IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 04 OF 2020

(C/F Criminal Case No. 429 of 2018 District Court of Moshi at Moshi)

IMAN PAUL KAVISHE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

28th *September & 27th October, 2020*

JUDGMENT

MKAPA, J:

The appellant was charged with and convicted of the offence of Armed Robbery c/s **287A of the Penal Code,** Cap 16 R.E. 2002 by Moshi District Court (P. MEENA, RM) in Criminal Case No. 429 of 2018.

In a nutshell the factual background of the matter is that on 27/07/2017 at around 09:00 hours at Njoro Sokoni area within Moshi Rural District, Kilimanjaro Region, PW2 (Delton S/O Joseph) while on his way from the office of the ward education coordinator two youngster suddenly emerged and scuffle ensued

whereby the appellant took a knife from his trouser's pocket and threatened PW2's to cut off his throat if he dared to raised alarm. During the scuffle PW2 identified the appellant by name as Justine Paul Kavishe @ Maximillian, while his accomplice searched him and ran away with shillings 122,000/= and a mobile phone make Tecno T 472 black in colour. It was further alleged that PW2 immediately reported the matter to Njoro police station the station but unfortunately the station was closed, then he had to report to the Ward Executive Officer (WEO) at Njoro. WEO summoned the militia who searched the appellant and found him in possession of a mobile phone and a knife. WEO called the police who came and sent the appellant to the police station. It was alleged further that, while at the police station the accused confessed to have stolen from PW2.

After a full trial the appellant was found guilty, convicted of armed robbery and sentenced to thirty (30) years imprisonment.

Aggrieved by the judgment and sentence of the trial court, the appellant preferred this appeal praying that the judgment and sentence be quashed and set aside by raising a total of six (6) grounds as follow;

1. That, the trial court magistrate erred in law and fact in overlooking, if not noticing (sic!) that, PW1 (the Police Officer) appeared to have personal interest against the

appellant for being the only officer who participated in re-arresting, interrogating, keeping and bringing the exhibit before the court.

2. That, the learned trial magistrate grossly erred in law in showing bias against the appellant especially when admitting the exhibits in which he overruled the appellant's objections instead of taking place (sic!) in the trial and examine PW1 of the law requirements desired by the appellant. (sic!)
3. The learned trial magistrate erred in failing to adhere to the rule of practice which requires all cautioned statement to be read over before the court after its admission which led to procedural irregularity and prediction of the appellant's right of a fair and just trial.
4. That the trial court magistrate erred both in law and fact in convicting the appellant and sent him to jail despite the fact that "doctrine of recent possession" was not established neither PW2 (the victim) appeared to have identified before the court his alleged phone or the knife which is said to have been used in threatening him with,
5. That, the learned trial magistrate grossly erred in law and fact in apparently not assessing and analysing the prosecution evidence which was left unresolved with inconsistencies and contradictions.

6. That, the trial magistrate erred in failing to apprehend or taking into account the appellant's defence in composing her judgment which vitiated the conviction.

On the date this appeal was set for hearing parties consented the same to be argued by filing written submissions and the court so ordered. The appellant appeared in person unrepresented while the respondent was represented by Ms.Grace Kabu, learned state attorney.

Submitting for the appeal generally the appellant in his submission failed to argue on the grounds of appeal due to language barrier which made it difficult for the court to comprehend. However, what I gathered from the submission on the first ground of appeal is the fact that the appellant challenged PW1 for being biased against the appellant as he was involved in arresting and interrogating the appellant at the same time was the custodian of the exhibits at the police. To support his argument he cited the decision in **Njuguna Kimani V. Regina (1954) EACA 316** where the court held that; "*it is improper for the police officer who is conducting the investigation of a case to charge and record cautioned statement of a suspect*"

The appellant further submitted that, PW1 was not a competent person to tender exhibit P2 and P3 before the trial magistrate. Thus the chain of custody was not established.

The appellant further challenged the trial magistrate for failure to consider the four basic principles of establishing the doctrine of recent possession and further that the testimonies of PW1 and PW4 were inconsistent and contradictory as regards the make and colour of the stolen mobile phone. The appellant further faulted the prosecution for failure to establish the chain of custody relating to the exhibit labelled (PF 145) as the said exhibit passed from one police officer to another without proof of being documented as required by police force internal guidelines. Submitting on the third ground the appellant faulted the prosecution for failure to read out the cautioned statement after being admitted. Submitting for the fourth ground the appellant contended that the prosecution has failed to establish the doctrine of recent possession. He cited the case of **Omari Iddi Mbezi and others V. Criminal Appeal No. 227/2009** to support his argument. On the fifth ground the appellant challenged the inconsistence of PW1 and PW4 testimonies and the fact that the trial magistrate failed to analyse the same in arriving at his decision. Finally the appellant prayed for the appeal to be allowed.

In reply against the first ground of appeal Ms. Grace Kabu submitted that the appellant contention is not supported by the trial court proceedings because PW1 arrived at the crime scene for the purposes of arresting the appellant and further that he did not witness the ordeal. It was Ms. Kabu's view that PW1 was not bias in interrogating the appellant. She went on explaining that PW1 after seizing the exhibit, PW1 handed over the exhibit to the exhibit custodian and the same was brought before the court by exhibit custodian Sergeant Sultan.

Ms. Kabu went on mentioning the basic requirements for the admissibility of evidence in the court of law being relevance, materiality and competence of the person to tender the exhibit. It was Ms. Kabu's view that PW1 was competent in tendering exhibit P2 and P3 respectively, as was the one who seized the same from the appellant and he had knowledge of the exhibits therefore the trial court was right in admitting the same.

As for the issue of chain of custody Ms. Kabu contended the fact that, the same can be established at the closure of the prosecution case and not otherwise. As PW1 was the first witness to testify on prosecution side the appellant's objection on this issue was not a ground for admissibility of evidence.

It was Ms. Kabu's further argument that, Exhibit P4 (appellant's cautioned statement) was read over before the court.

The learned state attorney contended further that, PW2 (the victim) did identify his mobile phone and a knife which was used to threaten him and the same were found with the appellant when arrested.

Furthermore, Ms. Kabu went on submitting that, the evidence tendered by the prosecution side at the trial court was sufficient to prove the offence of armed robbery which the appellant was charged with as the appellant used dangerous weapon to wit; a knife to threaten PW2 and stole the mobile phone and cash money. Also the appellant was clearly identified by the prosecution witnesses.

Furthering her argument Ms. Kabu submitted that, the appellant faulted the trial court in failing to take into account the defence by the appellant. She cited the case of **D.R PANDYA Versus REPUBLIC (1975) EA 336** in which the court held that; "*the first appellate court has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny and if warranted arrived at its own conclusion of fact*"

Finally, the learned state attorney prayed this appeal to be dismissed.

In rejoinder, the appellant reiterated his submission in chief and maintained his stance that the prosecution had failed to prove its case beyond reasonable doubt.

Having considered both parties submissions for and against the appeal, I have observed the fact that all grounds of appeal are centred in challenging the prosecution's failure to prove its case beyond reasonable doubt. Thus the question for determination is whether the prosecution has proved its case beyond reasonable doubt to ground conviction to the appellant for the offence charged? To begin with the issue of biasness and incompetency of PW1 in tendering the exhibits, In **Hamisi Saidi Adam Versus Republic Criminal Appeal No. 529 of 2016 Court of Appeal,** had this to say;

> *"Person who at one point in time possesses anything, a subject matter of trial, as we said in* ***Kristina Case*** *is not only a competent witness to testify but he could also tender the same. It is our view that it is not the law that it must always be tendered by a custodian as initially contended by Mr. Johnson. The test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question. "*

It is on record at pages 10 and 11 of the trial court's typed proceedings on how PW1 being a police officer with investigation knowledge was competent enough to tender the exhibit in question and further that he was not bias in interrogating the appellant as he did not witness the offence being committed at the scene of crime. Thus the first ground of appeal is dismissed for lack of merit.

As for the cautioned statement not being read in court following its admission by the court my perusal of the trial court's typed proceedings has revealed the fact that the cautioned statement was not read in court after being admitted hence the same cannot be acted upon. Thus exhibit P4 is hereby expunged from the court records. Therefore this ground of appeal is allowed.

Having expunged the cautioned statement it is evident from records of submission the fact that the evidence relied upon by the trial court in convicting the appellant is the evidence of identification and appellant's cautioned statement.

In **Wangiti Mansa Mwita and others Vs Republic, Criminal Appeal No 6 of 1995** (Unreported) it was held that the ability of the witness to name the suspect at the earliest opportunity possible is an all-important assurance of his credibility and reliability. The fact that PW2 (the victim) at page 15 of the trial court's typed proceedings was able to identify and name the

appellant at the scene of crime on broad day light when the environment was conducive for identification and also managed to name the appellant before the Village Executive Officer immediately after the incidence and when he reported the incident to the police station is assurance of credibility of his evidence. More so, PW2's evidence was corroborated by PWI (police officer) who searched the appellant at the police station and found him in possession of a knife which was used to threaten PW2 and the same was tendered and admitted as exhibit P3 and the mobile phone which was tendered and admitted as exhibit P2. Thus PW1's testimony strongly corroborated PW2's testimony in proving the case against the appellant.

It is opportune for me at this juncture to point out the fact that the law is settled on the issue of burden of proof in criminal offence to the effect that the burden of proof lies on the prosecution. In **Nathaniel Alponce Mapunda and Benjamin Alphonce Mapunda V Republic** (2006) TLR the court underscored this fact that in criminal trial the burden of proof always lies on the prosecution. The trial magistrate convicted the accused on the strength of the prosecution evidence which in my view suffices to connect the appellant with the alleged committed offence. Thus the prosecution has proved the charge against the appellant beyond reasonable doubt and further that

the trial magistrate did not erred in law and in fact in assessing and analysing the prosecution evidence. This ground is meritless and is hereby dismissed.

In the circumstances, I find this appeal lacks merit. Consequently I dismiss it in entirety.

Dated and delivered at Moshi this 27th day of October, 2020

S. B. MKAPA

JUDGE

27/10/2020