IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 45 OF 2020

(Originating from Kinondoni District Court in Criminal Case No 22 of 2016)

DAVID KABADI.....1ST APPELLANT

JACOB MALIBA.....2ND APPELLANT

E. 7879 D/CPL USWEGE.....3RD APPELLANT

HILAL IBRAHIMU.....4TH APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

17/01/2023 & 17/02/2023

LALTAIKA, J.

The appellants herein, **David Kabadi**, **Jacob Maliba**, **E. 7879 D/CPL Uswege** and **Hilal Ibrahimu** (herein after the 1st, 2nd, 3rd, and 4th appellant respectively and collectively simply as appellants) and seven others were arraigned in the District Court of Kinondoni charged with two counts of armed robbery contrary to section 287A of the Penal Code [Cap 16 RE 2002, now RE 2022].

On the first count, it was the prosecution's assertion that on the 10th June 2015 at Mbezi Africana Area within Kinondoni District, Dar es Salaam,

the appellants [along with seven others] did still a motor vehicle make Toyota Prado with Chassis No R2JI200024881 valued at TSH 65,000,000/= and Mitsubishi Canter with Chassis No FE638EV500583 valued at 30,000,000, one Battery Charging Machine, One TV and its Azam decoder the property of Abdulmalick Said and immediately before and after such stealing did use a Pistol to threaten Kassim Shaban a security guard at the car yard in order to obtain and retain the said property.

On the second count, the prosecution alleged that on the 10th June 2015 at Mbezi Africana Area within Kinondoni District, Dar es Salaam, the appellants [along with the seven others] did still a motor vehicle make BMW with Chassis No WBAPDI20WG50784 valued at TSH 30,000,000 the property of Jay Madereka and immediately before and after such stealing did use a Pistol to threaten Kassim Shaban a security guard at the car yard in order to obtain and retain the said property.

The appellants and the seven others pleaded not guilty to the charge (one of the accused persons was charged with only one count of obtaining stollen property). This necessitated conducting a full trial to enable the prosecution to prove the allegations and afford the appellants the opportunity to prove their innocence. To achieve this, the prosecution marshalled in a total of 21 witnesses and tendered 23 exhibits. The appellants, (then accused) on their part, had five witnesses and tendered one exhibit. The list of all witnesses and exhibits tendered will be reproduced later in this judgement for ease of reference.

At this juncture, I considered it imperative to provide albeit briefly some factual and contextual backdrop to this appeal. Owing to its strategic location along the coastline of the Indian Ocean, Dar-es-Salaam, (Arabic word literally translated the *"Harbour of Peace"*), Tanzania's commercial hub is awash with what are locally known as "yards" meaning places where imported (mostly used) cars are sold. Locals and nationals of neighbouring countries (especially landlocked ones) would walk into any of these yards and are spoilt for choice. In yesteryears, these yards were confined to affluent streets of the city. Not anymore. As the number of the yards increases so are the diversity of their locations.

On the night hours of the 10th day of June 2015 one of those yards located at Mbezi Africana Area within Kinondoni District fall prey of robbery with violence. The cars and other items as enumerated in the charge quoted above were stolen. A manhunt was immediately launched leading to the arrest and arraignment in court of the appellants and seven others. Records indicate that the trial lasted for many days (from the 14th day of February 2016 when the accused persons pleaded not guilty to the 30th day of October 2019 when the impugned judgement was delivered). At least three magistrates were involved at different times, one after another. Hundreds of papers of handwritten records filed in three volumes were generated. They were later typed and filed along the handwritten sheets making the record unnecessarily massive.

Upon closure of the prosecution case, the learned trial magistrate ruled that only five of the accused persons hitherto arraigned in court had a case to answer. Consequently, the defence case opened. As hinted, five witnessed

testified and one exhibit was tended and admitted as evidence. This marked closure of the defence case. On the 30th day of October 2019 the learned trial magistrate delivered her judgement. The then 10th accused (one Hamisi Masudi Pelle) was acquitted. The first, second, third and fifth accused persons (the current appellants) were convicted as charged and sentenced to serve imprisonment term of thirty (30) years for each count running concurrently.

Dissatisfied, the appellants appealed to this court on twenty (20) grounds. With leave of this court sought and obtained on different occasions, the appellants filed four additional grounds of appeal each. As a matter of facts, the twenty grounds of appeal (probably penned down by the appellants before securing legal representation) are full of repetition and inconsistencies. It is no wonder, the learned counsels chose to focus on the supplementary grounds.

Pursuant to the order of this court dated the 29th day of October 2021, written submissions was the preferred mode of hearing of the appeal. A schedule to that effect was agreed upon and duly complied with by both parties. The first appellant was represented by Mr. Domicus Nkwera, Learned Advocate. The 3rd and 4th appellants enjoyed legal services of Mr. Hosea Chamba, learned Advocate. The 2nd appellant appeared in person unrepresented. The respondent Republic, on the other hand, appeared through Mr. Adolf Kisima, learned State Attorney. I am not going to reproduce the detailed submissions and all the arguments for and against the appeal but the learned counsels and the anonymous legal aid provider

who assisted the second appellant should rest assured that their efforts are highly appreciated.

Before I delve into the crux of the matter, I cannot resist penning down a few lines on the urgent need of this court to embark on digitization of court records. In short, lower court records upon which this judgement is based could not be traced for a very long time! One day, after so many tears had been shed and countless complaints voiced, the same were found "neatly packed" in one of the court lockers. This brought back sad memories on my part. Let me explain. As a child growing up in a remote village, I would overhear bitter stories of close relatives and neighbours who, after travelling for many days to a public office (a place they fondly referred to as "Wilayani") they would be told that they needed to go back to the village because their files could not be traced. The files had "vanished!"

Alternatively, my folks narrated sobbingly, they were invited to "buy some milk" for someone who was skilled in the art of going through piles and piles of files to unearth the purported "lost file" in a dusty warehouse nearby. The word milk was a euphemism "tafsida" for corruption. In hindsight, it is not the corruption part that makes the stories "unforgettable" (in a negative way of course). It is how, for God's sake, a whole file full of records could simply disappear from the tables of a decision maker.

That said, it is incumbent upon our generation, sixty years after independence of our country, to bring this deplorable habit to a halt. In the words of former President of the United States (POTUS) Barack Obama: "Change will not come if we wait for some other person or some other time.

We are the ones we've been waiting for. We are the change that we seek." Without prejudice to the tireless efforts made by our predecessors, the advent of ICT puts us in an advantageous position to hold the bull by the horn. In other countries, digitization of office records has contributed significantly to reducing the problem of misplacement of files. The paperless court vision can be accelerated by massive scanning of court records. I will stop here less I turn this judgement into a sermon on paperless courts and digitization. I reserve that to some other platform or some other judgment.

Having dispassionately considered rival submissions, grounds of appeal and court records, I am fortified that one ground of appeal raised by all appellants can determine the entire appeal. However, before I come to that ground, it is imperative to note that this being the first appellate court, the appellants are entitled to re-evaluation of the entire evidence. See among other authorities the case of **Peters v. Sunday Post** [1958] EA 424 and **Alex Kapinga v. Republic**, Criminal Appeal No 252 of 2005 (unreported). I have taken the liberty to re-evaluate the entire evidence and revisit the testimony of all prosecution and defense witnesses.

For reasons that will become apparent later, I am inclined to reproduce the list of the witnesses and exhibits as I hereby do. PW1 D/CPL Adulmalik Said, PW2 F.6833D/CPL Joseph, PW3 F3931 D/SGT Thabit, PW4 D/CPL Roden, PW5 Jay Musa Madereka, PW6 Ass. Insp Shaaban Shilla, PW7 Ass. Insp. Elia Peter, PW8 Pantaleo Mushi, PW9 Suleiman Hemed Seif, PW10 E70 D/C Elias, PW11 D9753 D/SGT Mashauri, PW12 D2910 SGT Emanuel, PW13 H505D/C Abeid, PW14 Insp. Jafar Jafar Nguli, PW154163 D/C Kenneth, PW16 Divinus Fabian Mkui, PW17 Kassim Shaban Kakuzumbi, PW18 Insp.

Godfrey Lumbange, PW19 Insp. Alfred Rugamala PW21 Ass. Insp. Yusuf Sambua and PW21 Insp. Adallah.

The exhibits tendered were: ExhP1 (a) and (b) Sale agreements for motor vehicles, ExhP2, P3, P4, P5 and P6(a) Cautioned Statements of the 2nd, 10th, 3rd, 9th, and 1st accused persons respectively. Exhibit P6(b) handing over receipt, ExhibP7 and P8 identification parade register of the 6th and 7th accused persons respectively. P10 Forensic Bureau's Report, and finally P11 Sale agreement in respect of Toyota Canter. One exhibit was not admitted as evidence as it was successfully objected by the defence counsel.

The five Defence Witnesses were DW1 David Kabadi (1st appellant), DW2 Jacob Maluba (2nd appellant), DW3 CPL Uswege (3rd appellant) DW4 Hilal Ibrahim (4th appellant) and DW5 Hamisi Mohamed Pelle (then 10th accused). The exhibit tendered was Exhibit D1 Letter from the Commission for Human rights and Good Governance (CHRGG).

My first task has been to carefully go through the evidence adduced by the above witnesses and reexamine the exhibits tendered. I am alive to the frequent insistence of our country's apex Court (The Court of Appeal of Tanzania) on proper evaluation of evidence. See among other authorities; **Leonard Mwanashoka v. R.** Crim. App. 226 of 2014 (unreported) where the Court stated categorically that:

> *"It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate chaff from grain. Furthermore, it is one thing to consider evidence and then disregard it after proper scrutiny or evaluation and*

another thing not to consider the evidence at all in the evaluation and analysis."

What then, amounts to proper evaluation of evidence? The art and craft of evaluating evidence, which is not peculiar to courts involves evaluating, among other things:

(i) The source of the evidence (where it comes from, who took over from who and who has tendered it in court)
(ii) The nature of the evidence (whether primary or secondary)
(iii) How the evidence compares with the rest of evidence in the same transaction/matter (whether there is corroboration)
(iv) How current is the evidence (whether it is still valid, or another newer evidence makes it redundant),
(v) The scope of the evidence (whether it proves a specific or a general item, direct versus circumstantial aspects)
(vi) What the evidence suggests (inference)
(vii) Whether the evidence is a part of common knowledge or new scientific/technological findings.

(See generally Damaska, Mirjan ***Evaluation of Evidence: Pre-Modern and Modern Approaches*** **(**Cambridge: Cambridge University Press 2019).

Coming back to the appeal, armed robbery is one of the most repugnant criminal activities in any society. Victims of this violent crime, especially children, experience traumatic effects that may last for a lifetime. Criminologists agree that there are currently three main typologies of armed robbery: amateurs, intermediates, and professional offenders. This typology corresponds to informal categorization among criminal investigators in Tanzania thus ***vibaka*** *(*amateurs*)*, ***wezi*** *(intermediates*) and ***majambazi***

(professional offenders). A study by the Australian Institute of Criminology expounds:

> *"**Amateurs tend to be opportunistic offenders**; with short-sighted intentions and little understanding of what to expect from the robbery experience or the amount of money they are likely to receive…**Intermediary armed robbers are generally more organized** and experienced than amateurs but not as dedicated as professionals. These offenders are more likely to engage in a reasonable amount of planning and are prepared to use weapons if necessary. **Professional armed robbers have a higher level of motivation**, are involved in violence and are more likely to persistently commit armed robberies as a means of making a living. Professional offenders are considered high-risk, violent offenders while they make up only a small percentage of the offending population, they cause the greatest concern to the community."* (Emphasis mine)

See Lance Smith and Erin Louis "Cash in transit armed robbery in Australia" ***Trends and Issues in Criminal Justice*** No. 397 July 2010 p. 1.

Cognizant to the devastating effects of armed robbery including physical injuries that may lead to loss of innocent lives, trauma, and sleepless nights in towns and villages, as well as incompatibility with hospitality industry and tourism in general, some countries have amended their penal statutes to punish armed robbery (and attempted armed robbery) by a death sentence. See for example **Section 296(2) of** the Penal Code of the Republic of Kenya. In Tanzania armed robbery used to attract the maximum sentence of life imprisonment. However, the law lacked clarity on essential elements of the offence. As will be shown later, the current section of the Penal Code offers no room for ambiguity.

As alluded to above, all appellants have complained that the offence of armed robbery was not proved beyond reasonable doubt as required by law. Counsel for the first appellant went an extra mile by arguing that the trial court had applied double standard (presumably a form of unfairness.) At page 21 the appellant averred

> *"In his evidence…PW17 stated that he managed to identified (sic!) 1st, 2nd appellants and also identified 4th, 5th, 7th & 8th accused person in the scene of crime. And PW17 stated further that 8th accused in the scene of crime carried a pistol. When [the] trial court in the ruling discharged 4th, 7th and 8th accused persons…. [the] trial court applied a double standard."*

Counsel for the respondent Republic, on his part, vehemently opposed the entire appeal insisting that the prosecution had left no stone unturned in their quest to prove the allegations beyond reasonable doubt. In the exact words of counsel for the respondent

> *"We have careful (sic!) scrutinized the entire proceedings and the judgement of this case…we have observed that this appeal is worthless, as the records of the trial court precisely demonstrates (sic!) that the case was proved beyond reasonable doubt, consequently we do not agree with this appeal."*

It is elementary law that the elements of the offence of armed robbery are both stealing and use of a dangerous or an offensive weapon. Both elements must be proved for the charge of armed robbery to stand. In the instant matter, the only reference to a weapon is PW17's assertion that when he was attacked, he saw the then 8th accused person holding a pistol. The prosecution laboured to prove the offense of stealing. The evidence tendered

was substantially inadequate to prove the prosecution case beyond reasonable doubt. The most fatal blow to the prosecution case however, was acquittal of the then 8th accused who, as alluded to was the one who carried a weapon and (allegedly) directed it to PW17.

Armed robbery has always been considered a very serious crime in our jurisdiction and proof of stealing alone has never been considered sufficient to warrant conviction. Before the introduction of section 287A, this offence was cited as armed robbery contrary to sections **285 and 286 of the Penal Code Cap. 16** and the punishment was life imprisonment, with or without corporal punishment. For instance, in the former regime in the case of **Samson Mzamani v Republic** [2002] T.L.R. 79(CAT at Dodoma) the Court stated that even in the absence of an express and specific definition of what constitutes "armed robbery", it is clear that the offence of armed robbery was amply disclosed because a gun was used as a weapon and thus constituting the offence of armed robbery.

For ease of reference, I am inclined to reproduce below the current version of the provision of the law which, in my opinion, is substantially well drafted compared to the old version thus leaving very little (if any) room for ambiguity. It can be noted that the entire typology of armed robbery namely vibaka, wezi and majambazi can easily be netted. This is because the law uses the word *instrument.* The word instrument is wide enough to include very crude tools such as screwdrivers "bisibisi" used mainly by amateur armed robbers such as the infamous ***panyarodi*** who occasionally wreak havoc in the streets of Dar es Salaam.

The section provides:

> *"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 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."*

In the case of **Shabani Said Ally v Republic**, Criminal Appeal No.270 of 2018, CAT at Mtwara (unreported) decided under the current provision, the Apex Court had this to say:

> *" It follows from the provisions of section 287A of the Penal Code that in order to establish armed robbery, the prosecution must prove the following: (a) There must be proof of theft; (b)There must be proof of the use of a dangerous or offensive weapon or robbery instrument at or immediately after the commission of robbery; (c) Use of dangerous or offensive weapon or robbery instrument must be directed against a person."*

In the present matter, part (c) above is conspicuously missing. Counsel for the first appellant is wondering why the republic has not appealed against acquittal of the only accused person that was allegedly seen using a pistol. Although no inference can be drawn by this court to that effect, I cannot help but reiterate the words of my brother in the bench **His Lordship Kahyoza** J. in **Andrea Chacha & Another v. Republic** [2020] T.L.R. 27 albeit in a slightly different context (I would replace the word prosecution with trial court) thus:

> *"The prosecution **applied a double standard** principle to drop charges against Joseph Magige @Peter. That double standard, destroyed the credibility of the key witnesses of the prosecution…I find prosecution's key witnesses saying something which is not probable in the circumstances of the case or something **which defeats logic**."* (Emphasis mine)

There is no doubt that armed robbery is an atrocious crime. Whether perpetrators are heavily or lightly armed, the trauma and disruption caused goes beyond what can be seen outwardly. There is no better way that this court can contribute to social harmony in the *harbour of peace* and Tanzania in general than by imposing the deterrence sentence (currently thirty years) to anyone convicted of armed robbery whether amateur (*kibaka)*, intermediate (*mwizi)* or professional offender (*jambazi)*. In doing so, the judiciary would be contributing to economic growth by inspiring confidence in trade and commerce generally (such as selling imported cars to neighbouring, landlocked countries) and boosting the tourism industry and bring true meaning to the now famous catch phrase #**TanzaniaUnforgetable.**

It is widely believed that it is impossible to build a vibrant tourism industry without reacting strongly to all forms of violent criminals including *vibaka*. Nevertheless, this court will always stick to the canon principle of criminal justice including presumption of innocence and proof beyond reasonable doubt of all elements of a given offence. It is also a cannon principle of our law that any doubt on the prosecution case must be resolved in favour of the accused. In the same line of reasoning, the burden of proof

cannot shift to the accused person save for extraordinarily rare circumstances specifically provided by law.

All said and done, I allow the appeal. I hereby order that the appellants **DAVID KABADI, JACOB MALIBA, E. 7879 D/CPL USWEGE and HILAL IBRAHIMU** be released from jail forthwith unless they are being held for any other lawful cause(s).

It is so ordered.

E.I. LALTAIKA

JUDGE
17.2.2023