IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL NO. 20 OF 2022

(Arising from Ukerewe District Court at Nansio in Criminal Case 04 of 2021)

BENARD BIGAMBO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

25/8/2022 & 9/9/2022

ROBERT, J:-

Before the District Court of Ukerewe, the appellant herein was charged with an offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E 2019]. After a full trial, he was convicted and sentenced to 15 years imprisonment and payment of compensation to PW2 at the tune of Tshs 32,000/= being the value of a mobile phone stolen during the alleged roberry. Aggrieved, the appellant lodged his appeal before this court armed with seven grounds of appeal reproduced herein below:-

1. *That the trial Magistrate erred both in law and fact to convict and sentence the appellant while the respondent did not prove the case*

beyond reasonable doubt (please see the evidence of PW2 in page 3, PW3 in page 4 and PW4 in page 4,5 of the judgment).

2. *That the trial Magistrate erred both in law and in fact to convict the appellant basing on the appellant's cautioned statement while was recorded in police station without considering that the appellant caution he was recorded out of time, exhibit P2 (please see the Criminal Procedure Act, section 50(1) a,b and B of the Penal Code(sic) Cap 20 [R.E 2019] and its amendments.*
3. *That the trial Magistrate erred both in law and in fact to convict the appellant with the offence charged with without considering the evidence of prosecution side is weak, doubtful and had discrepancies.*
4. *That the trial Magistrate erred both in law and fact to convict the appellant with the offence of robbery with violence that offence is variance with charge sheet brought in the court (please see page 1, 12, 13 of the judgment).*
5. *That the trial Magistrate trampled down the principles of natural and criminal justice where proof of the occasion of an offence should be beyond reasonable doubt.*
6. *That the Magistrate denied the appellant the benefit of the doubt where the prosecution case is riddled with dubious statements.*
7. *That the trial Magistrate erred both in law and in facts to convict the appellant for basing on the prosecution witnesses without considering that the appellant was beaten and forcefully in police station (please see the Constitution of Tanzania in section 13(6)(d) and (e) (sic).*

The appellant prayed for the appeal to be allowed, the proceedings and judgment of the lower court be nullified and the conviction and sentence be quashed.

On 25th of August, 2022 when this appeal came up for hearing. The appellant appeared in person unrepresented whereas the respondent enjoyed the services of the learned State Attorney, Ms. Maryasinta Lazaro.

When called upon to argue the appeal, the appellant prayed that his grounds be adopted as stated in the petition of appeal and he be discharged.

On the other hand, the learned State Attorney resisted the appeal. In her submissions, she opted to combine the 1st, 3rd, 5th and 6th grounds and argue them together for the reason that they are similar in substance. Similarly, she argued the 2nd and 7th grounds of appeal together for the same reasons.

Submitting in respect of the 1st, 3rd, 5th and 6th grounds where the appellant claimed that the case was not proved beyond reasonable doubt, she maintained that the prosecution case was proved beyond reasonable doubt with the testimonies of PW2 and PW3 who were the victims and eye witnesses in the alleged crime. The two witnesses testified that they were invaded by three people and they were able to identify the appellant.

Further to that, one of the two mobile phones which were stolen from the victims was found in possession of the second accused person who later told the court that he got it from the appellant who also

admitted in his testimony that he gave the victim's phone to the second accused.

Another piece of evidence was the appellant's cautioned statement which was admitted in evidence as exhibit P1 in which the appellant confessed to have been in the alleged robbery and that he was the one who took the stolen mobile phone to the second accused person. It was her strong view that the case against the appellant was proven beyond reasonable doubt based on the evidence presented.

On the 2nd and 7th grounds, the appellant claimed that the cautioned statement was not recorded voluntarily because he was beaten. It was the learned State Attorney's reply however, that the said complaint was raised in the trial court during hearing and the trial Court conducted an inquiry after which the court came to a conclusion that the appellant recorded his statement voluntarily. Moreover, the appellant's conviction was not based solely on his cautioned statement but also other pieces of independent evidence which were considered by the trial Court before convicting the appellant.

With regards to the 4th ground of appeal in which the appellant faulted the trial court for convicting him with the offence of robbery with violence while he was charged with armed robbery, the learned State

Attorney prayed that this being the first appellate court should re-evaluate the evidence on record and if it finds the appellant guilty of armed robbery, as the evidence suggests that he attacked the victims with a bottle of K-Vant and panga, then he be found guilty of armed robbery and the right sentence should be imposed which is that of 30 years.

She then concluded her submission by praying that the appeal be dismissed for lack of merit.

In his rejoinder submission, the appellant submitted that there was no evidence indicating that the victim was invaded at the Guest House and that although PW2 stated that she informed the Chairman of that locality of the incident, the said Chairman was not called to testify if it was true.

He submitted further that it was PW3's testimony that PW2 was beaten and fainted thus doubtful if she managed to identify the assailant. He insisted that PW2 was his girlfriend and that he informed the trial Court about that. In conclusion, he prayed that he be discharged because he never committed the alleged offence.

Having gone through the record of the trial court, grounds upon which the appellant rests his appeal and submissions for and against those grounds respectively, I will make determination of the issues raised in the

said grounds as submitted by the learned State Attorney for the respondent.

As shown earlier, the learned State Attorney for the respondent combined and argued the 1st, 3rd, 5th and 6th grounds of appeal as they are intertwined. Looking at the said grounds, as rightly put by the learned State Attorney, they all raise a concern that the case against the appellant was not proved beyond reasonable doubt.

Having gone through the evidence adduced at the trial, I am inclined to join hands with the learned state attorney that the case against the appellant was proved beyond reasonable doubt. The prosecution called a total of five witnesses, two of them, PW2 and PW3 being eye witnesses who testified that they managed to see and identify the appellant to be among the robbers who invaded them on the night of the incident. They also testified that the appellant managed to take two phones and cash money and it was later discovered that the phone Infinix Hot 6, which belonged to PW2 and which was one of the items taken by the appellant after attacking the victims was in the second accused's possession who later testified that he got it from the appellant who left it with him as pawn in exchange for money Tshs 60,000/=, that fact was not controverted by the appellant who admitted to giving DW2 the said phone. Moreover,

there was the appellant's cautioned statement which was admitted as exhibit P1 in which the appellant confessed to have taken part in the said incident.

All that evidence combined, proved without leaving any flicker of doubt on the appellant's involvement in the commission of the alleged robbery. The cited grounds are therefore baseless.

Coming to the 2nd and 7th grounds of appeal in which the main complaint is that the trial court based its conviction on a cautioned statement while the same was recorded out of time and that the appellant was beaten and forced to sign, it was the learned State Attorney's contention with regard to the issue of voluntariness that the same was raised during trial which led to an inquiry being conducted, after which the trial Court concluded and was satisfied that the cautioned statement was recorded voluntarily and admitted it. She further stated that the conviction was not based solely on the cautioned statement but also other pieces of evidence which the trial court considered in convicting the appellant.

Another issue pertaining to the cautioned statement which was raised by the appellant but not responded to by the learned State Attorney was that the said statement was recorded out of prescribed time. I wish

to state from the very outset that this issue is an afterthought. This is because the appellant did not raise it during trial where the trial court was the proper forum clothed with the jurisdiction to hear the objection and make determination of the same after conducting an inquiry in accordance with the law and finally rule out whether or not the statement is admissible. What was tested by the trial Court was only the voluntariness of the statement in question.

It is trite law that once the provisions of section 169(1) are not invoked in challenging the admissibility or admission of certain evidence, that cannot be raised at the appellate level; see **Msafiri Jumanne and Two Others vs The Republic**, Criminal Appeal No. 187 of 2006, CA-Mwanza.

Moreover, the Court of Appeal sitting at Mwanza in the case of **Mashimba Dotto @ Lukubanija vs The Republic**, Criminal Appeal No. 317 of 2013, was faced with a similar situation whereby upon appeal, the appellant raised an allegation that the cautioned statement was recorded out of time which allegation was never canvassed at the trial, the counsel for the appellant had to drop the ground and the Court had this to say;

> *"Ideally, under section 169(1) of the Criminal Procedure Act (Cap 20 R.E 2002) (the Act) objection regarding the admissibility of the statement on that aspect ought to*

have been raised at the trial in order to give the prosecution the opportunity to discharge the burden mandated to it by virtue of the provisions of sub-section (3) thereto. As it is, since objection to the admission in evidence of the statement based on the above point was not raised at the trial it would be futile and out of place to raise it at this late stage where this court is not seized with the jurisdiction to determine the admissibility or otherwise of the statement in question- see also this court's decision in Zakayo Shungwa Mwashilingi and Two Others vs Republic, Criminal Appeal No. 78 of 2007 (unreported)"

Based on the cited position, I can safely conclude that it was improper to raise the issue at this stage because this court lacks jurisdiction to determine the admissibility of the said cautioned statement. The ground is thus dismissed.

On the 4th ground of appeal in which the appellant faults the trial court for convicting him with the offence of robbery with violence while he was charged with armed robbery, the counsel for the respondent stated that she agrees and invited this court to re-evaluate the evidence and if it finds the offence of armed robbery is proved then to proceed to convict the appellant with the said offence and the sentence should be 30 years.

Having gone through the evidence, I find nothing to fault the trial Court for reducing the offence as the evidence adduced proved the offence of robbery with violence as provided for under section 285 and 286 of the Penal Code Cap 16 RE 2019. Thus, the trial Magistrate rightly invoked the provisions of section 300 of the Criminal Procedure Act to convict the appellant with the offence of robbery with violence instead of that of armed robbery.

Further, on the complaint that if PW2 was attacked and fainted it is doubtful if she was able to identify the appellant, I passed through the evidence adduced in the trial court by PW3 whose testimony was to the effect that he was the one who fainted and not PW2. It appears that the appellant misquoted the said evidence therefore the issue of uncertainty automatically dies.

In the light of the foregoing reasons, I uphold the decision of the trial Court and dismiss this appeal.

It is so ordered.

K.N.ROBERT
JUDGE
9/9/2022