THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 156/2019

(From the District t Magistrate Court of Momba, at Momba Songwe , Criminal Case No. 36/2018)

1. SEIF OMARI NGWATA@KAZOLE/BABU.....1st Appellant
2. JACOB SIMON MBUKWA.....2nd Appellant
3. LAZARO VENANCE SINKAMBA.....3rd Appellant
4. IBRAHIM ANYAMLE KIBONA@IBRA.....4th Appellant

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 26.03. 2021

Date of Judgment: 24.03. 2021

MAMBI, J.

In the District Court of Momba, at Momba Songwe, the appellants **were** on 27th Day of January 2018 arraigned and jointly charged for armed robbery c/s 287A of Penal Code Cap 16 [R.E.2019]. The other

two accused (1st and 2nd) were also charged with gang rape c/s 131(1) (2) of Penal Code Cap 16 [R.E.2019].. It was alleged that on the material date, at midnight hours at Majengo Mapya Street Area, Tunduma Town within Momba District, the appellants jointly and together did break and enter the dwelling house of one Ms Wema d/o Christopher Pela and successfully stole various properties such as Mattres (Godoro) valued at 300,000/= , TV Samsung valued at 1,400,000/= , Computer (PC) Toshiba valued at 1,000,000/= , Three blankets valued at 180,000/=. The other properties were Bed sheet valued at 500,000/=, 10 pair of Vitenge valued at 300,000/=, ten pairs of shoes valued at 200,000/=, one suit valued at 90,000/=, mobile phone (sum sung) valued at 180,000/=, one hand bag valued at 50,000/=, one charger of DSTV valued at 50,000/=. The appellants are alleged to have used force to obtain and retain stolen properties. It was further alleged that in the course of committing armed robbery, the 1st and 2nd accused persons did have carnal knowledge to one Ms.Anipha (a girl of 20 years old).

The records reveals that the prosecution paraded 20 witnesses and tendered various exhibits including cautioned statements and

extrajudicial statements. The trail District Court found all of them guilty of an offence of armed robbery and they were sentenced to thirty years imprisonment. On the other hand, the 1st and 2nd accused persons were also convicted of gang rape and sentenced to life imprisonment.

Aggrieved by the decision of the District Court, the appellants appealed to this court basing on six grounds as follows;

1. That the trial magistrate erred in law and fact by convicting and sentencing the 1st, 2nd, 3rd and 4th appellants with the offence of Armed Robbery as he failed to evaluate evidence adduced by the prosecution side hence basing his conviction and sentence on the weak and forged evidences of the prosecution side.
2. That the trial magistrate erred in law and facts by convicting the 1st and 2nd appellants on the offence of gang rape as the same based on the weak evidences adduced by the prosecution witness PW3 and all other contradictions arising therein.
3. That the trial magistrate erred in law as he failed to comply with mandatory requirement to conduct an inquiry on objected caution statement.
4. That the trial magistrate erred in law as he failed to comply with mandatory requirements of the identification parade and rules of its evidence.

5. That the trial magistrate erred in law and fact by convicting the appellants despite the fact that prosecution side failed to prove their case beyond all reasonable doubts.
6. That the trial magistrate erred in law and facts by convicting and sentencing the appellants despite all the contradictions and controversies of the evidence adduced by the prosecution witnesses.

During hearing, the appellants were represented by the learned State Attorney Ms Kajanja while the Republic was represented by the learned State Attorney Ms.Prosista.

The appellants through their learned Counsel Ms Kajanja submitted that the prosecution did not prove the charges against the accused at the trial beyond reasonable doubt. She argued that there were contradictions of evidence. The learned Counsel further submitted that there were irregularities in conducting identification parade. She contended that the identification parade was done after PW1 who was aware of the appearance of first and second appellant through PW2. She argued that, the witness (PW1) saw the 1st and 2nd appellant at the Police when they just arrested. She further submitted that the Police informed PW2 on the arrest of the appellants and PW2 stayed with the appellants for 2 hours at the Police and for this matter it could be easy for her to inform PW1 who was his saved the appearance of the appellants. She was of the view that it was now easy to PW1 to identify the appellant. She further submitted that identification parade was done contrary to P. G. O. No. 232, Provision

No. (2) (l). My Lord, the samples of the people to be identified were not identical. The learned Counsel further submitted the law is clear that before conduct identification parade, the person to be parade must have some similarities in term of age, appearance, life, length etc. She referred PW14 who was an old man aged 54 and PW13 had 45 years, but they were all paraded with young people for identification.

The learned Counsel further submitted even exhibit P No. 17 and 18 did not indicate the age of the persons paraded for identification. She argued that the appellants were not informed before being paraded for identification parade. Ms Kajanja contended that there was no any evidence that the appellants committed the offences they stand charged. The learned Counsel further submitted the prosecution only relied with caution statements and extra judicial statements. She contended that though the admission of these documents was objected as exhibit, the court didn't make any trial within trial. She referredd the decision of the court in **Salehe Omari vs. Republic, Criminal Appeal No. 353 of 2018, page No. 7 (unreported)**. She prayed the exhibits be expunged from the records. The learned Counsel further submitted the documents/exhibits were not read to the accused/appellants. She refed the decision of the court in **Robinson Mwanjisi vs. Republic, 2003 T. L. R. P. 218**. She contended that the decision of the court based on exhibit P2 (PF3) which was invalid for lack of signature at the name. The learned Counsel further submitted that it appears PW1 was raped at night but on the next day she went to the Hospital and this could show the

sperms of the appellant but the doctor didn't say anything. She contend that the evidence by PW1 who testified that she sent the appellants to PW2 (victim of robbery) and later they come back to rape her (PW1) was uncommon.

The learned Counsel further submitted that PW2 in his evidence testified that he saw the appellant taking properties form the next room, but one can wonder how he saw them while he was in the different room. She argued that, page 22, 23 & 26 of the proceedings, the evidence of PW1 is contradictory. She argued that , the evidence of PW18 (who conducted identification parade) and PW1 was contradictory. She averred that while PW18 testified that identification parade was done at 10am, PW1 said it was at 9am. The learned Counsel further submitted that the witnesses did not identify the appellants at night as per the principles in the case of **Waziri Amani**. She argued that the witness did not explain the light and distance.

The learned Counsel further submitted that the exhibit P11 that was tendered by PW15 shows the victim was raped by different people from the appellants.

The learned Counsel submitted that PW5 who arrested the first appellant testified that he arrested the appellant at 13pm, but the caution statement of the appellant tendered by PW9 indicated that he was interviewed from 8am – 10am the time which he was not yet arrested. She further argued that, even the caution statement of the 2nd appellant was interviewed from 13 – 14 before he was searched.

The learned Counsel submitted that it is was not explained as to why, PW4 testified on different dates as indicated at 130 of proceedings.

The Republic through the learned State Attorney submitted that they don't support this appeal since the prosecution proved the charge against the accused/appellants beyond reasonable doubt. She argued that this is indicated by the victim of armed robbery, the victim of rape and other witnesses. The learned State Attorney averred that learned State Attorney further submitted that the 1st and 2nd appellants were properly identified by PW1 & PW2 as indicated at page 22 & 23 of the proceedings. She argued that the appellants were identified through the bright light from the electricity tube light and the two appellants did rape the victim. The learned State Attorney submitted that PW1 had ample time to identify the appellants. She averred that the 1st and 2nd appellants were also identified during identification parade. The learned State Attorney submitted that PW18 clearly explained on what proceedings of identification parade were made. She was of the view that the argument by the appellant's counsel that the appellants during parade appeared didn't state simplified identification, is baseless. With regard to the caution statement and extra judicial statements, the learned State Attorney submitted that the documents were properly admitted at the trial court in line with the provisions of the law and the appellants didn't object their statements. The learned State Attorney further submitted that extra judicial statement for the 3rd appellant was properly admitted as exhibit 4 at page 44 of

proceedings. She argued that, even extra judicial statement of the 4th appellant was properly admitted as indicated under page 76 of the proceedings. She averred that, the caution statement for the 1st appellant was admitted as exhibit P8.

The learned State Attorney further submitted that the law allows a witness to be recalled like what happened to PW4 as indicated under page 129 of the proceedings in her with section 147 (4) of the Evidence Act. The Republic through the learned State Attorney submitted that the evidence is clear that the prosecution proved the case beyond reasonable doubt.

I have considerably gone through the records and submissions from both parties and grounds of appeal. In my considered view, the main issue is whether all the appellants did commit an offence of armed robbery. The other key issue is whether the first and second appellant also committed an offence of gang rape apart from armed robbery. This issues can be answered based on the answers from an issue that whether the prosecution proved the case beyond all reasonable doubt. Before I answer the above issues I wish to highlight that it is settled law that the prosecution is required to prove the case against the accused persons beyond reasonable doubt. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state (See ***Ali Ahmed Saleh Amgara v R [1959] EA 654***). The state (The Republic) has the primary duty of proving that the accused has committed the *actus reus* elements of the offence charged, with the *mens rea* required for

that offence. This can be reflected and founded on the famous maxim that "*he who alleges must prove*". This means that the principal burden is on the accuser, and in criminal cases the accuser is the prosecution, usually the state". The Court of in ***Christian s/o Kaale and Rwekiza s/o Bernard Vs R [1992] TLR 302*** stated that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case. It is the trait law that in criminal cases the burden of proof has always remained on the state throughout, to establish the case against the accused beyond reasonable doubt. The rationale for this principle and legal position is that since the burden lies throughout on the state (the Republic) , the accused has no burden or onus of proof except in a few cases where he would be under the burden to prove certain matters. This position was clearly clarified and underscored by the court in ***Milburn v Regina [1954] TLR 27*** where the court noted that:

> *"it is an elementary rule that it is for the prosecution (the Republic) to prove its case beyond reasonable doubt and that should be kept in mind in all criminal cases".*

There is no doubt that as this court has already alluded in various cases that a prosecution case must, as the law is, be proved beyond reasonable doubt. The plain meaning of this principle is that the prosecution evidence must be strong to leave no doubt to the criminal liability of an accused person.

Coming back to the issues I raised, I will start first addressing the offence of armed robbery that involve all the appellants. The question before is whether the prosecution at the trial court did prove the charges of armed robbery against the appellant beyond reasonable doubt or not. Since the offence involved armed robbery, I will first refer the elements of such offence and see if the prosecution evidence is water tight to incriminate the appellant with an offence he was charged convicted and sentenced. Indeed the law under the Penal Code, Cap 16 [R.E.2019]. The law that is Penal Code, Cap 16 [R.E.2002] under section 278A reads as follows:

> *"Any person who steals anything, and at or immediately after the time of stealing is* ***armed with any dangerous or offensive weapon*** *or instrument, or is in company of one or more persons, and* ***at or immediately before or immediately after the time of the stealing uses or threatens to use violence to any person,*** *commits an offence termed "armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment".*

The above section implies that for a person to commit an offence under which the appellant was charged, he must be armed with any dangerous or offensive weapon or instrument. The above section further implies that the accused can also be charged with an offence of armed robbery even if he does/they do not have weapon so as they force while they are more than one person. In other words if a person is in company of one or more persons commit an offence using

violence by using weapon or not they will still be committing an offence of armed robbery.

The wordings from the above provision of the law is clear that if a person uses violence to steal anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument or uses or threatens to use violence to any person commits an offence termed "armed robbery. The question at hand is that did prosecution evidence proved that the ingredients of armed robbery were satisfied?

The answers can be extracted from the prosecution evidence and the appellants' caution statements and extrajudicial statements which were admitted at the trial court. It is on records (page 22-23 of the proceedings) that the prosecution witnesses especially PW1 who also identified the appellants' at the identification parade testified that on the mid night of the material date the appellants while armed with various weapons such as "panga" entered her room and forced her to show them the room of the victim. PW1 testified that she saw the appellants taking various properties such as laptop, blanket, bedsheet and other items.

Similarly, the evidence of PW4 (Justice of peace) at page 49 of the proceedings who recorded the extrajudicial statement of the 1st appellant on 15/3/2018 testified that the appellant voluntarily admitted that he jointly with other appellants participated in committing an offence of armed robbery. The evidence of PW4 is corroborated by the evidence of PW8, the resident Magistrate (Justice of peace) at page 74 of the proceedings who recorded the extrajudicial

statement of the 4th appellant on 15/3/2018 testified that the appellant voluntarily admitted that he jointly with other

The evidence of PW4 and PW8 is corroborated by the evidence of PW5 as indicated under page 53 of the proceedings.PW4 testified that the 2nd appellant confessed that he participated in committing an offence of armed robbery jointly with the 1st and 3rd appellants. PW5 further testified that when they searched the house of 3rd appellant he said that he received the stolen TV the 2nd and 3rd appellants.

The records (page 97-99 of the proceedings) further revel that PW12 testified that he recorded the cautioned statements of 3rd appellant where he admitted to have jointly committed an offence of armed robbery with the other three appellants.

Looking at the evidence of the prosecution witnesses at the trial court it is clear that the witnesses testified reliable evidence that proves the appellants committed an offence of armed robbery. The evidence of the prosecution witnesses is also corroborated by confession and admission by some of the appellants through their caution statements and extrajudicial statements. The Court in ***MSAFIRI JUMANNE & 2 OTHERS V. REPUBLIC, CRIM. APPEAL NO. 187 OF 2006 CAT AT MWANZA Pg. 19*** the court held that;

"an accused who confesses his guilt is the best witness".

The records also show that the appellants in their cautioned statement admitted to conspire and participated in breaking the house before they robbing various properties that were later found by the police officers. I wish to reproduce some of the wordings from the second accused (Jakob Mbukwa who was the second accused) cautioned statement as follows:

> *"Nakumbuka mwanzoni mwa Mwezi wa pili mwaka 2018 Riziki Alex aliniambia niwasindikize na tukakubalian kuvunja nyumba kwa kutumia sululu baada ya kuingia tulikuta watoto na kubeba Laptop, TV Flat screen, na godoro moja...."*

Reading between the lines from the above extracted part of the appellant cautioned statement, it is clear that he voluntarily admitted to have committed the offence using weapons such as "sululu" though he did not say if they committed gang rape weapon that is a gun.

The above statement was corroborated by the admission made by Ibrahim Anyawile Kibona in his caution statement at page 2 and 3 as follows:

> *"Nakumbuka mnamo tarehe 26/1/2018 majira ya saa 1;00 usiku tukiwa na wenzangu tulienda kuvunja nyumba.Mimi nilikubaliana na kazi hiyo kwa kuwa haikuwa kazi ngumu.Nakumbuka tulipoingia ndani ya Nyumba Omari na Seif walikuwa wameshika panga. Vitu tulivyokuta na kuchukua ni Vitenge, Mablanketi, Viatu vya kike, TV Flat screen moja...."*

In my view all the above words from the appellants show that they were responsible for the offence of armed robbery and the

trial court rightly convicted and sentenced them. The appellants claim that the caution statements and extrajudicial statements were not properly admitted has no merit since the documents were properly admitted and they did not object as indicated under the proceedings.

The appellants" confession in their caution Statements and Extrajudicial Statements which court found to be taken voluntarily has also clearly showed that they participated in the offence of armed robbery. Similarly, the law is clear on admission of oral evidence. This is found under Section 19 of the Tanzania Evidence Act Cap.6 [R.E 2002] which provides that:

> *"an admission is a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact and which is made by any of the persons and in the circumstances hereinafter mentioned".*

The Evidence Act, Cap 6 [R.E.2006] UNDER Section 33 provides that:

> *"(1) When two or more persons are being tried jointly for the same offence or for different offences arising out of the same transaction, and a confession of the offence or offences charged made by one of those persons affecting himself and some other of those persons is proved, the court may take that confession into consideration against that other person".*

Similarly the court in ***Surujpaul (called Dick) v R [1958] 3 All ER 300*** at 304A-B underscored that:

"A voluntary statement made by an accused person is admissible as a "confession"

The above statements extracted from the accused caution statements are corroborated the evidence of PW20 who at page 142 of the proceeding testified that he witnessed the search of the room by the second accused. PW20 in his evidence testified that he witnessed the search where white bedsheet, one deck, TV flat screens (21inches), DSTV Decoder and two mobile phones were found at the accused room.

The appellants claim that it was wrong to convict them basing on illegal caution statement and extra judicial statement in their grounds of appeal has no merit.

In my considered view all these facts and evidence clearly shows that ingredients of an offence of armed robbery were complete by the act of appellant who forcibly used a knife to threaten the victim and robe various properties. The evidence of both PW2 and PW3 is corroborated by PW6 who was the doctor who testified that he found the bullet at the victim's body.

The appellant argument that the prosecution did not provide reliable evidence has no merit since the prosecution through 16 witnesses and exhibits proved the charges against the accused/appellants beyond reasonable doubt. It is clear from the evidence that the prosecution has proved the case on the offence of armed robbery. The prosecution evidence has established facts and clear evidence that the appellants were at the scene on the material date. In the

premises, I am of the settled mind that the prosecution did properly discharge their duty of proving the case beyond reasonable doubt. This means the appellants' grounds of appeal that the prosecution did not prove his charges beyond reasonable doubt is devoid of merit.

For the reasons I have started, I am of the firm view that the guilt of the appellants was proved beyond reasonable doubt. I am satisfied that the evidence by the prosecution side was strong enough to convict the appellants

The facts and evidence have also established that the appellants voluntarily admitted on their cautioned statements and extrajudicial statements as I reproduced some contests of the caution statement in this judgment. In the light of all that, no reasonable court would have failed to find the appellants guilt. Indeed PW1, PW2, PW3, PW4, PW8, PW12 and other prosecution witnesses , were not only reliable witnesses but also witnesses of truth and their evidence clearly showed that the appellant had clear hand in the offence of armed robbery he stood charged.

In our case the trial magistrate was correct in sentencing the appellant thirty years imprisonment as the charge involved the offence of armed robbery. The Court in ***STEPHANO NDAGIZI AND JAMANNE SAID v REPUBLIC 1994 TLR 62 (CA)*** observed that:

> *"For a sentence of thirty years' imprisonment to be imposed, the charge must be armed robbery".*

In the premises, I am of the settled mind that the prosecution did properly discharge their duty of proving the case beyond reasonable doubt on the offence of armed robbery.

With regard to an offence of gang rape, the prosecution mainly relied on one witness that is PW1. However, my perusal from the record did not reveal if PW1 was actually raped by the appellants. I have no doubt as the law provides that the best evidence is that of the victim, however in my view the weight of that evidence must be thoroughly considered and given proper due weigh otherwise there could no needs of other witnesses. In this regard, one of the key question to be desired is that; was the evidence of the victim (PW1) who was alleged to be raped for several times for a long time by the appellant reliable?. The evidence of the victim show that she was raped for several times while the other appellants collecting properties. However, her evidence was not supported by any other evidence taking into account that she slept with other children at the same room. I understands that the prosecution is not bound to call all witnesses, however in this matter it was crucial to call the other people who slept with the victim to corroborate and give weight the evidence of PW1. The question is was the testimony of PW1 enough to convict the appellant on the charges? As I observed earlier that given the fact that the victim did not testify reliable evidence, it follows that the evidence of PW1 had no proper probative value. This means that the prosecution did not prove the charges on rape against the appellants save for the offence of robbery that was proved beyond reasonable doubt. This means that the 1st and 2nd appellants are discharged from

the conviction based on offence of gang rape. However, I have no reason to fault the findings on an offence of armed robbery to all the appellants reached by the trial District rather than upholding its decision.

In the final event the appeal on an offence of armed robbery is non-meritorious and it is accordingly dismissed. All the appellants (each) shall serve the sentence of thirty years imprisonment from the date they were sentenced by the trail court. Order accordingly.

A. MAMBI
JUDGE
24/03/2021

Judgment delivered in Chambers this 24th day of March 2021 in presence of both parties.

A. MAMBI
JUDGE
24/03/2021

Right of Appeal is fully explained

A. MAMBI
JUDGE
24/03/2021