IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 260 OF 2020

(Appeal from the decision of the District Court of Kilombero at Ifakara)

Hon. KHAMSINI RM,

dated the 19th day of June, 2019

in

Criminal case No. 94 of 2018.

ABDUL SALUM MBUTA @KWELEA KWELEA .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT OF THE COURT

6th June & August, 2022

CHABA, J.

The appellant, Abdul Salum Mbuta @Kwelea Kwelea, was charged and convicted by the District Court of Kilombero, at Ifakara (the trial Court) with the offence of Armed Robbery contrary to section 287 A of the Penal Code [Cap. 16 R. E. 2019]. He was sentence to serve thirty (30) years imprisonment. Aggrieved by the decision of the District Court of Kilombero. The appellant raised ten (10) grounds of appeal as follows:

1. That your Honourable Jugde the learned trial magistrate grossly erred in finding the appellant guilty based on the defective charge where the person to whom the threat was targeted was not mentioned.
2. That, the trial magistrate erred in holding to huge contradictory evidence of PWI, PW2 and PW3 in respect of various aspects.
3. That, the magistrate erred in failing to assess validity of caution statement Exh. PEI obtained by PW4 contrary to mandatory

provisions of criminal Procedure Act (Cap 20 R; E 2002) worse still admitted un- procedural where its contents were not read over before court by its author to alleged maker in compline with mandatory requirement.

4. That, the learned trial magistrate erred in holding to PF3 (PE.2) tendered unprocedural by the prosecutor who was not under oath nor was it serviced to the appellant to form an opinion in compliance with mandatory provision of Tanzania Evidence Act (Cap 6 RE 2002). Worse still was not read loud in court in compliance requirement
5. That the learned trial magistrate grossly erred in holding to PWI, S, PW2, S and PW3'S evidence with wide discrepancy in regard to who gave to victim (PWI) the alleged KITENGE after the alleged offence.
6. That, the learned trial magistrate grossly erred in holding to PW1'S and PW3'S evidence with wide discrepancy in regard to the person who reported the incident to PW3.
7. That, the learned trial magistrate grossly erred presuming that the appellant was the perpetrator of crime where no crime evidence was lead suggest his manhunt immediately after occurrence of the offence considering he was known before hand by PW1, PW2 and PW3 as they hail from the same vicinity.
8. That the learned trial magistrate erred in holding to uncredible and reliable visual identification of PWI and PW2 against appellant at the quo where they failed to mention the intensity of light which aided their identification.
9. That, the trial magistrate erred in failing to appraise objectively credibility of the prosecution evidence before relying on it as basis for conviction.
10. That, the trial magistrate erred in law and fact to convict the appellant in a case which was not proved beyond reasonable doubt.

Briefly, the background of the case which led to the appellant conviction is as follows: On the night of 15th August,2017, at or about 23:00 hrs at Katindiuka within Kilombero District, Morogoro region, PW1 (Mbechule s/o Sama) went to receive her wife at Kwamakali then they

decide to rest somewhere to have the drinks. Her wife gave him Tshs 400,000/=. They took bajaji in their way home they received the information that her relative was died. Then they went to attend and later on they passed at the festival they were given the chair they sat and started to drunk beer. Suddenly the appellant took the bottle of beer and beat PW1 on his face, he took the panga from his bag, took off PW1 trouser which contained Tshs 400,000/= on the pocket in it. PW2 reported the matter to the PW3 then PW3 reported the matter to the police, and PW4 was the investigation officer, PWI taken to the hospital for treatment and medical examination.

In his defence the appellant denial the commission of an offence, he was with his friend namely Frank went for Mama Mwaya for drinking then the PWI and PW2 came two beer was sent to them, then PWI started to insulted his friend they had the quarrels PWI bit his friend and his friend bite him, then it happened that PW1 went to the hospital and on the following day he was arrested.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent was represented Ms. Evelyne Ndunguru, the learned State Attorney.

On being invited to elaborate his ground of appeal he opted to let the learned State Attorney respond first and reserved his right to rejoin later, if the need would arise.

In opposing to the appeal, the learned State Attoney Ms. Evelyne Ndunguru, submitted that, on first ground of appeal argued that the charge was correctly and victim was Mbechule s/o Sama, as shown at page 3 of the proceeding. That ground number one has no merit

Regarding to ground number 2, 5 and 6 of the appeal the learned State Attoney Ms. Evelyne Ndunguru, argued that the point has not merits as no contradictions in page 2 of the judgement the victim said the one who cover him with kitenge at the house of Village chairman is his wife. But this contradiction doesn't go to the root of the matter, as PW2 who went to the PW3 house. The ground has no merits.

Regarding to the 4th ground of appeal the learned State Attoney Ms. Evelyne Ndunguru argued that the documentary evidence was read loud before the court and it is against the law, and it must be expunged from the court records but the prosecution witness are water tight to prove the conviction of the appellant as in the case of **Daniel Malogo Makasi and two others vs Republic,** Criminal Appeal no 346 of 2020, 475 and 476 of 2021 CAT Dodoma the Court of Appeal of Tanzania held that the expounded that oral testimony is sufficient ground to conviction of the appellant. Thus, ground has no merits.

In respect of the ground number 7 of the appeal the learned State Attoney Ms. Evelyne Ndunguru argued that at page 3 of the judgment it was adduced that the victim was invaded by young boys including the appellant, whose nick name is Kwelea Kwelea, PWI did identity the appellant from the beginning and the persons who assaulted him was appellant, relied on the case of **Adili Ally vs Republic**, Criminal Appeal No 99 of 2020, CAT, DSM page 11-12.

Argued on ground number 8 of the appeal, the learned State Attorney submitted that, the victim knows the appellant for the long time, at the scenes there was sufficient light of generator, as in page 7 and appellant

was full identified by PWI and PW2 as laid down in the case of **Waziri Amani vs Republic** (1980) TLR 250.

Argued on ground number 9 and 10 the learned State Attorney argued that the credibility of the witness can positively explained by the trial court magistrate, at page 5 of the judgment explained how the prosecution witness was credible. Therefore, the learned state attorney prayed the appeal to be dismissed for lacks of merits.

In the rejoinder the appellant believes the court will do justice to him and prayed to the court to consider ground of appeal.

Having examined the grounds of appeal and heard both parties. I will now turn to consider the merits or otherwise of the appeal in the light of the submissions, facts and evidence gleaned from the record of the present appeal. However, it is the principles of the law that, in our jurisdiction that a first appeal is in the form of a re-hearing. In that respect I will subject the evidence tendered before the trial through a fresh re-evaluation by subjecting it to a scrutiny and where necessary arrive at my own conclusions of facts. This is what was stated in the case of **D. R. Pandya vs Republic**, (1957) EA 336 as well as **Iddi Shaban @ Amasi vs Republic**, Criminal Appeal No. 2006 (unreported) to mention but a few.

In addition to that, I will also be mindful of the principle enshrined under section 110 and 111 of **the Evidence Act, Cap. 6 R.E. 2019**, that he who alleges must prove. That therefore means that, before the trial court, it was the prosecution that had a duty to prove the case against the respondent to standard known to our law, that is beyond reasonable doubt. As to what it means beyond reasonable doubt the Court of Appeal

in Criminal Appeal No. 205 of 2007, **Samson Matiga Vs. R,** (unreported) defined it as follows: -

> "A prosecution case, as the law provides, must be proved beyond reasonable doubt what this means, to put it simply, is that the prosecution evidence must be strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person; and not any other, as the one who committed the offence".

There is no dispute that the appellant was charged with the offence of armed robbery as per section 287 (A) of the Penal Code Cap 16 RE 2002 now RE 2019 which reads as follows:

> 287A. A person who steals anything, and at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or immediately before or after stealing uses or threatens to use violence to any person in order to obtain or retain the stolen property, commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment.

The ingredients of 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 ..."** [Emphasize is mine]

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

Guided by the above authorities, the question whether the above ingredients of armed robbery were proved in the present case. To prove the above ingredients the prosecution side called five (5) witnesses, that is **Mbechule Sama** (PWl); **Regina Mgaya** (PW2) **Sela Saida** (PW3) **C.7210 Dtv CPL Mhina** (PW4) and **Dr Horogo** (PW5). Together with witness testimonies, the prosecution tendered two exhibits: a caution statement of the appellant (Exh- PE1) and PF3 (Exh. PE.2).

In the present appeal, the appellant as per ground number 3 and 4 of appeal submitted the documentary evidence were not read loud before the court, thus were wrongly tendered in court. Ms Evelyn Ndunguru agreed that exhibits tendered were wrongly tender and it worth to be expunged from the court records. Reading on the records on the proceeding at page 11 of the proceeding read as follows:

> **Pros:** I pray on behalf of the witness for admission of the caution statement

Accused: it is not true.

Court: the cautioned statement of Mbuta is admitted and marked as PE.1.

Again, on page15 of the proceeding.

Pros: I request for reception of the document

Accused: Nil

Court: The PF.3 is admitted and marked as 'PE.2' That is all.

Secondly, the exhibits were tendered by the prosecutor who was not a witness as he was not sworn or under oath. 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 **Frank Massawe vs. Republic,** Criminal Appeal No. 302 of 203 of 2012, **Sospeter Charles vs. Republic,** Criminal Appeal No. 555 of 2016. The position of the law is that allowing a prosecutor to tender evidence is fatal error.

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. Guided by the above authorities, I expunge, from the records Exhibits Peals and PE.2. As indicated above, having expunged from the records exhibits PE. I and PE.2, the question remains, in the absence of the said exhibits is the oral evidence of PWI, PW2, PW3, PW4 and PW5 sufficient to prove the case?

Having carefully consider the oral evidence tender during the trial the key prosecution witnesses included PW1 and PW2. On 25th August 2017 about 11: 00 midnight PWI and PW2 were together drinking beer at the

bar. The appellant took the bottle of beer and bite on his head, then he took the panga and took off PW1 trouser which contained Tshs 400,000/= which he was given by PW2. However, PWI didn't stated how the quarling started between him and the appellant, if there are other people at the festival (bar) why there is no independent witness to prove the case? why did PW2 went to seek help to PW3 while there were other people in the incident? And if there are many people in incident why did PWI got injured himself and not other people? The evidence suggested there was misunderstanding between appellant and PWI, if the appellant was bandit, he could attack the one who seller beer in the bar and not PWI alone, As shown in the page 7 of the proceeding evidence of PW2 that; -

> *"At Fatuma we met other friends, we decided to sit and have a beer"*

There also contradictions to the evidence of PWI stated that he run to Mama Changa while PW2 stated that PW1 went home there is no corroboration between the evidence of PWI and PW2. Through learned state attorney argued the contradictions does not go to the root of the matter, but if PWI and PW2 were both present in the incident, how comes the evidence adduced are differ? This gives benefit of doubt to the appellant.

I have gone through the records and noted that, indeed, neither of the prosecution witnesses gave an account on how quarrel started and failed to explained how the appellant took off his trouser. It is trite law that in criminal trials, it is the prosecution that is required to prove the case against the accused person beyond reasonable doubt. The position of law, in the case of **George Mwanyingili v. R,** Criminal Appeal No. 335 of 2016 (unreported), the Court stated thus:

'We wish to re-state the obvious that the burden of proof in criminal cases always lies squarely on the shoulders of the prosecution, unless any particular statute directs otherwise."

From the foregoing, I am satisfied that the prosecution side failed to prove their case in accordance with the require standards. Meanwhile I see no reason to labour on other grounds of appeal as by so doing that will be an academic work.

In the final event, and to the extent of my findings, I find that this appeal has merits. I allow the appeal, quash the conviction and set aside the sentence imposed to the appellant. I order the immediate release of the appellant from prison unless his incarceration is in relation to some other lawful cause. **It is so ordered.**

DATED at **MOROGORO** this 26th day of August, 2022.

M. J. CHABA

JUDGE

26/08/2022

Court:

Judgment delivered at my hand and Seal of the court via video conferencing this 26th day of August, 2022 in the presence of the appellant who appeared in court by remote through video conferencing linked from Ukonga Prisons, and Mr. William Dastan, learned State Attorney who entered appearance for the Respondent/Republic.

M. J. CHABA

JUDGE

26/08/2022

Rights of the parties fully explained.

M. J. CHABA

JUDGE

26/08/2022