IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO. 35 OF 2012

[Originating from Korogwe District Court in Criminal Case No. 74 of 2011 at Korogwe]

MAULIDI SEFU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

U. MSUYA, J.

The appellant, Maulidi Sefu was charged and convicted of Armed Robbery contrary to section 287A of the Penal Code [Cap. 16 R. E. 2002]. It was alleged in the charge sheet that on 23rd day of May, 2011 at about 20.00 hours at Kilole area within Korogwe District in Tanga Region, the appellant used actual violence and managed to steal cash money 164,000/= Tshs and one mobile phone make NOKIA valued at 80,000/= Tshs both the property of Said Adamu. The trial court convicted the appellant and sentenced him to 30

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years imprisonment. Further, the trial magistrate ordered the appellant to pay the complainant Said Adamu 244,000/= Tshs as a compensation for the stolen properties.

Briefly, the material facts which led to this appeal are summarized as follows:-On the material day [i.e. 23.05.2011], the victim, Said Adam (PW1), a businessman in flying passengers from one area to another within Korogwe District by using his motorcycle was hired by the appellant to take him from Mandela area to Mtonga area. The appellant consented to pay the victim (PW1) 5,000/= Tshs.PW1adduced evidence that when they arrived at Mtonga area, the appellant informed him to wait the appellant's friend who could pay him the agreed fare. The victim (PW1) together with the appellant remained at Mtonga for about half an hour. Late on, the appellant informed PW1 that he has received a call through a phone from his friend to the effect that he was at Kilole area. In that regard, the appellant asked PW1 to go to Kilole area. The victim (PW1) responded positively. When they arrived at Kilole, the appellant's friend denied paying the fare in question. Following such denial the complainant decided to live the place. PW1 also testified that in the course of leaving the place he was suddenly attacked and strangled by the appellant and his friend on his neck. He added that the appellant together with his friend managed to steal the complainant's money 164,000/= Tshs and a mobile phone make NOKIA valued at 90,000/= Tshs. The complainant (PW1) adduced further that in the course of strangling

action, he cried for help. Following such cries for help, two people appeared to rescue him but the appellant together with his friend managed to escape from the scene of crime. PW1 reported the incident at Korogwe police station and following that report, the appellant was apprehended. This piece of evidence was confirmed by D 4146 D/CPL Anyetike (PW3) a police officer from Korogwe police station. PW3 testified further that in the course of interrogation, the appellant confessed to have strangled the complainant. The caution statement to that effect was produced and admitted as exhibit P2. Moreover, when the incident was reported at Korogwe police station, the victim was given PF3 to go to the hospital for treatment. This information was confirmed by Ashura Ally Chuma (PW2) a clinical officer at Magunga hospital. The witness (PW2) produced PF3 which was admitted as exhibit P1 justifying that the complainant was assaulted and strangled by a blunt object and sustained injuries on his neck. The appellant was charged and arraigned in the District Court at Korogwe facing the charge of armed robbery. Basing on the evidence, the trial court found the appellant guilty, convicted him and punished him accordingly.

Dissatisfied with both conviction and sentence, the appellant lodged this appeal. In the main, the appellant complains that the charge against him was not proved beyond reasonable doubt and therefore the trial court ought to have not convicted and punished him

At the hearing of this appeal, the Appellant appeared in person-unrepresented, while the Respondent was represented by Miss Akyoo Learned State Attorney.

In arguing the appeal, the appellant adopted his three grounds of appeal and opted to hear first from the Learned State Attorney for the Republic.

Submitting, Miss Akyoo supported the appeal for the following reasons. In the first place, the Learned State Attorney contended that the charge sheet filed in the trial court did not disclose the charged offence against the appellant. Elaborating, the Learned State Attorney contended that the accused person was charged with the offence of Armed Robbery contrary to section 287A of the Penal code [Cap. 16. R. E 2002] of which no dangerous or offensive weapon was used. So, the Learned Counsel pointed out that the trial magistrate erred in law for arriving at a conclusion that the particulars of offence in the charge sheet constituted the offence of Armed Robbery. The Learned Counsel concluded the point by stating that from the evidence on record together with the particulars of offence did not establish that the appellant commit the offence of Armed Robbery.

Secondly, the Learned State Attorney supported the appeal on ground that the caution statement of the accused person was not recorded within four hours, the prescribed period in terms of sections 50 and 51 of the Criminal Procedure Act [Cap 20 R.E 2002].

Advancing her argument, the Learned State Attorney stated that the evidence of D4146 CPL Anyetike (PW3) indicated that the statement was recorded on 17/6/2011 and according to the facts the accused was arrested on 15/6/2011. In that regard, the Leaned Counsel submitted that the accused/appellant's cautions statement was recorded after two days from the date of his arrest. The Learned State Attorney concluded this point by contending that the caution statement exhibit P1 which formed the basis of conviction was unlawfully admitted.

The third ground of which the Learned State Attorney supported this appeal is in respect of an inquiry. Miss Akyoo submitted on the point that despite the fact that the accused retracted the caution statement an inquiry was not conducted by the trial magistrate. The Learned State Attorney referred this court to the case of **Mereji Logori, V. R, Criminal Case Appeal No. 14 of 2010, CAT at Arusha [unreported]** to the effect that if the prosecution intends to tender the caution statement in court as evidence in subordinate court and the accused object to its admissibility the next step is to conduct an inquiry. The State Attorney concluded the point that in present case an inquiry was not conducted.

The fourth ground of which the Learned State Attorney supported the appeal is about calling witnesses. Explaining, the Learned State Attorney argued that the witnesses who were at the scene of crime were not called in court to give evidence. She added that even the arresting officer was not called to come and

testify on the matter. The Learned State Attorney referred this court to the decision in the **case of Amos Paulo and Another v. DPP, Criminal Appeal no. 308 of 2009, and CAT at Arusha (unreported)** to the effect that the arresting officer ought to have adduced evidence in respect of when the incident was reported to the police and how the appellant was arrested.

In conclusion, the Learned Counsel urged the court to quash the conviction and set aside the sentence imposed against the appellant.

In his rejoinder, the appellant supported the arguments of the Learned State Attorney.

As revealed earlier, basically, the appellant complains that the charge against him was not proved beyond reasonable doubt. His complain has merit because of the following reasons: As correctly submitted by the Learned State Attorney, I have read the contents of the charge sheet as contained in the particular clause of the charge sheet and observed that it does not reveal the offence of Armed Robbery. Likewise, upon perusal of the evidence on record I have noted that the record does not indicate any type of weapon used by the appellant in committing the alleged offence of Armed Robbery. The law is very clear that for the offence of Armed Robbery to be committed, there should be the use of any weapon or dangerous arm. This is accordance with section 287A of the Penal Code [Cap. 16 R. e 2002].It was also insisted in the **case of Michael**

Joseph vs. Republic [1995] T.L.R 278 by the court of Appeal that though there is no express and specific definition of what constitutes "armed robbery" it is clear that if a dangerous or offensive weapon or instrument is used in the course of a robbery such constitutes armed robbery. In the present case the record does not indicate that the appellant was armed with any dangerous or offensive weapon or instrument. In that regard, with due respect, the trial magistrate misdirected himself in arriving at the conclusion that the use of actual violence in this case constitutes the offence of Armed Robbery. Moreover, section 300 of the Criminal Procedure Act [Cap 20 R. E 2002] empowers this Court to convict the appellant for the lesser or minor offence. However, in the present case, the evidence on record does not prove the offence of Robbery with violence which is a minor offence to the offence of armed robbery.

In addition, the evidence of PW1 to the effect that after the accused person/appellant and his colleague strangled him, he shouted and two people came to help him is doubtful for lack of corroborative evidence from those people whom he neither named nor described. Section 143 of the law of Evidence Act [Cap 6 R.E 2002] clearly provides that no particular number of witnesses is required to prove a case, however in the circumstance of this case, PW1 ought to have assisted the prosecution and the trial court by naming those who turned out to rescue him from attackers and hence summoned to adduce corroborative evidence. So, the absence of their evidence weakened the prosecution case.

Another shortfall in this case is on the caution statement. As correctly submitted by the Learned State Attorney for the Republic since the appellant retracted the statement, before admission, the trial magistrate ought to have made an inquiry to determine the appellant's voluntariness in recording that statement. Therefore in view of the decision in the case of **Mereji Logori V. R [supra]** with due respect the trial magistrate erred in law for admitting the appellant's retracted caution statement without conducting an inquiry. In that regard, exhibit P1-caution statement is hereby disregarded.

Having re-evaluated the evidence on record, depicted the shortfalls in the prosecution case and disregarded the caution statement, I am of the settled mind that the remaining evidence neither proved the charge nor any minor offence against the appellant beyond reasonable doubt. It follows therefore, that the appeal has merit, it is hereby allowed by quashing the conviction and setting aside the sentence. The appellant should be released forthwith from jail unless is withheld for another justifiable cause. It is so ordered.

U. MSUYA, J.
17/3/2014