IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

CRIMINAL APPEAL NO. 138 OF 2022

(From the decision of the District Court of Mbarali at Rujewa (Hon. T. Mlimba, RM) in Criminal Case No. 85 of 2022)

RAMADHANI s/o MLOGE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Hearing : 17/10/2022
Date of Judgement: 19/12/2022

MONGELLA, J.

The appellant was charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2019. The case was tried in the district court of Mbarali at Rujewa in Criminal Case No. 85 of 2022. He was alleged to have stolen cash money amounting T.shs. 50,000/- from one Pelusi s/o Gamba and that at or immediately before and immediately after the time of stealing did use knife and piece of iron bar in order to obtain the stolen properties. The trial court convicted him of the offence and sentenced him to serve 30 years imprisonment. He was aggrieved, hence filed the appeal that hand containing 9 grounds of appeal as follows:

1. *That the trial court grossly erred in law and fact by holding that the prosecution side proved the case beyond reasonable doubt against the appellant while it was not.* (sic)

2. *That the trial court erred in law and fact in convicting the appellant by relying on hearsay evidence of the prosecution witnesses (PW3).*

3. *That the trial court erred in law and fact in convicting the appellant by failure to examine contradictory evidence of the prosecution adduced by PW1 and PW3.*

4. *That the trial court erred in law and fact in convicting the appellant by failing to consider the strong testimony rendered by the appellant to deny committing the offence.*

5. *That the trial court erred in law and fact by convicting the appellant without considering the principle which has to be taken into account with respect to chain of custody and preservation of exhibits.*

6. *That the trial court erred in law and fact in convicting the appellant by replying on the cautioned statement which was illegally obtained and un-procedural admitted I court as it was not read over to the appellant.*(sic)

7. *That the trial court erred in law and fact for convicting the appellant by relying upon unreliable and incredible visual identification of the appellant by PW1 and PW3 which was poor and unreliable.*

8. *That the trial magistrate grossly erred in law and fact in its failure to take into account the mitigation facts of the appellant in imposing prison sentence without affording the appellant other types of sentence as the appellant had no criminal record.*

9. *That the trial court magistrate erred in law and facts to hold that the ingredients of the offence charged was proved while not.*

The appeal was argued orally whereby the appellant fended for himself. He prayed for his grounds of appeal to be adopted as his submission in chief and to hear first from the learned state attorney.

The respondent was represented by Ms. Zena James, learned state attorney. She opposed all grounds of appeal. She started by collectively arguing on the 1st and 9th grounds whereby she contended that the appellant was charged with armed robbery contrary to section 278A of the Penal Code. In that respect she said that the prosecution was required to prove that stealing was conducted and a weapon was used to threaten the victim. Considering the evidence on record she had the stance that the appellant committed the offence as identified by PW1. She said that PW1 who was the victim explained that he was not at home and on return he found the appellant at his home. That, PW1 stated to have known the appellant from before and the offence was committed at noon. That, after entering his house the appellant threatened him with a knife and managed to steal from him T.shs. 50,000/-.

Ms. James further referred to the testimony of PW3 arguing that the same corroborates that of PW1. That PW3 explained that he saw the appellant at the crime scene coming out of PW1's house. With the evidence of PW1 and PW3, Ms. James had the stance that there was proof that a dangerous weapon was used in commission of the offence rendering the charge being proved beyond reasonable doubt.

Addressing the 2nd ground, she briefly stated that the trial court decision relied much on the evidence of PW1 and the evidence of PW3 just corroborated that of PW1. She found the ground baseless and prayed for the Court to disregard it.

On the 3rd ground, Ms. James disputed the allegation that there were contradictions in the testimony by PW1 and PW3 that go to the root of the matter. She referred again to the testimony of PW1 and PW3 clarifying that PW1 explained how the offence occurred and PW3 testified to have seen the appellant coming out of PW1's house. Arguing further, she said that contradictions can only be considered if they go to the root of the case, which is not the case in the matter at hand.

Replying to the 4th ground, she disputed the appellant's assertion that his defence case was not considered. He referred the Court to the trial court judgment contending that the trial court vividly analysed the evidence of both sides and observed that even if the appellant denied committing the offence, it believed the evidence of the prosecution. On the other hand however, she argued that this being the first appellate court, is empowered to re-evaluate and re-consider the evidence. to that effect

she referred the case of ***Adamson Mwaitembo vs. The Republic***, Criminal Appeal No. 28 of 2015 (CAT at Mbeya, unreported).

On the 5th ground, she conceded to the claim that there was no chain of custody. However, she argued that the exhibit has no relation to the offence charged thus even if expunged from the record the prosecution case shall not be affected in holding the conviction against the appellant. She nevertheless prayed for the exhibit to be expunged from the record.

As to the 6th ground, she found the ground baseless arguing that there was no any cautioned statement tendered in the trial court. She explained that there were only three prosecution witnesses and none of them tendered any cautioned statement.

She as well disputed the 7th ground under which the appellant faulted the trial court for relying on unreliable visual identification of PW1 and PW3. She contended that in accordance with the evidence on record, the offence was committed at 12:00 hours in the afternoon and PW1 knew the appellant from before the occurrence of the incident and identified him in court as well. That PW1 reported the incident to the village chairperson and the police immediately after its occurrence and mentioned the appellant as the culprit on the same date. Then PW1 went to the appellant's house with the police officer and the appellant was arrested. She contended that the Court of Appeal has ruled in many cases that mentioning the suspect at the earliest possible stage ensures

the credibility of the witness. She also found the ground an afterthought as the appellant never cross-examined PW1 or raised any doubt.

On the 8th ground, she submitted that the appellant was charged with armed robbery thus the trial court relied on the legal requirement which provides for minimum sentence of 30 years imprisonment. She thus found the claim baseless and prayed for the entire appeal to be dismissed.

In rejoinder the appellant briefly submitted that he was arrested at his farm and does not know what is going on. He prayed for his appeal to be allowed and he be set free.

Having considered the grounds of appeal and the arguments by the parties, and gone through the trial court record, I prefer to reserve the 1st, 4th, and 9th grounds for last. I shall therefore start with the 2nd ground.

On the 2nd ground the appellant challenged the trial court for relying on hearsay evidence of PW3. I have gone through the testimony of PW3. I partly agree that PW3 gave hearsay evidence. This is with regard to the occurrence of theft at PW1's house. However, the rest of his testimony is not hearsay. PW3 explained that he heard a cry for help from PW1's house and headed there and on the way he saw the appellant at PW1's door carrying a Bob Marley bag. The appellant was running at that moment. I agree with Ms. James that this piece of evidence is not hearsay as the appellant testified what he exactly saw. I therefore expunge the part that I have ruled to be hearsay.

As to the 3rd ground, the appellant challenged the evidence of PW1 and PW3 for being contradictory. He however did not point in which specific areas the witnesses contradicted. I have gone through the evidence and found no contradictions between the witnesses. In that case, I agree with Ms. James that the ground is baseless.

With respect to the 5th ground, the appellant faults the conviction and sentence against him on the ground that the trial court failed to take into consideration the principles guiding chain of custody and preservation of the exhibits. The record shows that two items, being: a bag and an iron bar were seized. In my view, chain of custody becomes more relevant on things that can be easily interfered or tempered with. The items in the case at hand, in my view, cannot be easily tempered with. On this position I am fortified by the decision of the Court of Appeal in the case of ***Dickson Kamala vs. The Republic***, Criminal Appeal No. 422 of 2018 (CAT at DSM, unreported) in which the Court stated:

> *"... the chain of custody principle should not be treated as a straitjacket but one that must be relaxed when dealing with items which cannot be easily altered, swapped or tampered with."*

The Court further revisited its previous decision in the case of ***Joseph Leonard Manyota vs. The Republic***, Criminal Appeal No. 485 of 2015 in which it held:

> *"It is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its*

nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed, polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."

As argued by Ms. James, to which I subscribe, the items seized at the appellant's house would have not affected the prosecution case even if not tendered. Under the circumstances, even where the chain of custody of the items is not proved, the prosecution case remains unaffected. The ground therefore lacks merit.

Under the 6th ground the appellant claims that the cautioned statement was illegally obtained and un-procedurally admitted in court as it was not read over to the appellant. As argued by Ms. James, the argument is baseless as no cautioned statement was tendered or admitted in evidence. The ground of appeal is dismissed.

Under the 7th ground, the appellant faults the trial court for relying on unreliable and incredible visual identification of the appellant by PW1 and PW3. It should be noted that the offence was alleged to have been committed during daylight. Under the circumstances I find the question of mistaken identity not standing a chance. Further, PW1 testified that she knew the appellant from before. Her identification therefore was by recognition. In the case of ***Nebson Tete vs. The Republic, Criminal Appeal no. 419 of 2013***, the Court of Appeal held:

"The situation is different where the evidence of identification is by recognition, which has been held by courts to be more reliable than an identification of a stranger, but caution should as well be observed in that, when the witness is purporting to have recognized someone known from before, mistakes cannot be ruled out."

PW1 further mentioned the appellant at the earliest possible opportunity to PW2 and PW3. In the case of ***Marwa Wangiti Boniface Matiku Mgendi vs. Republic, Criminal Appeal No. 6 of 1995 (unreported)*** cited in ***Nebson Tete vs. The Republic, Criminal Appeal no. 419 of 2013,*** the Court observed that:

"The ability to name a suspect at the earliest opportunity is an all-important assurance of his reliability in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry."

Considering the above observation, I find this ground lacking merit as well and I dismiss it accordingly.

Under the 8th ground, the appellant laments on being given a sentence of 30 years imprisonment despite the mitigation he gave before the trial court. It is clear on record that the appellant was charged with the offence of armed robbery contrary to **section 287A of the Penal Code, Cap 16. R. E. 2019**. For ease of reference the provision states:

> *"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.***"

As argued by Ms. James, the above provision provides the sentence of 30 years imprisonment for the offence of armed robbery as the minimum sentence. The trial court was therefore correct in issuing the sentence for the offence charged.

As stated earlier, I shall deal with the 1st, 4th, and 9th grounds at this last stage and collectively. On the 1st and 9th grounds, the appellant basically complains that the offence was not proved beyond reasonable doubt. Under the 4th ground he complains that his defence evidence was not considered by the trial court. As a first appellate court I shall re-evaluate the whole evidence on record and come out with my own findings. This is because the first appeal is in the form of re-hearing. See: ***Mkaima Mabagala vs. The Republic***, Criminal Appeal No. 267 of 2006, in which while reverting to the decision made in ***D. R. Pandya vs. Republic*** (1957) E.A. 336 and in ***Iddi Shaban @ Amasi vs. Republic***, Criminal Appeal No. 2006, the Court held:

> *"First appeal is in form of re-hearing. Therefore, the first appellate court, has a duty to re-evaluate the entire evidence on record by reading it together and subjecting it to a crucial scrutiny and if warranted arrive at its own conclusion of fact."*

In defence, the appellant only defended that he was arrested at the farm and sent to the police station. Upon arrival at the police station he was showed a bag. He denied knowing the bag or being found with it. He claimed to have found the bag at the police. In scrutinizing the defence evidence I find nothing tangible being presented particularly on the main ingredients of the offence.

However, I also had to scrutinize the prosecution case to ascertain whether the offence of armed robbery was proved to the hilt. To this juncture I wish to quote again the provisions of section 278A of the Penal Code under which the appellant was charged. It states:

> *"**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."*

Considering the provision as above, it follows that for an offence of armed robbery to stand; two important elements must be proved. These are: **one**, the offender must be armed with a dangerous or offensive weapon or instrument; and, **two**; the offender must use violence to any person whether at, immediately before or after stealing for purposes of obtaining or retaining the stolen property. The offence therefore cannot be said to have been committed unless it is established by evidence that the appellant used or threatened to use actual violence to obtain or retain

the stolen property. See also: ***Zuberi Bakari vs. Bakari*** [2005] TLR 31 which discussed the element of violence in robbery. In the case of ***Stuart Erasto Yakobo vs. The Republic***, Criminal Appeal No. 202 of 2004 (CAT at DSM, unreported) the Court of Appeal explained the meaning of violence as provided in **Black's Law Dictionary (Six Edition) at page 1085** whereby it stated the meaning to be:

> *"Unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury. Physical force unlawfully exercised; abuse of force; that force which is employed against common right, against public liberty. The exertion of any physical force so as to injure, damage or abuse."*

In essence, the victim must explain how the force using the dangerous weapon was used on him/her. In the case at hand, the victim (PW1), only stated that the appellant threatened her with a knife. She however did not explain how the appellant did threaten her. That is, how the said knife was used in the alleged threat as directed in the above referred authorities. In the circumstances I agree with the appellant that the offence of armed robbery against the appellant was not proved to the hilt. Consequently, I quash the conviction and sentence by the trial court. I order for immediate release of the appellant from prison custody, unless held for some other lawful cause.

Dated at Mbeya on this 19th day of December 2022.

L. M. MONGELLA

JUDGE