IN THE HIGH COURT OF TANZANIA

AT MBEYA

CRIMINAL APPEAL No. 86 OF 2020

(Original Criminal Case No. 150 of 2018, in the Court of Resident Magistrate of Mbeya, at Mbeya).

1. BARAKA S/O LUSEKELO KIBONA.....1ST APPELLANT

2. FRIRDAYS S/O MBWIGA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

08/12/2020 & 04/03/2021.

UTAMWA, J.

The two appellants in this first appeal, BARAKA S/O LUSEKELO KIBONA and FRIRDAYS S/O MBWIGA (henceforth the first and second appellant respectively) challenged the judgement (impugned judgement) of the Court of Resident Magistrate of Mbeya, at Mbeya (the trial court) in Criminal Case No. 150 of 2018.

Before the trial court, the two appellants and another (one Boniface s/o Mwaihojo) who is not party to this appeal, stood charged with some counts. The two appellants were charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 R. E. 2002 as

amended by section 10A of Act No. 3 of 2011 (henceforth the Penal Code). The said other person was charged receiving stolen property contrary to section 311 of the same Penal Code.

The particulars of offence regarding the two appellants alleged thus; on the 10th day of July, 2016 at New Forest area within the City and Region of Mbeya, jointly and together, the two appellants did steal one mobile phone make Samsung s3 valued at Tanzania shillings (Tshs.) four hundred and eighty thousand (480,000/=), cash Tshs. nine hundred thousand shillings (900,000) television make Boss valued at Tshs. seven hundred thousand (700,000/=) one laptop make Dell valued at Tshs. seven hundred thousand (700,000/=) the properties of one MELVIS D/O MWANGUPI and immediate before stealing did use a panga, to obtain and retain the said properties.

Both appellants pleaded not guilty to the charge. A full trial thus, followed. At the end of it, they were found guilty as charged, convicted and sentenced to serve thirty (30) years in prison.

Aggrieved by the conviction and sentence the two appellants preferred this appeal. Their joint petition of appeal filed in this court by them was based on ten (10) grounds which can smoothly be condensed to following two grounds only:

1. That, the trial court erred in law and facts in convicting and sentencing the appellants though the prosecution had not proved the charge against them beyond reasonable doubts.

2. That, the trial court erred in convicting and sentencing the appellants without considering their respective defences, especially the one for the first appellant.

Owing to these grounds of appeal, the appellants urged this court to allow the appeal, quash the conviction, set aside the sentence and ultimately set them free.

When the appeal was called upon for hearing, the two appellants had nothing to add to their petition of appeal. It must however, be here noted that, in the usual layman's language used by unrepresented appellants in appeals of this nature, the appellants had raised some complaints against the impugned judgment in the joint petition of appeal. These complaints indeed, constituted the first ground of appeal. They essentially complained that, they were not properly identified at the scene of crime and at the police identification parade conducted after their arrest. The evidence that the second appellant led police investigators to the scene of crime was untrue, and the search in the second appellant's place that allegedly led to the discovery of the stolen goods was against section 38(1) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (now R. E. 2019), henceforth the CPA. They further lamented that, there was an improper identification of the television as one of the stolen goods and that, the trial court improperly based its decision on the involuntary cautioned statements of the appellants. There was also no production of the machete allegedly used in committing the armed robbery at issue.

On her part, Ms. Exaveria Makombe, learned counsel for the respondent objected the appeal. Regarding the first ground of appeal, she

submitted that, the complainant, one MaLvis Mwangupi (PW. 6) properly identified the two appellants at the material night at the scene of crime as shown at page 47-49 of the typed proceedings of the trial court (the proceedings in short). This was because, the appellants did not cover their faces and there was sufficient tube-lights. The second appellant took the complainant from her sitting room to the bedroom and back. They were in fact, looking each other face to face. She also testified that, the event took about 15-20 minutes which sufficed to identify the second appellant. The PW. 6 also testified that, she identified the first appellant from only 10 paces from her. She further described the respective attire put on by both appellants at the material time.

It was also the submissions by the learned counsel for the appellant that, PW. 8 (Insp. Nyenza) also gave evidence that, the two appellants were properly identified in the identification parade conducted on the 7th November, 2016. The identification parade register was also tendered as exhibit P. 7. The complaint by the appellants that the participants of the identification parade were not called as prosecution witness is lame. This is because, the evidence of PW. 6 and PW.8 sufficed to prove their identification. Section 43 of the Evidence Act, Cap. 6 R. E 2002 guides that, there is no specific number of witnesses required for proving a fact. This stance of the law was underscored by the Court of Appeal of Tanzania (the CAT) in the case of **Godlack Kyando v. Republic [2006] TLR. 363**.

The other arguments by the learned State Attorney were that, the lamentation by the appellant's that the failure to call the local leader who witnessed the search (at the second appellant's place) as the prosecution

witness was fatal is also weightless. This is because, PW. 2 (Kefline) also witnessed the search which resulted to the discovery of the stole television from the second appellant's place. PW. 2 also signed the seizure certificate in relation to the search. The same was tendered as exhibit P. 1 as shown at page 32-33 of the proceedings.

The learned State Attorney further contended that, the allegation by the appellants that the PW. 6 contradicted herself when she testified that the stolen television was valued at 700, 000/= while its receipt showed that it was bought at Tshs. 750, 000/= was also not genuine. This is because, at page 56 of the proceedings it is clear that she testified that the television was valued at Tshs. 750, 000/=. Even if the appellants' averment was true, the same could not affect her ownership on the television since the contradiction is minor and does not go to the root of the evidence adduced by PW. 6. Courts are enjoined to neglect such petty contradictions. She supported the contention by the decision of the CAT in the case of **John v. Republic, Criminal appeal No. 313 of 2015, CAT at Bukoba,** (unreported). Besides, the second appellant did not give any reasonable explanation on how he came across the television.

Regarding the appellants' complaints against their respective cautioned statements, the learned State Attorney contended that, the fact that the two appellants were not taken before the justice of peace to make voluntary confessions did not affect the voluntariness of the cautioned statements taken at the police station. Moreover, no law compels police investigators to take every criminal suspect before a justice of peace for confession. Again, all the procedures for recording such confessions were

followed, hence the same was properly recorded. She added that, the fact that the prosecution did not produce in evidence the machete used in committing the crime was also not fatal to the prosecution case. This is because, the appellants were not arrested with the said machete. She also contended that, the evidence by PW. 1 sufficed to prove that the first appellant had led policemen to the scene of crime.

It was also the contention by the learned State Attorney that, the first appellant made an oral confession to the PW. 1. Such oral admission is good evidence against an accused. She supported this contention by the case of **Rashid v. Republic, Criminal Appeal No. 105 of 2014, CAT at Mbeya** (unreported).

Regarding the second ground of appeal, the learned State Attorney for the respondent briefly argued that, the trial court correctly considered the defence evidence at page 9-11 of the impugned judgment. He however, rejected their respective defences for not raising any doubts.

In their rejoinder submissions, the appellants essentially reiterated their complaints embodied into the petition of appeal.

I have considered the grounds of appeal, the arguments by the parties, the evidence on record and the law. In deciding this appeal I opt to firstly consider the second improvised ground of appeal for purposes of convenience.

The issues regarding the second ground of appeal are only two as follows:

i. Whether or not the trial court did not consider the defence evidence.

ii. In case the answer regarding the first issue will be affirmatively, then which is the legal effect of the omission committed by the trial court.

In relation to the first issue, the answer is available in the impugned judgement. Upon perusing it, I totally agree with the arguments advanced by the learned State Attorney for the respondent. In fact, the same shows clearly that, the trial court narrated the evidence of both sides of the case from page 1- 5 of the judgment. It then posed two issues for determination at page 5. The first issue related to the two appellants. The issue was whether or not the two appellants had committed the offence of armed robbery against the complainant. The trial court then evaluated the prosecution evidence and the respective defences of the appellants from page 5 – 13, but it rejected their respective defences. For avoidance of repetitions, such prosecution and defence evidence on record will be discussed in details later in examining the first ground of appeal.

It follows thus that, under the circumstances of the case, it cannot be said that the trial court failed to consider the defence evidence. I therefore, answer the first issue under the second ground of appeal negatively. This finding makes it unnecessary to consider the second issue under this second ground of appeal. This follows the fact that, its consideration depended much on the first issue being answered affirmatively as planed earlier. I consequently overrule the second ground of appeal.

In relation to the first ground of appeal, the issue is *whether or not the prosecution proved the case beyond reasonable doubts.* In my view, and as rightly argued by the learned State Attorney for the respondent,

there was sufficient prosecution evidence against both appellants. There was for instance, ample evidence of visual identification of both appellants at the scene of crime at the material night. Though the appellants challenged the identification evidence adduced by the complainant, one Melvis (the PW. 6), she in fact, afforded to show that she had properly identified them. She for example, testified that, at the material time, she was in her sitting room where there was sufficient and bright electric tube-light. She then saw the second appellant approaching her from the dining room where there was also bright light. He commanded her not to move. He put a machete on her neck and instructed her to go to her bedroom. He escorted her there. She saw another robber already in the bedroom. When the second appellant demanded money from her, the other robber said that, he had already found the money.

Moreover, the PW. 6 testified that, she was in a short distance in observing the second appellant. In fact, the evidence that the second appellant put the machete on her neck implies that he was at a short distance from the PW. 6 herself. This is because, one cannot put a machete on another person's neck from a distance place. The PW. 6 also stated that, it took long time of about 15-20 minutes of observing the second appellant. She also testified that, the second appellant was not covering his face when he got into her house. She added that, she and the second appellant were looking each other at the material time.

Again, the PW. 6 testified that, she saw the first appellant who was outside the house from a distance of about 10 paces. He was also not

covering his face. There was also bright light there. He was on the body of her own son (Fredric) holding him down.

It was also the evidence by the PW. 6 that, the two appellants and the other person who was in the bedroom, but is not in court, took the items mentioned above from her house forcefully. The items included cash, Tshs. 700, 000/=, the TV made boss, a cell phone make Samsung S3 and a laptop make dell.

Furthermore, the PW. 6 described the respective attire which the two appellants put at the material time. She said, the first appellant put on a T-shirt and a black jeans. As to the second appellant, she said, he put on a jeans and a small coat. These pieces of evidence vindicate that there was, indeed, bright light at the scene of crime and the PW.6 properly identified the two appellants. She further testified that, she also identified them in the police station when they were arrested.

It must be noted here that, the law on visual identification makes a general rule where the evidence against an accused person is wholly based on visual identification. It guides that; *the evidence of visual identification of an accused person in difficult circumstances (like darkness, smoke, fog etc.) is the weakest and most unreliable, no court should therefore, act on such evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight*; see a decision by the Court of Appeal of Tanzania (CAT) in the landmark case of **Waziri Amani v. R [1980] TLR 250.** This precedent

set various guidelines which must be met by an identifying witness before the court finds that the accused was properly identified.

The **Waziri Amani case** (supra) set guidelines/factors to be considered by courts in determining the issue of visual identification. The factors include the following; whether the witness testified on the sufficiency of light that assisted him/her in identifying the accused, the source and intensity of the light, the distance from where he/she identified the accused, the time spent in observing the accused, whether he/she knew him/her before the event, if yes, when was the last time he/she saw the accused, the witness mentioned or described the accused immediately after the event to another person (and before his/her arrest) and whether that other person testified in court to that effect, etc.

In the matter at hand nonetheless, it is clear from the record that, the evidence by PW. 6 as the identifying witness did not meet all the factors related to the guidelines set in the **Waziri Amani case** (supra). However, that does not mean that her identification evidence has been rendered totally useless. This is because, the evidence against the two appellants (in the appeal under consideration) was not wholly based on visual identification of the PW. 6. There were other pieces of evidence which also implicated them. Such other pieces of evidence corroborated the fact that the PW. 6 in fact, properly identified them. The said other pieces of evidence are discussed below.

Examples of such other pieces of evidence include the cautioned statements of the first and second appellants taken at police station

(exhibits P. 4 and 6 respectively). In such statements, the two appellants confessed that they committed the offence against the PW. 6 in cooperation with others. Both of them mentioned one Shukuru (Shuku) as being one of the members of their group. Both of them stated that, it was the said Shukuru who carried the TV from the PW. 6 house. This statement tallied with the evidence of PW. 6 who also testified that, such other person (apart from the two appellants in court) took the TV from her house.

Again, in the two cautioned statements, the two appellants stated that, the first accused remained outside holding a boy living in the house in which the crime was committed. The second appellant said, the first appellant sat on the chest of that boy. This statement also matches with the evidence of PW. 6 who testified that, she saw the first appellant on the body of her son, one Fredrick while outside the house where there was also bright light. Moreover, the stolen items mentioned in the cautioned statements matched with the stolen goods mentioned by the PW. 6 in her evidence.

The above mentioned challenges by the appellants against the two cautioned statements was not firm enough. As rightly argued by the learned State Attorney for the respondent, it was not necessary in law to take the appellants before the justice of peace for another confession upon making their respective cautioned statements.

Furthermore, there is evidence on record that, both appellants admitted orally before PW. 1 (Insp. Mwombeki, a police officer and investigator) that

they had committed the offence at issue. In law, the admission sufficed as evidence against him. This is because, the law guides that, oral confession or admission may also be proved against an accused himself. Apart from the **Rashid case** (supra) cited by the learned State Attorney for the respondent in her submissions, other decisions by the CAT also support that stance of the law. It was guided that, oral confession or admission by a suspect before a reliable person/s, be they civilians or not, may be sufficient, by itself, to base a conviction against the suspect, if the suspect was a free agent when he/she made it; see **Godfrey Sichizya v. DPP, Criminal Appeal No. 176 of 2017, CAT at Mbeya** (unreported) following **Martin Manguku v. Republic, Criminal Appeal No. 194, CAT** (unreported) and **Akili Chaniva v. Republic, Criminal Appeal No. 156 of 2017, CAT, at Mbeya** (unreported). In the case at hand there was no any allegation by the two appellants that they were compelled to make the oral admissions or confessions before the PW. 1 as shown above.

It must also be noted at this juncture that, PW. 1, to whom the two appellants admitted the commission of the offence, is entitled to be believed by this court as a competent witness. The law provides that, every witness giving oral evidence is entitled to credence unless there are cogent reasons for not believing him; see the CAT decision in the case of **Goodluck Kyando v. R [2006] TLR. 363.** The appellants in the matter at hand did not show any reason as to why PW. 1 could not be believed.

Additionally, I agree with the learned State Attorney that, the appellants' challenge against the non-production of the machete in evidence was a lame argument. This is because, they were not arrested at the scene with

it. Moreover, it is not the requirement of the law that failure to produce a weapon used in committing a crime necessarily weakens the prosecution case. It is more so where there are other pieces of evidence implicating the accused, like the ones discussed above.

The respective defences by the appellants that they did not commit the offence at issue, and they were arrested later for nothing, cannot thus, be believed amid the strong prosecution evidence discussed above. Their defences do not raise any reasonable doubts in the mind of the court. Their respective defences did not thus, shake the proof beyond reasonable doubts that they had committed the offence. The law guides that, what matters is that, the proof should make the court feel that the accused committed the offence at issue. This was the position that was underscored by the CAT in the case of **Magendo Paul and another v. Republic [1993] TLR. 220** which followed the holding by Lord Denning in the English case of **Miller v. Ministry of Pensions (1947) 2 ALL ER 372.** In that **Miller Case,** it was held that, the law would fail to protect the community if it admitted fanciful possibilities to defeat justice. It was further held in that case that, where there is strong prosecution evidence against an accused, then remote possibilities in his favour can be dismissed and a finding that the case has been proved beyond reasonable doubts should be reached at.

Owing to the above evidence, I cannot fault the trial court's judgment against the two appellants. I find that, the prosecution proved the case against both of them beyond reasonable doubts. I thus, answer

the issue related to the first ground of appeal affirmatively. I consequently also overrule the first ground of appeal.

As to the sentence imposed against the appellants, I am of the view that, the same was a legal sentence according to law. Besides, their complaints were mainly against the conviction and not against the sentence.

Having overruled the two grounds of appeal, I find that the entire appeal lacks merits. I therefore, dismiss it. It is so ordered.

JHK. UTAMWA.
JUDGE
04/03/2021.

04/03/2021.

CORAM; Hon. JHK. Utamwa, J.
Appellants: present (by virtual court link while in Ruanda Prison-Mbeya).
For Respondent; Ms. Zena James, State Attorney.
BC; Ms. Gaudensia, RMA.

Court: Judgment delivered in the presences of both appellants (by virtual court link while in Ruanda Prison-Mbeya) and Ms. Zena James, learned State Attorney for the Respondent/Republic, in court, this 4th March, 2021.

JHK. UTAMWA.
JUDGE
04/03/2021.