IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 156 OF 2020

(Arising from Criminal Case No.17 of 2021 in the Court of the Resident Magistrate of Mbeya at Mbeya)

Between

MESHAK ALISON..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

A.A. MBAGWA J.

This is an appeal against conviction of robbery and sentence of imprisonment of twenty (20) years meted by the trial Resident Magistrate Court of Mbeya.

The appellant herein was arraigned before the trial court on an indictment of robbery contrary to sections 285 and 286 of the Penal Code. He pleaded not guilty to the charge hence the matter went to a full trial.

The prosecutions side called a total of four witnesses and produced two exhibits namely, the caution statement of the appellant (PE1) and PF3 issued to PW3 (the victim) though the record at page 18 to 19 is not clear whether the said PF3 was actually admitted. The appellant, in his defence, testified himself and called another witness DW2 one Naiste Mwakipesile.

The facts of the case as per the evidence were as follows;

On the 9th day of September, 2017 at Mafiati area within the city and region of Mbeya at around 06:00hrs, PW3 Charles Mpesya was on his way to work was invaded by two hooligans namely, the appellant and his confederate. They hit him with heavy object and robbed him his wallet and a sports bag containing NMB and CRDB bank cards, Suma JKT identity card mobile phone make Techno 8 and cash money to a tune of one hundred seventy five thousand (175,000/=).

Despite the violence inflicted on PW3, he did not readily give up. He pursued them while raising alarm. PW1 Peter Mwangosi, in response to the alarm, joined PW3 in pursuing the culprits. As luck would have it, one of the culprits to wit, the appellant was arrested. However, his associate managed to flee with the stolen properties. As the appellant was arrested, many people within the vicinity gathered and started beating the appellant. On seeing the beatings that were being inflicted to the appellant, some of the people went to call the area chairman one Enock James Mwankusye (PW4) to rescue the appellant from mob justice.

PW4 arrived at the scene of crime and was able to convince people to stop beating the appellant. PW4 thus surrendered the appellant at Mwanjelwa Police Station. Owing to the injuries sustained from beatings, he was admitted to bail and given PF3 for medical treatment. However, according to PW2 G5498 DC Herbert, the appellant jumped bail. PW2 said that on 19th day of September, 2017 he was informed that the appellant was arrested. He thus went to Mbeya Central Police Station where the appellant was detained and recorded him a caution statement. PW2 tendered a caution statement of the appellant which, after the inquiry, was admitted in evidence as prosecution exhibit P1.

During defence, the appellant denied his involvement in the commission of the alleged offence. He also continued to retract the caution statement (exhibit PE1). The appellant further contended that he was arrested by police officers on 19th day of September, 2017 while on his way to home. He said nothing specifically on the fateful day i.e. 9th day of September, 2017. In addition, the appellant called his mother Naiste Mwakipesile (DW2) whose testimony, in actual fact, had nothing useful to the appellant.

On account of the evidence adduced, the trial court was satisfied that the charge against the appellant was proved beyond reasonable doubt. Consequently, it convicted the appellant and sentenced him to imprisonment for twenty (20) years and twelve strokes of cane. In addition, the trial court ordered the appellant to compensate the victim Tanzanian shillings seven hundred thousand (Tshs. 700,000/=).

Aggrieved by conviction, sentence and ancillary orders, the appellant appealed to this Court. He filed a petition of appeal comprising complaints which can conveniently be reduced in to the following grounds;

1. That the trial court erred in law and fact to believe the testimony of PW2 Herbert that the appellant was beaten by civilians and when brought to police station was issued with PF3 without producing the said PF3.
2. That the trial court erred in law and fact by believing the evidence of PW3 that he properly identified the appellant
3. That the trial court erred in law and fact to admit and rely on the caution statement (PE1) whilst the same was recorded by incompetent officer to wit; Detective Constable.

4. That the trial court erred in law and to rely on the hearsay evidence of PW1 and PW2
5. That trial court erred in law and fact as it failed to analyse and consider the defence evidence
6. That the trial court erred in law to order sentence of twenty years imprisonment, twelve strokes of cane and compensation of Tanzanian shillings seven hundred thousand (Tshs 700,000/=).

When the appeal was called for hearing the appellant appeared in person and fended his appeal whilst the respondent/Republic was represented by Davis Msanga, learned State Attorney.

The appellant insisted the Court to consider his complaints in the petition of appeal and thereafter allow his appeal. In contrast, Mr. Msanga opposed the appeal.

Submitting against the appeal, Mr. Msanga said that the charge was proved beyond reasonable doubt through four witnesses and two exhibits namely, caution statement and PF3. He said PF3 was properly produced in court by PW3. He however, hastily opined that even if the PF3 had not been properly produced, still the offence was proved because it is not mandatory that PF3 must be produced in order to prove the offence of robbery.

With regard to the identification of the appellant, Mr. Msanga remarked that there was no need for identification because the appellant was arrested at the scene of crime.

Further, the learned state attorney strongly argued that the trial court was right to believe and rely on the evidence of PW2 and exhibit PE1 (caution

statement) for the said caution statement was recorded by Detective Constable on the ground that section 3(1)(b) and 27of the Evidence Act allows any police officer to record the caution statement from the rank of constable and above. He thus dismissed the complaints.

Coming to the complaints that the evidence of PW1 and PW2 was hearsay, Msanga submitted that PW2 was a police officer who recorded the appellant's statement whereas PW1 a person who helped the victim to arrest the appellant. Msanga said both witnesses testified on what they saw and heard hence their testimonies were not hearsay.

On being prompted by the court, the learned State Attorney told the court that the appellant was arrested on 09/09/2017 but the caution statement was taken on 19/09/2017 and therefore told the Court to expunge it from evidence for being recorded out of prescribed time without reasons. He, however, remarked that there is still overwhelming evidence to sustain conviction.

With respect to the analysis and consideration of defence evidence, Mr. Msanga was of the firm views that the evidence was properly analysed and the defence evidence was considered accordingly. Msanga referred the Court to page 7 of the judgment to augment his contention. In conclusion, the state attorney prayed the court to dismiss the appeal.

Starting with the complaints against the testimony of PW2 D/C Herbert that the appellant was beaten by civilians and when brought to police station was issued with PF3 without producing the said PF3, the prosecution evidence is consistent that the appellant was arrested at the scene of crime and that after arrest he was beaten by the civilians until when the area

chairman PW4 came and rescued him. The appellant was thereafter taken to police by PW4 where he was issued with PF3. This was evidently testified on by PW1, PW3 and PW4. Further, PW2, a police officer affirmed the version. On this basis, I find the appellant's complaints unfounded

With respect to the attacks towards identification evidence, this complaint is misconceived. It is common cause in the evidence that the appellant was arrested at the scene of crime while attempting to run away. This is clearly featured in the testimony of the victim PW3 and PW1 whom I find no reason to disbelieve them. In the circumstances, the issue of identification is immaterial.

With regard to the admissibility and reliability on the caution statement (PE1) whilst the same was recorded by incompetent officer to wit; Detective Constable, I agree with the learned state attorney that the complaint has no merits. Section 3(1) of the Evidence Act allows a police officer of any rank to record the caution statement. The section defines a police officer to mean any member of the Police Force of or above the rank of constable. As such, PW2 G5498 DC HERBERT was a competent person to record the caution statement of the appellant.

Further, the appellant faulted the trial court for relying on the evidence of PW1 and PW2 which, according to the appellant, was hearsay. In rebuttal, Msanga submitted that their evidence was not hearsay. I have gone through the testimonies of PW1 and PW2. PW1 is among the person who responded to the alarm raised by the victim PW3 henceforth joined the efforts with PW3 to arrest the appellant. Further, PW2 is the person who received the appellant at the police station when he was surrendered by the area chairman PW4. PW2 also issued PF3 to the appellant. Upon

reevaluation of their evidence, I do not see any elements of hearsay. I thus dismiss this complaint.

Moreso, I have had occasion to thoroughly navigate through the evidence and judgment. The trial magistrate considered the defence evidence and found it too weak to shake the prosecution evidence. Also, at page 7 of the judgment, as submitted by Msanga, it is very clear that the trial magistrate took in to account the defence evidence while composing the judgment. This ground therefore is equally devoid of merits.

Lastly, the appellant complained about the sentence of imprisonment of twenty years, twelve strokes of cane and compensation of Tanzanian shillings seven hundred thousand (Tshs 700,000/=). Sections 285 and 286 of the Penal Code under which the appellant was convicted provide maximum punishment of imprisonment for twenty (20) years. However, section 5(a)(1) of the Minimum Sentence Act provides for minimum sentence for robbery to be imprisonment for fifteen (15) years. The section provides;

5. Notwithstanding the provisions of section 4–
(a)(i) any person who is convicted of robbery shall be sentenced to imprisonment for a term of not less than fifteen years;

In terms of section 170(1) of the Criminal Procedure Act, a subordinate court has no powers to impose a sentence of imprisonment exceeding five years unless such sentence is a minimum sentence for an offence which the subordinate court has powers to try. As such, the trial court was wrong to impose the sentence of imprisonment for twenty (20) years which it had no powers. Thus, the sentence was illegal. Further, section 286 of the

Penal Code does not provide for a punishment of strokes as imposed by the trial court.

Further, I have noted that the prosecution simply cited section 285 in the charge without mentioning the specific subsection. This was wrong in law as they ought to have cited section 285(2) of the Penal Code. Nonetheless, it is my considered views that the errors are curable under section 388(1) of the Criminal Procedure Act. See **Jamali Ally @ Salum Vs the Republic, Criminal Appeal No. 52 Of 2017, CAT at Mtwara** and **Feston Domician vs the Republic, Criminal Appeal No. 447 of 2016, CAT at Mwanza**

In the premises, I reduce the sentence of imprisonment for twenty (20) years meted out by the trial court to fifteen (15) years which is a minimum sentence under section 5(a)(1) of the Minimum Sentence Act. Further I uphold compensation order to the victim PW3 Charles Mpesya of Tanzania shillings seven hundred thousand (Tshs 700,000/=).

Save for the sentence as indicated above, the appeal is dismissed.

It is so ordered

Right of appeal is explained

A.A. Mbagwa
Judge
10/12/2021

The judgment has been delivered in the presence of the appellant and Davis Msanga, State Attorney for the Republic this 10th day of December, 2021

THE HIGH COURT OF TANZANIA

A.A. Mbagwa
Judge
10/12/2021