

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(MOROGORO DISTRICT REGISTRY)
AT MOROGORO
CRIMINAL APPEAL NO. 07 OF 2022

(Originating from Criminal Case No. 125 of 2019 in the District Court of Morogoro)

MACKBRUNO ZACHARIA 1ST APPELLANT
MANENO YAHAYA BAKARI 2ND APPELLANT
SHABANI HAMISI MBAGA 3RD APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Last court order on: 29/08/2022

Judgment date on: 03/10/2022

NGWEMBE, J.


Before the District court of Morogoro, the appellants jointly with other two, were arraigned in court and charged for armed robbery contrary to section 287A of the Penal Code Cap 16 R.E. 2002 as amended by Act No. 3 of 2011.

The particulars of the offence as per the charge sheet stated that on 04th May, 2018 at Modeco area, Mazimbu ward within the District and Region of Morogoro, the appellants jointly with other two persons did steal a motorcycle make Sanlg bearing Reg. No. MC 680 AAS worth TZS. 2,200,000/=, cash TZS. 150,000/=, mobile phones to wit; two

Sumsung, two tecno, one ATM card and various identity cards all properties of Gabriel Pastory, and immediately before such stealing, they threatened with firearms, bush knife and club in order to obtain those properties.

When the charge was read over to the accused persons and explained as required by law, the appellants denied all, thus triggered the prosecution to line up six (6) witnesses and three (3) exhibits to prove the accusations against the accused persons jointly and severally. After several inquiries and rulings, at the end the trial court found all accused persons to have a case to answer. Thus, they defended themselves under oath without an assistance from another independent witness or exhibit.

Finally, the court acquitted two accused persons and proceeded to convict the three appellants who are now in this court challenging both their conviction and sentence. The appellants came up with eight detailed grounds of appeal and eleven supplementary grounds of appeal forming a total of nineteen (19) grievances. For convenience purposes, those grounds may be summarized as follows:-

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1. The prosecution failed to tender relevant exhibits including the motorcycle make Sanlg Reg. No. MC 680 ASS, money TZS. 150,000/=, two Sumsung phones, Tecno celluler phones and ATM card;
 2. Whether the appellants were properly identified at the crime scene during the eventful night.
 3. Whether the preferred charge sheet against the appellants was defective; and

4. Whether the prosecution proved the case beyond reasonable doubt against the appellants.

In disposing of this appeal, both parties agreed to compose their arguments in writing. The appellants argued jointly their grounds of appeal as summarized herein. On the first ground of appeal, they submitted quite strongly that the prosecution failed to produce and tender in court the alleged stolen properties like motorcycle registration Card, purchasing receipt of those mobile phones and business licenses. Therefore, failure to do so created serious doubt. They supported their argument by referring the cases of **Jastine K. Kasusura @ John Laizer Vs. R, Criminal Appeal No. 175 of 2010** and **Rashidi Amiri Jaba & Another Vs. R, Criminal Appeal No. 205 of 2008**.

Further argued strongly that, it was wrong for a wife and husband to testify as PW1 & PW3 and their testimonies were contradictory in respect to amount of money of either TZS. 150,000/= or 180,000/=:, thus, unreliable. Cited the case of **Goodluck Kyando Vs. R, [2006] T.L.R. 363** and **Mohamed Saidi Matula Vs. R, [1995] T.L.R. 3**

On proper identification, the appellants have strongly argued that, since the event occurred during night, then PW1 & PW3 failed to explain on intensity of light and time used in the crime scene. Referred this court to the cases of **Shihobe Seni and Another Vs. R, [1992] T.L.R. 330** **Waziri Amani Vs. R, [1980] T.L.R. 250**, and **Bushiri Amri Vs. R [1992] T.L.R. 65**.

Proceeded to argue on validity of charge sheet that same was defective for it was contrary to the evidences adduced by PW1 & PW3.

They made reference to the case of **Mashara Njile Vs. R, criminal Appeal No. 179 of 2014.**

Proceeded to argue that, the trial court failed to remind the accused as per section 231 (4) of CPA before their defence. Also failed to raise issues for determination.

Finally, they argued that the prosecution failed to prove the case beyond reasonable doubt. Thus, prayed this court to find them innocent, quash the conviction and set aside the sentence while declaring them free.

In turn the learned State Attorney summarily rejected this appeal as unfounded. Substantively, the learned State Attorney, argued generally that the stolen amount of money was in aggregate of TZS. 180,000/- and in this point there were no contradictions from any prosecution witness. Such evidence was testified by PW1 as well as PW3 who were the victims.

Arguing on visual identification in difficult environment accepted that generally, is one of the weakest pieces of evidence and the court ought to warn itself before acting on such evidence to ensure all possibilities of mistaken identity has been eliminated. But contradicted it with the circumstances which occurred at the crime scene. The two victims had enough time to identify them, bright light from motorcycle and the surrounding bulb lighting from neighboring houses. The intensity of light was enough to identify whoever around them. Further insisted that, the appellants were close to the victims PW1 and PW3 and the 1st appellant had gun pointing to the victims, thus easily identifiable. More so, prior to

the ordeal, the appellants visited PW3's place of business several times. Therefore the issue of identification was done to persons who are known to the victims.

On variances between the charge sheet and evidences testified by PW1 & PW3, in the contrary, the State Attorney strongly argued that the charge and evidences adduced therein proved the offence as appeared in the charge sheet.

On failure to call Pastory Gabriel or Pastory Gabriel Kondo, the State Attorney briefly responded that the names refer to one and the same person who was PW1 (Victim).

On failure to read charge sheet on commencement of hearing and on failure to apply properly section 231 (4) of CPA, the State Attorney briefly answered by referring this court to page 117 of the trial court's proceedings. Rested by a prayer that the two issues lack merits.

On conducting identification parade, the State Attorney referred this court to section 60 of CPA and Order 232 of PGO which provide modalities of conducting identification parade which same was properly conducted as per the letters of law.

In respect to propriety of the trial court's judgement, the learned State Attorney cited section 312 of the CPA that it was rightly complied with and the court judgement was properly composed to the letters of law. In totality, the Republic insisted that the prosecution case was proved beyond reasonable doubt and the appellants were properly convicted and sentenced according to law. Thus, the appeal be dismissed forthwith.

Considering this appeal, I find important to point out some fundamental legal principles. In our jurisdiction, certain legal issues are well developed and settled, ready for application. Among them is the duty of prosecution in criminal trials. Second is propriety of the charge sheet, third is the duty of the accused, fourth is identification of an accused, fifth is composition of court judgement.

It is an elementary rule which should not be forgotten that the prosecution has a noble duty to establish and prove criminality of the accused beyond reasonable doubt.

Section 3 (2)(a) of **The Evidence Act** provides standard of proof as quoted hereunder: -

Section 3 (2) *"A fact is said to be proved when*

*(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution **beyond reasonable doubt** that the fact exists;"*

Likewise, section 110 of **The Evidence Act**, stipulates quite clearly in the manner as quoted hereunder: -

Section 110 (1) *"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

These sections received breath from several precedents of the Court of Appeal including in the case of **Anthony Kinanila Enock Anthony Vs. R, Criminal Appeal No. 83 Of 2021** where it held: -

*"As to the standard of proof which we shall also have the opportunity to consider in the instant case, the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and here, one should not waste time trying to invent a new wheel as that is exactly what was stated by the House of Lords in England way back in 1935 in **Woolmington Vs. DPP [1935] AC 462** from where our present general principles of criminal law and procedure emanate"*

In similar vein in the case of **Magendo Paul & Another Vs. R, [1993] T.L.R. 219** the Court of Appeal issued a clear interpretation on what constitutes *"proof beyond reasonable doubt,"* as follows:-

"If the evidence is so strong against a man as to leave only a remote possibility in his favour, the case is proved beyond reasonable doubt"

Equally important is the holding in the case of **Samson Matiga Vs. R, Criminal Appeal No. 205 of 2007** (Unreported) held: -

"What this means, to put it simply, is that the prosecution evidence must be so 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"

In simple meaning, the criminal trial, demand the prosecution to establish and prove those accusations against the accused by producing strong evidences linking the offence with the accused. When the evidence points all fingers to the accused, it means the prosecution has discharged its duties to the standard required by law, that is, beyond reasonable doubt.

In the contrast, the accused has no duty whatsoever to prove his innocence, unless the case is under strict liability, otherwise, the duty of the accused is to shake the case of the prosecution by raising reasonable doubts in relation to his accusations. It is clear that the court convicts the accused on strength of the prosecution evidence not on the weaknesses of the defence case. This court ruled in the case of **R. Vs. Kerstin Cameroon [2003] T.L.R. 84**, where among others, it held: -

"The accused can only be convicted of an offence on the basis of the strength of the prosecution case and not on the basis of the weakness of the defence case"

Therefore, two issues are well covered by our laws and precedents, that is, the duty of prosecution over criminality of the accused and the duty of the accused to raise shakable defenses over his criminality.

Equally important, in criminal trials is propriety of the charge sheet. It is elementary knowledge of criminal law that, the cornerstone of any criminal case is the charge sheet. The charge sheet is a heart, brain and blood of criminal justice and fair trial, which plays a duo role of informing the accused persons on the nature of their accusations and

allow them to prepare their defense. Second, the charge sheet notifies the trial court on the subject matter with a view to determine its jurisdiction and prepare the procedure to be applied during trial. Therefore, the charge sheet is the most important document in any criminal trial.

Due to its importance, the Legislature in section 132 of the Criminal Procedure Act Cap 20 R.E. 2019, provided necessary prerequisites of a proper charge sheet.

In fact, charge sheet lays out the whole foundation of criminal justice in any court of law. Therefore, framing properly the charge sheet, according to the dictates of law, goes to the root of criminal justice itself.

Another important issue is the identification of an accused in a challenging circumstances of crime scene. This point I think also is well developed because even the appellants have rightly referred this court to the valid precedents.


In regard to the composition of judgement, first it is a statutory duty of every court sitting to determine disputes be it criminal or civil. It is a statutory requirement under section 235 read together with section 312 of CPA. Failure to compose properly the required judgement, obvious the superior court on appeal or revision will order the trial Magistrate to compose a proper judgement known by law.

Having provided for all those basic principles, the question remains, how do they apply in this appeal? The answer is found in the

summary of grounds of appeal. All detailed grounds of appeal touched those four grounds.

In brief the appellants lamented bitterly that the prosecution failed to prove the accusations against them by producing strong and tangible evidences like tendering of exhibits, that is, motorcycle make Sanlg Reg. No. MC 680 AAS, stolen money TZS. 150,000/=, two Sumsung phone, Tecno cellular phones and ATM card, which were stolen by the appellants. Unfortunate this ground must fail because those properties were alleged to have been stolen by the appellants from PW1 & PW3. Logically if were stolen, how could PW1 & PW3 found them and be ready to tender them during trial? Reading the proceedings of the trial court, it is evident that the appellants were arrested by police and the complainants identified them at police identification parade. As such, tendering of the stolen properties could not be possible because all of them were under custody of those thieves.

Equally the appellant raised the issue of whether the 1st complainant was Gabriel Pastory or Gabriel Pastory Kondo? I think this fact is answered by revisiting the trial court's record. According to the trial court's proceedings, PW1 took oath and testified in court as Gabriel Pastory Kondo who was the victim on the crime scene and as a husband of PW3 named Stella Deus. In the charge sheet and in the trial court's judgement, the name referred to is Gabriel Pastory without the name of Kondo. The appellants raised this as an issue that there were different persons. Unfortunate and without labouring much, this cannot be an issue capable of shaking the prosecution case.



Evidently, the first complainant was Gabriel Pastory, who is also referred to as Gabriel Pastory Kondo. Both names refer to one person who was PW1. Thus, this cannot be an issue serious to be determined on appeal. Accordingly, I dismiss it as unmeritorious.

Another important issue related to proof of criminality of the appellants is on propriety of identification of the appellants at the crime scene. The evidence of PW1 at page 8 of the proceedings, indicates that, the lighting from his motorcycle was on and the electricity light from bulbs of neighbouring houses from right side, left side and back were on, and the place was completely clear to see anything thereon. Thus, the 1st accused/appellant pointed him with a gun, throughout while two others were searching in his pockets and bag. He testified *"while still lifting up my hands, they searched me from the chest side to the leg area and stole my wallet which I had, ATM card, National Identification Card, and the bag, mobile phone Tecno C5, 2 phones make Samsung, at the end they departed with my motorcycle"*. The same evidence was testified by his wife (PW3).

Above all, he testified that, on identification parade, he saw many people, but he managed to identify the accused persons among many of them. The parade for identification was supported by PW2 who organized that parade involving 12 people. Likewise, the evidence of PW3 was equal to the testimonies of PW1 because both were victims of that robbery.

PW3 proceeded to testify that, the accused were not masked on their faces. Further testified that, 1st accused was familiar to her, a day before the event, he went to her business and he deposited money.

Even the 2nd appellant was equally familiar to her business for he went and made some money transfer. What does this piece of evidence mean in relation to proper identification? The law put weight on a person who not only identified for the first time, but also familiar to the victim for they transacted their money with the victim (PW3) prior to the event.

Notably, though identification of the appellants during that night, is generally known in law as among the weakest, yet in the presence of enough light from both motorcycle and electric light from bulbs and the fact that the accused were not the first time to meet with the victims, I think such doubt was cleared and the appellants were clearly and properly identified.

Equally important is the lamentation of the appellants that, there were contradictions of evidences by the key prosecution witnesses. When there are serious contradictions and inconsistencies of evidences testified by key witnesses, obvious the court must take it seriously in favour of the appellants (accused).

In such circumstances, the court is bound to analyse and make a finding as to whether those contradictions and inconsistencies are material or minor ones. The Court of Appeal in the case of **Mohamed Said Matula Vs. R, [1995] T.L.R. 3**, held: -

"Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible; else the court has to decide whether the inconsistencies and



contradictions are only minor, or whether they go to the root of the matter"

In similar vein, in the case of **John Gilikola Vs. R, Criminal Appeal No. 31 of 1999 (unreported)**, and in the case of **Alex Ndendya Vs. R, Criminal Appeal No. 207 of 2018 (CAT, Iringa)**, the court held: -

"The discrepancies were on details and they may have been occasioned by the relatively long passage of time between the two statements and the giving of evidence in court and also by the frailty of human memory. Like the trial judge, we do not, with respect, consider the discrepancies in the two statements and the evidence of the witness material so as to affect the credibility and reliability of PW4"

In this appeal, the appellants insisted that the amount of money named by PW1 and PW3 were contradictory, thus portrayed irresistible conclusion that both witnesses were not reliable. Reading closely on the evidences of PW1 and PW3 as recapped in the proceedings, every reasonable person would realise that, the two had consistent evidences, that the amount of money stolen were TZS. 150,000/= and TZS. 30,000/= forming an aggregate of TZS. 180,000/=. If there were any inconsistencies must be negligible and irrelevant, perhaps the trial magistrate did not find any need to address them in a specified approach. But as above discussed, the discrepancies were trivial. The ground is therefore lacking merits.



While approaching to the end of this appeal, I need to point out that the appellants were charged for armed robbery and the sections so preferred meant exactly what was written. Whoever is convicted on armed robbery, should be sentenced to a minimum of thirty years imprisonment. The charging section does not require critical legal interpretation as rightly, pointed out by the Court of Appeal in the case of **R, Vs. Mwesige Geoffrey and Another, Criminal Appeal No. 355 of 2014** (unreported). The Court discussed the familiar canon of statutory interpretation and quoted with approval the decision of the USA Supreme Court in **CAMINETTI Vs. United States, 242 US. 470 (1917)** the court categorically held:-

"It is elementary that the meaning of a statute must in the first instance, be sought in the language which the Act is framed, and if it is plain...the sole function of the courts is to enforce it according to its terms"

When the words of a statute are unambiguous, judicial inquiry is complete. Courts must presume that a legislature says in a statute what it means and means in a statute what it says. (See the case of **Serengeti Breweries Ltd Vs. Joseph Boniface Civil Appeal No. 150 of 2015**).

In totality therefore, I find no reason to depart from the decision of the trial court. Accordingly, this appeal is dismissed and the decision of the trial court is upheld as it is.

Order Accordingly.

Dated at Morogoro in chambers this 03/10/2022



P.J. NGWEMBE

JUDGE

03/10/2022

Court: Judgment delivered at Morogoro in Chambers on this 3rd day of October, 2022, **Before Hon. J.B. Manyama, AG/DR** in the presence of the Appellants and in the presence of Mr. Dastan William State Attorney, for respondent.

SGD. HON. J.B. MANYAMA

AG/DEPUTY REGISTRAR

03/10/2022

