IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MOSHI SUB REGISTRY)
AT MOSHI
CRIMINAL APPEAL NO. 26 OF 2022
(C/F District Court of Moshi Criminal Case No. 59 of 2021)

LAURENT LEONIDI CHAMI..... APPELLANT
VERSUS
REPUBLIC..... REPONDENT

JUDGMENT

Last order: 20/03/2023
Judgement: 24/04/2023

MASABO, J,:-

This is an appeal against the decision of the District Court of Moshi in Criminal Case No. 59 of 2021 in which the appellant was found guilty and convicted for the offence of armed robbery contrary to Section 287A of the Penal Code [Cap 16 RE 2019] and sentenced to serve 30 years in prison.

Briefly, the facts surrounding the case are that on 26th January 2021, the appellant and another person, not part to this case, entered into Raha Guest House located at Njoro Sokoni Area within Moshi District pretending to be customers whereby they booked a room and paid her 8,000/- for the room. The duo paid for the room to PW4, the guest attendant, who was attending them. After they had finishing paying, one of them attacked PW4 from behind and held a knife at her. When PW4 screamed for help one of the robbers ran away leaving the accused person behind. He forced PW4 to take him to the room in which they kept money and on arrival at the room he robbed Tsh. 900,000/- and PW4's mobile phone make Nokia

torch valued at Tsh. 40,000/-. He then tied PW4's hands, pushed pillow cases into her mouth and left. After he had left, PW4 managed to get out and screamed for help. Some people came to assist her whereby she described her assailant and they started to pursue him. PW2 confirmed to have seen the appellant leaving the guest house while holding a handbag. Also, PW3 confirmed to have seen the appellant boarding a motorcycle (boda-boda). In pursuit of the appellant, PW2 boarded PW3's motorcycle and went after him. After a while, the appellant was arrested while on a *bodaboda* he had boarded. At his arrest, the appellant was found in possession of a pair of sandals, knife, and a handbag which contained a piece of khanga, two or three trousers, a mobile phone make nokia believed to be PW4's phone and Tshs 400,000/-. The money was handed over to PW5, the owner of the guest house. The matter was reported to a police station and upon an investigation conducted by PW7 the appellant was arraigned in court charged with armed robbery.

The appellant offered a total denial for his defence. He stated that, on the fateful day he was at Mbuyuni area, Moshi Town whereby he was approached by two people who were on a bodaboda. He saw them pointing at him and when he asked them what was the matter, they arrested him and took him to taken to police then around Njoro at Raha guest house. His items were also seized. Later at the police, a man named Omari (PW5) came to the station with exhibits presented before the court. At the conclusion of the trial, the trial court found the prosecution to have proved its case beyond reasonable doubt. The appellant was forthwith found guilty, convicted and sentenced to 30 years imprisonment.

Aggrieved by the conviction and sentence, the appellant has filed this appeal premised on nine grounds which I shall shortly rephrase as follows: **one,** the charge laid against him was fatally and incurably defective; **two,** the appellant was not properly identified at the crime scene; **three**, the victim failed to describe the appellant at the earliest stage; **four**, the doctrine of recent possession was incorrectly invoked; **five,** the prosecution evidence was weak, tenuous, contradictory, inconsistent, incredible, improbable and wholly unreliable; **six,** the charge was not proved beyond reasonable doubt; **seven**, the trail court failed to take into account the evidence of the defence; **eight**, the trial magistrate convicted the accused by relying on hearsay evidence; and nine, the prosecution did not tender a certificate of seizure.

At per the request of the parties, hearing of the appeal proceeded in writing.The appellant was unrepresented. The respondent was represented by Mr. Diaz Makule, learned State Attorney. In his submission in chief, the appellant zeroed on the first ground. He submitted that the charge sheet listed stolen items to be cash at a tune of Tsh. 900,000/- and a mobile phone make Nokia valued Tsh. 400,000/ while PW4 testified that the stolen items were a purse/handbag in which there was a trouser, a pair of sandals and a pair of khanga items which were not listed in the charge sheet. He argued that, the inconsistence implies that the prosecution's evidence was unsupportive of the charge. In fortification, he cited the case of **Mashaka Bashiri vs Republic** (Criminal Appeal 242 of 2017) [2021] TZCA 25 [Tanzlii] at page 11 and 13 where the court stated that since there were items mentioned in testimonies of some witnesses as stolen but the same where not in the charge, the right action

was for the charge to be amended. The failure to amend the charge was fatal, prejudicial to the appellant and seriously consequential to the prosecution's case. Further, he cited the case of **Issa Mwanjiku @ White vs Republic** (Criminal Appeal 175 of 2018) [2020] TZCA 1801 [Tanzlii] at page 16 in which the court found the prosecution case incompatible with the particulars in the charge sheet and concluded that the case was not proved to the required standard as some of the items mentioned by the witnesses were not indicated in the charge.

Based on these authorities, the appellant argued that as it is apparent on record that the prosecution witness mentioned items other than those in these charge sheet and alleged that they were equally stolen in the robbery incident. He argued the prosecution was bound to amend the charge as per requirement of section 234(1) of the Criminal Procedure Act, Cap 20 RE 2019 so as to clear the inconsistence. Their failure to amend the charge was fatal and prejudicial to him as he was unable to fully understand the nature of the offence and to properly prepare his defence. He prayed that the court allow the appeal, quash the conviction, set aside the sentence and set him at liberty.

In reply to the first ground, Mr. Makule presented that the evidence relayed by the seven prosecution witnesses was sufficient for the appellant to understand the nature of the offence he stood charged with and on that basis, he ably entered his defence. He argued that the charge was well drafted such that it disclosed the ingredients of the offence of armed robbery. Thus, there is nothing to fault it. Further, Mr. Makule submitted that, as per the records, PW4 clearly testified to have been

attacked by two bandits one of the two being the appellant who held a knife at her threatening to kill her if she did not surrender the money to them. PW4 complied with their instructions and gave them Tsh. 900,000/, a phone Nokia, purse and sandals. He cited the case of **John Madata vs Republic,** criminal Appeal No. 453 of 2017, CAT Mbeya (unreported) where the Court discussed the ingredients of the offence of armed robbery which are: - theft; use of dangerous weapon immediately before or after commission of robbery; and that the dangerous weapon must be directed against the person (victim). In the present case, he argued, all the ingredients were present. There was theft. PW4 testified that the appellant robbed Tsh. 900,000/-. 3 pairs of jeans trousers, 1 piece of khanga, 1 skirt, and 2 handbag which were all admitted as exhibits. Also, the appellant was armed with a knife with which he used to threaten PW4 during the robbery.

In further fortification, Mr. Makule cited **Jamal Ally @Salum vs Republic,** Criminal Appeal No. 52 of 2017 (unreported) and **Joseph Maganga Mlezi and Dotto Salum Butwa vs Republic,** Criminal Appeal No. 536&537 of 2015, CAT (unreported) in which the Court listed circumstances in which a defective charge can be cured by evidence. He concluded that, the particulars of the offence together with evidence of PW4 enabled the appellant to understand the nature of the offence he was charged with thus, the first ground of appeal is with no merit.

On the 2nd ground, Mr. Makule submitted that the issue of mistaken identity is a zero-probability given that the offence occurred during day time and immediately after the offence PW4 reported the incidence to

PW2 who traced the appellants whereabouts and pursued him leading to his apprehension being in possession of the items he had stolen from PW4 which were identified by PW4 who also confirmed his identity. Further, he submitted that the ability of PW4 to describe the appellant soon after the crime was committed raises no doubt that the accused was identified. He supported his argument with the case of **Cosmas Chaula vs Republic,** Criminal Appeal No. 6 of 2010, CAT and **Ambwene Lusajo vs Republic**, Criminal Appeal No. 46 of 2018, CAT.

On failure to issue certificate of seizure, he argued that the properties were collectively seized from the appellant. Thus, there was compliance with section 38(3) of the Criminal Procedure Act. He also argued that, under certain circumstances the court can convict the accused in the absence of a certificate of seizure if the evidence on record proves that indeed the accused was found in possession of the stolen properties. He supported his argument with the case of **Abdallah Said Mwingereza vs Republic** Criminal Appeal No. 358 of 2013, CAT (unreported). Based on this authority, he argued that, the evidence of PW2, PW3, PW4 and PW5 was enough to establish that the appellant was found in possession of the said exhibits immediately after the armed robbery, therefore the doctrine of recent possession can also be invoked in convicting the appellant. In summation, Mr. Makule submitted that, the case against the appellant was proved to the required standards and prayed that the appeal be dismissed and the conviction and sentence be upheld.

In rejoinder, the appellant argued that the prosecution did not prove the case against him beyond reasonable doubt as required by section 3(2)(a)

and 112 of the Evidence Act [Cap 6 RE 2019]. He cited the case of **Republic vs Kerstin Cameroon** [2003] TLR 84 in support of his argument and argued that, the case against him was not proved beyond reasonable doubts because the prosecution did not tender certificate of seizure; there was no eye witness as PW5 admitted that she did not clearly identify the appellant, important witnesses such as the village chairman was not called to testify and the charge was incurably defective. Based on this he reiterated his prayer that the appeal be allowed as the prosecution evidence was tainted with doubts and therefore carried no weight. Lastly, he submitted that justice must not only be done but should also be seen to be done. He cited the case of **Rex vs Sussex Justice ex parte Mac Carthy** [1924]1KB to support this stance and prayed that the appeal be allowed and he be set at liberty.

Having summed up the submissions from both parties which I have duly considered alongside the lower court record placed before me, it is now my turn to determine the appeal starting with the first ground of appeal to which the appellant has zeroed his submission. His major argument in this ground which seems not to have been contested by the learned counsel is that, there was a variance between the charge sheet and the evidence on record as regards the items stolen during the armed robbery incidence. Whereas the particulars of the offence contained in the charge sheet relayed that the appellant stole cash money amounting to Tshs 900,000/= and a mobile phone make nokia valued at Tshs 40,000/=, one Priscilla Didas, (PW4), from whom the above properties were allegedly stolen, told the court that, the appellant stole from her Tshs 900,000/=, of which only Tshs 400,000/= was recovered, her mobile phone make

nokia valued at Tshs 40,000/=, her sandals and a client's pulse containing 3 jeans trousers, one piece of khanga, one skirt or of which were tendered in court by PW1, the exhibit keeper who received and stored the same after they were seized from the appellant.

The main question arising from this discrepancy and to which this court has been called upon to determine is the consequences of such discrepancy. For the appellant, it has been argued that the discrepancy constitutes a fatal anomaly which could have been cured through amendment of the charge and since the prosecution bothered not to amend the case, the case against him remained unproved and the trial court materially erred by convicting him. On her party, the respondent is of the view that the discrepancy represents a minor anomaly curable under section 388 of the Criminal Procedure Act considering that all the ingredients of armed robbery were proved without reasonable doubt and the appellant was found in possession of the stolen items soon after the incidence.

In resolving this controversy, I have found the two decisions cited by the appellant quite useful as the Court of Appeal dealt with situations akin to the one in the present case. In **Mashaka Bashiri v R** (supra), the facts resonate very well with the one at hand. Both, the appellant and the respondent were at common that there was a variance between the charge and prosecution evidence as regards the items allegedly stolen during armed robbery but they, too, had different views as to the consequences of such discrepancy. Whereas the appellant reasoned that the variance negatively affected the prosecution's case, the respondent

took a view that, the prosecution's case was not any how affected and the case against the appellant was thus proved to the required standards. Having ironed the variance, the Court held that, the prosecution ought to have cured the anomaly through amendment of the charge under section 234 (1) of the Criminal Procedure Act which provides a room for the charge to be amended at any stage of the trial to cure a defect in substance of form. As regards the consequences, the Court held that:

> The failure to amend the charge sheet is fatal and prejudicial to the appellant hence leads to serious consequences to the prosecution case as it was stated by this Court in various cases some of which have been cited to us by the appellant. We however wish to add more cases such as **Mohamed Juma @ Mpakama v. Republic,** Criminal Appeal No. 385 of 2017, **Noah Paulo Gonde and Another v. Republic**, Criminal Appeal No. 456 of 2017 and **Issa Mwanjiku @ White v. Republic**, Criminal Appeal No. 175 of 2018 (all unreported). Specifically, in the latter case, when the Court dealt with an akin situation where the charge sheet was at variance with the evidence in relation to the type of properties which were alleged to have been stolen from the complainant PW1, it stated that: -
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> > "We note that, **other items mentioned by PW 1 to be among those stolen** like, ignition switches of tractor and Pajero **were not indicated in the charge sheet**. In the prevailing circumstances of this case, we find that the prosecution evidence is not **compatible with the particulars in the charge sheet to prove the charge to the required standard.**" [Emphasis added]
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> We entertain no doubt that in this case there was variance between the charge and the evidence on the items alleged to have been stolen from PW2. The prosecution case, as rightly

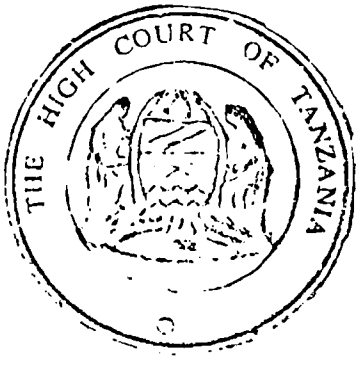
argued by the appellant, was not proved to the required standard. In the circumstances, we find the second ground to have merit

Again, in **Issa Mwanjiku@ White v R** (supra), just as in the present case, some of the items mentioned by the victims as items stolen from him by the appellant were not listed in the charge sheet. The Court held that, the anomaly was fatal as, literally, the prosecution evidence was incompatible with the particulars in the charge sheet and did not therefore, prove the charge to the required standard.

In the foregoing, it is obvious that, the anomaly in the present appeal just like the two authorities above, was fatal and pregnant with negative consequences to the prosecution's case which, as correctly argued by the appellant, remained unproved to the required standard of proof. Accordingly, I uphold the first ground of appeal for being meritorious. Further, as the finding in this sole ground suffices to dispose off the appeal, I see no need to proceed to the remain grounds to which the appellant bothered not to submit.

Accordingly, I allow the appeal, quash the conviction and set aside the sentence passed by the trial court and consequently order that, the appellant be forthwith set at liberty unless held for lawful purposes.

DATED and DELIVERED at Moshi this 24th Day of April 2023



J.L. MASABO
JUDGE