IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 246 OF 2020

PETER NGOKO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Kilombero at Ifakara (Hon. L.O. Khamsini, RM))

dated the 25th day of April, 2019
in
Criminal Case No. 152 of 2017

JUDGMENT

Date of Last Order: 12/11/2021 &
Date of Ruling: 19/11/2021

S.M. KALUNDE, J.:

PETER NGOKO, the appellant, stood charged before the District Court of Kilombero at Ifakara (herein referred to as **"the trial court"**) in **Criminal Case No. 172 of 2009** with the offence of armed robbery contrary to section 287A of **the Penal Code, Cap. 16 R.E. 2002** to which he pleaded not guilty. The particulars of the offence were that on 14th February, 2017 at about 22:00hrs at Camp

Hospital Mlimba within the Kilombero District in Morogoro Region, the appellant stole a bag of clothes valued at Tshs. 30,000.00, various types of clothes valued at Tshs. 250,000.00 and money amounting to Tshs. 600,000.00 the property of Sara Mbadjo and immediately before such stealing, the appellant, assaulted her with a knife on her face in order to obtain or otherwise to retain the stolen property.

During trial before the trial court, the prosecution called five (5) witnesses and the appellant defended himself under oath. The appellants trial terminated in him being convicted of armed robbery which earned him the maximum sentence of thirty (30) years imprisonment. The appellant is aggrieved both conviction and sentence meted by the trial court and thus he has preferred an appeal before this Court. In his Petition of Appeal, which was filed before this Court, the appellant itemized eleven (11) grievances as listed below:

> *"1. That, the learned Trial Magistrate grossly erred in both law and facts by convicting the appellant based on Exhibit P2 (Caution statement) allegedly made by the appellant which was unprocedural tendered by the P.P who was not on oath nor was he a witness yet*

no inquiry was conducted and worse still it was nor read aloud in Court after it was admitted and marked as an exhibit.

2. *That, the learned Trial Magistrate grossly erred in both law and fact by basing the appellant's conviction on PW1's evidence dispute her admitting during cross – examination that she had lied to the Court hence the trial magistrate ought to have assessed exhaustively the credibility of prosecution witness before convicting the appellant.*
3. *That, the learned trial magistrate grossly erred in both law and fact by convicting the appellant based on Exhibit P1 (the alleged red bag) which was tendered in Court by the P.P despite him assuming a role of prosecutor and a witness at the same time yet he was not on oath.*
4. *That, the learned Trial Magistrate grossly erred in law in convicting the appellant based on each P3 (a PF3 Form) which was tendered by PW4 yet failed to note that it was a concocted document aimed to fix the appellant with this case as the age of the victim there in was different from that of PW 1 and still it was not read aloud in Court.*
5. *That, the learned Trial Magistrate erred in both law and fact in admitting PW4'S evidence without according the appellant a chance to comment on whether he had any objection in admission of his evidence as required by law.*
6. *That, the learned Trial Magistrate erred in law in convicting the appellant based on Exhibit P1 which was tendered in Court by the PP yet failed to draw an inference against the*

prosecution case as to how would the appellant been roaming with a bag containing items alleged to have been stolen three months before, hence this was a clear sign to show that it was a fictitious case.

7. *That, the learned Trial Magistrate grossly erred in both law and facts by convicting the appellant in a case where there was no evidence from the prosecution that there was enough light at the scene of crime that could have enabled them to positively identify their attacker un mistakenly.*

8. *That, the learned Trial Magistrate grossly erred in both law and fact by convicting the appellant in a case where the prosecution failed to provide evidence to suggest that there was a manhunt mounted after the said crime, yet the evidence on record is to the effect that the appellant disappeared after the death of his friend which occurred in May 2017, hence his arrest did nor emanate from the case at hand.*

9. *That, the learned Trial Magistrate erred in law by convicting the appellant without considering his defence against the prosecution case and worse still he was not accorded a chance to close his defence case.*

10. *That, the judgment of the trial Court does not have the ingredients of a proper judgment hence it was not composed as required by law.*

11. *That, the learned Trial Magistrate grossly erred in law in convicting the appellant in a case where the prosecution had failed to prove its case to the required standard.*

Relying on the strength of the above grounds, the appellant pleaded that the appeal be allowed and that the conviction be quashed, and the sentence be set aside.

It is on record that, on 13th September, 2021 when this matter came for hearing, the appellant prayed that the appeal be argued by way of written submissions. The respondents supported the prayer. The prayer was thus granted, and a schedule for filing submissions was issued. I commend both parties for their compliance to the schedule issued by the Court and for their industrious research which assisted the Court in composing the present judgment.

Upon a careful perusal of the records and submissions made by the parties, the question which I am now required to determine is whether the present appeal is merited.

I propose to start by responding to the nineth and tenth grounds of appeal where the appellant is faulting the judgment of the trial court on the ground that it did not contain the ingredients of a judgment known to the law of the land and that the trail magistrate

failed to consider the defence case. To support his argument, the appellant cited section 312(1) of **the Criminal Procedure Act, Cap. 20 R.E. 2019** ("the CPA") for the contents of a judgment and argued that the judgment delivered by the trial court did not meet the stipulated ingredients in the above cited section. In furtherance of his argument the appellant cited the case of **Hamis Rajab Dibagula vs The Republic**, Criminal Appeal No. 53 of 53 of 2001 (unreported). The Republic did not specifically respond to the above cited complaints. Indeed s. 312 of CPA provides for the contents of judgment. For ease of reference the section reads:

> *"312.-(1) **Every judgment** under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and **shall contain the point or points for determination, the decision thereon and the reasons for the decision**, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court." [Emphasis mine]*

From the wording of the above section, it is clear that every judgment must contain *"the point or points for determination, the decision thereon and the reasons for the decision"*. Upon going through the records, I have noted that, in its five (5) page judgment the trial court summarized evidence in four (4) pages and an analysis and made an analysis and determination of the entire case in one paragraph. After summarizing evidence, the learned trial magistrate made the following observation:

> *"On reading thoroughly the testimony of both sides, everything is open to that all public witness, have testified on the offence alleged to have been committed by the accused. The testimony produced implicates the accused person wholly leaving no doubt behind his defense which is only to the effect that he was arrested but declined on the offence, the exhibits marked as PE.1, PE.2 and PE.3 are all in support of the charge the accused person is facing."*

The trial court then made the following conclusion:

"I hereby proceed to convict the accused person on a charge of armed robbery as by the prosecution framed.

It is so decided."

That was all about the analysis and evaluation of evidence, the decision as well as the reasons for the same. In my view this was not anything close to an analysis and evaluation of evidence presented during trial. In the circumstances the trial court was expected to assess the probative value, credibility and weight of evidence adduced by the prosecution as well as that adduced by the defence and determine whether there are any reasonable doubts in the prosecution case. That was not done. As a result, the defence was disregarded. No issues were framed or determined by the trial court, and certainly, and there was no determination of the essential ingredients the offence or armed robbery for which the appellant was charged and convicted with.

The position of the law is well settled that failure or rather improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice. The case of **Leonard**

Mwanashoka vs. R, Criminal Appeal No.226 of 2014 (Unreported) avails useful guidelines on what is to be considered in the evaluation of evidence:

> *"We must quickly and respectively point out here that that is where the learned first appellate judge got wrong. We accept that the learned trial Resident Magistrate "summarized the defence evidence", much as he/she did summarize the prosecution evidence. But that was not the complaint of the appellant. It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation and analysis"*

In **Hussein Idd and Another vs R** (1986) TLR 166, the trial court dealt with the prosecution evidence implicating the first appellant and reached the conclusion without considering the defence evidence. This Court of Appeal found that to be serious

misdirection as it deprived the accused of having his defence properly considered. Specifically, the Court of Appeal stated:

> *"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."*

Most recently in June, 2021 in the case of **Kaimu Said vs Republic** (Criminal Appeal No. 391 of 2019) [2021] TZCA 273; (07 June 2021 TANZLII), the Court of Appeal, **Lila, J.A** relied on the case of **Leonard Mwanashoka vs. R** (supra) and **Hussein Idd and Another vs R** (supra) to come to a conclusion that failure to consider the defence rendered the trial a nullity. The Court reasoned that, the trial court and first appellate court are imperatively required to consider and evaluate the entire evidence so as to arrive at a balanced conclusion. An omission to do so is a serious misdirection and a clear indication that there was no fair trial.

Having found that the trial court failed to properly analyze the evidence before it, I think, this Court, being the first appellate court,

is duty bound to re-evaluate and weigh the evidence by both sides (as a whole) so as to arrive at a just and fair finding. See **Charles Thys vs. Hermanus P. Steyn**, Civil Appeal No.45 of 2007.

It is on record that the appellant was charged with armed robbery. The ingredients of the offence of armed robbery were stated in the case of **Fikiri Joseph Pantaleo @Ustadhi v. R**, Criminal Appeal No. 323 of 2015 (unreported) in which it was stated:

> *"...we agree with Ms Mdegela the learned State Attorney over her doubts whether the element of stealing in the offence of armed robbery was proved at all. For purposes of instant appeal, the main elements constituting offence of armed robbery section 287A are first stealing. The second element is using firearm to threaten in order to facilitate the stealing ..."*

Subsequently in **Yosiala Nicolaus Marwa and Others v. Republic**, Criminal Appeal No. 193 of 2016 (unreported) the Court of Appeal held that:

> *"...an important element of the offence of armed robbery is indeed the use of force against the*

victim for the purposes of stealing or retaining the property after stealing the same."

Being guided by the above authorities, I will respond to the question whether the above ingredients of armed robbery were proved in the present case. To prove the above ingredients the prosecution paraded six (6) witnesses, that is Sara Mbadjo **(PW1)**; Jackson Ngoko **(PW2)**; F. 457416 Dtg Sgt Gilbert **(PW3)**; Dtc Horogo; and Onesmo Alphonce Mpogole **(PW5)**; and MG. 44141 Isoding Mbuya **(PW6)**. Together with witness testimonies, the prosecution tendered three exhibits: a bag and its clothes **(Exh. PE. 1)**; Cautioned Statement of the appellant **(Exh. PE.2)**; and PF3 issued to PW1 **(Exh. PE.3)**.

In the present appeal, the appellant has faulted the validity of the exhibits tendered on several fronts. **Firstly**, that the said exhibits were wrongly tendered in evidence by the prosecutor who was not a witness as he was not sworn or under oath. **Secondly**, that the exhibits PE.2 and PE. 3 were not read out after they were admitted in evidence. **Thirdly**, that Exh. PE.2 was wrongly admitted and relied on as it was not voluntarily made, and no inquiry was conducted to

determine its voluntariness. **Fourthly**, the chain custody of Exh. PE. 1 was not established in evidence. **Fifthly**, that the doctrine of recent possession was wrongly applied against the appellant.

I will start with complaint whether the prosecutor was a competent witness to tender exhibits during trial. There is no dispute that exhibits PE.1, PE.2 and PE.3 were tendered by the prosecutor. See page 13 15 and 17 respectively of the typed proceedings. Relying on the case of **Thomas Ernest Msungu @ Nyoka Mkenya vs Republic**, Criminal Appeal No. 78 of 2012, the appellant argued was not a competent witness to tender the respective exhibits as he incapable of being examined upon oath or affirmation in terms of section 98 (1) of the CPA. He invited the Court to expunge the exhibits from the records.

In response the Republic contended that the irregularity in tendering the exhibits was minor as the prosecutor was attempting to assist the witnesses to tender the exhibits. The Republic contended that the irregularity was minor and curable under section 388(1) of

the CPA. To further support the argument the case of **Khamis Said Bakari vs Republic**, Criminal Appeal No. 359 of 2017.

As pointed out above, exhibits PE.1, PE.2 and PE.3 were all tendered by the prosecutor who not being a witness, was not qualified to adduce them in evidence. The position of the law is that allowing a prosecutor to tender evidence is fatal error. Such position was taken by the Court of Appeal in **Thomas Ernest Msungu@ Nyoka Mkenya vs. Republic** (supra), **Frank Massawe vs. Republic**, Criminal Appeal No. 302 of 203 of 2012, **Sospeter Charles vs. Republic**, Criminal Appeal No. 555 of 2016, **DPP vs. Festo Emmanuel Msongaleliand Nicodemu Emmanuel Msongaleli**, Criminal Appeal No. 62 of 2017 and **Tizo Makazi vs. Republic**, Criminal Appeal No. 532 of 2017 (all unreported).

In **Sospeter Charles vs. Republic** (supra) the Court of Appeal relied on its previous decision in **Frank Massawe vs. Republic** (supra) to hold that as the prosecutor is not a witness sworn to give evidence, he cannot assume the role of a witness. A similar view was adopted by the Court **(Mwambegele, J.A)** in

Athumani Almas Rajabu vs Republic (Criminal Appeal No.416 of 2019) [2021] TZCA 529; (23 September 2021 TANZLII) and **(Mugasha, J.A)** in **Director of Public Prosecutions vs Festo Emmanuel Msongaleli & Another** (Criminal Appeal No.62 of 2017) [2020] TZCA 312; (15 June 2020 TANZLII). Guided by the above authorities, I expunge, from the records Exhibits PE.1, PE.2 and PE.3. That said, the complaint on the admissibility of Exhibits PE.1, PE.2 and PE.3 is merited.

However, as was stated earlier that was not the only setback, even assuming that Exhibits PE.2 and PE.3 were properly tendered in evidence, I have also gathered that the cautioned statement of the appellant (Exh. PE.2) and PF3 issued to PW1 (Exh. PE.3) were not readout loudly when they were admitted in evidence as required by law so afford the appellant an opportunity to understand them and prepare his defence. That said, I would have no option than to expunge those exhibits from the record. The question whether Exh. PE. 2 was voluntarily made or otherwise becomes superfluous. The complaint that the documentary exhibits in the form of Exhibits PE.2 and PE were not read out loudly is also merited.

This takes me to the appellant's last complaint that the prosecution did not prove the case beyond reasonable doubt. As indicated above, having expunged from the records exhibits PE.1, PE.2 and PE.3, the question remains, in the absence of the said exhibits is the oral accounts of PW1, PW2, PW3, PW4, PW5 and PW6 sufficient to prove the case?

The key prosecution witnesses included PW5 and PW6. Their version of the story was that on 24th May, 2017 they got information from an informant leading up to the arrest of the appellant who was passing with a bag red in colour. Inside the bag were items believed to have been stolen. The items were seized, and the accused was arrested. They drove the appellant to a police station on motorcycle. The appellant has raised a complaint in the way the seized items were seized, kept and presented before the trial court. I have gone through the records and noted that, indeed, neither of the prosecution witnesses gave an account on how the seized items were handled from seizure on 24th May, 2017 at Mbungo up to the police station and how they were stored and eventually tendered in evidence. As such There was no certificate of seizure nor receipt

presented before the trial court. Further to that, there was no evidence that the seized items were entrusted to the storekeeper or whether they were labeled or registered in the exhibit's ledger book for safe custody. With the above shortcomings, it can be safely concluded that the goods seized were the same presented before the trial court.

Dealing with a similar scenario, the Court of Appeal in the case of **Mussa Hassan Barie and Albert Peter @JOHN vs. Republic**, Criminal appeal No. 292 of 2011 (unreported) the referred to its earlier decision in the case of **Paulo Maduka and Others vs. Republic**, Criminal, Appeal No. 110 of 2007 (unreported) emphasized the importance of proper chain of custody of exhibits and that there should be:

> *" ...chronological documentation and/or paper trail, showing the seizure; custody, control, transfer, analysis and disposition of evidence/ be it physical or electronic. The idea behind recording the chain of custody is to establish that the alleged evidence is in fact related to the alleged crime."*

In the circumstances it cannot be safely concluded that the items alleged to have been seized from the appellant on the 24th May, 2017, were those which were presented in the evidence during the trial. As was stated in **Director of Public Prosecutions vs Festo Emmanuel Msongaleli & Another** (supra):

> *"The anomaly cannot be redressed by the oral account of the prosecution and as such, the chain of custody was not broken."*

As observed above, the failure to establish a chain of custody cannot be redressed by oral accounts of the prosecution witnesses. As pointed out in **Fikiri Joseph Pantaleo @Ustadhi v. R** (supra) stealing is an important element of armed robbery. In absence of proof of the items alleged to have been stolen, there are doubts whether the element of stealing in the offence of armed robbery was proved at all.

For the above reasons, I find it difficult to positively conclude that the evidence presented by the prosecution was sufficient to prove the offence of armed robbery to the standard of proof required to prove the guilt of the appellant beyond reasonable doubt as was

construed by the court of Appeal in **Fikiri Joseph Pantaleo @Ustadhi v. R** (supra) and **Yosiala Nicolaus Marwa and Others v. Republic** (supra). I also find merit in the eleventh ground.

In the upshot, I allow the appeal and quash the conviction and set aside the sentence imposed on the appellant. I order the appellant, **PETER s/o NGOKO**, be released from prison custody forthwith unless he is being held there for some other lawful cause.

Order accordingly.

DATED at **MOROGORO** this **16th** day of **NOVEMBER, 2021**.

THE HIGH COURT OF TANZANIA

S.M. KALUNDE

JUDGE