IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 67 OF 2019

(Arising from Criminal Case No.19 of 2017 of the District Court of Bariadi at Bariadi)

CHACHA LUCAS.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

Date of Last Order: 18/11/2019
Date of Judgment: 12/02/2020

JUDGMENT

C. P. MKEHA, J

This is an appeal from a decision of the District Court of Bariadi, convicting the appellant, Chacha s/o Lucas of an offence of armed robbery under section 287A of the Penal Code. Before the trial court, the appellant was charged with an offence of armed robbery it being alleged that, on 10th day of January, 2016 at Nassa Ginnery Village, within Busega District in Simiyu Region, the appellant, did steal TZS. 5,000,000/= the property of Mwanaidi d/o Chacha and that, immediately before the time of such stealing and in the company of five other persons who were not prosecuted, while armed

with iron bars, knives and machetes, did use the said weapons to assault the said Mwanaidi d/o Chacha on several parts of her body in order to retain the stolen amount of money.

When the charge was read over to the appellant, he protested his innocence. Five witnesses testified for the prosecution. The appellant defended himself. At the end of trial, the appellant was found guilty. He was convicted and sentenced to be imprisoned for thirty (30) years.

Dissatisfied, the appellant appealed to this court. The appeal consists of four grounds as hereunder:

1. That, the trial court erred in law and in fact in holding that the prosecution side proved its case beyond reasonable doubt at the required standard against the appellant;
2. That, the trial Magistrate erred in fact by accepting unreliable evidence adduced by prosecution witnesses;
3. That, the trial Magistrate erred in law by relying on more words adduced by prosecution witnesses and
4. That, the defence case was not considered.

When the appeal came up for hearing, the appellant appeared in person. On the other hand, Ms. Tuka learned State Attorney appeared for the Respondent/Republic.

It was the appellant's submission that PW3 testified that he (the appellant) was not a thief. The appellant added that, there was no sufficient evidence on record proving the offence of armed robbery. The appellant finalized his submissions by insisting that the defence was not considered by the trial court at all.

Ms. Tuka learned State Attorney declined to support the appeal. It was her submission that, the offence of armed robbery had been proved to the required standard. According to the learned State Attorney, there were no chances of mistake in identification of the appellant who used to be the victim's boyfriend.

The learned State Attorney went on to submit that, PW2 and PW3 arrived at the scene of crime immediately after the event. The learned State Attorney added that, PW2 was on record to the effect that, when he arrived at the appellant's premises, he found the appellant holding a piece of iron bar. The learned State Attorney further told the court that PW2 testified to have seen the victim's injuries on her head.

The learned State Attorney conceded that it was true that the trial Magistrate did not give sufficient reasons for disregarding the defence case. She however maintained that, the victim's evidence was reliable. The learned State Attorney faulted the appellant for failure to offer reasons why the victim's story should not be believed. She prayed for dismissal of the appeal.

From the appellant's submissions, the main complaint appears to be failure of the trial court to evaluate evidence thereby arriving at a conclusion that there was sufficient evidence proving the offence of armed robbery. The appellant insisted during hearing of the appeal that, there was no such evidence on record. On the other hand, the learned State Attorney found no good reasons of not believing the victim's story. As such, she maintained that there was ample evidence on record to sustain a conviction on the offence charged. Reference was made to different portions of evidence as testified by the victim (PW1), PW2 and PW3. There was also a concession on part of the learned State Attorney that, indeed, the trial Magistrate offered no reasons for disregarding the appellant's defence.

As the first appellate court, for cases originating from District Courts or Courts of Resident Magistrate, the High Court has a duty to re-evaluate and reconsider the material evidence before the trial court and make its own independent conclusion on whether or not the findings of the trial court should stand. That is a duty I will shortly turn to do.

As I approach the task of re-evaluating and considering the evidence available on record, I am mindful that, this court never saw nor heard the witnesses' testimonies but the trial court. **See: Okeno Vs The Republic [1972] EA 32.** See also: **Salim Petro Ngalawa Vs The Republic, Criminal Appeal No.60 of 2003, CAT at Arusha (unreported).**

PW1 (the victim) is on record to have testified before the trial court that on 10/01/2016 at about 23:30 hours the appellant and other persons (not prosecuted along with the appellant) assaulted her (PW1). As that happened, a kerosene lamp was on to enable the victim identify the appellant whom she knew well. The appellant happened to be PW1's boy friend at the time relevant to this case. PW1 testified further that, as a result of the said assault, she was severely injured and rendered momentarily senseless as to be admitted at Magu District Hospital for one week and thereafter at Bugando Referral Hospital for four (4) months.

There was no specific testimony on part of PW1 to the effect that the appellant and his company did steal TZS. 5,000,000/= as alleged in the particulars of the offence charged. Reference to the said amount of money in PW1's testimony, had nothing to do with stealing.

The testimonies of PW2 and PW3 were to the effect that, they happened to be among those who ran to the victim's aid upon hearing an alarm being raised. That, when they arrived at the appellant's house, they found the house locked from inside. Even when they knocked at the door the appellant was not ready to open the door for them. They decided to break the door. They found the victim lying on the floor. The victim complained to them that she had been heavily assaulted and injured. PW3 testified that, upon breaking the door, they found the appellant holding a piece of iron bar into his hands. When the appellant was associated with the victim's assault, his response was that, his wife was suffering from demons. PW2 considered the event as that of husband and wife who were fighting. The two witnesses participated in the event of referring the victim to the hospital. None of the two witnesses testified on the aspect of stealing.

PW4 happened to be a Medical Officer, who treated the victim on the night of the event. His testimony was briefly that, on 11/01/2016 at about 00:25 hours, attended the victim who was brought before him along with PF3 from Nyashimo Police Station. The witness testified that, the victim (PW1) had wounds and several bruises all over her body. The witness could recall a fracture on the victim's left hand, bruises at the right ear, chest and stomach. The witness added that, the victim was by then unconscious. Having rendered first aid to the victim, PW4 referred her to Magu District Hospital for further treatment. PW4 tendered into evidence, PF3 which indicates that, as a result of what befallen her, the victim suffered dangerous harm.

No. H.441 DC Maira, testified as an investigator of the present case. He appeared in court as the fifth prosecution witness. According to this witness, the initial complaint when he was assigned the case file in question, was causing grievous harm to PW1. That was on 11/01/2016. The witness could recall the way he drafted a charge sheet in respect of the offence of causing grievous harm to the victim. The witness failed to record the victim's statement on 11/01/2016 as she (the victim) was still unconscious. According to PW5, the victim's statement was later on

recorded by a fellow police officer. Since the witness did not record the victim's statement, he was unable to testify on what did the victim state in her formal complaint to the police. This witness too, did not link the appellant with the alleged stealing of TZS. 5,000,000/=.

The appellant's defence was in short that, there was no basis for withdrawal of former charges of causing grievous harm thereby substituting them with charges of armed robbery. According to the witness, none of the prosecution witnesses testified on how he stolen TZS. 5,000,000/= from PW1. The appellant insisted that PW2 and PW3 confirmed to the trial court that he (the appellant) was not a thief. The appellant testified that, if anything, the two witnesses testified on domestic conflicts that existed between himself (the appellant) and the victim.

It was the trial Magistrate's finding that there was sufficient evidence that the appellant and his company stolen from the victim TZS. 5,000,000/= and that, immediately before the said stealing there was actual use of dangerous weapons in assaulting the victim. It was the trial Magistrate's finding that the appellant had failed raising doubt to the prosecution's case as he merely narrated a story on how he was arrested. The trial Magistrate

finally found that, a charge of armed robbery had been proved. She therefore convicted the appellant of the said offence.

An important question that arises is whether the trial court's finding is justified by the evidence on record. Whereas the appellant maintained that there was no such evidence, Ms. Tuka learned State Attorney was of the firm stand that there was ample evidence on how the appellant committed armed robbery.

The evidence on record indicates that following the victim's assault she was rendered unconscious. However, before losing consciousness she had managed to identify her boyfriend whom she had lived with as husband and wife for a considerable period of time. Although it was during night hours, a kerosene lamp aided her to identify her boyfriend. The appellant did not seriously challenge the said identification. From the testimony of the victim there was nothing suggesting that the appellant and his company did steal from her. The only part referring to the victim's money in the said testimony was to the effect that she once told her boyfriend that she had TZS. 5,000,000/= and that she even shown to her boyfriend a place where she kept the said money. She never testified on stealing.

PW5 who investigated this case denied to have ever recorded the victim's statement. He testified that, the victim's statement was recorded by a fellow police officer. This witness did not specifically testify on the aspect of stealing. All what he could recall was the fact that, he initially arraigned the appellant for an offence of causing grievous harm to the victim. The witness could not explain how the charges changed to that of armed robbery.

PW2 and PW3 who responded to the victim's aid testified that, upon arriving at the appellant's premises, they found the door locked from inside. Despite knocking, the appellant never opened for them. On breaking the door, they found the victim lying on the floor. She had been injured on several parts of her body. The victim was crying for help. The appellant who was by then holding a piece of iron bar could not explain as to why his wife/girlfriend had injuries all over her body. The appellant, according to the witnesses, associated his wife's condition with demons. The witnesses explained the event as that of a fight resulting from frequent domestic conflicts that existed between the appellant and his wife.

PW4 who examined the victim medically, testified to have seen injuries and bruises on different parts of her body (victim's). Exhibit P1 indicates that, the victim sustained dangerous harm.

Was this armed robbery case? The evidence on record does not indicate that there was proof of stealing. There can not be armed robbery in the absence of proof of theft. In fact, armed robbery is a form of **stealing** characterized by use of dangerous or offensive weapon or instrument and use or threat to use violence at or immediately before or after such **stealing.** The use or threat to use violence should be directed to any person. The aim of using threats or actual use of violence is to obtain or retain the **stolen property.** Put it otherwise, an offence of armed robbery has the following ingredients:

1. *Stealing;*
2. *Being armed with any dangerous or offensive weapon or instrument at or immediately before or after stealing;*
3. *Use or threat to use violence at or immediately before or after stealing;*
4. *The use or threat to use violence at or immediately before or after stealing should be directed to any person and*

5. *The said use or threat to use violence at or immediately before or after stealing should be for the purpose of enabling the offender to obtain or retain the stolen property.*

Therefore, for failure of the prosecution to specifically elicit evidence proving stealing of the alleged TZS. 5,000,000/=, the holding that an offence of armed robbery had been proved to the required standard was not justified. Actually, had the trial Magistrate properly directed her mind to the evidence on record, she would have found that the evidence established an offence of assault occasioning actual bodily harm under section 241 of the Penal Code.

While I agree with the appellant that there was indeed no proof of the offence of armed robbery, considering his defence, I do not agree with him that he managed in any way to shake the prosecution's evidence on the offence of assault. The appellant's quick reaction would possibly be that, he was never charged with the said offence before the trial court.

On finding that the evidence on record established an offence other than the one with which the appellant stood trial, the next question to the trial Magistrate would have been whether section 300(1) and (2) of the Criminal

Procedure Act applied in the circumstances of the case. Section 300 of the Criminal Procedure Act provides:

1. *"When an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.*
2. *When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."*

From the above quoted provision substitution of conviction is not automatic. The offence to be substituted with must be cognate and minor to the offence that the accused was initially charged with. The two offences must relate one another.

The principle is, an accused person charged with a major offence may be convicted of a minor offence if the minor offence and the major one are cognate, that is to say, both are offences that are related or alike, of the same genus or specie. To sustain a conviction, the court must be satisfied on two things; first, that the circumstances embodied in the major charge

necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence, secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. **See:** 1. **Richard Estomihi Kimei & Another Vs The Republic, Criminal Appeal No.375 of 2016, CAT at Arusha.** 2. **Robert Ndecho & Another Vs The Republic (1951) 18 EACA 171 at page 174.**

The Blacks Law Dictionary defines the phrase **cognate offence** in its 8th Edition at page 1111 to mean, **"a lesser offence that is related to the greater offence because it shares several of the elements of the greater offence and is of the same class or category."**

The charge sheet to which the appellant stood trial indicates plainly in its particulars that, **immediately before the time of such stealing and in company of five other people, while armed with iron bars, knives and machetes, the appellant, did use the said weapons to assault Mwanaidi d/o Chacha on several parts of her body in order to retain the stolen amount of money.**

As indicated hereinabove, in the present case, an allegation of armed robbery plainly included an allegation of an assault. I have demonstrated

how PW1, PW2, PW3 and PW4 testified on the kind of harm sustained by the victim as a result of the said assault. Exhibit P1 was tendered into evidence as a medical proof of the said fact. The appellant was therefore required to defend himself against the allegation of assaulting the victim as well. He merely defended himself against the charged offence of armed robbery. He remained silent on the allegation of assaulting the victim.

The only remaining issue is whether the offence of assault occasioning actual bodily harm is minor and cognate to that of armed robbery. Upon considering all the essential ingredients of the offence charged I have found as a fact that, indeed, as correctly submitted by the appellant, the evidence on record did not prove commission of an offence of armed robbery. However, the remaining ingredients, including all the essential ingredients of a minor offence of assault occasioning actual bodily harm have been proved. I have, I think, sufficiently demonstrated that the particulars of the minor offence were as well plainly included in the major charge thereby giving the appellant notice of all the circumstances constituting the minor offence. It is the holding of the court that the offence of assault occasioning actual bodily harm is minor and cognate in nature to that of armed robbery.

In view of what I have endeavoured to explain hereinabove, I am satisfied that the appellant ought to have been convicted for the minor and cognate offence of assault occasioning actual bodily harm contrary to section 241 of the Penal Code and not armed robbery.

On strength of the foregoing, I invoke the provisions of section 300(1) and (2) of the Criminal Procedure Act, partly allow the appeal, quash the conviction for armed robbery and set aside the sentence earlier imposed against the appellant. In place therefor, I convict the appellant for the offence of assault occasioning actual bodily harm under section 241 of the Penal Code. The appellant is sentenced to be imprisoned for five years. The sentence of imprisonment starts running from the date when the appellant was convicted before the trial court, on 19th June, 2017.

Dated at **SHINYANGA** this **12th day of February, 2020.**

C. P. MKEHA
JUDGE
12/02/2020

Court: Judgment is delivered in the presence of the appellant in person and Mr. Enosh Gabriel Kigoryo, learned State Attorney for the Respondent/Republic.

C. P. MKEHA
JUDGE
12/02/2020

Court: Right of further appeal to the Court of Appeal of Tanzania is fully explained.

C. P. MKEHA
JUDGE
12/02/2020