IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 47 OF 2021

***(Arising from Kasulu District Court at Kasulu in Criminal Case No.* 114 of 2021)**

KAIZA S/O GAUDIN .....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

17th February & 18 March, 2022

F. K. MANYANDA, J.

The Appellant, Kaiza s/o Gaudin, was jointly charged with another person, Baraka s/o Khalid, who was acquitted, in the District Court of Kasulu at Kasulu with two offences. The first offence was armed robbery; Contrary to section 287A of the Penal Code, [Cap. 16 R. E. 2019]. It was alleged that on 28th December, 2020 at Kimobwa area within Kasulu District in Kigoma Region Kaiza Gaudin and the said Baraka Khalid did steal 50kg of rice valued Tsh. 60,000/=, 25 kg of sugar valued at Tshs 61,000/= and four pockets of soap valued at Tshs 4,000/=; all properties valued at a

total value of Tshs 125,000/= the properties of one Adam Bernadino a immediately after such stealing did use iron bar to beat and threaten said Adam s/o Bernadino in order to obtain or retain the said propertie

The second count was causing grievous harm; Contrary to section 225 the Penal Code, where it was alleged that on 28th December, 2020 Kimobwa area within Kasulu District in Kigoma Region, Kaiza Gauc unlawfully did beat one Adam s/o Bernadino by using an iron bar on l head and causing him to suffer grievous harm.

After full trial, the second accused, Baraka s/o Khalid, was acquitte whereas the first accused, now the Appellant was found guilty ar convicted on both counts. On the first count, he was sentenced to suffe a custodial sentence of thirty (30) years imprisonment and on the secon count was sentenced to serve one year in jail, the sentences were ordere to run concurrently.

Aggrieved by both the conviction and sentence, the Appellant preferre this appeal parading four grounds of appeal namely;-

1. *That the trial court magistrate erred in law and facts by convictin and sentencing the appellant for the offence of armed robber, despite of the lack of ingredients which constitute the offence o armed robbery.*

2. *That the trial court magistrate erred in law and facts by convicting and sentencing the appellant regardless of inconsistence evidence provided by the prosecution witness.*
3. *That the trial court magistrate erred in law and facts by convicting and sentencing the appellant regardless of the contradiction of raised among the PW1, PW2, PW5, PW6, and PW7 allegation such as where the place of iron bar found,*
4. *That the guilty of the appellant was not proved beyond reasonable doubt as require by law.*

At the hearing of this appeal the Appellant appeared in person while the Respondent had the service of Mr. Riziki Matitu, Senior State Attorney.

The Appellant adopted the grounds of appeal and submitted generally by arguing all grounds of appeal that he was unlawfully convicted without enough evidence. He prayed his appeal to be allowed.

Responding to the Appellant's arguments, Mr. Matitu for the respondent submitted that the 4th ground carries with it all other three grounds thus he decided to argue all together.

He opposed the appeal and supported conviction and sentence on reasons that the evidence was water tight as the accused was arrested on the spot.

He submitted that, (DW1) the Appellant was caught by PW1, Adam Bernadino while escaping from the shop carrying four (4) packets of powder soap which he had stolen. In order to overcome the apprehension, the Appellant hit the said Adam Bernadino on the head with a piece of an iron bar thereby injuring him. Then, Adam Bernadino raised an alarm and people who responded there managed to arrest the Appellant armed with a piece of iron rod with which he used to assault the complainant for purpose of retaining the stolen packets of powder soap.

Mr. Matitu referred this Court to a case decided by the Court of Appeal, the case of **Ali Said @ Tox vs Republic**, Criminal Appeal No. 308 of 2018 (Unreported) which tells the ingredients of armed robbery. He said in the present matter, the Appellant stole the 4 packets of powder soap, and immediately after stealing the same used violence and was armed with a piece of an iron bar with which he used to assault and injure PW1.

It was his submission that the offence was proved beyond reasonable doubt. The conviction was well supported by strong evidence. The Senior State Attorney also submitted that the offence of causing grievous harm was also proved. He submitted further that PW1 is corroborated by PW2 who eye witnessed the injuries inflicted on her husband PW1. Also, PW6 a clinical officer who attended medically PW1 stated, at pages 17 and 18

that PW1 was injured on his face after been hit with a heavy blunt object. Exhibit P3 (PF3) also supports the same.

The Senior State Attorney went on submitting that, on the basis of the evidence above, the guilty of the Appellant was proved beyond all reasonable doubts and that there is no any inconsistence nor contradictions in the testimonies of the prosecution's witnesses namely, PW1, PW2, PW5, PW6 and PW7. The Senior State Attorney argued that PW1 and PW2 saw the Appellant holding a piece of iron bar, PW1 said it was the Appellant who hit him with that piece of iron. PW5 found the iron rod and the 4 packets of powder soap and a pair of pliers kept in a bag in the PW1 shop.

The Senior State Attorney stated that there are some minor contradictions in PW6 and PW7 testimonies who was an exhibit keeper and PW6 a clinical officer as to where the iron bar (rod) was obtained. However, he quickly pointed out that these two witnesses didn't visit the crime scene, hence these cannot be said to be contradictions affecting the prosecution's evidence but rather differences on perceiving hearsay facts, which is not evidence. He was of the views that the Court should not act on it.

Even though the court finds that there are some contradictions, the same are minor and don't go to the root of the case. He cited the case of

Mohamed Said Matula Vs Republic, [1995] T.L.R. 4 in which it was held that the court is required to decide whether they go to the root of the matter, if not it is to resolve inconsistences and contradictions.

Lastly, Mr. Matitu argued that, the Appellant didn't cross examine the witnesses in regard to the whereabouts of the iron rod. He however prayed this court to re-evaluate the defence evidence and make a fresh conclusion. It was his prayer that, the appeal be dismissed in its entirety.

In his rejoinder, the Appellant argued that what was presented by the prosecution in their evidence is not true. He stated that during the trial they were two, he was not at the crime scene and he was arrested at his home, he was searched and none of the exhibits were found in his home, but he didn't question the witnesses who said the iron rod was found with him. He prayed this court to allow his appeal.

Having heard the parties as herein above and gone through the records of the trial court at hand, I will start by discussing the first ground of appeal that the offence of armed robbery was not proved because it lacked necessary ingredients. The law under which the offence is established, section 287A of the Penal Code [Cap 16 R.E 2019] provides as follows: -

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

This provision was well elaborated in the case of **Ali Said @ Tox Vs Republic (Supra)** cited by Mr. Matitu where the Court of Appeal held *inter alia* that;

"It is trite that the offence of armed robbery is not complete unless there is proof of key ingredients namely; stealing facilitated by the use of actual or threat of violence by the perpetrator at or immediately thereafter using any dangerous or offensive weapon or instrument or by the use of or a threat to use actual violence to obtain or retain the stolen property."

From the provisions above, the essential elements of the offence of armed robbery are;

i. stealing anything capable of been stolen;

ii. while armed with any dangerous or offensive weapon or instrument;

iii. at the time of stealing or immediately before or after, uses or threatens to use violence;

iv. to any person, who has to be named,

v. in order to obtain or retain the stolen property.

Guided by the above decision, the question for consideration and determination is whether the key ingredients of armed robbery were proved.

In the instant matter, the appellant was alleged to have stolen the properties of Adam Bernadino and immediately after such stealing the Appellant did use an iron bar to hit the said Adam Bernadino in order to obtain or retain the said properties.

From the evidence on record, there is no dispute that indeed the victim PW1 was hit on his head with a heavy object as per PW6 evidence on page 18 of the proceedings who clearly testified that the victim (PW1) was brought to him while had swollen face due to wounds on his face and bruises on his hands. Similarly, the Appellant did not dispute the fact that PW1 suffered the injuries at his business premises (shop) on the material date.

The issue is about who inflicted the wounds on PW1. The testimonies of PW1 and his wife PW2 tells it vividly that the Appellant was arrested at the crime scene by people who responded to an alarm raised by PW2. These witnesses testified that the Appellant was armed with a piece of iron bar which according to these witnesses used to hit the victim PW1 on the head for purposes of overcoming the arrest and retain the stollen items, four packets of powered soap.

The packets of soap which were retrieved from the Appellant were tendered in the trial court. It is the finding of this Court that the ingredient of theft was proved.

Let me examine the other ingredients of the offence of armed robbery.

Upon my perusal of the evidence on record it is evident from the testimonies of PW1 and PW2 that the appellant was arrested on the spot while armed with a piece of iron bar. The evidence of PW8, a police officer who investigated the case is the effect that a hole was dug in the wall of his shop and the thugs penetrated into it. Upon inspection of the crime scene, PW8 found a piece of iron bar together with the four packets of powder soap, a pair of pliers and a screw driver, which he tendered as evidence exhibit P4, P5, P6 and P7.

The complaint by the Appellant is that there is no proof whether the piece of iron bar tendered in court as exhibit P4 was the very one he used to hit the victim. In my opinion, it does not matter whether or not the weapon used in commission of the crime of armed robbery is found and tendered in court but rather what matters is the fact that the accused used a weapon to assault or threaten to assault the victim.

On top of the that in this appeal, as stated above, there is ample of evidence that PW1 was hit with a piece of iron bar at the crime scene where confrontation between PW1 and the Appellant took place. This is what PW1 stated at page 7 of the typed proceedings: -

> *"The wall of the shop was broken and there was a person inside the shop he come (sic) out with four packets of powder I managed to catch him he threw me down, I screamed for help and then he hit me with an iron bar on my head".*

From this testimony, the confrontation was within the premises of the shop. PW2 testimony is that the Appellant was armed with two pieces of iron bars and a pair of pliers and PW8 retrieved Exhibit P4, the iron bar, from the shop building which was invaded. Therefore, it is a piece of an iron bar which was used in the commission of the offence, and a piece of iron bar was retrieved from the crime scene. I am satisfied that the

Appellant was armed with a piece of iron bar which he used to hit the victim in order to overcome the arrest and retain the stollen items, the offence of armed robbery was proved to the required standard in criminal law, that is beyond all shadows of doubts.

I will determine collectively the second and third grounds of appeal in which the complaint is on inconsistency and contradiction of the prosecution's evidence. From the findings expounded above, I'm of the guided view that there is no inconsistency and contradiction. I say so because PW1 testified to have been hurt at the scene of crime, PW2 stated that the Appellant had two iron bars, PW8 testified that he retrieved a piece of iron bar inside the shop. Therefore, from the eye witnesses' testimonies, they gave straight evidence as narrated above. PW6, a clinical officer and PW7 an exhibit keeper, as rightly argued by the Senior State Attorney did not eye witness the incident.

In the light of the above discussion, it is clear that the evidence of the prosecution is water tight against the Appellant.

As to the offence in the second count, needs not to detain me, having navigated through the evidence above it is evident and unchallenged evidence by the Appellant that the same was proved. The evidence of

the victim, PW1 that he was assaulted by the Appellant is well corroborated by the evidence of PW2 who saw the Appellant assaulting her husband is also further corroborated by the evidence of PW6, the clinical officer who examined PW1 and found him with assault wounds on the face and arms. The Appellant gave no evidence challenging this piece of evidence other than general denial. The evidence shows that he was arrested on the spot. There is no reason of differing from the trial court's findings that the second count was also proved.

Given the cumulative pieces of the prosecution's evidence which corroborate each other as herein above demonstrated, I find that both of the offences were proved to the required standard. The the Appellant was correctly convicted and sentenced. I accordingly dismiss the appeal in its entirety. It is so ordered.

F. K. MANYANDA

Judge

18/03/2022