

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
AT TABORA**

CRIMINAL APPEAL NO. 78 OF 2021

(Originating from Urambo District Court in Criminal Case No. 172 of 2020)

ELISHA LUCAS @ MZENGAA ----- APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

JUDGMENT

Date: 17/04/2023 & 23/05/2023

BAHATI SALEMA, J.:

In the District Court of Urambo, the appellant **ELISHA LUCAS @ MZENGAA** together with one another who was acquitted in the ruling of no case to answer were charged for the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap. 16 [R.E 2019] and upon full hearing, on 16/02/2021 the appellant was convicted and sentenced to serve 30 years custodial sentence.

A brief history that led to the arrest and arraignment of the appellant followed an allegation that on the 4th day of August 2020 night hours at Imalamakoye Village within Urambo District, Tabora Region the appellant did steal the properties of one Erick s/o Eliphace which values TZS: 857,000/= and immediately before, during and after such stealing, he used a locally made gun known as a Shotgun to obtain the said properties.

The prosecution further alleged that, during the act of robbery the appellant was accompanied by two other robbers who managed to escape but with the aid of the victim's brother and some civilians the appellant

was arrested a few paces from the victim's place of business where the robbery occurred.

Aggrieved with both conviction and sentence imposed by the trial Court, the appellant lodged a Petition of Appeal accompanied by six (6) grounds of appeal;

- i. That the case for the prosecution was not proved against the appellant beyond reasonable doubt*
- ii. That, PW2 cum the victim did not positively identify exhibit P1, properties allegedly stolen from him both at the pre-trial and in trial stages.*
- iii. That, PW2 did not establish ownership of exhibit P1*
- iv. That, the learned trial Magistrate erred in fact and law to impose upon the appellant the doctrine of recent possession.*
- v. That, PW2 & PW3 did not positively identify the appellant to be the person who committed the offence.*
- vi. That, exhibit P3 the cautioned statement purported to be made by the appellant was wrongly made since PW5 being the investigator of the case at hand and the person who recorded the same had the interest to serve.*

Wherefore, the appellant prayed this Court to allow the appeal, quash the conviction, set aside the sentence and order for his immediate release from prison.

When the appeal was called up for hearing, the appellant appeared in person unrepresented whereas the Republic was represented by the learned State Attorney Ms. Tunosye Luketa.

The appellant being the first person to submit in the appeal, he did not elaborate on his grounds of appeal but he pleased the Court to adopt the same to form part of his submission.

In reply, Ms Tunosye started her submission on the 1st ground of appeal that, the prosecution proved the case beyond reasonable doubt because according to the evidence, PW2 explained how he was armed by the appellant using a local gun.

On the second ground on the identification of Exhibit P1, the properties alleged to have been stolen from the victim; Ms Tunosye submitted that the trial Court proceedings reveal that the victim mentioned and identified all the properties that were stolen from him.

As to the third ground of appeal on proof of ownership of exhibit P1, the learned State Attorney submitted that the ownership of exhibit P1 is mentioned in evidence that it is the property of PW2 but the appellant did not explain how the same came to his hands.

Stating the ^{fourth} ground of appeal on the doctrine of recent possession, the learned State Attorney stated that the Magistrate did not base the conviction on the principle but the evidence on pages 12 and 13 of the proceedings reveals that the appellant was chased by the victim's brother and caught red-handed.

Submitting on the fifth ground of appeal on which the appellant alleged that PW2 and PW3 did not positively identify him, the learned State Attorney stated that PW2 explained in evidence that there was electricity hence that was clear identification.

Regarding the last ground, the appellant alleged that exhibit P3 the cautioned statement was wrongly made since PW5 was the investigator of the case and the person who recorded the same had an interest to serve. In this allegation, the learned State Attorney referred this Court to the case of ***DPP vs James Msumule & 4 Others Criminal Appeal No. 397/2018*** that it is not fatal since PW5 was a police officer.

Having considered the submissions by both parties and the lower Court record, the major issue for determination is whether the prosecution case was proved beyond reasonable doubt; which is premised on the 1st, 2nd, 3rd, and 5th grounds of appeal, and I am going to analyse them collectively.

As to the sixth ground, the appellant alleged that the cautioned statement was wrongly made because PW5 who was the investigator of the case was the same person who recorded the same. In my quest for the truth on the allegation, I noted that the Charge sheet stated that the offence of armed robbery was committed on 04/08/2020 night hours and the evidence reveal that the appellant was immediately arrested and was taken directly to the police station on the same night, but upon reading exhibit P3 the cautioned statement of the appellant shows that it was recorded on 05/08/2020 at 17:00hrs almost 18 hrs from the time of the arrest.

Section 50 of the Criminal Procedure Act, Cap. 20 prescribes available periods for interviewing persons. Under subsection (1) (a) the basic period is four hours commencing at the time when he was taken under restraint in respect of the offence. Section 51(1)(a) and (b) of CPA provides for the extension of time and that extension is sought from a Magistrate. As a general rule, the procedure of recording the Cautioned statement must be observed as laid down by the law to allow such a statement to be admitted in evidence.

Based on the explanation and quoted provision of the law this Court finds that the appellant's Cautioned Statement was illegally obtained and hence inadmissible, I hereby expunge it from the record.

Regarding the ground of appeal number 4, the appellant faulted the trial Magistrate for imposing the doctrine of recent procession to his case.

In his defence, he claimed that he was given a black bag having cell phones in it to create a picture that he is a thief when he is not. The prosecution side relied on the evidence of PW2 (the victim) who narrated that the appellant was caught with all of the stolen properties.

The position of the law on the application of the doctrine of recent possession was stated in the case of ***Abdi Julius @ Mollel & Another vs R***, Criminal Appeal No. 107 of 2009 CAT (unreported) that;

*"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis for conviction, it must be proved, **first** that the property was found with the suspect, **second** that the property is positively proved to be the property of the complainant, **third** that the property was recently stolen from the complainant and **lastly**, that the stolen thing constitutes the subject of the charge against the accused..... The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements."*

Blending the wisdom and the principle developed by the Judges of Appeal in ***Abdi Julius's case (supra)*** to the evidence on record it is my considered view that the prosecution proved beyond doubt that the appellant was found in possession of items that were stolen from the complainant in the course of robbery.

Regarding the question as to whether the offence of Armed Robbery was proved beyond reasonable doubt, the appellant claims that the

offence of armed robbery was not proved to the required standards because, one, PW2 did not identify exhibit P1 alleged to have been stolen from him, two, PW2 did not establish ownership of exhibit P1 and that PW2 and PW3 did not positively identify him to be the person who committed the offence.

The offence of armed robbery is created by section 287A of the Penal Code which states that,

"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.

In proving the offence of armed robbery three elements must be proved, the elements were strengthened in the case of ***Shabani Said Ally vs. Republic***, Criminal Appeal No. 270 of 2018 (unreported) the Court stated that;

"It follows from the above position of the law that in order to establish an offence of armed robbery, the prosecution must prove the following:

- 1. There must be proof of theft; see the case of **Luvana v. Republic**, Criminal Appeal No. 1 of 2005(unreported);*
- 2. There must be proof of the use of dangerous or offensive weapon or robbery instrument against at or immediately after the commission of robbery;*

3. That, use of dangerous or offensive weapon or robbery instrument must be directed against a person; see Kashima Mnadi v. Republic, Criminal Appeal No. 78 of 2011 (unreported) ”

Now, I will go through one element after another to see whether the offence of armed robbery was proved against the appellant. The prosecution side proved without doubt that the appellant was found in possession of the victim's stolen properties, which was evidenced by testimonies of PW2 Eric Elphace Kalenganya that the robbers took 9 phones and backed them in their bag. This evidence was also corroborated by the evidence of PW1 SP. Alfred Kyebe who stated that upon receiving a call that informed him of the arrest of the appellant, he rushed to the scene of the crime and found the appellant under arrest together with 9 cell phones stolen from the complainant.

This evidence proved without doubt that the act of stealing occurred in the complainant's place of business and Exhibit P1 that was found in possession of the appellant is the one that was stolen from him.

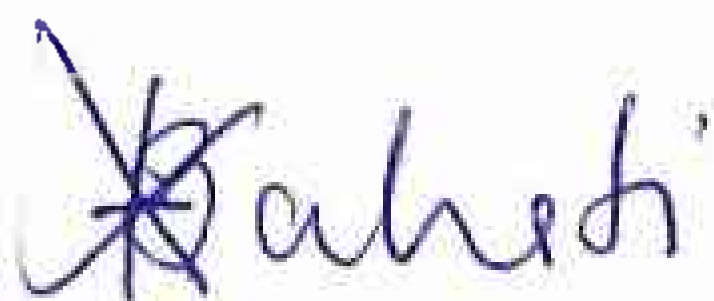
Another important element is proof of the use of a dangerous or offensive weapon of robbery or instrument and whether the same was directed against the complainant. The evidence of PW2 made it clear that on 4th August 2020 three men invaded him while carrying a gun, they directed it to him and forced him to go back to the shop to give them money; he stated further that all the robbers were men and he clearly identified them because there was enough electric light and they were standing on one step distance.

The fact that the appellant was found with stolen property a few minutes from the time the act of robbery happened and the fact that the complainant identified the said property immediately during his arrest is

a clear indication that he was among the three robbers who invaded the complainant's place of business, therefore, he is responsible for the crime.

Given the reasons stated hereinabove, I am satisfied that the prosecution's case was proved beyond reasonable doubt; I, therefore, dismiss the appeal for lack of merit. The decision of Urambo District Court is hereby upheld.

Order accordingly.



A.BAHATI SALEMA

JUDGE

23/05/2023

Court: Judgment delivered in presence of both parties.



A.BAHATI SALEMA

JUDGE

23/05/2023

Right of Appeal fully explained.



A.BAHATI SALEMA

JUDGE

23/05/2023

