IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 94 OF 2022

(C/F Criminal Case No. 194 of 2020 at the District Court of Babati at Babati)

BETWEEN

JAFARI MAULIDI SHANGWE @ KAIFA.....1ST APPELANT

AWADHI IDD MPINGA.....2ND APPELLANT

BASHIRU ATHUMAN SALIM.....3RD APPELLANT

VERSUS

THE REPUBLIC (D.P. P) ..... RESPONDENT

JUDGMENT

26/05/2023 & 03/08/2023

MWASEBA, J.

The appellants herein were charged with and convicted of two offences, firstly, Conspiracy to commit an offence contrary to **Section 384 of the Penal Code**, Cap 16 R.E 2019, and Second, Armed Robbery contrary to **Section 278A of the Penal Code**, [Cap 16 R.E 2019] in the District Court of Babati @ Babati.

The facts of the trial case were unveiled by the prosecution that on 16th day of May 2020 in Gendi area, within Babati District in Manyara region the appellants herein conspired to commit an offence and stole one Mobile phone make Tecno Cammon-C8 valued at Tshs. 260,000/=, one Mobile Phone make Tecno Tochi valued at Tshs. 50,000/= cash Tshs. 60,000/= M-Pesa Tshs. 1,050,000/= and Airtel Money Tshs 1,000,000/= all total valued at Tshs. 2, 423,000/= the property of one RUMINSIA D/O FLANA MWANGA. Further, immediately before and after such stealing they e threatened to cut her head and hands with a panga in order to obtain and retain such properties.

The appellants denied any involvement in the commission of the crime and pleaded not guilty to the charge. They further claimed that they were not at the crime scene on the date of the incident.

At the hearing of the case before the trial court, the prosecution case was made on the testimonies of sixteen (16) prosecution witnesses with sixteen (16) exhibits while a total of five (5) witnesses with one (1) exhibit concluded the defence case.

The trial Magistrate was satisfied that the prosecution has proved the case beyond a reasonable doubt hence the appellants were convicted and

sentenced to serve one (1) year imprisonment for the first offence and thirty (30) years imprisonment for the second offence to run concurrently.

In pursuit of their innocence, the appellants lodged the present appeal to this court having seven (7) grounds of appeal as depicted on the petition of appeal.

During the hearing of the appeal, which was done orally, the appellants appeared in person, unrepresented whereas Ms. Eunice Makala assisted by Ms. Helena Sanga, both learned State Attorneys represented the respondent.

Submitting in support of the appeal and on behalf of other appellants, the 1st appellant submitted on the 1st and 2nd additional grounds of appeal that, the appellants were charged based on the defective charge sheet. It was his further submission that the charge was defective based on the following anomalies: First; the properties mentioned on the charge sheet and PW1 (victim) do differ. PW1 said the stolen properties were Tecno C8, a smartphone brown in colour, and Tecno double line black in colour while the charge sheet listed Tecno Camon C8 valued Tshs. 260,000/= and Tecno Torch valued at Tshs. 50,000/=. Second; the value of the properties was only mentioned on the charge sheet, PW1 did not mention the value of the properties. Third; the stolen properties were tendered by

PW1 at the court who did not tender any receipt to prove ownership of the stolen properties. Fourth, the charge sheet shows that M-pesa had Tshs.1,050,000/= while PW1 said she had Tshs. 1, 500,000/= in M-pesa which makes the total value to be Tshs. 2, 503,000/= which is different from the total value on the charge sheet.

Fifth; the charge sheet is silent regarding the weapon of the screwdriver that was mentioned by PW1 and lastly, the charge sheet shows the offense occurred on 16/5/2020 and PW1 said it was 16/5/2021. He supported his arguments with the cases of **Mohamed Kamongo vs Republic** (1980) TLR 279 and **Andrea Augustina @Msigara vs Republic**, Criminal Appeal No. 365 of 2018. He prayed for the court to find merits on these grounds.

Responding to these grounds, Ms. Makala submitted that the charge sheet was not defective as alleged by the appellants. She submitted further that the act of PW1 not to mention the value of the properties does not make the charge defective and that the properties on the charge sheet were the same as the one mentioned by PW1. She stated further that PW1 did not specify the type of the second mobile phone only and the IMEI number was added by the trial magistrate when he was marking the exhibits.

It was her further submission that the prosecution was only supposed to prove the ingredients of the offence which they did. She added further that as the 1st appellant admitted committing the offence in his caution statement, which was admitted as an exhibit without any objection, he cannot object it at this stage. As for the issue of receipts she replied that, PW1 who is the owner of the properties testified in court so there was no need to bring a receipt to prove ownership. Regarding the issue of the amount in M-pesa phone, the original records show that PW1 said it was 1,050,000/= and not 1,500,000/= so, there was no variance as alleged. Further, regarding the value of properties not being mentioned by PW1, the same cannot make the charge defective as she clearly stated what was stolen.

Regarding the issue of dates, all the witnesses said it was 16/5/2020 as per the charge sheet, it was only PW1 who said it was 16/5/2021 and that was due to shock or due to time as it was already a year lapsed since the day of the incident. Lastly, regarding the issue of a screwdriver, she admitted that it was not on the charge sheet but the same cannot vitiate the proceedings. She supported her arguments with the case of **Joshua Joseph @ Paulo vs Republic**, Criminal Appeal No. 307 of 2018.

Expounding the 3rd ground of appeal on additional grounds of appeal, the 1st appellant challenged the issue of identification. He submitted that both the appellants were not properly identified at the scene of the crime as the victim (PW1) did not describe the source of light used to identify them. Further to that he alleged that no identification parade was conducted for PW1 to identify them and PW12 (Police Investigator) did not state who helped them to arrest the appellants. To conclude, he stated that PW1 identified them as the workers in his son's shop and not as suspects. They supported their arguments with the case of **Andrea Augustine @ Msigara** (Supra).

Replying to this ground, Ms. Makala argued that PW1 did not identify the appellants at the scene of a crime. The police investigated the matter after the incident and arrested the 3rd appellant with some of the properties after interrogation he mentioned the other appellants. So, there was no need for an identification Parade in such circumstances. She argued further that the accused were five but two of them jumped bail and as long as exhibit P12 (Caution statement of the 3rd appellant) was admitted without any objection the same cannot be challenged at this stage.

Coming to the 1st and 4th grounds of appeal, the 1st appellant challenged the act of their caution statement being admitted without the trial court

conducting an inquiry after having been objected by the appellants. He submitted further that they were tortured at the police station and the caution statement was not voluntarily taken. He added that one police officer interrogated two accused persons contrary to the law. They prayed for those statements to be expunged from the records.

On her side, Ms. Makala supported these grounds of appeal and prayed for the caution statement of the 2nd and 3rd appellants to be expunged from the record. However, she submitted that after the statement being expunged the caution statement of the 1st appellant will remain as it was not objected at the trial court together with the circumstantial evidence as the 1st appellant mentioned other appellants in his caution statement. She supported her arguments with the case of **Manyangu Mangwena @ Mlugamluga vs Republic**, Criminal Appeal No. 227 of 2012.

Submitting on the 2nd ground of appeal, the 1st appellant prayed for the evidence of PW1, PW2, PW5, and PW6 concerning the money transaction to be expunged from the records as no expert on cybercrime was called to testify on the same.

Reacting to this ground, Ms. Makala averred that PW5 testified that the 3rd appellant and his fellow appellants went to his shop to withdraw Tshs. 1,000,000/= using the phone of PW1. Further, PW3 testified that he

communicated with Pili an agent (Wakala) to withdraw money from PW1's airtel number. So, there was no need to call an expert on cybercrime to prove the said transaction.

Submitting in support of the 3rd ground of appeal, the appellants complained that the evidence of the prosecution was not collaborated as there was a contradiction as to the number of people who said invaded PW1. When PW1 said they were 3, PW12 said they were 4 and the trial Magistrate convicted five people. They added that no weapons were submitted to prove the offence of armed robbery and why the same was not found with the appellant compared to other properties.

Responding to this ground, Ms. Makala submitted that PW12 did not mention the number of the accused persons he only said he received the report to investigate without the accused persons. Regarding the issue of phone numbers, he submitted that there was no contradiction on the Airtel number as on the original records both PW3 and PW6 mentioned 0784738898. As for the issue of weapons, there was no need to bring weapons before the court as they were only required to prove the ingredients of the offence and they did so.

Coming to the 5th ground of appeal, the appellants submitted that PW5 was not a reliable witness as he testified to receive money Tshs.

1,000,000/= from agent No. 25117 with the name of Ismail Alfan Maley but he also stated that the name of the agent was Ruminisia Mwanga. So, his evidence was unreliable to be relied upon by the trial court.

Responding to this ground, Ms. Makala argue that PW5 said they had withdrawn money from Ruminisia Mwanga, thus, the trial Magistrate did not error in convicting the appellants based on the said evidence of PW5. Her argument was supported by the case of **Goodluck Kyando vs Republic** (2006) TLR No. 363.

Regarding the 6th and 7th grounds of appeal, the appellants complained that the charge against them was not proved beyond a reasonable doubt based on all anomalies elaborated herein. More to that they argued that a chain of custody of exhibits was broken. Thus, they prayed for the appeal to be allowed with costs.

Responding to these grounds, Ms. Makala submitted that a charge was proved beyond a reasonable doubt. In proving an offense of armed robbery, three things were supposed to be proved by the prosecution. First, they need to prove there was stealing, Second, the offensive weapon was used, third, that the offensive weapon was directed against the victim. Ms. Makala argued further that the first ingredient was proved by PW1 who said her properties were stolen. PW1 stated that, the

appellants invaded her on her way home while having a machete and screw driver and robbed off her mobile phones. The bandits demanded money which PW1 did not have so to rescue herself she called her sons who sent two million to her phone numbers. The second ingredient was also proved when PW1 submitted that the appellants used offensive weapons to threaten her to retain her properties. Lastly, after being arrested, the 3rd appellant admitted to have committed the offence together with Gerald.

It was her further submission that, the issue of chain of custody was well explained by PW7 who received exhibits and labelled them, and the chain of custody form was tendered in court the appellants did not object. Thus, all the grounds of appeal have no merit. Therefore, she prayed for the appeal to be allowed.

In brief rejoinder, the appellants reiterated what had already been submitted in their submission in chief.

Having heard the rival submissions from both sides and going through the record, the main issue for determination is whether the appeal is meritorious.

Starting with the 6th and 7th grounds of appeal, the appellants complained that the trial Magistrate erred in law and in facts to convict the appellants on the second offence of Armed robbery while the same was not proved beyond a reasonable doubt. On her side, Ms. Makala submitted that the charge against the appellants was proved beyond reasonable doubt based on the evidence submitted by the prosecution witnesses. She referred this court to the elements of the offence of armed robbery and argued that the same were proved.

Regarding the offence of armed robbery, the law is clear as per **Section 287A of the Penal Code**, Cap 16 R.E 2019 which provides that:

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

The above provision was clarified in the case of **Zubell Opeshutu vs Republic**, Criminal Appeal No. 31 of 2003 (CAT- unreported) that:

> *"The prosecution has to adduce evidence to establish the essential ingredients of the offence, that is, whether actual violence was used to obtain or retain the thing stolen. The nature of the violence must also be proved. A prerequisite for the crime of robbery is that there should be violence to the person of the complainant ..."*

Thus, guided by the above legal position, the prosecution needs to prove that a person stole a property and immediately before or after such stealing uses violence to any person while armed with dangerous weapon. In our present case, PW1 (the victim) testified that she was invaded by three people who threatened her by using a screwdriver and Machete. However, she was not able to identify any of the persons who committed the said act at the crime scene. Thus, the proof of this case depends on what was revealed through investigation.

The records shows that when PW12 was assigned to investigate this case, he called the complainant and heard a story from her on how she was kidnapped by the bandits. Thereafter, he started to look for the suspects and on the material date he arrested Bashiru who is the third appellant herein who helped him to arrest Gerald Paulo (who is not among the appellants). Thereafter, Gerald Paulo helped the police to arrest Jafari

Maulidi Shangwe (1st appellant herein) who mentioned Ramadhan Hamisi Hussein and Awadhi Ramadhani (2nd appellant).

It is not clear as to how PW12 connected the 3rd appellant with this offence. The evidence is clear that the complainant (PW1) did not manage to identify any of the bandits at the crime scene. So, PW12 was supposed to state clearly as to what led him to arrest the 3rd appellant in connection with the alleged offence.

More to that, to establish the commission of the offence at hand, one must establish that there was stealing. In this case PW2 during his investigation he averred that he managed to find stolen phones to Gerald Paulo and Ramadhani Hamisi who are not subject to this appeal as they absconded from lawful custody. However, the chain of custody of those exhibits is questionable. PW7 testified in court that he received those exhibits for safe custody from DC Donald. But in court, it is the complainant who tendered them as exhibits. I wonder how the said phone came back to her possession if they were stolen and kept with PW7. This raises a serious doubt in the prosecution case. In the case of **Ramadhani Mboya Mahimbo vs Republic**, Criminal Appeal No. 326 of 2017, Court of Appeal sitting at Arusha had this to say:

"Thus, having found that the chain of custody was broken, raises serious doubts in the prosecution case and we agree with the learned Senior State Attorney that this renders the charge against the appellant unproven"

Due to the above legal position, this case falls short of meeting the standard of proof required in criminal cases.

Ms. Makala learned state attorney was of the view that all the appellants confessed to have committed the offense due to their caution statements which were admitted as exhibits XII, XIII, and XV. However, the said caution statements were challenged by the appellants through the 4th ground of appeal for being admitted without conducting the trial within a trial (inquiry) as the same were objected by the 2nd and 3rd appellants. Ms. Makala learned state attorney supported this ground with regard to the caution statement of the 2nd and the 3rd appellant and prayed for the same to be expunged from the record. I concur with the learned state attorney and expunge exhibits XIII and XV from the record as they were admitted in contravention with the law. See the case of **Nelson George @ Mandela and Five Others vs The Republic**, Criminal Appeal No. 93 and 94 of 2010 (CAT-Unreported) where the Court of Appeal observed that, since the confession statement was admitted into evidence contrary to the law, the remedy is to expunge it from the records.

Having expunged the said statement we remain with the caution statement of the 1st appellant which is exhibit XII. **Section 33(2) of the Evidence Act,** Cap 6 R.E 2022, provides that:

> "*Notwithstanding subsection (1), a conviction of an accused person shall not be based solely on a confession by a co-accused.*"

Guided by the cited authority, the conviction based on the confession made by the co-accused needs to be collaborated. In the absence of collaborating evidence, the appellants cannot be convicted on the sole incriminating cautioned statement recorded by the 1st appellant herein. The same cannot stand to incriminate the 1st appellant due to weaknesses I have pointed out earlier as to the chain of custody.

Therefore, this court does not support the argument made by the learned state Attorney that the caution statement of the 1st appellant can stand on its own to convict the appellants herein. Therefore, it goes without saying that the prosecution, in this case, failed to discharge their duty of proving the 2nd offence beyond a reasonable doubt as required by the law. Since the 2nd offence has not been proved to the required standard, the 1st count cannot stand on its own, thus, the same was also not proved beyond a reasonable doubt.

Since the 4th, 6th and 7th grounds of appeal dispose of the whole appeal, there is no need to determine the rest of the grounds.

That being said, the appeal is allowed for being meritorious. The conviction is quashed, and sentence meted out is set aside. This court orders the immediate release of the appellants herein from custody unless they are lawfully held.

It is so ordered.

DATED at **ARUSHA** this 3rd August, 2023.

N.R. MWASEBA

JUDGE