IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CRIMINAL APPEAL NO. 82 OF 2019

(Arising from Criminal Case No. 84 of 2018 in the District Court of Urambo at Urambo)

ADAMU S/O AMRANI @ HUSSEIN

IDDI S/0 MAREKANI @YAHAYA ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

KIHWELO, J.

In the District Court of Urambo, the appellants stood jointly arraigned for two counts which were all predicated under the relevant provisions of Penal Chapter 16 of the laws, R.E 2002 (the Code). More particularly, on the first count, the arraignment was for armed robbery contrary to section 287A of the Code. The particulars were that the appellants on the 2nd March 2018 at or about 21:00 hrs at Kalemela A village within Urambo District in Tabora region, did steal one solar panel make sunar valued at Tsh. 35,000.00 the property of one Asha Said @ Binti Saidi whereby

immediately before such stealing they threatened her by using machete in order to obtain the said property.

On the second count, the statement of the offence was wounding contrary to section 228 of the Code. The particulars were that on 2nd March 2018 at or about 21:00 hrs at Kalemela A village within Urambo District in Tabora region, the appellants jointly and together unlawfully wound one Asha Said @ Binti Saidi on her face by using machete. When the charge was read over and explained to the appellants they all denied and therefore the matter went ahead for full trial.

After full trial, the court was satisfied that the prosecution had proved the case beyond reasonable doubt against the appellants, they were all found guilty as charged and consequently convicted and sentenced to thirty (30) years term of imprisonment for the first count and for the second count they were sentenced to serve a jail term of three (3) years imprisonment and the sentences were to run concurrently.

Unhappy with both the conviction and sentence, the appellants have come before this Court armed with a total of seven (7) grounds of grievance. However, all the grounds raised boil down to the question of evidence. So, in short, the appellants are saying that the evidence on the prosecution case is too weak to ground conviction.

At the hearing before this Court, the appellants were fending for themselves, unrepresented and they merely adopted their grounds of appeal while the respondent Republic was represented by Mr. Tito Mwakalinga, learned State Attorney.

It was the submission of the learned State Attorney that grounds number one and four is about identification of the appellants, he submitted that the appellants were correctly identified. He went on to refer to page 9 of the typed proceedings which indicates that the incident occurred at 21:00hrs and the victim PW1 testified that she ably identified the appellants by the aid of solar light. PW1 testified further that she was in her room when the appellants entered. PW2 at page 11 testified that she heard the appellants commanding PW1 to open the door, also PW2 testified further that she saw two people carrying a machete so they went to seek assistance from neighbors and as they returned back to the scene of the crime they found the two people who were suspected to be bandits had left. During cross examination at page 15 PW3 testified that all the appellants were his sons so the appellants were well known to the witnesses and they could not be mistaken hence the issue of identification is unmeritorious. I must remark in passing that I carefully read the proceedings of the trial court and I noted that PW3 at page 12 and not 15 during cross examination he indicated that he identified the second appellant because he is his son.

The learned State Attorney further argued that there was no contradiction of how the appellants were arrested.

Arguing in response to the fifth ground of appeal, the learned State Attorney strongly submitted that the appellants were not convicted on the evidence of suspicion but rather there was cogent evidence.

On the issue of right to be represented the learned State Attorney strenuously pointed out that the Legal Aid Act 2017, Act No. 1 of 2017 was enacted at the time that the appellants were already facing charges before the court of law and that the matter before this court relates to legal aid in criminal matters and not otherwise. He went further to submit that section 35 (1) of the Legal Aid Act does not require the magistrate or judge to find legal services to the accused persons and that section 310 of Criminal Procedure Code, Cap 20 RE. 2002 (Henceforth "the CPA") talks of the right of the accused to be defended by an advocate, finally he submitted that the case was proved beyond all reasonable doubt.

In rejoinder the first appellant vehemently argued that there was no any exhibit tendered to prove the offence and that the source and typed of the light used in identifying him was not clearly explained. He further submitted that he was born in different village and he never knew PW1, the victim. He further submitted that the issue that PW1 said she went to PW2 and informed him about the incident and that when they came they found the bandits have disappeared was a mere speculation.

The second appellant submitted that they were identified at the police station but not at the scene of crime as alleged. According to second appellant when he cross examined PW1 how she identified him, her reply was that she identified him by the aid of torch light then she talked of solar light. Finally, the second appellant strenuously argued that the prosecution case was not proved beyond any reasonable doubt.

I have carefully considered the rival arguments by the parties to this appeal in the light of the records of the trial court, the grounds of appeal as well as the substance of the oral submission during the hearing of the appeal and I must state that upon cautiously going through the judgment of the trial court I have noted that the trial court in its entire judgment did not analyze the defence case at all despite the serious allegations by the appellants that the entire case was fabricated against them and that the prosecution's case was contradictory. The trial court further never said anything about the allegations that the appellants were never arrested at the scene of the crime but rather both they were arrested at different times at their respective home contrary to the prosecution's evidence. Let part of the judgment of the trial court as appearing at page 9 paint the picture:

> *"On his defence the first accused tried to escape liability by saying that the evidence is cooked as the solar was not brought as exhibit before the court. Also, the second accused said he was charged with the case which he do (sic) not know and the solar which was stolen was not brought.*

In the final analysis from the prosecution evidence find (sic) that the accused persons did commit armed robbery as there is evidence that the victim was invaded, her solar lamp stolen and she was cut with a machete on her fore head, as explained by PW1, PW2, PW3 and PW4. Furthermore, the machete and PF3 tendered by the prosecution side proves the event occurred. As the second accused escaped at first that is why the solar stolen was not found."

In my view, the above clearly demonstrates that the trial court did not analyze the appellant's defence which was improper. I believe that the trial court ought to have analyzed and considered the appellant's defence in order to satisfy itself on whether or not his defence raised a reasonable doubt which is all it was required to do and not merely to mention it as it did in the instant case. Failure to do so constituted a miscarriage of justice in the case and it was a serious error.

The law is very settled and clear on this matter as the Court of Appeal has categorically stated that when a defence, however weak, foolish, unfounded or improbable, is raised by an accused person charged with a crime, that defence should fairly and impartially be considered by the trial court in order to vouch a miscarriage of justice on the accused. Where it may be found that the court(s) below did not observe this principle, there is no better option but to allow the appeal. See **Martha Swai v Republic,** Criminal Appeal No. 247 of 2013. In this case the Court of Appeal noted that the trial court in its entire judgment did not analyze

the defence evidence and the same error was done by the first appellate court despite the appellant complain in ground 6 of the appeal.

For the foregoing reasons, I find the appeal with merit and consequently, I allow it. The appellant's conviction is quashed, the 30 years as well as the 3 years imprisonment sentences are set aside with order of immediate release of the appellants from prison unless lawful held in on another cause.

P.F. KIHWELO

JUDGE

10/12/2020

Judgment to be delivered by the Deputy Registrar on a date to be fixed.

P. F. KIHWELO

JUDGE

10/12/2020

Date: 17/12/2020

Coram: Hon. B.R. Nyaki, Deputy Registrar

Appellant: Present in person

Respondent: Absent

B/Clerk: Grace Mkemwa, RMA

Court:-

Judgement delivered this 17th day of December, 2020 in the presence of the All Appellants but in absence of the Respondent.

Right of appeal explained.

B.R. NYAKI

DEPUTY REGISTRAR

17/12/2020