

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 166 OF 2022

*(Originating from Criminal Case No. 20 of 2022 before the District Court of Mkuranga at
Mkuranga)*

MAWAZO YASINI LIPAPALA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 8th & 22nd February, 2023

MWANGA, J.

In the District Court of Mkuranga, the appellant **MAWAZO YASINI LIPAPALA** was charged and convicted of Armed Robbery contrary to Section 287A of the Penal Code [Cap. 16 R.E 2019], currently [R.E 2022]. The particulars of the offence against the appellant were that; on 1st day of January, 2022 about 1:30hrs at Kimanzichana Village within Mkuranga District in Coast Region the appellant by using a club did steal one motorcycle with Registration No.142 CMM make HAUJUE, the property of

YASIN ABDALLAH LIPAPALA and, immediately before and after such stealing, he threatened the victim who is his biological father by using such club in order to retain the motorcycle. According to the evidence on record, the appellant escaped to Kibaha where he was arrested while in possession of the stolen motorcycle. He was arraigned in court and charged accordingly.

At the trial court, the prosecution produced a total of three witnesses and, upon their testimonies the appellant was convicted and sentenced to 30 years imprisonment. The appellant was not contented by both conviction and sentence, hence this appeal on the grounds that;

1. the learned trial magistrate erred in law in convicting the appellant of the Armed Robbery contrary to section 287A of the Penal Code where by the evidence of the prosecution and defence adduced in court was of bona fide claim of right.
2. the learned trial magistrate erred in law in failing to note that in case of conviction, the appellant was supposed to be convicted of demanding property with menaces with intent to steal as stipulated by Section 292 of the Penal Code [Cap16 R.E 2019].

3. the learned trial magistrate erred in law and fact in failing to consider and determine that the appellant denied all facts relating to the offence of armed robbery as charged as there was no evidence showed that PW1 was directed or threatened with either the said 'rundu' or an axe as asserted by PW1, PW2, PW3 and DW1.
4. the learned trial magistrate erred in law and fact in convicting the appellant of armed robbery which was not proved and or established conclusively as the appellant did neither sell nor hide the said motorcycle, vide the evidence of PW3.
5. the learned trial magistrate erred in law and fact in convicting the appellant as charged when the prosecution failed to prove its charge beyond reasonable doubt.
6. the learned trial magistrate erred in law and fact in convicting the appellant of armed robbery based on the evidence of PW1, PW2 and PW3 when the same failed to prove the allegation that the appellant was not a good son as he uses drugs always causing violence at home, thus unreliable.

7. the learned trial magistrate erred in law and fact in failing to note and consider that the evidence of PW1 and PW2 was in variance with the particulars of the offence and contradictory, the omission which renders their evidence to be incredible and unreliable to ground the appellant's guilty as charged.

Through leave of the court, the appeal was argued by way of written submission. Having close look at the grounds of appeal filed by the appellant, one can easily roundup and notice that he is contesting the trial court's decision that the offence of armed robbery was not proved according to law under section 287A of the Penal Code, Cap. 16 R.E 2022. The relevant provision of that section reads 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’.

The Court of Appeal of Tanzania while analyzing the above provision in the case of **John Makuya Vs The Republic**, Criminal Appeal No. 62 of 2022, had the following observations;

‘The provision above envisages two categories of armed robbery either of which the prosecution must lead evidence to prove beyond reasonable doubt. First is stealing, and at or immediately before or after stealing being armed with any dangerous or offensive weapon or instrument. The second category also requires proof of stealing, at or immediately before or after the stealing, the accused person used or threatened to use violence to any person in order to obtain or retain the stolen property’.

According to the evidence on record, PW1 who is the victim and father of the appellant testified that, the appellant threatened him with an

axe in order to obtain a motor cycle, which he denied. He stated further that, in the course of commotions, the appellant also threatened to pierce neighbors with a 'shoka'. On his part, PW1 stated that the appellant left away with the said shoka and, at around 01:00hrs the appellant returned back again and broke the kitchen door into pieces, an act that shocked the wife of PW1. Acting on the pressure of his wife, PW1 handed over motorcycle key to the appellant. Eventually, the appellant left with the motor cycle.

It was the appellant's submission that, he wanted a motorcycle for the business purposes and not otherwise. Equally, however, he being a child of the victim (PW1) has a right to his or her parent's properties and, therefore had a bona fide claim of right over the motorcycle.

On top of that, the appellant submitted that there was no proof of use the offensive weapon against the victim (PW1) at or immediately after the commission of the offence. Again, there was no proof that such dangerous or offensive weapon was directed to the victim for the purpose of taking or retaining the motorcycle. To support his argument, he cited the case of **John Mdata Vs R**, Criminal Appeal No.453 of 2017(Unreported).

On the part of the prosecution, the learned State Attorney denied the claims that the appellant had a bona fide claim of right over the properties of his father (PW1). It was submitted that, the appellant's had misapplied the principle of bona fide claim of right simply because the motorcycle which the appellant took by force was not his property. To make it clearer, he cited section 258(1) of the Penal Code [Cap. 16 R. E 2019], which provides for the ingredients of theft. He contended further that, the prosecution evidence is real, that is, when a motorcycle (Exhibit P2) was tendered by PW1 the appellant did not even object or cross examined on the relevant exhibit.

I have deeply considered the evidence adduced at the trial court and submission of the respective parties in this appeal. There is no doubt that, the instrument (an axe or a club) alleged to be used by the appellant in committing the crime was an offensive or dangerous ones. The court of Appeal in the case of **Simon Kanoni Vs Republic**, Criminal Appeal No 145 of 2015 (Unreported) quoting the case of **Michael Joseph Vs Republic** [1995] TLR 278 held that;

"...if a dangerous or offensive weapon or instrument is used, in the course of robbery, such constitutes armed robbery..."

The establishment of the offence under section 287A of the Penal Code do not end up on identifying the instrument or weapon used. As rightly submitted by the learned State Attorney in the cited case of **Shabani Said Ally Vs Republic**, Criminal Appeal No. 270 of 2018 (unreported) in order to establish an offence of armed robbery, the prosecution must prove that; **One**, there was a theft as it was stated in the case of **Luvana v. Republic**, Criminal Appeal No. 1 of 2005 (unreported). **Two**, there was use of dangerous or offensive weapon or robbery instrument at or immediately before or after the commission of robbery and **three**, the use of dangerous or offensive weapon or robbery instrument must be directed against a person. See the case of **Kashima Mnadi v. Republic**, Criminal Appeal No. 78 of 2011 (unreported).

After carefully examination of the evidence on records and in consideration of the submissions at hand, judgement and the proceedings of the trial court, this court has found out that; the charge of armed robbery against the appellant was not proved to the required standards. As

intimated above, the prosecution failed to ascertain as to whether the appellant was armed with any dangerous or offensive weapon or instrument during the commission of the offence and, that the same was directed to the victim (PW1). In the charge sheet, particulars of offence shows that the appellant used a club to threaten the victim (PW1) before obtaining the motor cycle while PW1 testified that, the appellant used axe in the first place to threaten him. However, how such axe was used to steal the motorcycle was not stated both in the chargesheet and the evidence of PW1 and PW2.

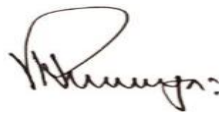
In addition to that, there was evidence of PW2 that, the appellant used '*mchi*' to pose threat to the PW1. However, it is the evidence of PW1 and PW2 that, the appellant broke into the kitchen door into pieces while PW1 was sitting in the living room. The distance between the kitchen door and the sitting room is not indicated to find out how exerted pressure by the appellant made the wife of PW1 to pressure her husband to give motorcycle key to the appellant. Absence of such explanation leaves some doubts as to whether the said weapon was directed to PW1 or his wife who did not even testified in court.

This now coincides with the argument of the appellant that, there was a variation between the chargesheet and the evidence adduced. The instrument used in the commission of offence of armed robbery and the manner how it is used being one of the key ingredients of the offence under Section 287A of the Penal Code, the prosecution ought to clear the same before the appellant was found guilty.

The argument of the learned State Attorney that, it is the appellant's faults since he failed to cross examine PW1 with regard to the kind of weapon used do not, in my view, conscience with the right of the appellant to a fair trial. I am aware of the decision of **Goodluck Kyando Vs R [2006] TLR 363** with regard to evidence not cross examined. However, much as failure to cross examine a witness on a particular point may lead the court to infer admission of such fact, it does not relieve the prosecution with a duty to prove the case sufficiently beyond reasonable doubts. The prosecution ought to ensure that, a clearer particulars of offence and the evidence are provided to the accused and are not in variance to enable the accused plea to the respective charge(s) or to defend himself against the charge(s) leveled against him.

In the results, this appeal must succeed. The conviction of the appellant and the sentence passed on him quashed and set aside. I order for the immediate release of the appellant from prison, unless otherwise, lawfully held for some other cause.

Order accordingly.

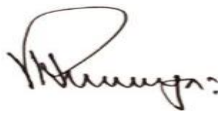


H. R. MWANGA

JUDGE

22/02/2023

ORDER: Judgement Delivered in Chambers this 22nd day of February, 2023 in the presence of the leaned State Attorney and the appellant in person.



H.R. MWANGA

JUDGE

22/02/2023

