IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 151 OF 2017
(Originating from Kibaha District Court in
Criminal Case No. 115 of 2016)

SALEHE ABDALLAH	.....	**1ST APPELLANT**
EDWARD ABDALLAH	.....	**2ND APPELLANT**
	VERSUS	
THE REPUBLIC	.....	**RESPONDENT**

JUDGMENT

6/6/2018
G.J. Mdemu,J

The two brothers SALEHE ABDALLAH and EDWARD ABDALLAH were convicted, as jointly charged by the District Court of Kibaha for two counts to wit Armed Robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002 as amended by Act No. 3 of 2011 and causing grievous harm contrary to section 225 of the Penal Code, Cap. 16 R.E. 2002. On 13/2/2017 the two brothers, Appellants in the present appeal were each sentenced to 30 years imprisonment and 7 years imprisonment for the first and second counts respectively, the sentences of which were to run concurrently. They preferred this appeal against both conviction and sentence.

Brief facts of the case that led to their conviction are summarized as follows:- On the 29th day of September, 2016 at Mbwate kwa Mathias area within Kibaha District the two Appellants invaded and subsequently assaulted PW1 at his farm using clubs

and "pangas". They also tied him in the tree as they continue to assault and managed to part away with some documents, a mobile phone make TECNO and Tshs. 600,000/= and hidden in their house located near PW1's farm. The Appellants called PW3 who went at the *locus in quo* only to find PW1 bleeding and being tied in the tree. Later, PW3 reported the incident at the Police Station whereby PW2 and other police fellows found PW1 under restraint of the Appellants. The latter informed PW2, PW3 and the crowd at the *locus in quo* that PW1 invaded their father's farm, hence the assault. As PW1 claim to be robbed, a search was mounted at the Appellants residence by PW2 in the presence of PW3 and PW4 whereby a mobile phone make TECNO and Tshs 50,000/= were recovered. The two Appellants admitted to have taken the mobile phone (exhibit P1) but denied to have robbed 600,000/= Tshs. and that the recovered 50,000/= Tshs. (exhibit P2) is the property of the 1st Appellant. By this evidence, the learned trial magistrate made the following assessment at page 8 of the typed judgment:-

> *".....however, both of them denied to steal the mobile phone of PW1 but they admitted to take it as they said they kept it for him. However, they failed to tell the Court as to why they denied to bring it back to PW1 when they were asked by him as well as by Police Officers to do so. In addition to that, DW1 and DW2 denied to use stick, Panga and knife as alleged by PW1 even though they admit to put PW1 under their arrest alleging that he had stole Cashewnuts from their farm".*

Having expounded and analyzed such evidence from both prosecution and defence, the learned trial magistrate quoting section 287A of the Penal Code as amended, made the following observation at page 9 of the typed judgment:-

> *"Therefore there is no doubt that with violence against PW1, the accused managed to steal mobile phone, documents and cash of which immediately were found in their house. And DW1 and DW2 admitted to take the mobile phone of PW1 of which they alleged to keep for him, in their house but the question is: is it possible to keep a property of another person without his consent? clearly this amount to theft".*

Consequently, the learned trial magistrate found the two Appellants guilty of armed robbery and convicted them accordingly. Aggrieved by both conviction and a 30 years sentence in prison, the Appellants filed a joint petition of appeal with separate 13 grounds for each Appellant hence 26 grounds which boil down to this and summarised that:- **First**, the trial magistrate erred in convicting the two Appellants on evidence not proving the offence of armed robbery, **second**, the conviction was bad in law for banking on weakness of the defence case and **third**, that the doctrine of recent possession was wrongly applied by the trial Court.

To prosecute the appeal, Appellants appeared in person. The Respondent Republic was under the service of Ms. D. Masinde, learned State Attorney. The petition of appeal was detailed and the

Appellants had nothing useful. They insisted on being wrongly convicted on a case never proved and reliance on defence weaknesses by the trial Magistrate.

On her part, Ms. Masinde could not oppose the appeal. She argued all 26 grounds of appeal jointly. She submitted that the evidence on record do not constitute the offence of armed robbery. The controversy hinged on ownership of landed property of PW1 which the Appellants claimed to be the property of their father. Conduct of the Appellants for not releasing PW1 waiting for their father do not constitute mensrea of robbery, the learned State Attorney added. She further concluded that the evidence on record established the offence of grievous harm and not armed robbery.

The issue pertinent for determination is whether the two brothers Appellants by invading, assaulting and grabbing a mobile phone of PW1 committed the offence of armed robbery. Section 287A of the Penal Code Cap. 16 [R.E. 2002] as amended constitute the offence of armed robbery in the following phrase:-

> *"Any person who steals anything and or immediately after or by the time of stealing is armed with dangerous weapon or instrument or is in company of one or more persons and at or immediately after the time of stealing uses or threatening to use violence to any person commits the offence termed armed robbery".*

In the just quoted section, the offence of armed robbery is complete if there is theft. Robbery simply connotes the manner through which theft is made into reality. It is in theft or stealing as one may call, one can hold existence of motive of crime which must be proved to exist as an essential element of a crime. **Dr. S.S. Srivastava** in his commentaries "Criminal law, Indian Penal Code, 2001 at page 425 made the following comments on robbery:-

> *"Robbery is an aggravated form of theft or extortion. According to the authors of the Penal Code: there can be no case of robbery which does not fall within the definition of either theft or extortion, but in practice it will perpetually be a matter of doubt whether a particular act of robbery was a theft or extortion...".*

In the present appeal, PW1, PW3 and DW2 are recorded that the two Appellants put PW1 under restraint waiting for their father following dispute over land ownership between PW1 and the Appellants' father. According to PW3, PW1 was assaulted and put under restraint because:-

> *"The first accused said that PW1 was pincking up cashew nuts "Korosho" from their farm. He also said that "huyu ana ugomvi na baba wa shamba leo tumempata", at the moment the first accused had a knife in his pocket. Hence as a leader I asked them to go to police so that we bring the said thief (PW1) but the*

first accused denied saying that they should wait for their father".

Much as the Appellants admitted to have taken the mobile phone from PW1, but the evidence on record do not establish to have done so with any intention or motive towards theft. It is not common and wholly unusual for robberers to wait at the scene of crime for the police or anybody to come. The second Appellant manifested such an uncommon phenomenon when cross examined at page 41 of the proceedings thus:-

"Yes we would have sent him to the village officers but we did not go there and we did not allow people to take him to the village office but we wanted the police to come".

Truly, PW2 and the police met the Appellants with PW1 while the latter was tied in the tree and bleeding. Had the Appellant mounted with any intention or motive of robbing PW1, they could not have conducted themselves that way. The statement that *"huyu ana ugomvi na baba wa shamba leo tumempata"* to me is a manifestation of revenge following dispute over the land pending in land tribunal between the Appellant's father and PW1. Infact on the fateful day, PW1 attended the land tribunal and decided to pass by the disputed land. Had the trial magistrate considered this evidence, obviously he could not have convicted the two brothers with armed robbery. Ofcourse, in his judgment appeared to have invoked the doctrine of recent possession but as submitted by the

Appellants, and for the evidence on record, the trial Magistrate could not have held so as nothing was stolen. The Court of Appeal in **Ally Bakari and Pili Bakari Vs. Republic [1992] TLR** at page 10 held that:-

> *"...the prosecution of guilty can only arise where there is cogent proof that the stolen thing possessed by the accused is the one that was stolen during the commission of the offence charged, and no doubt, it is the prosecution who assumes the burden of proof".*

As demonstrated, there was no motive towards stealing. Circumstances surrounding the present appeal required the trial magistrate to apply the principle with a great caution. In his evidence, PW1 claimed to have been robbed 600,000/= Tshs. A search mounted on the spot recovered only 50,000/= in the first Appellant's bag and a mobile phone as recorded in exhibit P.4. It is dangerous to trust PW1 without any corroborative evidence. The prosecution case never proved this fact. Equally, even the mobile phone which Appellants admitted taking it, was not meant to be stolen. As reiterated above the Appellant's conduct is devoid of any motive towards theft or robbery. In conclusion thereof, I find that the offence or armed robbery as charged in the first count was not proved. A conviction thereof is quashed and a sentence of 30 years in prison for the two Appellants is hereby set aside.

As recorded, Ms. Masinde partly supported the appeal for the offence of armed robbery while holding that the Appellants ought to

have been convicted for the offence of grievous bodily harm. The learned trial magistrate discharged this duty by convicting the Appellants with grievous harm and sentenced each of the Appellant to seven years in prison.

There is no doubt that PW1 was injured by the Appellants. Prosecution witnesses that is PW1– PW6 all indicated that PW1 sustained injuries a fact which is not disputed by the Appellants. Exhibit P.8, the PF3 indicates that PW1 had cut wound in his finger and lost his two teeth. The trial magistrate was therefore justified to find the two brothers responsible for injuries sustained by PW1. A conviction was therefore meritorious.

As to the sentence, section 225 of the Penal Code which the two Appellants stand convicted and sentenced reads as follows:-

> *"Any person who unlawfully does grievous harm to another is guilty of an offence and is liable to imprisonment for seven years".*

The learned trial magistrate sentenced the Appellants to a custodial sentence of seven years in prison. He met the maximum sentence. The question is whether this Court can interfere the sentence so imposed. The principle on sentence interference was laid in **Hatibu Gadhi and others Vs. Republic 1996 TLR 12**. In this, the Court of Appeal stated, thus:-

"An appellate Court will not interfere with the sentence imposed by the trial Court unless such sentence is manifestly excessive".

This principle was also expounded in **DPP Vs Pyrari Kanji, Criminal Appeal No. 8/1981 [see Chipeta, Criminal law and Procedure: A digest of cases] 2nd edition, 2010 at page 97)**. It is only when the sentence was excessive, illegal, or based on improper factors that the appellate Court may interfere. The sentence in the present appeal is seven years for grievous harm. The maximum sentence as provided in section 225 of the Penal Code is seven years. The trial courts' sentence was illegal as in terms of section 170 (1) (a) of the Criminal Procedure Act, Cap. 20, the trial court's sentencing jurisdiction was limited to not more than five years imprisonment. For clarity, the section is reproduced, thus:-

Section 170 (1) "A subordinate court may, in cases in which such sentences are authorized by law, pass any of the following sentences:-

(a) Imprisonment for a term not exceeding five years. Save that where a Court convicts a person of an offence specified in any of the schedules, to the minimum sentences Act which has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment".

The offence under section 225 of the Penal Code is not scheduled in the Minimum Sentences Act, Cap. 90. The sentence of

seven years imprisonment met by the learned trial Magistrate was illegal as he lacked jurisdiction to impose a custodial sentence exceeding 5 years. Interms of section 170 (2) of the Criminal Procedure Act., the record of the trial Court was to be transmitted to the High Court for confirmation of sentence.

As this was not done, and owe to the circumstances surrounding the whole case and that the same arose from land dispute, the sentence of seven years imprisonment is hereby set aside and substituted in lieu thereof with a sentence of 18 (Eighteen) months imprisonment. The sentence to run from the date of conviction and sentencing of the trial court.

It is so ordered.

Dated at Dar es Salaam this 6th day of June, 2018.

G.J. MDEMU
JUDGE
6/6/2018

Judgment delivered today the 11th day of June, 2018 in presence of the two Appellants and Ms. D. Masinde, State Attorney, for the Respondent Republic.

G.J. MDEMU
JUDGE
11/6/2018