

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO.385 OF 2021

(Originating from Criminal Case No. 475 of 2018 in the

District Court of Temeke at Temeke)

CHEDI HAULE BRASH.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 30/09/2022

Date of Judgment: 07/10/2022

Kamana, J:

The Appellant one Chedi Haule Brash was arraigned before and convicted by the District Court of Temeke of an offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 [RE. 2002]. According to the particulars of the offence, on 11th day of February, 2018 at Keko Magurumbasi, within Temeke District in Dar es Salaam Region, the Appellant in the company of two others did steal two mobile phones valued at TShs. 1,260,000/=, Tshs. 59,000/= in cash, two chains of silver and a ring valued at Tshs. 400,000/-, six pairs of silver earrings valued and Tshs. 210,000/= Silver hand chain valued at Tshs 50,000/=, one pair of sandals valued at Tshs. 6,000/=, one leg chain valued at Tshs. 150,000/= and one handbag valued at Tshs. 40,000/=, properties of WP 10259 D/C Nuru Rashid Mtandi. It was alleged that before and after stealing the properties, the complainant was threatened with a knife with a view to obtaining and retaining the stolen properties.

At the hearing, the Appellant pleaded not guilty and the case went to a full trial. During the trial, the Prosecution paraded six witnesses. On the other hand, the Appellant had no witness other than himself. For the purpose of this judgment, I will not delve into analysing the evidence adduced by both parties unless it is necessary. Suffice to say that, after hearing the Appellant was found guilty of an armed robbery and sentenced to thirty years imprisonment.

Aggrieved by such conviction and sentence, the Appellant preferred this appeal armed with six grounds as follows:

1. That, the trial Court erred in law and facts in holding that PW1 identified the Appellant.
2. That, the Prosecution evidence is not compatible with particulars in the charge sheet to prove the charge to the required standard.
3. That, the trial Court erred in law and facts by convicting the Appellant basing on the evidence of PW1 who did not swear or affirm.
4. That, the trial Court erred in law and facts for convicting the Appellant relying on the contradictory evidence of PW1 and PW6.
5. That the trial Court erred in law and fact by failing to consider and evaluate the evidence adduced by the defence which raised reasonable doubts.

6. That the trial Court erred in law and facts in convicting the appellant while the offence was not proved beyond reasonable doubt.

Briefly, the facts that led to this appeal are to the effect that at midnight of 11th February, 2018, the complainant (PW1) WP10259 D/C Nuru Rashid Mtandi was attacked by three young men who robbed her various properties which have been mentioned hereinabove.

The incident took place at Keko Magurumbasi when PW1 was returning home from a function that took place somewhere within Temeke District. It was alleged by the Prosecution that PW1 was robbed while on a motorcycle. It was further alleged that PW1 managed to identify the Appellant amongst other robbers since she used to live with him in a street which she lives.

Reverting to this appeal, during the hearing the appeal, the Appellant appeared without legal representation. On the other hand, the Respondent had the services of Ms. Dhamiri Masinde, learned State Attorney.

When given the opportunity to submit, the Appellant being a lay person reiterated the grounds of appeal as contained in his Petition of Appeal. On the other hand, the learned State Attorney supported the appeal on the ground that the Prosecution failed to prove the case against the appellant beyond reasonable doubt.

In substantiating her argument. Ms. Masinde, learned State Attorney submitted that PW1 testified without taking or making an oath or affirmation respectively. It was her position that the evidence of PW1 was taken contrary to the law and hence could not be relied on in convicting the Appellant. She submitted that such evidence of PW1 is illegal and ought to be expunged from the records. In summing up, she prayed the Court to allow the appeal as the remaining evidence after expunging PW1's evidence cannot sustain conviction and sentence thereon as the same cannot prove the case beyond reasonable doubt.

Upon hearing the submission of both parties, the issue for the determination of this Court is what are the effect of taking the evidence without subjecting the witness to an oath or affirmation. The requirement that a witness should take an oath or make an affirmation before testification is a mandatory one. Section 198(1) of the Criminal Procedure Act stipulates that requirement of the law as follows:

'(1) Every witness in a criminal cause or matter shall, subject to any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act.'

In view of section 198(1) of the Act, every witness who is testifying in criminal proceedings of whatever nature is required to swear and affirm except otherwise provided by a written law.

From the records of the trial Court, it is clear that PW1 did not testify under oath or affirmation. This means that the evidence of PW1 is not evidence within the purview of section 198(1) of the Criminal Procedure Act. In that case, the trial Court erred in convicting the Appellant on such kind of evidence which is not recognised as such under the law. In holding this view, I am inspired by the decision of the Court of Appeal in the case of **Mwami Ngura vs Republic**, Criminal Appeal No. 63 of 2014 in which the Court stated:

*'... in several cases; this court has held if in a criminal case, evidence is given without oath or affirmation, in violation of S. 198(1) of the CPA, such testimony amounts to no evidence in law. (see: **Mwita Sigore @ Ogorea vs. Republic**, Criminal Appeal No. 54 of 2004 (unreported). (Emphasis added)'*

Convinced that the evidence of PW1 was taken without due regard to the provisions of section 198(1) of the Criminal Procedure Act, I expunge such evidence from the records.

Having expunged the evidence of PW1, the Court asked itself whether there is any evidence which supports conviction of the Appellant beyond reasonable doubt. The answer was negative as the remaining evidence is in shambles. In that case, I allow this appeal in its entirety.

I consequently quash the conviction of the Appellant and set aside the prison sentence meted out by the trial Court against the Appellant. The Appellant is to be released forthwith from the prison unless he is otherwise lawfully held.

It is so ordered.

Right to appeal explained.

DATED at **DAR ES SALAAM** this 7th day of October, 2022.

KS KAMANA

JUDGE

This Judgment delivered this 7th day of October, 2022 in the presence of the Appellant and Ms. Dhamiri Masinde, learned State Attorney for the Respondent.

