IN THE HIGH COURT OF THE UNITED REPUBLC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 110 OF 2022

(Arising from Criminal Case no 301 of 2021 in the District Court of Tarime at Tarime)

JACOB S/O SIMON PAULO

CHARWI S/O CHACHA KITARANGE } **..... APPELLANT**

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

21st March & 27th April 2023
F. H. Mahimbali, J.

The appellants in this appeal have been aggrieved by the decision of the trial court after it had sentenced them to 30 years imprisonment following conviction on the offence of armed robbery charged with pursuant to section 287A of the Penal Code, Cap 16 R.E 2019.

It was alleged by the prosecution that on 11th day of December 2021 at Gwitiro Village within Tarime District in Mara Region, the appellants jointly did steal TZS: 83,000/= from PW1 and that immediately before such

stealing, did use a panga to injure the said CHARLES JOHN MARWA in order to obtain and retain the said property.

According to the evidence of the case, the victim of the incident upon being robbed his money a total of TZS: 83,000/=, had been badly devastated as his both hands (humorous) and head have been badly cut by panga to the extent that he is almost disabled. The evidence further establishes soft tissue injuries of the fracture of the humorous (Exhibit PE1). Following the finding that the proof of the case has been beyond reasonable doubt, the appellants were thus convicted and accordingly sentenced.

Not amused by the said findings of the trial court, the appellants jointly filed this appeal challenging the decision of the trial court mainly (after condensing all ten grounds of appeal) that the prosecution's case was not established beyond reasonable doubt to mount conviction as charged.

During the hearing of the appeal, the appellants were not represented whereas the respondent enjoyed the services of Ms Monica Hokororo learned senior state attorney.

In arguing their appeal, both appellants first adopted their joint grounds of appeal to form part of this appeal submission and added that there was no any exhibit tendered by the prosecution in respect of this case at the trial court. Furthermore, there was no reason as to why there were no any independent witnesses apart from the victim's family members.

It was argued that as per PW1's testimony at the trial court, he mentioned one James Mwita as the person who was in the best position to identify the culprits. Unfortunately, the said James Mwita didn't testify in court. PW3 is their blood relative who could not testify anything material. The victim didn't specify exactly where he was attended his medication. As if this was not enough, it was argued that since there was no any investigator who gave his testimony in this case on how they are connected with this case, the prosecution's case was weak to stand this appeal. With the said *"yowe"*, it is strange that none of the village/local leaders who attended the said *"yowe"*, thus raises much doubt on its credence and strength.

Furthermore, they tried to attack the prosecution evidence as being cooked evidence. For example, with the said doctor, they wondered if had

any credence so far as he had not carried any credentials to tender before the court, if he had any. He is not registered anywhere.

In essence, they contended that there is no good evidence connecting the offence and the accused persons. Thus, they are at dilemma as to why they were convicted with the charges in the absence of trustable, cogent and reliable evidence by the prosecution. With PF3, they contended that the attending doctor didn't come to testify in court, thus raising much doubts.

On her part, Ms Monica Hokororo learned senior state attorney having heard their submissions and considered their joint grounds of appeal, she argued them jointly submitting that as per facts and evidence of the case, the important question she posed was whether the ingredients of the charged offence in this case have been proved beyond reasonable doubt s per law. She stated that as per law, the three ingredients to be established of the charged offence were:

- There must be theft
- There must be weapons
- The use of weapons to threaten the said stealing.

She boasted that, as per facts and evidence of the case, all these three ingredients have been clearly established by the evidence of PW1. He established how his money 83,000/= was stolen from him by use of weapon *(panga and rungu)* and that he clearly identified these appellants as the ones responsible.

PW1 further stated in his evidence how he identified the culprits and that they are familiar to each other and that they his fellow villagers. By use of electricity bright lights illuminating the scene, he had been able to identify the culprits clearly well. At page 11 of the typed proceedings, the victim even described how each one of the appellants took role in the said robbery. How he was hit by the 1st appellant and the second appellant.

In essence, the testimony of PW1 met all the favoring conditions as stated in the case of **Waziri Amani** (1980) TLR 250. That the appellants are familiar to the victim and that though it was night time, the scene was well illuminated by bright electricity lights, the culprits are known to each other and that the incidence lapsed for a considerable time and that each was well described even on their dress code. Since the appellants are familiar with the victim, their identification at the scene is of no doubt as per existing favoring conditions.

Regarding the credence and value of the testimony of PW1 which is corroborated by the testimony of PW2, says all on how the appellants actively harmed the victim. He described the place/scene as illuminated and that he had managed to see them.

With PW3's testimony, she submitted that Pw3 testified how he being neighbor to the victim's home and scene, responded to the *yowe* and managed to see the victim being brutally wounded on his shoulders and head who then could not manage himself for anything. As he heard PW1 naming the appellants as (culprits) and took initiatives to follow footsteps where they managed to arrive at the appellants' home. By that immediate reporting adds value to the PW1 and PW2's testimony (see **Jaribu Abdalah vs Republic,** (1996) TLR 245). Other evidences corroborating the PW1's evidence is that of PW4 and PW5 (pages 22 – 30 of the typed proceedings). PW4 was the first person to attend the victim at the private Hospital (Willims Memorial Health Centre). He testified how he had offered first aid to the victim on the wounds on his head and arms.

PW5 testified how then he received the victim with the said PF3, where he attended him and then filled it. The evidence of PW4 and that of PW5 corroborates what PW1 had testified.

The argument that all the prosecution's witnesses were related, she countered it not being true as only PW2 is relative to PW1. But PW3 is just a neighbor. Thus, she dismissed this claim as being legally baseless. Responding to the argument that there was no investigator who came to testify, she submitted that it is irrelevant as a fact of the case is not solely established by police investigator. Section 127 (1) and 143 of TEA is relevant on that.

On the concern that this is a framed/cooked case against them it is an afterthought argument, as none emerged it as an issue before the trial court. Basing on all these submissions, she prayed that this appeal be dismissed for being devoid of any merits.

On their rejoinder submissions, they maintained that in the circumstances of this case, it was important that the said investigator had given his testimony. By not giving, remains much doubts as they had questions against the investigator.

With intensity of lights, they are surprised as to how he got to know them as being 60W.

On the importance of many witnesses, they argued it as it is for the court getting assurance of the alleged facts. Not every early mentioning brings assurance they argued. Adding that there can be chances of mistaken identity even to an early naming.

With PW4 and PW5, though testified in court that they are medical practitioners, none issued any ID card for his identify. Therefore, it is hard to rely on them.

Having heard the both parties' submissions on appeal, gone through the proceedings and the trial court's judgment, the relevant question to pose now is whether the appeal is merited.

This being is a criminal case, it is worthy and instructive at this stage of appeal as per grounds of appeal which only based on issues of facts, to look at what section 110 and 112 read together with section 3 (2) (a) of the Evidence Act [Cap 6 RE 2019] in as far as the burden and standards of proof is concerned whether the prosecution case was established beyond reasonable doubt. It is a canon law principle that, the accused person should only be convicted of an offence he is charged with on the basis of the strength of the prosecution case and not on the weakness of the defence case (See **Christian Kale & Another Vs. The Republic** (1992)

T.L.R 302 CAT and **John Makorobera & Another Vs. The Republic** (2002) T.L.R 296). In line with this principle of burden and standard of proof, another important principle becomes necessary as enunciated in the case of the case of **Mariki George Ngendakumana Vs The Republic**, Criminal Appeal No. 353 of 2014 CAT - Bukoba (unreported), which inter alia held that:

> *"It is the principle of law that in Criminal Cases the duty of the prosecution is two folds, one to prove that the offence was committed, two that it is the Accused person who committed it"*

In the current appeal, we have seen how PW1 narrating the episode leading to his robbery and the naming of the appellants as his culprits. The fracas is continuous from the point where he had bought the torch cell and how he was demanded money for a drink. On that refusal and as he was seen dishing back the remainder of money in his pocket made him in high danger of the whole fracas. He was shortly robbed while the culprits armed as he was nearing his home. The venue was on a small path but with a clear bright electricity light shining. That he cried for help and amongst the people who responded were PW2 and PW3. PW2 is the next person to respond and actually witnessed part of the saga by PW1 being cut pangas

on his hand and head. The PW1 clearly stated how he was cut panga on his head, and both hands by the appellants (Jacob and Charwi). That it was Charwi Chacha who had cut him with a panga on his head, left hand, and beaten by clubs on his right hand. All this was done while also being accompanied by Jacob Simion. In the course of crying for help while naming the culprits amongst the persons who responded were PW2 and PW3. He exemplified as how he was badly beaten and robbed his balance of 83,000/= by the appellants. It was his relative PW2 who responded first and aided him by sending him to hospital. Following the injuries sustained, he is almost now a cripple with his hands not functioning well and his head badly affected.

The version of being attacked by these appellants is well corroborated by PW2 who testified also to have come from the funeral ceremony in which also PW1 attended. That while at his home as he was preparing for a sleep, he had heard a cry of help from a nearby house. He then recognized the said tune as being of PW1. He quickly opened his gate door where he also heard a second shout saying *"jamani msaidieni Charle."* By that time he had witnessed Charles (PW1) down and being attacked by four people amongst them he had been able to identify Charles Chacha

Kitalenge, Jacob and Sonko Matoke. That Chare had cut him (PW1) with a panga on his head, the other two were beating him sideways (Jacob and Sonko). He had been able to identify them because of the close point he had been, electricity lights illuminating the scene and that the culprits were familiar to them as fellow villagers, born there and grew up together and that they were not masked on their faces during the episode. Amongst the people he was accompanied with while heading to the scene for assistance were James and Paul. The culprits (thugs) escaped after seeing them. That himself was amongst the persons who aided the victim by sending him to hospital. The other neighbors who attended the yowe followed after thugs where they arrested the two while at their respective homes as per testimony of PW3 (neighbor).

It is trite law that every witness is entitled to credence and must be believed and his/her testimony accepted unless they are good and cogent reasons for not believing a witness. This is as per the case of **Mathias Bundala vs Republic ,** Criminal appeal No. 62 of 2004 CAT at Mwanza where it approved the case of **Goodluck Kyando vs Republic** (2006) TLR 363, where the court held that:

"it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless they are good and cogent reasons for not believing a witness".

In the current case, I am persuaded by the testimony of PW1, PW2, PW3, PW4 and PW5, that PW1 was really attacked and his money robbed. And by the evidence of PW1 and PW2, it is undoubted that it was these appellants as being amongst the culprits against him. I say so, basing on the testimony of PW1 and PW2 whose version is interrelated. They are thus supposed to be believed of their evidence as I have no good reason to doubt it at all.

In law contradictions and inconsistencies in the witness's statement or testimony can only be considered adversely if they are fundamental. Errors of observation, memory failure due to passage of time, panic and horror are considered to be of trifling effect and those are to be ignored (see **Sylivester Stephano v. Republic,** CAT-Criminal Appeal No. 527 of 2016 (Arusha-unreported). In **Luziro s/o Sichone v. Republic**, Criminal Appeal No. 231 of 2010 (unreported), the Court of Appeal held:

"We shall remain alive to the fact that not every discrepancy or inconsistency in witness's evidence is fatal to the case, minor discrepancies on detail or due to lapses of memory on account of passages of time

should always be disregarded. It is only fundamental discrepancies going to discredit the witness which count."

The foregoing position underscores the splendid position propounded by the Court of Appeal of Tanzania in **Dickson Elia Nsamba Shapurata& Another v. Republic,** CAT - Criminal Appeal No. 92 of 2007 (unreported) in which the learned Justices quoted the passage in Sarkar's Code of Civil Procedure Code. It was held as follows:

"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to material disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties' case material discrepancies do."

In **Mukami w/o Wankyo v. Republic** [1990] TLR, the Court of Appeal took the view that contradictions which do not affect the central story are considered to be immaterial. See also: **Biko/imana s/o Odasi@Bim elifasi v. Republic,** CAT- Criminal No. 269 of 2012.

The argument by the appellant that PW1 and PW2 are members of the same household thus their evidence is not reliable, that is not the correct position of the law. As who is competent to testify in court, section 127(1) of the TEA is clear that **every person shall be competent to testify** unless the court considers that he is incapable of understanding the questions put to him or of giving rational answers to those questions by reason of tender age, extreme old age, disease (whether of body or mind) or any other similar cause. The question of consanguinity perse, has not been an impediment of a person being a testimony. In the case of **Masudi Amlima V. Republic** [1989] TLR 25 as quoted in the case of **Paulo s/o Taray V. The Republic**, Criminal Appeal No. 216 of 1994 held that:

> *It is not the law that whenever relatives testify to an event they should not believed unless there is also evidence of non-relative corroborating that story. While the possibility that relatives may choose to team up and untruthfully promote a certain version of events must be borne in mind, the evidence of each of them must be considered on merit, as should also the totality of the story told by them. The veracity of their story must be considered and gauged judiciously, just like the evidence of non-relatives.*

Otherwise, the correct legal position is, it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness (See **Goodluck Kyando V. Republic,** 2006 TLR 363).

It is incontrovertible that in terms of section 143 of the Evidence Act, no particular number of witnesses is required in any particular case for the proof of any fact. This has been stressed in a range of cases including those of **Yohanis Msigwa v. Republic** [1990] T.L.R. 148, **Gabriel Simon Mnyele v. Republic**, Criminal Appeal No. 437 of 2007 CAT, and **Nicodemus Awe and 2 Others v.Republic**, Criminal Appeal No. 155 of 2014, CAT (both unreported). In the case of **Gabriel Simon Mnyele v. Republic**, the court emphasized that:-

> *"... under section 143 of the Evidence Act (Cap 6-RE 2002) no amount of witnesses is required to prove a fact - See **Yohanis Msigwa v. Republic**, (1990) T.L.R. 148. But it is also the law (section 122 of the Evidence Act) that the court may draw adverse inference in certain circumstances against the prosecution for not calling certain witnesses without showing any sufficient reasons - See **Aziz Abdaita v. Republic** (1991) T.L.R. 71."*

In the present case, the persons named by the appellant as prospective witnesses were not at all necessary witnesses in the

circumstances of the case because it is not the law that all persons who are knowledgeable of a certain fact must all be called. The issue is whether the ingredients forming the charged offence have been established as per law.

As a conclusion to the current appeal, I find all the arguments raised by the appellants as being baseless as per counter arguments by the respondent in which I agree with Ms Monica Hokororo, learned state attorney that the appellant's arguments in their grounds of appeal are meritless. For instance, the issue of professionalism of PW4 and PW5 is a new issue that was not raised at trial during their testimonies. They are thus precluded from arguing it now as it will be a new issue not dealt with at trial.

Since PW3, PW4 and PW5 are not relatives of the PW1, the appellants' arguments on this is meritless in law.

Since it is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness (See **Goodluck Kyando V. Republic),** I have not seen any good and cogent reason advanced by the appellants to persuade me fault the trial court's findings.

In the total consideration of the appeal, all grounds of appeal are of demerit and thus dismissed. The appeal thus fails in its entirety.

All this said and done, appeal is dismissed as it is devoid of merit. Conviction and sentence meted out are hereby upheld and confirmed.

It is so ordered.

DATED at MUSOMA this 28th day of April, 2023.

F. H. Mahimbali

Judge

Court: Judgment delivered this 28th day of April, 2023 in the presence of the Laruba Ngowi, state attorney for the respondent, appellants-present in person and Mr. D. C. Makinja, SRMA.

Right of appeal is explained to the parties.

F. H. Mahimbali

Judge