosecution.

Regarding the testimony of PW1 which is at variance with what was alleged in the particulars of the offence with respect to the names of the victims of the alleged robbery, we are enjoined to determine the effect of a situation of the evidence at the trial which proves the facts that are materially different from what is alleged in the charge.

It is a well-established rule that, in any criminal trial, the evidence led in support of the prosecution case must always tally with the material contents of the charge and, in case of any variance, the prosecutor must invoke the provisions of section 234 of the Criminal Procedure Act, Chapter 20 of the Revised Laws to have the charge amended so as to bring it in line with the evidence. (see **Leornard Raphael and Another v. Republic,** Criminal Appeal No. 4 of 1992 (unreported).

In this case, we agree with the argument by the learned State Attorney that, in all the three counts in issue, the victim or victims of the alleged robbery were different from those who were mentioned by PW1.

This in our view was a fatal defect in the prosecution case which could not be cured otherwise than by way of amendment to the charge.

On a further note, in the absence of the testimony of the victims of robbery, one can only speculate what were the real circumstances surrounding the stealing of the cells and the possibility of self-imposed slight bruises and tying up by security guards as it happened, to simulate robbery, cannot be ruled out.

Regarding the submissions made by Mr. Ndunguru, there is no doubt that all exhibits in support of the charge were tendered by the Public Prosecutor and that, after being admitted in evidence, the two certificates of seizure (exhs. P1 and P4) were not read over to the appellant to fully apprise him of their material contents. This in our respectful view, was a failure of the trial court to perform its constitutional duty to administer justice and be seen to guarantee the necessary procedural protection to the appellant.

By extension therefore, the trial court had abrogated its duty to guarantee the appellant a fair trial, and this omission, inevitably brings into question the appellant's ultimate conviction.

In view of our earlier decisions in the case of **Robinson Mwanjisi v. R.** [2003] T.L.R. 218 and **Tizo Makazi** (supra) together with a

plethora of other similar subsequent decisions, we find the prosecution's exhibits to have been wrongly admitted in evidence and we accordingly discard them.

Having thrown away the wrongly admitted exhibits, a serious consideration of the remaining evidence becomes futile if not academic and redundant. In short, PW1 for instance was seemingly an inherently unreliable witness. Despite being a supervisor at Lampact Security Company which was contracted by Vodacom to provide it with security services at Kaniha telecommunication booster station, in his oral testimony, has nothing to bear on the prosecution case.

Similarly is the testimony of John Fredrick Uyovu (PW3) whose evidence was in relation to a certificate of seizure (exhibit P4) which was prepared in his presence after a search which was conducted at the home of Innocent Charles (the third accused in the trial court).

In the same way, we are left with the oral testimonies of Joseph Kiboko (PW4) whose evidence does not in any way touch on the appellant and No. E 2638, Detective Station Seargent Bwana Mavota (PW5) whose investigation evidence failed to place the appellant at the scene of the crime.

In view of the foregoing analysis of the evidence, there is nothing left to discuss which will benefit the respondent Republic with regard to the appellant's culpability. Given the weakness pointed out in the prosecution case, and upon full consideration of the arguments mounted by the learned State Attorneys, we have found that the offences of armed robbery were not proved to the required standard and the two courts below should have so found.

In the ultimate event, we allow the appeal, quash the convictions and set aside the custodial sentences imposed on the appellant. We order for his immediate release from prison unless he is held for some other lawful cause.

DATED at **BUKOBA** this 12th day of December, 2023.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 13th day of December, 2023 in the presence of the appellant in person and Mr. Kanisius Ndunguru, learned State Attorney for the respondent Republic, is hereby certified as a true copy of the original.

A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL