THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 39 OF 2022

(Originating from the District Court of Momba at Chapwa in Criminal Case No. 140 of 2020)

Between

CLINTON GODWIN MWAMILO
NWAKA AMANYISYE KITA } **.....APPELLANTS**

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 12th July, 2022

Date of judgment: 18th July, 2022

NGUNYALE, J.

The appellants were arraigned before the District Court of Momba with the offence of armed robbery contrary to section 287A of the penal code Cap 16 R: E 2019 read together with miscellaneous amendments Act No. 3 of 2011. It was alleged that on 10th February, 2020 at about 03:00hrs at Majengo area Tunduma Township within Momba District in Songwe

Region the appellants did steal one fire arm made shotgun greener with serial No. 61666 and CAR No. 56609 valued at Tsh. 700,00/= the property of Amazon 12 Group Security Limited and cash money Tsh. 6,000,000/= the property of Lin Chen Kang and immediately before and after such stealing did threat to kill security Ndule Hakim Mwasele and Joel Abraham Mkoma by use of machete in order to obtain the said property. The appellants denied the charge.

The prosecution paraded four witnesses Abraham Mbuja (PW1), G7151 D/C Bariki (PW2), Issa Rajabu Sudi(PW3) and G.4463 PC Adv. Eribariki(PW4) and had five documentary evidence. The appellants defended themselves.

Briefly it was the prosecution case that on 10/2/2020 the residence of Chinese Nationals was invaded and robbed the gun with serial No. 61666 and CAR No. 56609 the property of Amazon 12 Group Security Limited and other properties. PW1 was informed through phone call during the night. PW2 went at the scene of crime where he found the door broken and the fence destroyed. He drew a sketch map and interrogated some person. On 11/2/2020 he was informed that the accused were at Mpemba, he went to arrested them and recorded statement of the first appellant who admitted the offence.

In defence the appellants denied each and every detail of the prosecution account and each narrated on how he was arrested and implicated with the offence of armed robbery. Upon full trial the trial Magistrate found the prosecution to have proved the offence against the appellants, accordingly, convicted and sentenced them to thirty years imprisonment. Aggrieved the appellants filed their petition of appeal containing a total of eight grounds which are paraphrases as follows;

1. *That the trial court erred to convict the appellants while they were not arrested at the area of crime;*
2. *That the appellants were not found in possession of the stolen properties including the gun;*
3. *The person against whom threat was directed were not called as witnesses in court;*
4. *That caution statements of the first appellant exhibit PE4 was admitted without inquiry;*
5. *That the prosecution failed to prove the charge as required by the law*
6. *That exhibit PE5 was admitted contrary to section 34B(2) of the Evidence Act cap 6 R: E 2019*
7. *That the appellants were not mentioned at the earliest possible opportunity*
8. *That the defence evidence was ignored by the trial magistrate.*

When the appeal came for hearing the appellants appeared in person while the respondent Republic appeared through Baraka Mgaya State Attorney. The State Attorney supported the appeal on the ground that the prosecution did not prove the charge beyond reasonable doubts.

Mr. Mgaya submitted that the element of use of threat before or after stealing was not proved because the person to whom it was directed were not called as witnesses by the prosecution. He cited the case of **Hassan Idd Shindo & Another v R,** Criminal appeal No. 324 of 2018 in which it was held that it is obvious that the absence of the element of use of a weapon to threaten a person in order to obtain or retain the stolen property as per section 287A of the Penal Code, makes the offence of armed robbery in the present case, unproven. Based on this ground he prayed the appeal to be allowed.

The appellants insisted the court to consider their grounds of appeal.

I have considered the submission of the State attorney and the prayer of the appellants. Essentially, I agree with the State Attorney that the prosecution did not prove their case against the appellant beyond all reasonable doubts. The ground which was raised by the appellant in their petition of appeal as ground three and five.

At this juncture, it is momentous to state that, in our criminal justice system like elsewhere, the burden of proving a charge against an accused person is on the prosecution. This is a universal standard in all criminal trials and the burden never shifts to the accused. As such, it is incumbent on the trial court to direct its mind to the evidence produced by the

prosecution in order to establish if the case is made out against an accused person. This principle equally applies to an appellate court which sits to determine a criminal appeal in that regard.

In the present appeal the charge of armed robbery is proved when all elements of the offence that is stealing, use of threat before or after stealing in order to retain the property and names of the person to whom threat was directed is disclosed in the charge. It is incumbent that the prosecution has to lead evidence that the perpetrator used threat in obtaining the stolen property. In this appeal the only issue is that the prosecution did not call victims as witnesses. Four witnesses who were paraded were not at the scene of crime and never testified how the victims were threatened. This failure to call the victims as witnesses entitles the court to draw adverse inference as was stated in the case of **Azizi Abdalah v Republic** [1991] TLR 71

> *'The general and well-known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution.'*

The victims who are Ndule Hakim Mwasele and Joel Abraham Mkoma were not called by the prosecution to prove that in obtaining the shotgun they were threatened by the machete as alleged in the particulars of the

charge. No reason was disclosed for not being called as witnesses. Based on this failure the prosecution evidence did not prove the element of use of force or threat hence rendering the charge unproved.

For purpose of completeness of this appeal as also prayed by the appellants I will consider the first, fourth and sixth grounds.

Starting with the first ground it is true that the appellants were not arrested at the scene of crime and no evidence was lead on who laid information before the police that the appellants were the culprits of armed robbery. Even the arresting or investigating police did not mention how he got the information on the appellants being the perpetrators of the offence. In defence each appellant gave evidence on how he was arrested and connected with the offence which were materially not cross examined.

In this appeal the prosecution evidence did not irresistibly point that the appellants are the ones who committed the offence of armed robbery in question. In the case of **Salim Petro & Another v R,** Criminal Appeal No. 234 of 2010, the court cited with approval the decision in the case of **R v Baskerville** (1916) 2KB 658 at 667 where Lord Reading said;

> *'We hold that the evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the*

crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.'

Failure to link the appellant with the commission of the offence of armed robbery left a lot to be desired in this case as the result the benefits should be resolved in favour of the appellants.

The fourth ground is that exhibit PE3 caution statement was admitted without conducting inquiry despite objection on its involuntariness being raised. When PW1 wanted to tender cautioned statement of the first appellant it was objected for reason that he was tortured. The trial Magistrate then invited the public prosecutor to reply. Thereafter the Magistrate made a ruling by admitting it.

This is not procedure of admitting cautioned statement in case it is objected by the accused. Under section 27 of the Evidence Act [Cap 6 R: E 2022] when objection is raised against voluntariness of the alleged confession, the trial court must stop everything and proceed to conduct an inquiry or a trial within trial in case of the High Court into the voluntariness or not of the alleged confession. Such inquiry should be conducted before the confession is admitted in evidence. Situation akin to the present was discussed in the case of the case of **Daniel Matiku v.**

Republic, Criminal Appeal No. 450 of 2016 CAT (unreported) the court held that;

> *Omission to conduct an inquiry in case an objection is raised, is a fundamental and incurable irregularity because if the confession stands out to be crucial or corroborative evidence, an accused would not be convicted on evidence whose source is doubtful or suspicious.*

In this appeal inquiry was not conducted hence exhibit PE3 is liable to be expunged from the record as I hereby do.

The complaint in six ground is that exhibit PE5 was admitted contrary to section 34B of the Evidence Act [Cap 6 R: E 2022] hence forth "the Act". It is in evidence that the prosecution prayed to recall PW2 so as to tender statement of Wang Chon, who had returned to China, Abdallah Said Seleman and Mzaramo whose whereabout could not be established. The prayer met objection from the appellants. Thereafter the court composed a ruling admitting the said statements as exhibit PE5 collectively. With respect to the trial Magistrate this is not the procedure of admitting statement under section 34B of the Act. The law requires the prosecution prior to tendering of the statement at the trial notice to be served to the accused so as to enable them to exercise their statutory right to object to its being tendered in the evidence against them as stipulated under section 34B(2)(e) of the Act. Further all the conditions stipulated in this

subsection are cumulative and must be satisfied by the prosecution before the statement is admitted in evidence. See the case of **Omary Athumani @ Magar & Another v R,** Criminal Appeal No. 398 of 2019, CAT at Dar es Salaam (Unreported).

In this appeal condition (d) and (e) stipulated under subsection 34B(2) of the Act was not met, that is, no notice was given and it was not served to the appellant to enable them file objection(if any) within ten day as the result exhibit PE5 collectively is expunged from the record.

In view of what I have endeavoured to discuss, the charge of armed robbery against the appellants was not proved to the hilt. I therefore allow the appeal, quash and set aside the conviction and sentence respectively and order the immediate release of the appellants unless lawful held with another lawful cause.

DATED at MBEYA this 18th day of July, 2022

D.P. Ngunyale
Judge