

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 13 OF 2020

GRACE CHARLES OMARY_____ **APPELLANT**

VERSUS

THE REPUBLIC_____ **RESPONDENT**

(Arising from the decision and orders of the district court of Tarime at Tarime, Hon. Mugendi RM, in criminal case number 46 of 2018 dated 29.01.2019)

JUDGEMENT

Date of last order: 03.06.2020
Date of judgment: 10.07.2020

GALEBA, J

This appeal arises from the decision and orders of the district court of Tarime in criminal case number 46 of 2018. In that case, the appellant was charged on account of armed robbery contrary to **section 287A of the Penal Code [Cap 16 RE 2002] (the Penal Code)**. At the end of the trial, the appellant, **GRACE CHARLES OMARY**, was found guilty and consequently convicted of the offence of armed robbery. Finally he was sentenced to serve thirty (30) years imprisonment.

The facts leading to prosecuting, convicting and the ultimate imprisonment of the appellant, according to the prosecution was that on 20.07.2017 during the night at Kyebikiri Street in Tarime district Mara region one **REHEMA RHOBH MASERO** (the complainant) while at her home alone and asleep she heard a

female voice crying for help at her doorstep. She lit the solar light, opened the window and could see outside a woman lying on the ground screaming for a dire assistance. Upon opening the door in order to offer the needed help, the appellant sprung from the ground, invaded the complainant, grabbed her by the neck and threw her on the ground whereupon two men appeared and cut the complainant on the head and they injured him twice on her left arm by using the same machete. They demanded money and she directed them where the money was and they took her Tshs 300,000/= from her mattress and disappeared from the scene of crime immediately. The complainant raised alarm and neighbors assembled. Amongst those who responded to the alarm had arrested the appellant and brought her to the scene of crime. There after the appellant was taken to the police station for appropriate action.

Both the charge and the facts were denied in the trial court in which case the prosecution called four witnesses to prove the case. The witnesses who were called were **PW1 REHEMA RHOBI MASERO, PW2 CHRISTINA MANAGA, PW3 STEVEN STANSLAUS BENATUS** and **PW4 MASIAGA JOSEPH CHACHA**. In defense, the appellant testified on her own without calling any more witnesses. As stated above, the trial court heard the matter and it finally found the appellant guilty, convicted and sentenced him as earlier stated. The appellant was aggrieved by both the conviction and sentence hence the present appeal in which she raised a total of five grounds of appeal to challenge the judgment

of the district court. The complaints in the respective grounds of appeal may be paraphrased as follows;

"1. The trial magistrate erred in law and fact for not meeting the basic factors of visual identification.

2. The trial magistrate erred in law and fact because there were no prior description and peculiar marks or features of the appellant that was proved rather she was victimized on inconclusive claims backed by dock identification with no identification parade.

3. The trial magistrate erred in law and fact because no police or any expert that investigated the case or made any report to back the case as to how the appellant was arrested.

4. The trial magistrate erred in law and fact for convicting the appellant based on the prosecution evidence which was not credible because of defects of the said evidence as it did not disclose whether the appellant confessed or she told lies to PW3 and the complainant.

5. The trial magistrate erred in law and fact for relying on the prosecution evidence which was dubious and uncorroborated instead of taking into consideration strong defense evidence.

This appeal was heard over the video conference facility with the appellant from a remote location in prison where she was held and Mr. Frank Nchanila learned state attorney represented the respondent arguing also remotely from the National Prosecution Services center in Musoma. The appellant prayed that her grounds of appeal be adopted as her submission is support of the appeal so that Mr. Nchanila could start submitting against the appeal.

On the 1st ground of appeal, Mr. Nchanila submitted that identification was not an issue at all. He stated that **PW1** at page 7

of the typed proceedings submitted that she lit her solar light and she could see the appellant lying on the ground pleading for assistance just outside her house. He added that the appellant and other two men robbed her and they ran away but **PW3** met the appellant and arrested her and brought to the scene of crime. With several other points, Mr. Nchanila submitted that the identification was sufficient and there was no need to hold an identification parade. In respect of this ground I agree with Mr. Nchanila. His submission is meritorious because according to the evidence of **PW1**, before she could open the door she lit the outside solar light and she could see the appellant laying down on the outside pleading for help like a person who needed urgent assistance. From the humanitarian point of view **PW1** opened the door, only to realize she had been, tricked; the appellant grabbed her by the neck, threw her on the ground whereupon the other robbers injured her with machetes. That was not all; according to the evidence of **PW1**, people who responded to her alarm apprehended the appellant and brought her to the scene of crime and she confirmed her identity there and then. According to **PW1**, while at the scene of crime, the appellant admitted committing the crime and even she mentioned her fellow criminals to be **JUMA** and **MWITA** who are petty traders by occupation. **PW2** at page 10 of the typed proceedings confirmed that **PW1** identified the appellant as one of the assailants to the people who responded to the alarm. **PW3, STEVEN STANSLAUS BENATUS**, on the way to **PW1** responding to the alarm, met to the appellant and asked her as to what was the issue at the home of

PW1 but the appellant responded that **PW1** and her husband had a misunderstanding. **PW3** did not believe her so he arrested the appellant and went with her to the scene of crime where she was immediately identified by the appellant as one of the robbers. With this discussion, surely there is no doubt that the appellant participated in the armed robbery subject of the charge and her identification to extent explained, she was properly identified at the scene of crime. Accordingly, the 1st ground of appeal has no merit and it is hereby dismissed.

The complaint in the 2nd ground of appeal was that the trial magistrate erred in law because there were no prior description and peculiar marks or features of the appellant that were proved rather she was victimized on inconclusive claims backed by dock identification with no identification parade. In response to the complaint in this ground, Mr. Nchanila submitted that the lamentations are baseless because, the appellant was apprehended while escaping from the scene of crime and she was brought back to the house of the complainant as immediately as the robbery happened and in the circumstances of this case the identification parade was not necessary. He added that it was irrelevant to disclosing any marks because the appellant was a stranger to the complainant. In any event he submitted, the matters complained of by the appellant were not cross examined upon at the trial. Mr. Nchanila referred the court to page 8 of the typed judgment in **CRIMINAL APPEAL NO 428 OF 2016 BETWEEN MARTIN MISARA VERSUS THE REPUBLIC, (UNREPORTED)**, where it was held that where a crucial point is not

cross examined upon, the same is deemed admitted by the party who failed to cross examine the witness or witnesses on it. The learned state attorney moved the court to dismiss the ground of appeal.

If I fully understand the complaint of the appellant in this ground is that before **PW3** came with the appellant to the home of **PW1** (the scene of crime), the latter (complainant) had not described to those who were already there, the distinctive features describing the robbers including the appellant. If this is the complaint, which I think it is, the same lack rationale, because for the **PW1's** evidence of identifying her, it is not, in my opinion a necessary requirement for her to have described the height, or the complexion or the clothes that she wore. The point is, immediately **PW3** showed up with the appellant, **PW1** pointed at her being the person who grabbed her by the neck and threw her to the ground creating a conducive opportunity for the other male robbers to injure her on the head and the left arm with a machete. I agree with the principle that whoever does not cross examine on a critical matter is taken to have admitted it or its effects as held in **MARTIN MISARA** case (supra) but in this case, the appellant cross examined on the issue only that upon asking the questions the positions were explained better. For instance at page 9 of the typed proceedings when the appellant asked a certain question which sought to know who assaulted **PW1**, the latter responded;

"Your are the one who knocked at mine (sic) you assaulted me by using a panga and piece of iron bar."

This answer suggests that the question which was asked had something to do with identity of the aggressors, which **PW1 REHEMA RHOBH MASERO** clarified as above. Also a closer look at page 13 of the typed proceedings, when responding to the only appellant's question during cross examination, **PW3 STEVEN STANSLAUS BENATUS** who arrested her along the path leading to the complainant's home, he responded;

"I met you coming from pw1's home I did not see you attacking the victim. You were mentioned by the victim to be among of the assailants."

So it is not true that the appellant did not cross examine on the aspect of identity and her participation in the fatal assault inflicted on the appellant as submitted by Mr. Nchanila, only that mere cross examining a witnesses in this case did not justify the complaint in the 2nd ground of appeal or shake the case of the prosecution. In resolving this ground of appeal, this court holds that the trial court did not err on any aspect of identification of the appellant because, **PW3** met her escaping from the home of **REHEMA RHOBH MASERO**, at the time everybody was running towards that point in order to see what was happening, and too, the appellant, in order to maneuver her escape from **PW3** she lied to the latter that the alarm at **PW1's** home was a result of a fight between **PW1** and her husband, but that did not convince **STEVEN STANSLAUS BENATUS** who doubted the truthfulness of the information and apprehended the appellant and presented her to the victim who unhesitatingly pointed to her as one of her aggressors in the presence all those who assembled at her home. That, in my opinion, was enough evidence proving the guilty of

the appellant albeit, circumstantial. With the above discussion, the 2nd ground of appeal is dismissed for want of merit.

The complaint in the 3rd ground of appeal was that the trial magistrate erred in law and in fact because no police or any expert that investigated the case or made any report to back the case as to how the appellant was arrested. In response to this ground Mr. Nchanila submitted that it is true that it is not the police who arrested the appellant, because she was arrested by **PW3**, but he added that the police was fully involved because after she was arrested she was taken to the police and the incidence was reported to the police and the latter gave a PF3 to the victim to go to hospital. So he submitted that the police was involved. In this ground I agree with Mr. Nchanila because, it not a requirement of law that every offender must be arrested by the police. Actually private persons have mandate to arrest offenders under the law. For instance section 31(1) of the **Criminal Procedure Act [Cap 20 RE 2002] (the CPA)** provides as follows;

"31(1) Any private person arresting a person without a warrant shall without unnecessary delay hand over the person so arrested to a police officer or to the nearest police station or, in the absence of either, to the Ward Secretary or the Secretary of the Village Council for the area where the arrest is made."

That means private persons are legally permitted to arrest criminals but only as permitted by law. That is to say, **firstly**, the complaint that the appellant was not arrested by the police is misplaced with no substance and **secondly** according to the evidence of **PW3** at page 13 of the typed proceedings the appellant was thereafter presented to the police, which the

appellant does not deny in her evidence. In my opinion the police was fully involved otherwise, the appellant would not have reached the court. In the circumstances, the 3rd ground of appeal lacks substance as stated above and the same is dismissed.

The 4th ground of appeal, according to the appellant is that the trial magistrate erred in law and fact for convicting the appellant based on the prosecution evidence which was not credible because of defects of the said evidence as it did not disclose whether the appellant confessed or she told lies to **PW3** and the victim. In addressing this ground Mr. Nchanila for the prosecution briefly submitted that the evidence of all witness was sufficient to convict the appellant. Of course there is some obscurity in this ground as framed, because quoted in *verbatim* the ground reads;

"4. THAT, learned trial magistrate erred to believe that the prosecution witnesses were credible despite of fatal deficits and incurable intricacies in their evidence on the material facts, ie whether she confessed and cheated to PW3 and the victim."

Much as I was desirous of understanding the complaint of the appellant in this ground, but I did not understand what was the actual complaint. But I must highlight a point or two; according to the evidence of **PW1**, at page 8 of the typed proceedings, **REHEMA RHOBH MASERO** testified that;

"I identified the accused person to be among of the three assailants, the gathered people interrogated the accused person whether she was among the culprits invaded me (sic). The accused persons (sic) admitted to be among of them and mentioned their names to be Juma and Mwila working as machinga."

There was no question in cross examination by the appellant to challenge this aspect of the evidence of **PW1**. To this court this is

credit to the prosecution case in the above ground especially if the appellant's complaint is that there was any aspect of his admission of the evidence from the prosecution because according to a long string of cases, a person who fails to cross examine on a crucial point incriminating him or which he ought to have refuted by way of cross examination admits its truthfulness if he does not. See **CRIMINAL APPEAL NO 88 OF 1992; CYPRIAN KIBOGOYO VS REPUBLIC CA DSM UNREPORTED, CRIMINAL APPEAL NO 129 OF 2017; ISSA HASSAN UKI VERSUS THE REPUBLIC CA, (UNREPORTED)** and also **MARTIN MISARA VERSUS THE REPUBLIC (supra)**. For instance in **MARTIN MISARA** at pages 7 to 8; the Court of Appeal held;

"It is the law in this jurisdiction founded upon prudence that failure to cross examine on a vital point, ordinarily, implies acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought if raised thereafter."

In the circumstance, the appellant's failure to raise any question on the above portion of the evidence of the victim but her to a disadvantage.

The other point in the 5th ground, is that of telling lies to **PW3**; according to **PW3** when responding to the alarm raised by **PW1**, he woke up and while on the way going to the house of **PW1**, he met the appellant and the latter when asked her as to what was happening at **PW1's** residence, she lied to him that the alarm at **PW1's** home was a result of a fight between **PW1** and her husband, but **STEVEN STANSLAUS BENATUS** doubted the authenticity of the information and apprehended the appellant and upon getting to the victim's house the story was different; the

victim had been invaded by robbers and further that the appellant was part of them according to **PW1**. Again this aspect of telling lies to **PW3** was not cross examined upon by the appellant. That said, this court does not find any useful complaint in the 4th ground of appeal and the same is dismissed for want of merit.

The 5th ground of appeal was that the trial magistrate erred in law and fact for relying on the prosecution evidence which was dubious and uncorroborated instead of taking into consideration strong defense evidence. In reacting to this ground Mr. Nchanila submitted that, according to him, the 4th and this ground bear the same complaint, in respect of which he submitted that the evidence of the prosecution was not at all shaken by the defense. I have studied the entire evidence of the prosecution, but I did not see any evidence which is dubious or uncorroborated. The evidence of **PW1** and **PW3** corroborated each other on the guilty of the appellant. This court is not in agreement with the complaint of the appellant that she had a very strong defence. The defense was evasive wherein she stated that while coming from drawing water she met two men who asked her if she was Grace and when she agreed they arrested her and told her that she is needed to the police and they took her there. She testified that she went to the police under arrest of the two men and after two weeks she was taken to court. This story is different from what she told this court on appeal.

When Mr. Nchanila was done with all the grounds before this court, I asked the appellant if she had anything to supplement her grounds or if she wanted to rejoin anything to Mr. Nchanila's submissions which were made in Kiswahili; she stated that she was arrested at a time when she was very drunk and she did not know anything. She also told the court that she was not given any right to be heard. She stated that no one took her to the police and that she surrendered herself there to get a PF3 without any further elaboration. She finally pleaded for clemency as she had children who have no one to take care of them. The defense of the appellant in the trial court coupled with what she submitted in court, the two do not marry at all. This court is of the view that the complaint of the appellant in the 5th ground, like in the rest grounds, has no merit and the same is dismissed.

Finally since all constituent grounds of the appeal have been dismissed, the whole appeal stands dismissed.

DATED at MUSOMA this 10th July 2020



Z. N. Galeba
JUDGE
10.07.2020

Court; This judgment has been delivered today the 10th July 2020 in the absence of parties. Parties may collect their copies from the judgment collection desk at the reception.



Z. N. Galeba
JUDGE
10.07.2020