IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CRIMINAL APPEAL No. 02 OF 2023

(Original Criminal Case No. 05 of 2022 of the Resident MagistrateCourt of Geita at Geita)

LUDAYA S/O WILSON ---------- 1st APPELLANT

MAHEGA S/O GERVAS @ RASI ---------- 2nd APPELLANT

FARAJA S/O NGALAMA @ FAJI ----------3rd APPELLANT

VERSUS

THE REPUBLIC---------- RESPONDENT

JUDGMENT

Last Order: 22/106/2023
Judgment: 22/06/2023

M. MNYUKWA, J.

In the Resident Magistrate Court of Geita at Geita, (The trial court) the appellants were arraigned and convicted of armed robbery c/s 287A of the Penal Code of Cap 16. RE: 2019. Upon conviction, they were equally handed down with a sentence of 30 years imprisonment each. Aggrieved, the appellants appealed to this court for both, the conviction and sentence. The appellants presently seek to impugn the decision of the trial court which convicted and sentenced them for the charged offence.

Dissatisfied, they filed the present petition on 16/01/2023 with six grounds of appeal which I shall reproduce at a later stage of the judgment.

The case for the prosecution was built around the accusation of armed robbery as it was alleged that the accused LUDAYA s/o WILSON, MAHEGA S/O GERVAS, OGOMA S/O CHARLES, JAMES S/O MAGINA @HENERICO, ELISHA S/O MALOLE @ JANJA, FARAJA S/O NGALAMA @FAJI and MANENO S/O @ NGADULE jointly, on 2nd day of January 2022 at Kadunda village within the District and region of Geita did steal one phone made Techno worth Tshs. 150,000/-, one small radio worth Tsh 10,000/- and cash money Tsh 7,000/- the property of EMMANUEL S/O JOHN and before such stealing, they did beat him with a club and the sides of machete in various parts of his body in order to obtain and retain the said properties from him.

At the hearing before the trial court, the prosecution side called six witnesses who were EMMANUEL RICHARD (PW1), EMMANUEL JOHN (PW2), G. 378 D/CPL MASUKE (PW3), INSP WILLIAM MBENA (PW4), G. 206 D/CPL MATETE (PW5) and E. 8646 D/SGT SAIDI (PW6. Their evidence in summary were as follows:

PWI who was a sungusungu commander tesfitied that, on 4/01/2022 at morning hours around 8.00 he was called with the village executive officer to his office. Whe he reached there he found Wilson Maduka who is the father of the 1st appellant complained about his son who is the 1st appellant to have invaded him in his home. That, he asked for his son to be arrested and sent to the police in which PW1 did as requested. PW1, further testified that, when the 1st appellant was interogated at the police station, he admitted to have invaded into his father's house and Emmanuel John's house (PW2) with his fellows Mahega, James Faji and Maneno. PW1 added that, PW2 was attacked on 2/1/2022 and he identified in court the 1st appellant who was in the dock.

PW2 testified that, in the night of 02/01/2022 his door was broken and three persons invaded him. Among them he met face to face with the 1st appellant who carried a bush knife who hit him in the head and demanded for money. That the bandits took a small radio, money and a mobile phone. PW2 further testified that he identified the 1st appellant because there was solar light and he knew him as a fellow villager

In his evidence PW3 stated that he drew the sketchmap of the scene of crime on 4/01/2022 which was admitted as Exhibit P1. On his part, PW4 testified that, when he was at Katoro police station he received the

information about the incidente of the invasion of PW2's house. On conducting investigation the 1st appellant was arrested and named his accomplices who were later on arrested.

The other prosecution witness was PW5 who took the 1st appellant cautioned statement which was not objected and the same was admitted as Exhit P2. He further testified to have wrote the 2nd appellant cautioned statement which was also not objected and the same was admitted as Exhibit P3 and that he also wrote the cautioned statement of the 3rd appellant which was also not objected during the tendering and the same was admitted as Exhibit P4. PW5 further testified that, he wrote the cautioned statement of one Maneno Ngadule which was not objected when the same was tendered and therefore the Court admitted it as Exhibit P5. On the other hand (para) PW6 testified to have written the cautioned statement of James Magina@ Hereto. When tendered, the said James Magina objected to its admissibility for the reason that, the same police officer interrogated Jmaes Malole but the objection was overruled for it was not a substantive objection and the same was admitted as Exhibit P6.

He further testified to have recorded the cautioned statement of Elisha s/o Malole. When the said exhibit was about to be tendered in the

court, it was objected as for the same was not read over to him after being recorded. The objection was overuled as it was not merited and the same was admitted as Exhibit P7. In his evidence PW6 also testified to have recorded the cautioned statement of Ogoma s/o Charles and prayed to tender it. When he wanted to tender it, the same was objected on the reason that, it was not voluntailly obtained as he was forced to sign. An inquiry was conducted and finally the same was admitted as Exhibit P8. That marked the end of the prosecution witnesses.

Upon arraignment, before the trial court and from the testimony of (6) prosecution witnesses, the trial Court ruled out that the 1st, 2nd , 6th and 7th accused persons who are now the 1st, 2nd and 3rd respectively appellants have a prima facie case to answer for the charged offence. The trial Court also dismissed the charge against the 3rd, 4th and 5th accused persons and they were acquitted. The appellants were afforded the right of their defence case to be heard before the trial court. Among them, the 1st appellant chose to remain silent and he did not call any witness while others defended themselves under oath without calling any witness.

The appellants refuted the prosecution's accusations and protested their innocence as they both entered a plea of not guilty. Their evidence mainly based on the assertion that they were arrested and sent to the

police and later on charged with the offence. The trial court findings were that, the prosecution case was proved against LUDAYA S/O WILSON, MAHEGA S/O GERVAS @ RASI and FARAJA S/O NGALAMA @ FAJI who were convicted and squarely sentenced to serve 30 years imprisonment.

As I have indicated, the convicted persons before the trial court are now the appellants who appealed to this Court with 6 grounds of appeal which are:

1. *That none of us was found in possession of the alleged stolen properties i.e Radio, cellular phone and no exhibit was tendered before the court related to the same.*
2. *That, none of the police officer i.e PW3, PW4, PW5, PW6 testified before the court on how, when PW2 reported to the police station and how the PF3 was issued to him.*
3. *That no doctor or any authorized medical practitioner summoned to testify before the Court whether PW2 (victim) was truly injured and being treated.*
4. *That the prosecution charged us an offence of Armed Robbery contrary to the law as it was only the family conflict as PW1 testified before the court i.e Ludaya s/o Wilson versus his father.*
5. *That the prosecution failed to summon an essential witness i.e Kadunda, VEO who could verify the allegations led to the arrest of Ludaya Wilson so as to avoid the contradictory testimony raised by PW1.*

6. *That the prosecution failed to prove the case against us beyond reasonable doubt for the offence of armed robbery c/s 287A of the Penal Code, Cap 16 R. E 2019.*

During the hearing of the appeal before this court, the appellants defended the appeal in person, unrepresented, whereas the respondent the Republic had the service of Mr. Joseph Ngussa and Sileo Mazula, the learned state attorneys.

It was the appellant's prayer that the respondent, Republic should start to submit and they will rejoin. Opposing the appeal, the learned state attorney submitted on each ground of appeal independently. On the 1st ground of appeal it was his submission that, in his cautioned statement the 1st appellant admitted the commission of the offence. That the said cautioned statement was not objected and was used to convict the appellants and therefore it was proper for the trial court to find him guilty.

On the second grund of appeal, the llearned state attorney referred to page 23 of the trial court's proceedings and stated that, PW2 reported the matter to the leadership of the village. He added that, PW2 went to the police and he was given PF3 for treatment. He therefore, prayed this ground to be dismissed because it lacks merit.

In responding to the 3rd griund of appeal, it was the submission of the learned counsel that, the PF3 tendered by the victim shows that the victim was ijured. He averred that, the Court is not bound by the medical report if there is other evidence which shows that the victim was injured. He supported his argument by referring to the case of **Agnes Dorice Liundi v R** 1980 TLR 46 that the court is not bound to accept accept medical report.

Submitting on the 4th ground of appeal he stated that, the appellants were correctly charged and convicted with the offence of armed robbery since all the ingredients of the ofence were met. He went on that, when they were interviewed, all of them admitted the commission of the offence and they did not object when their cautioned statements were tendered. He strongly disputed the offence committed by the appellant to be a result of the family dispute since all the ingredients of the offence of armed robbery were met. He added that, as the appellants failed to cross examine on the material fact on the offence charged they are regarded to have admitted the commmission of the offence. He supported his argument by referring to the case of **Nyerere Nyague v R,** Criminal Appeal No 67 of 2010.

Opposing the 5th ground of appeal he averred that, section 143 of the Law of Evidence Act, Cap 6 R.E 2019 consider the credibility of the

witness against a particular witness. He remarked that, if the appellants believed that a particular witness was material, they could have called him.

On the last ground of appeal the learned state attorney submitted that, the prosecution proved the case beyond a reasonable doubt by tendering PF3 and the cautioned statements of the appellants who confessed the commission of the offence. To support his argument he referred the case of **Mwakatobe v R,** Criminal Appeal No 65 of 1995. He retires by insiting that, page 9 of the Judgement shows how the prosecution proved the case beyond a reasonable doubt. He therefore prayed the appeal to be dismissed.

Responding from the learned state attorney submissions, it was the 1st appellant submission that, the offence was not proved because he was not found in possession of the properties alleged to be stolen. He retires his submission by stating that, it was the family dispute that led him to be convicted for the offence of armed robbery. He therefore prayed the appeal to be allowed.

The 2nd appellant prayed to adopt their joint petition of appeal to form part of his submissions and asked this Court to consider it and set them free. He submitted that, the PF3 was not tendered and there was no medical doctor who came to testify on how he treat the victim. He

further submitted that, PW1 was called to arrest the 1st appellant due to personal confict that existed between him and his father and that they were not found in possession of the stolen properties.

He added that, the prosecution side failed to call the village executive officer to prove if the victim was invaded by robbers and that he was injured. He retires praying the court to set him free.

On his part the 3rd appellant prayed to adopt the joint petition of appeal filed in this court to form part of his submissions. He briefly stated that, the victim failed to identify the appellants and that they were tortured in the police station that's why they admitted the commission of the offence. He also prayed this Court to set him free. That marked the end of the submission from both parties.

Having heard the submission by the learned state attorneys and the appellants the main issue for consideration and determination is whether the appeal is meritious.

As it stands in records, the appellants were both charged and convicted with an offence of Armed Robbery contrary to section 287A of the Penal Code, Cap. 16 RE: 2019 (now 2022) which reads as follows:

> *"...any person who **steals anything** and at or immediately after the time of stealing is armed with any **dangerous or offensive weapon** or robbery instrument; or is in the*

company of one or more persons, and at or immediately before or immediately after the time of the stealing ***uses or threatens to use violence to any person****, commits an offence termed armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."*

From the above-cited section, the Court of Appeal in the case of **Shabani Said Ally vs Republic** (Criminal Appeal No. 270 of 2018) [2019] TZCA 382, when discussing the ingredients of the offence of armed robbery 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* ***Dickson 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 commencement of the offence;*
3. *That use of dangerous or offensive weapon or robbery instrument must be directed against a person. See* ***Kashima Mnandi v Republic,*** *Criminal Appeal No 78 of 2011 (unreported)."*

At the trial, the prosecution evidence managed to establish the offence of armed robbery to the extent that there was a theft committed to PW2 house whose oral evidence shows that he was injured at the time of theft. What is left and challenged before this court for determination is whether it was the appellants who committed the offence of armed robbery as charged, tried, convicted and sentenced by the trial court.

Before I determine the appeal on merit, I am mindful with a well established principle that this being the first appellate court is duty bound to reconsider and re-evaluate the evidence on record and draw its own conclusion. This is the position of the case laws in a number of cases including the case of **Okero v R,** (1957) EA 32 and the case of **Huseein Mfaume v R** (1981) TLR 167.

Again, it is a trite position of law that in criminal cases, the prosecution bears a burden of proving its case beyond a reasonable doubt. The burden never shifts to the accused. An accused only needs to raise some reasonable doubt on the prosecution case and he need not prove his innocence. See the cases of **Said Hemed v Republic** 1987 TLR 117 Additionally, in **Mwita and Others v. Republic** [1977] TLR 54 the Court said:

"The appellants' duty was not to prove that their defence was true. They were simply required to raise a reasonable doubt in the mind of the magistrate and no more."

It is from this perspective that this court is obliged to analyse whether the prosecution managed to establish and prove its case beyond reasonable doubt. As it stands in the record, the trial court's proceedings and judgement show that the evidence of PW2 did not properly establish the identification of the appellants.

It is settled that, the guidelines to be followed by the courts on identification were stated with sufficient lucidity by the court in **Waziri Amani v. R** [1980] TLR 250. The same guidelines were reiterated in the case of **Ausi Mzee Hassan vs Republic,** Criminal Appeal No. 17 Of 2020 that for a positive identification, among others, the prosecution needs to show: -

1. *The time the witness had the accused under observation.*
2. *The distance at which he observed him.*
3. *The conditions in which such observation occurred.*
4. *Whether or not the witness knew or had seen the accused before.*

From the records, based on the evidence of PW2 the trial magistrate noted that there was no proper identification of the appellants since apart from PW2 who testified that, he knew the 1st appellant as his fellow villager, nothing more to establish that he really identified him. I say so because his evidence is silent on the bright light of the solar which enabled him to identify the 1st appellant, the ample time he observed him and the distance at which he observed him. I therefore, agree with the trial magistrate that the conditions favouring correct identification of the 1st appellant were not met. Thus, the appellants were not properly identified in the scene.

Turning now to the determination of the grounds of appeal, I will determine separate the first ground of appeal, then I will jointly determine the 2nd and 3rd grounds of appeal as they are intertwined, followed by the 4th, 5th, and 6th grounds of appeal whereby each of them will be determined separately.

Starting with the 1st ground of appeal, it was the appellants' submissions that they were not found in possession of the stolen properties and no exhibit were tendered to prove that the offence of theft. The respondent's challenged this ground by averred that, the cautioned statement of the 1st appellant mentioned the stolen properties through exhibit P2 which was not objected.

From the above competing argument it is pertinent to point out that, for the offence of theft to be proved as it is provided for under section 258 of the Penal Code, Cap 16 R.E 2019, found in possession of the stolen property by the person to whom is said to have committed that offence is not among the ingredients to prove the offence.

Now, looking generally the oral evidence of PW2, it is clear that he mentioned the properties that were stolen and the same properties were also mentioned by the 1st appellant in his cautioned statement. When PW2 testified before the trial court, no one among the present appellants cross examined the victim about the exhibit in relation to those properties. To challenge now is an afterthought. Additionally, failure to cross examine the witness on the material facts of the evidence tendered is equal to the admission of those fact as it was stated in the case of **Nyerere Nyague v Republic,** Crminal Appeal No 67 of 2010 and the case of **Martin Misara v Republic,** Criminal Appeal No 128 of 2016 where the Court of Appeal stated that:

> *" It is the law in this jurisdiction founded upon prudence that failure to cross examine on a vital point, ordinarily, implies the acceptance of the of the truth of the witness evidence and any alarm to the contrary is taken as an afterthought if raised thereafter."*

For that reason, it is my considered view that the properties were stolen. As the offence requires proof of the properties to be stolen, found in possession of them is another question which is not among the ingredients of the offence as the stolen properties may be disposed of in different ways. For that reason, I find Exhibit P2 which is the cautioned statement of the 1st appellant corroborates the evidence of PW2. Thus, this ground is not merited and it is hereby dismissed.

On the 2nd and 3rd grounds of appeal, the appellants challenged on how PW2 reported the matter to the police station, how PF3 was issued to him, and that no medical practioner summoned to testify before the court whether the victim was truly injured and treated. It is the respondent's submissions that in his evidence as reflected in the court record it shows that PW2 reported the incidente in the police and that he was injured. He further submitted that the PF3 was tendered by the victim and that there was no need to call the medical practioner if there is evidence to show that the victim was injured.

From the rival submissions of the parties, due respect to the learned state attorney representing the Republic, in the available court record, there is no PF3 that was tendered and admitted as Exhibit before the trial court. Therefore, the claim by the appellant on how PF3 was issued is a genuine claim. However, even if that is a genuine claim, still it is not the

requirement of the law for the victim to tender PF3 for the offence of armed robbery to be proved.

Again, it is my considered view that failure to call the medical practiotioner does not mean that the offence of armed robbery was not proved because what is important to be proved is the ingredients stated under the section which establish the offence of armed robbery.

Going to the records, the evidence of PW2 is very clear that he was beaten by the bush knife in the process of demanding money from him. His oral evidence corroborated by the cautioned statement of the 1st and 2nd appellant about the use of the offensive weapon.

Additionally, the appellants claimed that none among the police that is PW3. PW4. PW5 and PW6 testified on how and when the victim reported the matter to the police. To my view, I don't think if this issue should detain me much because in his evidence PW2 stated that he was escorted to the police station by the villagers and the village chairman. Thus to my view, failure of the police officers to testify on how and when the victim reported the matter to the police, has nothing to do with the offence of armed robbery. As the victim testified in his oral evidence that he was invaded, injured and reported the matter to the police is enough. This Court believed that every witness is entitled to credence and must be

believed as it was stated in the case of **Patrick s/o Sanga v Republic,** Criminal Appeal No 13 of 2008 where the Court of Appeal stated that:

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogen reasons for not believing a witness."*

For the foregoing discussion, it is my conviction that the 2nd and 3rd grounds of appeal lacks merit and I hereby dismissed them.

Turning now to the 4th ground of appeal, it was the appellant's contention that they were wrongly charged with the offence of armed robbery while it was the family dispute as it was testified by PW1. This contention was strongly opposed by the learned state attorneys who averred that the appellants were rightly charged and convicted with the offence of armed robbery and the same cannot be said to be a family conflict.

I had time to go through the court record and particularly the evidence of PW1 who claimed by the appellants to have said that the charge was out of the family conflict, In his evience as reflected on pages 20 ans 21 of the trial court's proceedings, PW1 testified that, he arrested the 1st appellant following the order of the village executive officer as the 1st appellant invaded his father. PW1 further testified that, when the 1st appellate was the interrogated at the police station, he admiited that he

invaded his father and Emmanuel John's home, with his colleague including the 2nd and the 3rd appelants.

To that end, invading the house of Emmanuel John the victim, cannot be said to be a family dispute because the evidence on record does not show if PW2 is related by blood with any of the appellants. The record shows that, the 1st appellant is related with Wilson Maduka who is neither the victim nor the complainant in our case at hand. Therefore, this ground is not merited and i hereby dismmied it.

On the 5th ground of appeal the appellants complained that the prosecution failed to summoned the village executive officer to prove the assertion about the arrest of the 1st appellant to avoid contradictions with PW1. The Respondent's learned state attorneys submitted that, if the appellants thought the village executive officer was an important witness they could have called him as their witness.

First of all, I wish to point out that, there is no any contradiction on the evidence of the PW1 since in his evidence he testified about the two scenario. The first scenario is the complaint of the 1st appellant's father which resulted to the arrest of the 1st appellant. The second scenario is when the 1st appellant was interrogated at the police station, admitted to have invaded the house of the victim. Thus, it is my view that there was no contradiction.

On the assertion that the prosecution could have called the executive officer to testify, I don't think if this is a genuine complaint. The prosecution is not bound to call a particular witness. As it was rightly submitted by the learned state attorneys that if the appellants thought that the village executive officer was a material witness on their part, they could have used that chance at the trial court to call him. Therefore, I find this ground to be not merited and I dismissed it.

On the last ground, the appellants claimed that the prosecution failed to prove the case beyond reasonable doubt as reiqured by law. The respondent submitted that, the case was proved in the required standard since their cautioned statements proved that they committed the offence charged.

As I perused the trial court records, PW5 D/CPL Matete testified to have recorded the 1st appellant's caution statement on 04/01/2022 at 12.00 and tendered the same as exhibit P2. The PW5 further testified that on 05/01/2022 he recorded the 2nd appellant's cautioned statement and the same was admitted as Exhibit P3. The record also shows that on 27/02/2022, PW5 recorded the cautioned statement of the 3rd appellant and the same was admitted as Exhibit P4. When these the cautioned statements was tendered by PW5 were not objected by the defence side.

I perused the cautioned statements tendered at the trial court, I find the same to be so detailed explaining what happened. Taking the evidence gathered in the record generally, it is the cautioned statements of the appellants which was mainly used to convict them. It is a trite position of the law that the best witness in a criminal charge is the accused who confesses complicity voluntarily. See the case of **Godfrey Kitundu @ Nalogwa and Another vs Republic**, Criminal App. 96 of 2018 (unreported) and **Republic vs. Khamis Said Bakari,** Criminal Sessions Case No. 119 of 2016 (unreported) where this Court, Hon. Korosso, J. as she then was, observed that: -

> *"It is trite law that the best evidence in a criminal trial, is that of an accused person who confesses to have committed the crime."*

As I have earlier on indicated, the cautioned statements of the accused mainly found the appellants guilty of the offence even though the same was corroborated with the evidence of PW2 who testified that he was invaded at his home and the robbers run away after a call of help, *mwano*. Even though the evidence of PW2 corroborated the cautioned statements of the appellants, still it is the settled position of law that it is not necessary for the cautioned statement to be corroborated. This

position was stated by the East Africa Court of Appeal in the case of **Tuwamoi vs Uganda** [1967] E. A. 84, the Court said:-

> *"... Corroboration is not necessary in law and the court may act on the confession alone when it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true"*

(see also **Makungu Misalaba vs R,** Criminal Appeal No. 351 of 2013. **Kevin s/o Emmanueal Mahiga & Another vs The Republic**, Criminal Appeal No. 83 Of 2009*)*

Going to the records, specifically exhibit P2 and P4, the same gave a narration on how they invaded in the house of PW2 and steal the properties that was also mentioned by PW2 in his evidence. I do not think that, PW5 Detective Coplo Matete was in a position to invent a narrating story of the incident.

Additionally, from the story narrated in Exhibit P3 it is quite clear that, the issue of the common intention cannot be ignored. The law is settled under section 23 of the Penal Code Cap. 16 RE 2002 (now RE: 2022) which reads: -

> ***23***. *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its*

commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence".

Much guidance on this may be obtained from the decision of the Eastern Africa Court of Appeal in the case of ***WANJIRO WAMIERO & OTHERS v. R.*** (1955) 22 EACA at page 523 where the Court, in relation to section 21 of the Kenya Penal Code which was identical with our section 23 of te Penal Code cited above held that: -

"... in order to make the section applicable, it must be shown that the accused had shared with the actual perpetrators of the crime, a common intention to pursue a specific unlawful purpose which led to the commission of the offence charged ..."

The cautioned statement of the 2nd appellant shows that, there was a common intention among the appellants. Despite the fact that the 2nd appellant accompanied the other appellants in the scene and wait for them to accomplish the mission, his evil intention to commit the offence charged is seen as he had failed to report the incidence at the police when the mwano was called. And instead, he used his motorcycle to rush the appellants for them to escape.

I thus hand with the trial court findings that the confession by the accused person was nothing but the truth and was it was right to be relied in conviction of the appellants. In fine, I find this ground wanting of merit for both appellants.

In that regard, I find no room to fault the trial court's findings. In fine, the appeal is therefore without merit and is accordingly dismissed in its entirety.

It is so ordered.

M.MNYUKWA
JUDGE
23/06/2023

Right of appeal explained to the parties.

M.MNYUKWA
JUDGE
23/06/2023

Court: Judgement delivered today this 23rd day of June, 2023 through video conference in presence of both parties.

M.MNYUKWA
JUDGE
23/06/2022