IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 37 OF 2022

(C/f Resident Magistrates Court of Arusha at Arusha

Original criminal case No 306 of 2019)

ARON CLEMENT NDOIVO @ BARIKI CLEMENT.....1ST APPELLANT

PETER NDOIVO .....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

03/08/2022 & 14/09/2022

KAMUZORA, J.

The Appellants herein, are challenging the conviction and sentence of 30 years imprisonment imposed to them by the Resident Magistrate Court of Arusha (the trial court) for the offence of armed robbery. Three grounds were preferred by the Appellants in their petition of appeal as follows: -

1) *That, the trial court erred in law and in fact in convicting the Appellant without proof of the offence against them beyond all reasonable doubt as required by the law.*
2) *That, the trial court erred in law and in fact when it changed presiding magistrates without assigning reasons which caused injustice to the Appellants.*
3) *That, trial Magistrate erred in law and fact in convicting the Appellant without proper evaluation of the evidence in record.*

Briefly, the Appellants were charged for the offence of armed robbery contrary to section 287A of the Penal code Cap 16 (R.E 2002). It was alleged that, on 29th day of June 2018 at Sorenyi Baraa area within the city, District and Region of Arusha the Appellants jointly did steal 5 velvet coats worth Tshs. 360,000/= 4 pairs of shoes worth 80,000/= mobile phone make Samsung Galaxy worth 400,000/=, 3 gas tank cylinders worth 300,000/= and cash money Tshs. 13,000,000/= the properties of Gabriel Kone Mollel and immediately before, during and after such stealing did use panga, club and hummer to threaten one Regina Kone Mollel in order to obtain and retain the said properties.

The trial court was satisfied that the prosecution evidence was water tight and convicted the Appellants and sentenced them to thirty years imprisonment. That is the basis of the present appeal to which the

Appellants are faulting the trial court decision which convicted them for the offence of armed robbery.

When the matter was called for hearing, the Appellants were ably represented by Mr. John Mseu, learned advocate, whereas Ms. Riziki Mahanyu, learned State Attorney appeared for the Republic. In his oral submission is support of appeal the counsel for the Appellants argued jointly the first and the third grounds while the second ground was argued separately.

Starting with the second ground of appeal, the counsel for the Appellant submitted that, the trial court at page 13 of the proceedings erred in law by changing the trial magistrate without giving reasons for doing so. He pointed out that, the trial magistrate by the name of I.T. Nguvava withdrew himself from the case and returned the file to the Magistrate in-charge for re-assignment and from 20/01/2020 the case was before Hon. Jenifa who continued with the hearing. That at page 34 of the trial proceedings it indicates that, the Republic had four witnesses who had already testified and from 09/07/2020 again Hon. Nguvava took over the hearing of the case to its conclusion. The counsel complained that, while Hon. Jenifa stopped the hearing, no reason was indicated as to why she could not continue with the hearing of the case

a fact which he claimed to be contrary to section 214(1) of the CPA Cap. 20 RE 2019.

The counsel in interpreting the said provision referred the CAT decision in Criminal Appeal No. 116 of 2015, **Abdi Masudi Iboma Vs. Republic,** pg.8, where the court insisted that, it is important to give reasons for re-assignment or change of magistrate and failure to give reasons make the predecessor magistrate not to have jurisdiction to try the case. It is the prayer by the Appellant that, the proceedings of the trial court from page 13 to its final be declared nullity as the predecessor magistrate had no jurisdiction to try the matter.

Submitting on the 1st and 3rd ground the Appellant's counsel argued that, the case was not proved beyond reasonable doubt before the trial court thus, the court erred in convicting the Appellant for the offences charged. It is the claim by the Appellants that, the complainant PW1 while testifying from page 19 of the proceedings claimed that while the incident took place, he was not at home or at the scene of crime. Surprisingly, this witness claimed to see the Appellants with weapon like slasher, bush knife (sime) and they stole his money and other properties from his house. He however pointed out that, at page 21 when he was

cross-examined by the first Appellant, PW1 claimed that he found the neighbours at the scene and not the Appellants.

It is the arguments by the counsel for the Appellants that PW1 never saw the Appellants at the scene and the alleged weapons were not found with the Appellants. That, among the things claimed to be stolen by the Appellants was money but PW1 could not prove if he had that money and no prosecution witness who proved that the stolen properties were found with the Appellants.

The Appellant's counsel further submitted that the second prosecution witness, PW2 is a relative to the first witness. That, she claimed that the weapon used in stealing were taken from the scene by the police officers. The counsel contended that, the said weapons that were tendered as exhibits were not seized from the Appellant's but taken from the house of the first witness. He was of the view that, this evidence could not be relied upon in convicting the Appellants. In support of the submission the counsel cited the case of **Hassan Idd Shindo Vs. Republic**, Criminal Appeal No. 324 of 2018, where the CAT held that in armed robbery offence, proof that force and threat were used against the complainant is crucial in proving the offence.

The counsel for the Appellants contended that, in this case, the complainant Gabriel Mollel admitted that while the incident took place, he was not at home and he did not witness the incident. That, he was told a story by his young sister and neighbours. Therefore, that, there is no force or threat used against him. He maintained that, the trial court erred in evaluating the evidence tendered before it hence arriving into erroneous decision. The Appellants' counsel prayer is that this court find the Appellants not guilty for the offences charged and acquit them.

Replying the grounds of appeal, Ms. Riziki maintained a position of the trial court and supported the conviction. On the second ground of appeal based on the change of magistrate, the counsel conceded to the fact that the case shifted from Hon. Jenifa to Hon. Nguvava as the records shows. She however argued that, the counsel for the Appellant did not state as to how the change of magistrate infringed the Appellants' rights. She insisted that such error is minor and can be cured under section 388(1) of the CPA. In support of her argument the counsel cited the case of, **Tumani Jonas Vs. the Republic,** Criminal Appeal No. 337 of 2020 page 11. where CAT held that where the Appellant did not state how he was prejudiced by the change of magistrate, that cannot be a reason for the case to be nullity as it was a

minor error curable under section 388. For that reason, the second ground of appeal is baseless.

Replying on the 1st and 3rd ground, the counsel submitted that, the Republic proved the case beyond reasonable doubt. She referred the evidence and argued that, as per the evidence of PW1 Gabriel Kone Mollel he received a text message from Regina Kone Mollel on 29/06/2018 at 21:00hrs that they were invaded at their house by the Appellants who were holding weapons. That, when he went at the scene, he witnessed the doors which were broken and different properties damaged including the cupboard to where he was keeping the money and the same was stollen. That, when PW1 arrived at the scene he also found the neighbours who went there to assist.

The counsel for the Respondent further submitted that, the evidence by PW2 is very clear because she was at home on the date of incident. That, she was put under hostage by the Appellants who beating her using the weapons they were carrying. That, she was able to identify the Appellants through a light from bulb inside the house as time spent at the scene was enough for her to identify them.

Ms. Riziki added that, the evidence by PW2 was collaborated by PW3 Elias Lasirinye at page 27 of the proceedings who said that he

heard the scream at his neighbour's house and went there. That, when he entered the house, he found the Appellants and was able to identify them through electricity light and they were holding PW2 as their hostage. That, PW3 heard them threatening PW2 that they will kill her if she could not tell them were her brother was. That, PW3 also witnessed the wardrobe being broken and when he tried to help PW2, he was cut with panga by the Appellant Aron.

The counsel added further that, the evidence by DW3 was also supported by PW4, Ibrahim Sindiyo Mollel, who is the Mtaa chairman. That, he was informed of the incident and went at the scene but the Appellants had already freed away. That, he however witnessed the damage in the house of PW1 and saw the weapon that were left at the scene by the Appellants. That, he also saw, the Cap, t-shirt and shoes which he identified as belonging to the Appellants.

The counsel for the Respondent maintained that the prosecution evidence proved that the Appellant committed the offence. That, the threats were used in the incident against PW2 Regina Kone Mollel as shown in the charge sheet and not Gabriel Kone Mollel as submitted by the counsel for the Appellants. It is the prayer by the Respondent that, the appeal be dismissed as all the grounds of appeal are baseless.

In a brief rejoinder the counsel for the Appellants added that, in considering section 214, (1) of the CPA, the Appellants were prejudiced by the conduct of the first magistrate to withdrew from the conduct of the case and to take back the case again without giving reasons for so doing and convicted the Appellants. On the 1st and 3rd ground, the counsel added that, the evidence by PW1 to PW4 was not satisfactory in convicting the Appellants. That, the evidence does not show if the Appellants took anything at the scene including the weapons as they were all found at the scene. That, PW3 did not state if there was any stealing at the scene and whether the Appellant did steal anything from that house. He maintained that, the offence of armed robbery was not proved thus this court should find the Appellants not guilty and acquit them.

I have clearly considered the grounds of appeal and the submission by the parties. There is no dispute there was a change of trial magistrate. It is not also disputed that there was no reason advanced for that change. The question is what is the consequence of the trial magistrate without giving reason. The counsel claimed that such conduct contravened the provision of section 214 (1) of the CPA. The said provision reads: -

"Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, resummon the witnesses and recommence the trial or the committal proceedings."

While interpreting the above provision, the Court of appeal in the case of **Abdi Masoud and 3 others** (supra) made it clear that it is necessary to record the reasons for reassignment or change of trial magistrate. The requirement of giving reason by the successor magistrate is necessary in order to provide a semblance of order and to ensure that the accused person gets a fair trial. Apart from the fact that it is the requirement under the law, it is also a good practice for the sake of transparency as the accused person has a right to know why there is a new presiding magistrate and any changes relating to the conduct of his case.

I agree with the counsel for the Respondent that in order for the Appellants to state that their they were infringed, they needs to show

how they were prejudiced by the failure to give reasons on the change of magistrate. This is supported by subsection 2 of Section 214 of the Criminal Procedure Act Cap 20 R.E 2019 which embrace subsection 1. The said subsection provides that,

> *"(2) Whenever the provisions of subsection (1) apply the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had,* ***if it is of the opinion that the accused has been materially prejudiced*** *thereby and may order a new trial." (Emphasis mine)*

Now the question is whether the Appellants in this appeal were prejudiced by the change of magistrate. I have revisited the proceedings of the trial court. It is clear that after several adjournments before different magistrates, the matter was table before Hon. Nguvava who proceeded with the preliminary hearing as per page 7 of the typed proceedings. The matter was then adjourned several times and before Hon. Guvava could record evidence of any witness, he recused himself from the conduct of the case and the reason given was that, the case file was called by RM in-charge for re- assignment. Hon. Jeniffa RM took over the proceedings and after recording evidence of four prosecution witnesses, the case file found its way back to Hon. Guvava who

proceeded with hearing of the case and delivery of the judgment. This time, neither Hon. Nguvava nor Hon. Jeniffer did not assign the reasons on the change of the trial magistrate. It is the submission by the counsel for the Appellant that the said act contravened the law and prejudiced the Appellants.

While I agree that the change of the trial magistrate in this matter contravened the law, I do not agree with the argument that the Appellants were prejudiced with such change. I say so because, from the analysis of the proceedings, the Appellants were present at all time the case was called in court. They were given opportunity by both magistrates cross-examine the witnesses paraded in court and they also had a chance to enter defence. This clearly proves that, the Appellant's rights to fair hearing were not abrogated by failure to record the reasons on the change of the trial magistrate. In the spirit of section 214 (2) I do not see how the Appellant were prejudiced by non-compliance of section 214 (1). I therefore agree with the counsel for the Respondent that the omission to give reasons for the change of trial magistrate is curable under section 388(1) of the Criminal Procedure Code Cap 20 R.E 2019 as the omission did not result into miscarriage of justice. I therefore find no merit in the second ground of appeal.

In answering the 1st and 3rd grounds of appeal, the question that needs the determination by this court is whether the case at the trial court was proved beyond reasonable doubt. It is the contention by the Appellants that, there was no proper evaluation of evidence which if properly evaluated the trial court could have arrived to a decision that the evidence did not prove the case against them beyond reasonable doubt. The counsel for the Appellants insisted that the offence of armed robbery cannot be proved in the absence of proof that there was a threat employed in the commission of offence.

I took a deliberate move to revisit the proceedings of the trial court as well as judgment of the trial court. The charge sheet to which the Appellants were convicted of shows that the alleged stolen properties belonged to one Gabriel Kone Mollel and that the force was used against one Regina Kone Mollel by the Appellants to obtain the said properties.

It is in record that the incident took place at night but the Appellants were identified by PW2 who was at the scene and PW3 when went at the scene to offer help after he heard the alarm that was raised by PW2. As per the evidence of both PW2 and PW3 they saw the robbers who were armed and they were able to identify three of them who were inside the house using electricity light that was inside the

house as they are their neighbours. PW2 mentioned that, other robbers were outside the house and she did not identify them as there was no light outside but she identified Peter Clement, Aron Clement and Clement Ndoivo who were inside the house. Her evidence was corroborated by PW3 who mentioned that, he found the outside light not working but the light inside the house was working. PW3 saw and identified Clement Ndoivo, Bariki/Aron Clement and Peter Clement. It is also the evidence by PW1 that when PW2 informed her of the incident, she mentioned that she was attacked by Peter Clement, Aron Clement/ Bariki Clement and Clement Ndoivo. PW1 testified also that, Clement Ndoivo was arrested on the same date and charged with Criminal Case No. 225 of 2018 to which he was found guilty but, the Appellants managed to escape and were later arrested and charged. In considering that evidence, it is in my view that, there is no doubt that the Appellants were clearly identified at the scene.

On the argument that there is no proof of threat against the complainant, it is in evidence that, the properties belonged to PW1 but the force and threat was used against PW2. It was the evidence by PW2 that, the 2nd Appellant had an iron bar which he was using to beat her. When Elias Lasarunywe (PW3) appeared to serve her, he was attacked

by the 1st Appellant on his right hand using a panga. That, when another neighbour appeared the appellants and their fellows fled away leaving behind exhibit P1 that is; a club, Slasher, hummer, machete, Cap and sandals.

The provision of section 287A of the Penal Code Cap 20 R.E 2019 to which the Appellants were charged under does not impose a mandatory requirement that the force or threat should only be imposed on the complainant to make the offence of armed robbery to stand.

> *"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.*

With the wording in the above provision, the threat or violence can be used against any person in order to obtain the stolen property. I therefore find this argument that the complainant was not threatened as he was not the at the scene to be baseless. It is in evidence that, PW2 was put under hostage and beaten by the armed robbers, the Appellant's inclusive. They threated PW2 asking for the whereabouts of

her brother as they wanted money which he got from selling plots. When PW3 tried to help her, he was attacked with a panga and injured on right hand by one of the robbers whom he identified as Aron or Barik (the first Appellant). I therefore find that, the use of force envisaged under section 287A was proved in this case.

On the argument that the weapon tendered by PW5 D/CPL Kassim exhibit P1 were not proved as used by the Appellants, it is my view that, even in the absence of the weapons, still the evidence available is water tight proving that the Appellants were armed at the time of incident. They used the said weapons to attack PW2 and PW3 and Exhibit P3 proves that PW2 suffered injuries in her body from the attack and was sent to hospital for treatment.

On the argument that nothing was stolen from the scene, this court find the same to be weak. There is ample evidence from prosecution witnesses showing that several items were taken by the Appellants from the house of PW1. PW1 confirmed that several items listed in the charge sheet were missing including the money which the PW1 obtained from the sale of plots. PW2 confirmed that she saw the Appellants taking those properties and breaking into the wardrobe and drawers and taking the money. The evidence by PW2 was also supported by PW3 who

found the Appellants in the house of PW1 breaking and taking different items.

The Trial court considered all that evidence as well as defence evidence before coming to a conclusion that the offence was proved beyond reasonable doubt. As I opted to re-evaluate the evidence, I also looked into the defence evidence to see if it established any reasonable defence affecting the prosecution evidence.

In their defence, the Appellants categorically denied to have committed the offence. They testified before the trial court that there was a land Conflict between PW1 and Clement Ndoivo thus, this case was fabricated against them as they are relatives to witness who testified for the prosecution case. The Appellant were unable to explain how that conflict is related to them being seen and identified at the robbery scene. They were also mentioned by other witness (PW3) who is their neighbour and whom, they did not mention if he was involved in the alleged land conflict for him to frame a case against them. I therefore find that the Appellants' defence did not in anyway shake the strong evidence of the prosecution witnesses.

In considering the totality of the evidence adduced at the trial court, I find that the prosecution case was proved beyond all reasonable

doubts as required by the law. I therefore find no merit in this appeal thus, the judgment, conviction and sentence of the trial court is hereby upheld.

DATED at **ARUSHA** this 14th Day of September 2022

D.C. KAMUZORA

JUDGE