IN THE HIGH COURT OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

HIGH COURT CRIMINAL APPEAL NO. 61 OF 2021

(Original Criminal Case No. 35 of 2020 of the District Court of Nyamagana at Mwanza)

MAJID BIGAMBANO &ANOTHER ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last Order: 31.05.2021

Date of Judgment: 07.06.2021

A Z. MGEYEKWA, J

In the District Court of Nyamagana at Mwanza, the appellants were arraigned and convicted of armed robbery contrary to section 287A of the Penal Code of Cap.16 [R.E 2019]. Upon conviction, they were handled down with the sentence of 30 years imprisonment. Aggrieved, the appellants appealed to this court for both the conviction and sentence. The appellants presently seek to impugn the decision of the District Court

upon a petition of appeal comprised of 7 grounds which I shall reproduce at a later stage of the judgment.

The case for the prosecution was built around the accusation of armed robbery as it was alleged that the accused one MAJID S/O BIGAMBO and AZIZ S/O PALAGA @BENARD jointly, were charged that, on 12th day of January 2020 at Igoma bus stand ya Magu area within Nyamagana District within Mwanza District did steal cash money in a tune of Tshs. 25,000,000/=from one Yusuph S/O Mgunda and immediately before such stealing did threat to stub the victim with a knife in his stomach in order to obtain and retain the money from him.

At the conclusion of the trial, the trial court was satisfied that the prosecution had proved the charge against the appellant to the required standard and proceeded to convict and sentence the appellant to serve thirty years imprisonment.

Undaunted, the appellants filed the instant petition of appeal before this court contesting against both the conviction and sentence in respect of armed robbery. They advanced the following seven grounds:

1. *THAT, the trial court erred in law and fact when not speculated and allay fears of planting evidence and exhibits upon unexplained unnecessary delay to arraign the appellants for so long i.e almost a*

month has passed since arrest if at all were positively identified and named to the alarmists before the 2nd appellant confessed to the charged offence as alleged.

2. *THAT, neither the arresting police officers neither any recipients who received the appellant at the police station had testified to establish the crux of arrest and in thus evidence tending to prove red-handed arrest in respect of the 2nd appellant is/was unfounded.*

3. *THAT, the conviction was wrongly based on inconclusive visual recognition/identification believing to be captured on the daylight whose elementary factors were not sufficiently established nor appellants peculiar descriptions were proved to be disclosed prior before credible independent recipients on issuing the first information report.*

4. *THAT, as the familiarity claims between the two adverse parties i.e the complainant and the appellants, were unfounded, equally, the need to conduct proper and fair identification parade was inevitable to clear those reasonable doubts but the trial court and prosecution harshly disregarded it and in thus led to serious prejudicial.*

5. *THAT, neither mobile phone advice was tabled as an exhibit into court nor the alleged communication transaction was proved to effectively lead the 1st appellant's arrest and the duo implicated into saga for*

lacking legal proof from the relevant mobile phone subscribed authority.

6. *THAT, the conviction was wrongly based on uncorroborated evidence and that of involuntary confession statements (Exh. P1) and (Exh.P2) which were not read over before the appellants soon after being obtained/ recorded some were out of the prescribed time limitation.*

7. *THAT, the prosecution case was fabricated, contradictory thus not proved to the hilt but the trial court wrongly and unreasonably relied upon it on convicting the appellants whose defence contention was so strong and of probative manner.*

When the matter was called for hearing before me on 31st May, 2021, the appellants defended the appeal for themselves, unrepresented whereas Ms. Sabina, learned Senior State Attorney represented the respondent Republic.

The first appellant had the floor, he opted to argue all grounds of appeal generally. He strongly denied to have committed the alleged crime. Instead, he claimed that the case was fabricated. He went on to state that on the material date he was at his house playing cards not at Igoma bus stand as alleged by the prosecution. Majid Bugambano denied to have stolen Tshs. 25,000,000/=. He claimed that he was arrested by

pedestrians. The first appellant contended that the complainant claimed that the robbery was committed during midday while her wife claims that the robbery occurred in the morning. He ended up praying for this court to set him free.

The second appellant urged this court to adopt his grounds of appeal and chose for the learned State Attorney to reply to his grounds of appeal but reserved his right to rejoin if the need would arise.

In reply, Ms. Sabina expressed her stance at the very outset of his submissions that he supported the appellant's conviction and sentence meted out to him by the first appellate court. The learned State Attorney prayed to combine and argue the third and fourth grounds of appeal together because they are intertwined. She opted to argue the remaining grounds separately.

On the first ground of appeal, Ms. Sabina claimed that appellants' ground that they were arrested late is baseless. She submitted that the 2nd appellant was arrested the same day and the 1st appellant was arrested at Magu district the second day by PW8. Citing pages 47 and 48 of the trial court proceedings and exhibit P1 and P2 reveals that they were arrested as soon after the commission of the offence that the 1st appellant was arrested on 13.01.2020 and the 2nd appellant on 12.01.2020.

Submitting on the second ground, she avers that the 1st accused was arrested by Pw3 and testified in court and the PW8 arrested the 2nd accused. He went on that the arresting persons testified in court as she cited pages 47 and 48 of the trial court proceedings.

The third and fourth grounds are interrelated as they centre on the evidence of identification. Ms. Sabina valiantly contended that PW5 knew the appellants before the incidence and they had an unfished business, they were to enter into a sale agreement of a vehicle. She enlightens that an identification parade is normally conducted when the bandits or suspects are unknown. She insisted that it was the 2nd appellant who accompanied PW8 in arresting the 1st appellant that means they were well known. She claims that these grounds are baseless.

Submitting on the fifth ground, the learned State Attorney insisted that the issue of mobile phones is baseless. She avers that what matters is that the ingredients of the offence of Armed Robbery were proved. The appellants used force, a weapon was mentioned and the act of stealing is tendering of the mobile phone before the court was not a must.

On the sixth ground of appeal, regarding voluntariness, she avers that PW1 to PW8 proved that the appellants threatened that victim with a knife and tried to run away but they managed to arrest the 2nd appellant. PW2

the owner of the grocery testified that the appellants were seated at her grocery. She went on to state that, the prosecution evidence was corroborated by exhibits P1 and P2. Insisting, Ms. Sabina stated that the caution statements were initially cleared for admission. To bolster her submission she cited the case of **Godfrey Shija v Republic**, Criminal Appeal No.176 of 2007.

On the fourth ground, that the prosecution evidence was fabricated and contradictory. She spiritedly refuted that this ground is baseless. She avers that PW4 and PW5 evidence were not contradictory. Ms. Sabina fortified her submission by referring this court to pages 15 and 18 of the typed trial court proceedings. Ms. Sabina stated that minor contradiction does not go to the roots of the case.

Having submitted and argued as above, the learned State Attorney strenuously argued against the appeal contending that the prosecution evidence was heavier enough to ground a conviction. She implored this court to uphold the trial court decision and dismiss the appeal in its entirety.

Rejoining, the 2nd appellant submitted that, the prosecution evidence was contradictory and the police who arrested him were not summoned to testify in court. He claimed that he was arrested without involving the

street leaders. He went on to argue that there is no evidence to prove that he was arrested in possession of the stolen money and alleged knife. He avers that the complainant did not testify how they met and no proof of any bank receipt to prove the stolen Tshs. 25,000,000/= was obtained from the bank. Stressing he complained the complainant did not explain how he entered into the alleged business for that short period and he carried the bag containing the alleged amount of money while the lorry was not identified and not even its registration number was not mentioned.

The second appellant vehemently argued that the case was planted. He lamented that PW1 testified to the effect the 1st appellant was holding the knife and PW2 said that it was the 2nd appellant who was holding the knife. He went on to state that the caution statement was recorded contrary to the law since no witness who was called to witness and also no Justice of the Peace who was not involved. He prays this court to allow the appeal and set him free.

The 2nd appellant went on that the phone was not brought as an exhibit to prove there was communication, no identification parade was conducted, and were not brought before the Justice of Peace and therefore they were wrongly convicted.

Rejoining, the 1st appellant avers that the complainant claimed to have met with the 1st appellant on 12.01.2020 and talked about a sale of a lorry and on 13.01.2020 the complainant took Tshs. 25,000,000/= to buy the said lorry which was not be identified by any witness. Insisting, he claimed that the process of buying a lorry is wanting. He stated that he was arrested at Buzuruga and not Magu. He claimed that the phone which was used in communicating with him was not tendered in court. He insisted that the case was planted against him and he was arrested without the alleged bag of money. He insisted that his caution statement was taken out of time and he was not involved in the alleged robbery.

In conclusion, the first appellant urged this court to allow the appeal and set him free.

I have dully considered the submissions of the appellants and learned State Attorney, reviewed the record, and gone through the appellants' grounds of appeal. I now turn to determine the issue *whether the prosecution proved the case to the hilt or not*.

On the third and fourth grounds, the conviction was wrongly based on inconclusive visual recognition/identification believing to be captured on the daylight whose elementary factors were not sufficiently established nor appellants peculiar descriptions were proved to be disclosed prior

before credible independent recipients on issuing the first information report it is in a record that the evidence that implicated the appellants was due to visual identification. There are numerous cases on visual identification. In determining whether conditions of identification were favourable in the case of **Mussa Hassan Barie & Libert Peter @ John v R**, Criminal Appeal No. 292 of 2011 CAT at Arusha (unreported) the court held that whether or not it was daylight or might the type of intensity of light. The closeness of the encounter at the scene of the crime, whether there were an obstruction to a clear vision, whether the suspect was known to the identifier previously and that the witness if identification would be expected to state the description of the suspect.

According to the evidence on record, the 2nd accused was under observation for a long time and not only one person who saw him, PW1, PW2, PW3, and PW5 were at the scene of the crime and saw the second appellant. Therefore, he cannot complain that visual identification was weak. However, the 1st accused was not identified at the scene of the crime, it was the 2nd accused who named him. Therefore in his case, the prosecution was required to conduct an identification parade to satisfy itself whether the 2nd appellant was presents at the scene of the crime.

Taking to account that only PW5 claimed to have known the appellants the rest of them saw him at the scene of the crime.

Addressing the sixth ground of appeal, the appellants are claiming that the cautioned statements were not read in court after its admissions, and the same was recorded out of time. In the trial under scrutiny, on pages 35 and 46 of the typed trial court proceedings, it is shown that the caution statements of both appellants were admitted and like any other documentary evidence, before being introduced in evidence, both cautioned statements were cleared for admission, the same was read aloud in court. In the case of **Walii Abdallah Kibutwa & 2 Others v R,** Criminal Appeal No. 181 of 2006 and also in the case of **Omari Iddi Mbezi v Republic**, Criminal Appeal No. 227 of 2009 (both unreported). Therefore, the legal procedure in admitting the said cautioned statements was adhered to.

Next for determination is whether the cautioned statements were recorded within time. I have scrutinized the appellants' cautioned statements and noted that the 2nd accused person cautioned statement was recorded out of time. It is in the record that the 2nd accused was arrested on 12.01.2020 and he was brought to the Police Station of Nyakato. The following day on 13.01.2021 at 17:00 hour, PW5 recorded

the 2nd accused statement. It is vivid that the cautioned statement of the 2nd accused was recorded order after the lapse of the basic four hours period from the time the 2nd appellant was arrested and there was no clarification from any of the prosecution witnesses as to why there was such a delay contrary to sections 50 and 51 of the Criminal Procedure Act Cap.20 [R.E 2019].

Therefore, exhibit P2 was wrongly admitted as required by the law thus the same is a fatal irregularity. I proceed to expunge it from the court record. The Court of Appeal of Tanzania in its numerous decision has stated that a cautioned statement recorded out of time is inadmissible in evidence. In the cases of **Thomas @ Mwangamba v. Republic**, Criminal Appeal No. 308 of 2007, Roland (unreported) and **Florence Athanas @ Baba ALI & another**, Criminal Appeal No. 438 of 2016 which was delivered on 26th August, 2019. The Court of Appeal of Tanzania in **Florence Athanas @ Baba A** (supra) held that:-

> *" Obviously, those statements were taken contrary to sections 50 and 51 of the CPA. They were recorded out of the basic period available for interviewing a person who is in police custody, that is, four hours. This means the statements made by both the appellants were inadmissible in evidence. "*

In so far as the irregularities surrounding the recording of the 2nd appellant' cautioned statement are concerned, I need not detain myself further. I proceed to expunge it from the court recorded.

With the expungement of the 2nd accused cautioned statement (Exh.P2) I am asking myself are there any cogent evidence for supporting the instant appeal?

On the fifth ground that the phone was not tabled as exhibit. First, I will determine if at all prosecution managed to establish whether theft occurred. I have pointed out that the appellants were charged with an offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 [R.E 2019] reads as follows:

> *"...any person who **steals anything** and at or immediately after the time of stealing is armed with any **dangerous or offensive weapon** or robbery instrument; or is in company of one or more persons, and at or immediately before or immediately after the time of the stealing **uses or threatens to use violence to any person**, commits an offence termed armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."*

It follows from the above provision of the law, that for an offence of armed robbery to be established, the Court of Appeal of Tanzania in the case of **Shabani Said Ally vs Republic**, Criminal Appeal No.270 of 2018) [2019] TZCA 382; delivered on 06th November, 2019 stated that the prosecution must prove among other things; an act of stealing that at or immediately after the stealing the perpetration was armed with any dangerous or offensive weapon or instrument and that, he used or threatened to use actual violence to obtain or retain the said stolen property. In the instant appeal, there is no dispute that the ingredients of armed robbery were all mentioned in the charge sheet.

However, the evidence on trial court records left doubts as to whether there was anything stolen. I am saying so because Tshs, 25,000,000/= as alleged in the charge sheet and testified by PW5 were not supported by any evidence. The prosecution evidence goes:- PW5, the victim testified that he had an agreement to meet the appellants they had a business. It was alleged that the appellants wanted to sell a lorry at a tune of Tshs. 25,000,000/=. PW5 alleges to carry that amount of money and claimed the same to have been stolen by the appellants. I have considered the circumstances of the business which was to be conducted, and the amount of money which was to be transacted. It creates doubt

how PW5 carried a huge amount of cash and in his evidence, he claimed that the bag contained Tshs. 25,000,000/=.

Also, the trial court proceedings are silent on who was caught in possession of the stolen money and the whereabouts of the lorry. It would, therefore, be a risk to assume without demur that the 1st appellant was the only person who stole that money. It is on records that the incident is alleged to occur at midday at Igoma bus stand, a public place. The 2nd appellant was apprehended at the scene of the crime by PW8.

I have scanned the entire evidence on record. With due respect to the learned Magistrate, I have failed to glean therefrom a trace of evidence showing that any of the appellants was found in possession of "money." The only available evidence is that it was the 2nd appellant who was arrested at the scene of the crime. Furthermore, my scrutiny of the charge sheet has revealed that the appellants had been charged with stealing Tshs. 25,000,000/=. However, the prosecution failed to prove whether the complainant was in possession of the said money. The prosecution did not parade an investigator who investigated the case, he was in a position to prove beyond doubt that theft occurred and what was stolen was the alleged bag from PW5 containing Tshs. 25,000,000/=. The record is silent whether the prosecution conducted

any search at the 1st appellant's house and there was no any proof that the lorry which was on sale was seized.

Robbery, let alone armed robbery, cannot be committed without the offence of stealing/theft being committed. The Court of Appeal of Tanzania discussing the import of section 285 of the Penal Code Cap.16 [R.E 2019] , in the case of **Stuart Erasto Yacobo v Republic**, Criminal Appeal No. 202 of 2004, had this to say:-

> *"For an offence under Section 285 the prosecution has to adduce evidence to establish the ingredients, that is whether actual violence or threat of actual violence was used to* ***obtain or retain the thing stolen****. The nature of violence must also be proved. Violence to the person of the complainant is a prerequisite for the crime of robbery. There must be evidence to establish that the accused person used or threatened to use actual violence* ***to obtain or retain the stolen property****. "(Emphasis added).*

To say the least, robbery is stealing in which violence is employed by the accused to the person of the complainant to obtain or retain the thing stolen. And, armed robbery is committed when the accused who, at or immediately after the time of stealing, is armed with any dangerous or offensive weapon or instrument and uses the same to threaten violence

on the person of the complainant or is in the company of one or more persons in order to obtain or retain the stolen property. In the instant case, it is not proved whether the money was obtained or retained. On that account, where stealing/theft is not proved, like in the present case, the offence of armed robbery cannot stand. See the case of **Mshewa Daudi v Republic**, Criminal Appeal No.50 of 2018.

Regarding the doubts raised by the defence side, it was not safe for the first trial court to assume without proof by the prosecution that, upon a professional investigation conducted, theft of 25,000,000/= occurred as claimed by PW5.

Again, from the prosecution evidence, it is with no doubt that 2nd appellant was apprehended at the scene of the crime at the time of the alleged commission of the crime. PW1 and PW4 testified to the effect that they accompanied PW5 who was going to buy a lorry and when reached Igoma stand they met the appellants who showed them the lorry which was intended for a business. What was leftover was to draft a sale agreement which was to be drafted by the complainant's advocate. It is from the records that the advocate did not show up and the appellants robbed PW5. I did not find any evidence which explains the subject matter after the alleged robbery.

The prosecution did not at all explain if PW5 was shown the lorry at the scene of the crime and the 1st appellant who was selling the same robbed him. What was the status of the lorry, and why it was not mentioned by prosecution witnesses? Taking into consideration that the 2nd appellant was arrested at the scene of the crime but the whereabouts of the subject matter (lorry) were subdued. There is no record what was the status of the lorry after the 2nd appellant was arrested and sent to police custody. To me this left doubts as to whether the theft was proved in connection with the intended sale.

Next for consideration is the first ground that the Police Officer delayed to arraigned the appellants before the court. In the nimble of the prosecution evidence, it is shown that the 2nd appellant was apprehended on 12th January, 2020 at the scene of the crime, and the 1st appellant was apprehended the following day on 13th January, 2020. From the record that the appellants were arraigned on 07th February,2020, however, no prosecution evidence justifying the delay of the arraignment of the accused. It is a well-established principle that a suspect after his arrest must be taken to court as soon as possible pursuant to section 32 (2) of the Criminal Procedure Act, Cap.20 [R.E. 2019], which is applicable under the circumstances. It provides that:-

"When any person has been taken into custody without a warrant for an offence other than an offence punishable with death, ***the officer in charge of the police station to which he is brought may, in any case, and shall if it does not appear practicable to bring him before an appropriate court within twenty-four hours after he was so taken into custody,*** *inquire into the case and unless the offence appears to that officer to be of a serious nature, release the person on his executing a bond with or without sureties, for a reasonable amount to appear before a court at a time and place to be named in the bond; but where* ***he is retained in custody he shall be brought before a court as soon as practicable****." [Emphasis added].*

Equally, the Court of Appeal of Tanzania in the case of **Martin Fabiano & Another vs Republic**, Criminal Appeal No.84 of 2020; delivered on 04 December 2020 held that:-

".....there was a delay in the arraignment of the appellant in both cases of Martin and Mashimba and that is why the Court referred to section 32 (2) of the CPA which requires for a suspect who has been taken to custody without a warrant to be taken to court "as soon as practicable"

Admittedly, this was the prosecution's smoking gun. Unfortunately, this "gun" misfired. This was a result of the fatal failure by the prosecution to comply with the mandatory provisions of section 38 (3) of the Criminal Procedure Act, Cap 20, [R.E. 2019]. Twenty –four hours lapsed, no explanation as to why the appellants were arraigned in court after three weeks. The investigator did not testify in court whether conduct search in the 1st appellant house to justify the delay. Nevertheless, as consistently argued by the appellants, no iota of evidence was proffered by the prosecution to prove that the alleged stolen amount in a tune of Tshs.25, 000, 0000/= were in possession of the complainant (PW5) or was caught in possession of the 1st appellant and it was not proved whether the alleged lorry which was a subject matter, in this case, was seized by the Police Officer.

Regarding arrest, it is clear from the appellants' submissions, they claimed that they were arrested on different dates and that the case against them was a fabricated one. The prosecution did not justify why they delayed to arraign the appellants in court. Bearing in mind that the appellants were arrested immediately after the alleged commission of the crime and the claimant was well known.

The 2nd accused , although he was arrested but his cautioned statement was expunged from the court records. After its expungement, there is no any other evidence to connect him with the offence charged since the shortfalls cannot be said to be in favour of the prosecution.

Furthermore, the 1st accused person cautioned statement was required to be corroborated by other evidence, however, there are no cogent evidence to corroborate the 1st accused person cautioned statement and as mentioned earlier there is no evidence to prove the existence of communication between the 2nd appellant person and the Police Officer who recorded the 1st appellant's cautioned statement.

Having determined the first, third, fifth, and sixth grounds of appeal, I have and come up with the findings that theft was not proved to the hilt as an important ingredient of the offence of armed robbery as alluded above. Therefore, I am satisfied that the prosecution case is not proved beyond a reasonable doubt. The Court of Appeal of Tanzania in the case of **Mohamed Haruna@ Mtupeni & Another v R**, Criminal Appeal No. 25 of 2007 (unreported) held that:-

> *"Of course in cases of this nature, the burden of proof is always on the prosecution. The standard has always been proved beyond a reasonable doubt. It is trite law that an accused person can only be*

convicted ***on the strength of the prosecution case and not on the basis of the weakness of his defence****." [Emphasis added].*

For the above reasons, I have no other option than to find that the appeal is meritorious. I thus allow the appeal, quash the convictions, set aside the sentences, and order the immediate release of the appellants, from custody unless otherwise lawfully detained.

Order accordingly.

DATED at Mwanza this 7th June, 2021.

A.Z.MGEYEKWA

JUDGE

07.06.2021

Judgment delivered on 7th June, 2021 vide audio teleconference whereas the appellants and Ms. Sabina, learned State Attorney for the respondent and the appellant.

A.Z.MGEYEKWA

JUDGE

07.06.2021

Right to appeal fully explained.