IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TANGA DISTRICT REGISTRY)

AT TANGA

CRIMINAL APPEAL NO. 46 OF 2020

(Arising from Criminal Case No.197 of 2018 of Handeni District Court)

HEMED MWINJUMA MAYEGA .....1ST APPELLANT

MOHAMED OMARY DOGOLI .....2ND APPELLANT

SAID OMARY DOGOLI .....3RD APPELLANT

-VERSUS-

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 10/12/2021
Date of judgment: 01/03/2022

AGATHO, J.:

The Appellants were charged with two offences: 1st count Armed Robbery c/s 287A of the Penal Code [CAP 16 R.E. 2002], and 2nd count Causing grievous ham c/s 225 of the Penal Code [CAP 16 R.E. 2002]. The Appellants denied the charges, which prompted the prosecution to bring witnesses who testified to satisfaction of the trial Court that the Appellants were guilty, convicted and sentenced to 30 years imprisonment.

The Appellant were aggrieved by the decision of District Court of Handeni, and appealed to this Court on the grounds shown herein below. There were two sets of grounds of appeal: those in the petition of appeal and others in the amended petition of appeal and in the written submissions.

But before embarking on examination of this appeal, I should state that the Appellants filed several petitions of appeal and written submissions.

The first petition of appeal was filed by the Appellants' advocate Joseph Kulemba on 03/07/2020. There was also an order given by the Court on 23/03/2021 on filing of written submissions. The schedule was that the Appellants to file their written submissions on 13/04/2021, the Respondent to file the reply on or before 04/05/2021, and the Appellants to file rejoinder (if any) on or before 11/05/2021. A date for Mention was fixed to be on 11/05/2021 with a view to set date for judgment. It is on record that on the same date (23/03/2021) the Appellants informed the court that they have withdrawn the services of their advocate Joseph Kulemba. They decided to proceed on their own without services of any advocate.

The Appellants filed their written submission on 30/03/2021. The Respondent filed their reply to the Appellants' written submissions on

04/05/2021. Thereafter, the Appellants filed their rejoinder on 02/06/2021 which was beyond the date schedule by the Court, that is 11/05/2021. There was no leave of the court sought to file the rejoinder out of time.

On 02/08/2021 when the matter was set for mention, the Appellants did not appear in court physically or by video link. However, the Respondent counsel prayed for the date for judgment as the submissions were ready pursuant to the order given on 23/03/2021. The Court adjourned the matter to 05/08/2021 for judgment delivery. On that day the Appellants appeared before the Court via video link. However, when the judgment was about to be delivered and the grounds of appeal were read out the Appellants raised concern that their grounds of appeal read out were not the ones contained in their amended petition of appeal. Upon hearing that concern, and to meet the end of justice, the Court thought it prudent and just to adjourn the delivery of judgment to accommodate the Appellants concern. It ordered the Appellants to file the said amended petition of appeal before the Court. On probing further to the Respondent, it appeared that the Respondent had a copy of the said amended petition.

I have perused the Court records I could not find any order given to the Appellants to file the amended petition of appeal. Nevertheless, for the

interest of justice the Court on 05/08/2021 rescheduled dates for filing written submissions. The Appellants were ordered to file their written submissions on 03/09/2021, the Respondent to file their reply on 17/09/2021, and rejoinder if any to be filed on 24/09/2021. And judgment was set to be delivered on 08/10/2021. The parties did abide to the schedule, as they filed their submissions timely. However, on 08/10/201 the date fixed for judgment the Respondent's counsel informed the Court that they have not been served with a copy of the Appellants' written submissions. They have therefore failed to file their reply. The Court proceeded to grant the Respondent 10 days extension to file their reply. They ought to file the reply on or before 19/10/2021. Judgment was rescheduled to be delivered on 01/11/2021. Again on 02/11/2021 the Appellants informed the Court that the grounds of appeal were not those contained in their amended petition of appeal. The Court ordered the Appellants to file the same before the Court and judgment was fixed to be delivered on 09/11/2021. The judgment could not be delivered on that day as the Judge was in the Criminal sessions.

To determine the present appeal the Court asked itself several questions that are linked to the grounds of appeal. But as will be noticed shortly, the

appeal could be briefly determined by examining two questions contained in grounds of appeal: whether it was proper to include the counts of causing grievous harm and armed robbery in one charge sheet (ground 5; and (ground 7), and whether failure to consider defence case is a fatal irregularity that vitiates conviction? But before we delve into these two critical issues, we endeavour to look at other grounds of appeal first.

The initial grounds of appeal as gathered from the Appellants' written submissions filed on 30/03/2020 were:

1. The learned trial District Court Magistrate erred in law and fact for failure to note that PW6 contradicted himself regarding the exact number of the alleged Bandits invaded him.
2. The learned trial RM erred in law and fact as he failed to realize the contradictions on the exact number of the alleged Bandits.
3. The learned trial RM erred in law and in fact to believe the evidence of PW6 Raphael Leskari Loisho, the victim of the incident that he could identified all Appellants at the locus in quo without considering that he (PW6) himself testified to the effect that:

   "While there another three people [sic] including Hemed (1st accused), Omary Mgaya and Mohamed Omary (2nd accused) came

from the same forest. At that time I laid down as I was ordered by the 3rd accused then, the 1st accused took my sheet [sic] (Masai shet)[sic] and use it to hide my head."

The above grounds of appeal were filed prior to engagement of Advocate Kulemba. The Appellants engaged the said advocate and informed the Court on 31/08/2020. Following his engagement, the learned advocated filed new petition of appeal dated 03/07/2020 with six grounds of appeal as shown hereunder:

1. That the learned trial Magistrate erred in law and fact by holding that the Respondent herein proved the case against all Appellants herein beyond reasonable doubt as charged.
2. That, the trial Court erred in law and fact to convict all Appellants based on the testimony of prosecution's witnesses while are not corroborated.
3. That, the trial Court erred in law and fact by delivering judgment in favour of the Respondent herein without to consider strong evidence adduced by the Appellants.

4. That, the trial Court erred in law and fact to convict both Appellants while the prosecution's witness who identified all Appellants herein is complainant only.
5. That, the trial Court erred in law and fact by delivered judgment in favour of the Respondent herein without to consider that the Respondent herein fail to tender exhibits of any dangerous or offensive weapon or instrument used in order to complete elements of armed robbery.
6. That, the trial Court erred in law and fact to convict all Appellants here without considering that there is families dispute on matter of land between family of complainant and family of the Appellants.

As stated earlier while the appeal was still pending in this Court, the Appellants disengaged advocate Kulemba and prosecuted the appeal themselves. Although there was no order for them to file amended petition of appeal, they filed the same. The said amended petition of appeal had eight (8) grounds of appeal as follows:

1. The learned trial Magistrate erred in law and factual analysis when he failed to give weight the material variance between the charge and the evidence on records, as the charged alleges that the victim was

robbed, among other things two mobile phones make TECNO and INFINIX, while in the evidence adduced PW6 claims that the stolen mobile phone was HALOTEL and not TECNO.

2. The learned trial Magistrate erred in law and factual analysis when he failed to note that in matters of identification it is not enough to look at factors favouring accurate identification, equally important is the credibility of witnesses because favourable conditions for identification alone are no guarantee against untruthful evidence.
3. The learned trial Magistrate erred in law and factual analysis when he failed to note that material prosecution witnesses were never summoned to testify that is the arresting officers of the 2nd and 3rd Appellants who could clear the air on the cause of their arrest, the village leader VEO Asha Dhahabu and the investigator of the case.
4. The learned trial Magistrate erred in law and factual analysis when he failed to consider that the cause of the first Appellant's arrest was due to suspicions of PW2 and PW4 who had doubts of whether he stood and being greeted but could not reply, while he was sweating, as such suspicions however strong cannot warrant conviction.

5. The learned trial Magistrate erred in law and factual analysis when he failed to note that the offence of grievous harm was not proved at all as firstly, the tendered PF3 exhibit P1 was not read out after being admitted, secondly, the victim was never showed in the Court the scar or place of injury and lastly the doctor (PW7) never even mentioned which leg was the victim (PW6) attended to.
6. The learned trial Magistrate erred in law and factual analysis when he relied on weak, inconsistent, contradictory with material discrepancies and uncorroborated prosecution evidence.
7. The learned trial Magistrate strayed into error of law when he failed to consider the defence evidence at all.
8. The learned trial Magistrate erred in law and factual analysis when he failed to note that the charge against the appellant was not proved beyond reasonable doubt.

On 3/09/2021 the Appellants filed their written submissions based on the amended petition of appeal. The submissions were on the amended petition of appeal. However, there were also other grounds of appeal mentioned below that are found in the written submissions. I have merged

them with the grounds of appeal in amended petition of appeal as they are related.

The first ground is merged with 8th ground of appeal, that, the learned trial Magistrate erred in law and fact by holding that the Respondent herein proved the case against all the Appellants herein beyond reasonable doubt as charged.

The second ground of appeal is merged with 6th ground of appeal, that, the trial Court erred in law and fact to convict all the Appellants based on the testimony of prosecution's witnesses while are not corroborated.

Regarding, the third ground of appeal seen in the Appellant's written submissions that the trial Court erred in law and fact by delivering judgment in favour of the Respondent herein without considering strong evidence adduced by all the Appellants. This ground of appeal is not in the petition of appeal dated 18/08/2021. However, it is a kin to the failure of the trial Court to consider the Appellants' defence.

The fourth ground appeal as presented in the written submissions of the Appellants also relates with the 2nd ground of appeal. That, the trial Court

erred in law and fact to convict both Appellants while the prosecution's witness who identify all Appellants herein is the Complainant only.

That the trial Court erred in law and fact by delivering judgment in favour of the Respondent herein without considering that the Respondent herein failed to tender exhibits of any dangerous or offensive weapon or instruments used in order elements of armed robbery. This ground of appeal is not found in the amended petition of appeal.

As derived from the grounds of appeal, the issues for determination were:

(1) Whether case was proved beyond reasonable doubt (this is also linked to the ground 8 of appeal):

Were the Appellants caught with money stolen? Were the Appellant caught with firearm? Who robbed and shot the victim? The victim (PW6) testified that he saw them at the crime scene. It thus does not matter whether they were caught with the stolen money or not. Since eyewitnesses who saw them, have testified to the effect that the Appellants are the ones who committed the offence, the failure to tender the stolen money is not fatal.

(2) Whether the testimony of prosecution witnesses were weak, inconsistent, contradictory, material discrepancies and uncorroborated? The answer to this issue is no. The prosecution witnesses' testimonies were corroborated (ground 6) (PW1 – Raphael Abraham, PW2, PW3 – Said Muya, PW4, PW5-Simon Reuben, PW7 and PW8). The PW6's testimony is direct evidence. His testimony is corroborated by the testimony of PW1, PW4 - Zuhura Hassan (her testimony is also seen on page 3 of the judgment), PW2 – Ibrahim Said (who overhead Appellants planning the robbery), and PW 5 (who was asked by the Appellants if he know the victim). Apart from PW6 – Raphael Loisho Lazier (the victim) who was the eyewitness other witnesses gave circumstantial evidence. PW7 (medical doctor) gave a testimony that the victim (PW6-Doglas Emanuel Chamshama) was shot (as shown on page 6 of the judgment); PW8 – police officer, was the one who recorded Appellants cautioned statements.

(3) Whether relying or convicting Appellants basing on visual identification by the prosecution witness was irregular in law. Generally, there is nothing wrong with convicting an accused

basing on identification by the victim. This was stated in **Waziri Amani v R, [1980] TLR 250**. In that the Court laid down principles that have to be followed on issues of identification. In the present case the save for other shortfalls, the conviction basing on identification was proper because PW6 know the Appellants: Hemed, Said and Mohamed. Thus, the victim and Appellants know each prior to the incident. This is an important ingredient of visual identification whether victim and accused knew each before the incident. That was held in the cases of **Waziri Amani (supra)**; and **Mohamed Juma @Kodi v Republic, Criminal Appeal No.273 of 2018 CAT at Mtwara** (unreported). Another important aspect for consideration during identification is when was offence committed? Was it daytime or night? In the present case the offence was committed during the daytime at 17:00 hours. That time the sun has not set yet. See **Waziri Amani's case (supra)**. Another crucial element is the incident took some time. The victim observed the Appellants for considerable amount of time. The PW6 also testified that the Appellant were standing close to him, and they asked him to lay

down. Therefore, the distance of the victim and the Appellants was close. It follows that the requirements/conditions set in **Waziri Amani v R** (supra) were fulfilled.

(4) The learned trial Magistrate erred in law and factual analysis when he failed to note that material prosecution witnesses were never summoned to testify that is the arresting officers of the 2nd and 3rd Appellants who could clear the air on the cause of their arrest, the village leader VEO Asha Dhahabu and the investigator of the case. I agree with the Respondent submitted that the VEO was not material witness because her testimony would have been hearsay. She would have testified what she was told about the incident. Moreover, in line with Section 143 of the Law of Evidence Act [Cap 6 R.E. 2019], there is no exact number of witnesses that prosecution is bound to bring to the Court to prove the charge. I am of the view that even a single witness may be sufficient to prove the charge, provided his testimony is credible, truthful, and believable.

(5) The learned trial Magistrate erred in law and factual analysis when he failed to consider that the cause of the first Appellant's arrest

was due to suspicions of PW2 and PW4 who had doubts of whether he stood and being greeted but could not reply, while he was sweating, as such suspicions however strong cannot warrant conviction. I agree with the Appellants that, indeed suspicion cannot be the basis of conviction. The same was held in the case of **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda v R, [2006] TLR 395**. I find this ground of appeal to have merits.

(6) Whether the trial court considered the defence evidence? The trial court on pages 8-9 of its judgment captured the defence evidence. However, as shown below, it is clear that the trial Magistrate did not evaluate the defence evidence. This has links to the Ground 7 of the amended petition of appeal. This ground of appeal is extensively examined herein below.

(7) Whether failure to tender offensive/dangerous weapon/instrument (Gobore) used in the course of armed robbery as exhibit is fatal and vitiates the conviction proved the charge beyond reasonable doubt? I am of view that failure to tender the Gobore was not fatal the prosecution proved the charge against the Appellant

beyond reasonable doubt because there was direct evidence of PW6 which was corroborated by the testimony of PW1, PW2, PW3, PW4, PW5, PW7 and PW8. The PW7 (medical doctor) testified that there was a bullet in PW6's leg, which confirmed that he was shot by the firearm. Merge this ground with grounds 5 and 8. Even if the scar caused by the bullet was not shown in the examination in chief, it was up to the defence to inquire the same during cross examination.

(8) Whether the learned trial Magistrate erred in law and factual analysis when he failed to note that the offence of grievous harm was not proved at all as firstly, the tendered PF3 exhibit P1 was not read out after being admitted, secondly, the victim was never showed in the Court the scar or place of injury and lastly the doctor (PW7) never even mentioned which leg was the victim (PW6) attended to. The claim that the offence of grievous harm was not proved may somewhat have substance. I am saying so because the PF3 which was admitted as exhibit P1 was not read out loudly in the Court after its admission in evidence. Looking at pages 61-62 of the trial Court proceedings, where the said PF3

was tendered by Dr Chamshana (PW7), it clear that the said exhibit was not read out. That is fatal and prejudicial to the Appellants as they were denied an opportunity to know the content of that exhibit which could have assisted them to make proper cross examination. That was held in **Mohamed Juma @Kodi v Republic, Criminal Appeal No.273 of 2018 CAT at Mtwara** (unreported). But the charge of causing grievous harm is not as serious as armed robbery. It is common practice that where there two offences in the cause of the same transaction, an accused is charged with a serious offence which a attracts heavier punishment. That is a reason why combined the two in the same charge makes it irregular.

(9) Whether existence of land dispute between the families of Appellants ad complaint is a motive for framing or implicating the Appellants with the armed robbery charge. This ground does exist in the amended petition. Despite that, and to ensure justice, I have examined the said ground of appeal as well.

The latter ground of appeal on the existence of land dispute, it apparent that the same has not been mentioned by any prosecution witness.

Moreover, as can be seen on page 5 of the trial Court judgment, the PW6 issued a kind of dying declaration. He had thought he will die and hence he named his assailant as Hemed s/o Mwinjuma Mayega as the one who shot him. The PW6 stated on page 54 of the typed proceedings of the trial Court that the 3rd accused (Said Mohamed Dogoli - a peasant) sold his farm to the PW6's father and it was peaceful. There was no land dispute.

While DW2 and DW3 claimed that there was land dispute (as seen on page 8 of the judgment), the PW6 refuted it. Actually, DW2 and DW3 sold their piece of land to PW6's family. This also support the fact that they know each. Moreover, the details of a purported land dispute is not provided. This is just mechanism to exonerate themselves form the charges they were facing. In **Luhemeja Buswelu v R, Criminal Appeal No. 164 of 2012, CAT at Mwanza** (unreported) the CAT held that in armed robbery prosecution must prove, firstly, that there was theft, and secondly, the stealing (cash money and mobile phone) was accompanied by use of actual/violence or a threat to use violence either before, during or after the theft in order to obtain and or retain the property. In the present case these ingredients were proved. There was money and mobile phone stolen, and there was use of actual violence where PW6 was shot by a gun. This

is also related with 1st the ground of appeal. Whether there is the material variance between the charge and the evidence on records? Along that there was allegation of irregularity of the charge sheet. That the charge embodies two counts: armed robbery and causing grievous harm.

The variance or inconsistency of PW6 testimony and charge sheet with respect to what was stolen from him and what was shown in the charge is a minor one. In **Issa Hassan Uki v Republic, Criminal Appeal No. 129 of 2017 Court of Appeal of Tanzania at Mtwara pages 18-19 (unreported), and Mohamed Said Matula v R [1995] TLR 3 th**e Court of Appeal of Tanzania had guided the courts to determine whether the contradictions are minor or goes to the root of the matter.

In terms of the evidence adduced, the PW6 stated that the stolen phone was Halotel and not Techno. It is my view that this does not affect the legality of the charge. The Appellants were charged of armed robbery, and they stole mobile phones and cash money clearly indicated in the charge sheet. The PW6 testified to that effect. Therefore the cases of **Issa Mwanjiku @White v R., Criminal Appeal No. 175 of 2018, Court of Appeal of Tanzania** (unreported) and that of **Abel Msikiti v R,**

Criminal Appeal No. 24 of 2015, Court of Appeal of Tanzania (unreported) are distinguished.

Despite what has been observed herein above, the present case is coupled with two fatal irregularities that form the base for disposing the appeal. The irregularity as to the charge itself as it bears two counts, first count: armed robbery and second: causing grievous harm; and another irregularity is the failure of the trial court to consider defence evidence (case).

Regarding irregularity of the charge sheet, the charge embodies two counts: armed robbery and causing grievous harm. Considering the second count that is causing grievous harm c/s 225 of the Penal Code [CAP 16 R.E. 2002], there is irregularity in the way the prosecution framed the charge. As it can be seen on pages 9 – 10 of trial Court judgment, that the trial Magistrate did not consider that the Appellants have been charged with two offences: first count armed robbery and second count causing grievous harm in which the latter is a cognate offence. In that case grievous harm relates to armed robbery. It was therefore improper for the trial Court to convict the Appellants on the count of causing grievous harm. The more serious offence is armed robbery it would have sufficed to charge and

convict them on that offence alone. I invoke the revisionary powers of this Court to quash the trial Court's convictions of Appellants on causing grievous harm and I set aside the respective sentence as the CAT held in **Raymond Mwinuka v R, Criminal Appeal No. 366 of 2017 CAT** (unreported). However, as for the count on armed robbery, since there is enough evidence on record, I order the file be remitted to the trial Court to enable it to consider defence case and compose proper judgment.

The 7th ground is with regards to failure of the trial Court to consider the Appellant's or defence case, the CAT held in the case of **Yusuph Amani v R, Criminal Appeal No. 255 of 2014, CAT at Mbeya** at page 8 that:

> *" It is the position of the law generally failure or rather improper evaluation of the evidence leads to wrong conclusions resulting into miscarriage of justice. In that regard, failure to consider defence evidence is fatal and usually vitiates the conviction."*

Again, on the same page the CAT held:

> *"We are satisfied that, both the trial and first appellate courts did not treat the appellant fairly who was all the same not availed a*

fair trial which occasioned a miscarriage of justice as his evidence was not considered. Thus, the conviction was not safe and it cannot be sustained."

The CAT in **Hussein Idd and another v R [1986] TLR 166**, found serious misdirection of the trial Court that it dealt with the prosecution evidence implicating the first appellant and reached the conclusion without considering the defence evidence.

The remedy as it was held in **Stephen Martine v R, Criminal Case No. 129/2020** High Court of Tanzania, Mwanza District Registry (unreported) is to order retrial to ensure justice is done. The **Stephen Martine's case** the Court relied on the decision of **Lockhart Smith v United Republic (1965) EA 217** where the Court held:

"Having found the judgment and the trial proceedings were profoundly flawed, the remedy is retrial since the interest of justice is required in this case. I have gone through the prosecution evidence and found that the evidence on record is heavy. However, in order to reach a fair decision, the defence case be evaluated and analysed."

From the above cited principle, I find the appeal to have merits as the trial court did not consider the defence case. Consequently, the appeal is allowed, the conviction is quashed, and the sentence is set aside. I order the file be remitted to the trial Court for the trial Magistrate to consider the defence case and compose a proper judgment within three months. The period that the Appellants have so far served in prison shall be considered. The Appellants shall remain in custody while waiting for the trial.

DATED at **TANGA** this 1st Day of March 2022.

U. J. AGATHO

JUDGE

01/03/2022

Date: 01/03/2022

Coram: Hon. Agatho, J

Appellant: Present

Respondent: Ms. Kazungu, State Attorney

B/C: Zayumba

Court: Judgment delivered on this 1st day of March, 2022 in the presence of the Appellants, and the Respondent State Attorney.

U. J. AGATHO

JUDGE

01/03/2022

Court: Right of Appeal fully explained.

U. J. AGATHO

JUDGE

01/03/2022