**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**CRIMINAL APPEAL NO. 6 OF 2022**

*(Originating from Criminal Case No. 36 of 2021 before the District Court of Moshi at Moshi)*

**GIFT EDES TEMBA ..... 1ST APPELLANT**

**JACKSON JOHN MWAMBURE.....2ND APPELLANT**

**JAMES MINDE @ MAPAKA.....3RD APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

# JUDGMENT

Last Order: 5th December, 2022
Judgment: 16th December, 2022

## MASABO, J.:-

In a judgment delivered on 27th December 2021, the district Court of Moshi, at Moshi, convicted the appellants of armed robbery contrary to section 287A of the Penal Code, Cap 16 and sentenced each of them to a jail term of 30 years while it acquitted the three co- accussed persons. The allegations leading to their conviction and sentence were that, on the eve of new year, 1st January 2021, while armed with machete, the accussed ina company of other persons, invaded a home of Neema Mwacha at Logua Ushirika wa Neema area within Moshi district and after breaking into her

house, they stole her cash, a television make Samsung, a radio make home theatre and a school bag.

Disgruntled by the conviction and sentence they have come to this court armed with four grounds of appeal. The first three grounds as set out in the petition of appeal are that: the offence or armed robbery was not proved beyond reasonable doubt; the prosecution evidence was marred by irregularities and the judgment and proceedings have fatal irregularities which have rendered both of them, incurably defective. The fourth ground of appeal as set out in the supplementary grounds is that, there was a variance on the place at which the crime was committed as set out in the chargesheet and the evidence adduced by the prosecution witnesses.

Hearing of this appeal proceeded through written submission. The appellant appeared in person, unrepresented whereas the respondent was represented by Ms. Mary Lucas, learned State Attorney.

Submitting in support of the first ground of appeal, the appellants argued that their conviction was solely based on non-credible visual identification by the victim who claimed to have identified the appellants through a window. Explaining the anomaly in the identification, they cited the case of **Abdi Julius@ Mollel- Nyangusi and Another v R**, Criminal Appeal No. 107 of 2009, CAT, **Jaribu Abdallah v R,** Criminal, Appeal No. 220 of 1994, CAT; **Salim Petro Ngalawa v R**, Criminal Appeal No. 85 of 2004, CAT and **Julius Mwanduka@ Shila v R,** Criminal Appeal No. 322 of

2016, CAT and argued that the conditions for identification were unfavourable considering that the offence was committed at night, the victim, PW1 did not clearly identify the source of the light through which she identified the appellants and its intensity. Besides, she did not instantly mention their names to PW2 who came to her rescue and she did not timely report the incident to the relevant authorities all of which suggest that they were not positively identified and the case against them was merely fabricated.

As to variance on the place at which the crime was committed, it was submitted that the charge sheet alleged that the crime was committed at Longua Usharika wa Neeema area whereas the victim, testifying as PW1, stated that she lives at Cosata KCMC. Thus, it is not clear as to whether the crime was committed at Longua Usharika wa Neema or Cosata KCMC. Based on this they submitted that the prosecution failed its burden of proof.

The appellants argued further that, the offence of armed robbery required the prosecution to prove that the appellants used the machete in the course of stealing or did threaten the victim with it before or after the incident a fact which was proved as no evidence was led to this effect. All what the victim stated is that she saw the appellants with a machete. In conclusion, they submitted that their conviction was erroneous as there was no sufficient evidence on record. Thus, they implored upon the court to quash and set aside the conviction and sentence and to order a release.

The respondent supported the appeal on ground that the prosecution failed to prove its case. In support of this point, it was submitted that visual identification of the appellants was far below the standard set out in **Waziri Amani v R** [1980] TLR as PW1 did not describe the physical appearance of the appellants; the clothes they were wearing and her description of the light did not specify the source of light and its intensity. Hence, there are doubts on whether she positively identified the appellants. Also, she did not mention the names of the accussed she identified while peeping through her window. Also, in agreement with the appelants, she submitted that the offence of armed robbery was not proved as no evidence was led to show the use of force or arms during, before or after stealing. Thus, the offence of armed robbery was not proved.

I have carefully considered the submission in support of this uncontested appeal. Being the first appeal, I am obligated to assess the evidence on record and form an independent opinion on whether, as submitted by both parties, the conviction and sentence were unfounded as the offence against the accussed was not proved. As stated earlier on, the appellants together with 3 other persons were charged of armed robbery contrary to section 287A of the Penal Code which states thus:

> 287A. 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.

The law is now settled that, charges of armed robbery would be considered to have been proved if the proof rendered by the prosecution satisfies the requirements summed up by the Court of Appeal in **Shabani Said Ally v. Republic**, Criminal Appeal No. 270 of 2018 (unreported) where, while echoing its previous decisions on the application of the provision above it stated that:

> "It follows from the above position of the law that in order to establish an offence of armed robbery, the prosecution must prove the following:
>
> 1. There must be proof of theft; see the case of **Luvana v. Republic,** Criminal Appeal No. 1 of 2005 (unreported);
> 2. There must be proof of the use of dangerous or offensive weapon or robbery instrument at or immediately after the commission of robbery;
> 3. That, use of dangerous or offensive weapon or robbery instrument must be directed against a person; see **Kashima Mnadi v. Republic**, Criminal Appeal No, 78 of 2011 (unreported).

There is a plethora of other authorities on this trite law. It is not my intention to cite them all. I will, just for reinforcing what I have stated, add the case **Ally Nassoro @Burule v Republic** Criminal Appeal 94 of 2020 where having cited the provision above the Court of Appeal proceeded to hold that:

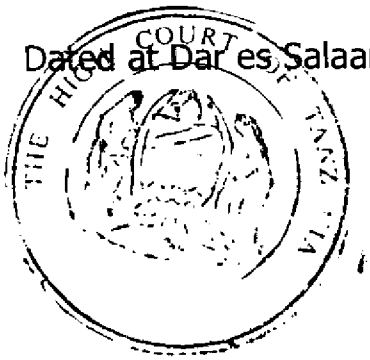
> In the light of the above-reproduced statutory provisions, it will be discerned at once that the offence of armed robbery is committed where, the accused person, while armed with any dangerous or offensive weapon or instrument, steals anything and immediately before or after such stealing, uses or threatens to use violence against the victim. Such violence needless to say, must be meant for obtaining or retaining the stolen property (See **Amani Masunguru v. R.** [1970] H.C.D. n. 213 **Dickson Luvana v. Republic**, Criminal Appeal No. 1 of 2005 and **Shaaban Said Ally v. Republic,** Criminal Appeal No. 270 of 2018 (both unreported). It follows therefore that, in any charge of armed robbery or robbery with violence, before the prosecution can start inviting people over to celebrate a conviction, it must lead evidence showing to the satisfaction of the court, not only that there was violence or threats of violence but also that there was theft which was preceded, accompanied or followed by the said violence or threats of violence aimed at obtaining or retaining the stolen property. [emphasis is mine].

As correctly submitted by both parties, in the present case, none of these requirements were satisfied in the present case as PW1 just stated that he saw the appellants holding a machete. At no point did she state that the appellants used or threatened her with the machete. It would appear that this point escaped the attention of the trial magistrate as, had she correctly directed herself to the ingredients of the offence, she would not have convicted the appellants as there was no proof that the accussed committed armed robbery as charged. Under the premises, I agree with

both parties that the offence of armed robbery was not proved and I allow the appeal based on this sole point which naturally disposes of the appeal.

Accordingly, I quash the conviction and set aside the sentence imposed on the appellants by the trial court and I subsequently order their immediate release unless held for some other lawful cause.

Dated at Dar es Salaam this 16th December 2022.

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Signed by: J.L.MASABO

**J.L. MASABO**

**JUDGE**

16/12/2022