IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TABORA DISTRICT REGISTRY)
AT TABORA
CRIMINAL APPEAL NO. 55 OF 2022
(Originating from the decision of Urambo District Court in Criminal Case No. 33 of 2021, before Hon. M.M. Makonya, RM)

ALLY JUMA @ HUKUMU..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 31/07/2023
Date of Judgment: 21/08/2023

KADILU, J.

In the district court of Urambo, the appellant was charged with two counts of armed robbery contrary to Section 287A of the Penal Code, [Cap. 16, R.E. 2019]. It was alleged by the prosecution that on 28/07/2020 during night hours at Nsogolo Village within Urambo district in Tabora Region, the appellant stole cash money Tshs. 700,000/=, six mobile phones valued Tshs. 150,000/=, one inventor valued Tshs. 45,000/=, one bag valued Tshs. 35,000/=, all the properties of Dastani Abely @ Mbusi, with a total value of Tshs. 930,000/=. In the same night, the appellant is also alleged to have stolen cash money Tshs. 240,000/= from one Upendo Abely.

In both incidents, the appellant is said to have used panga before, during and after the stealing. When the charge was read over to him, he pleaded not guilty. The prosecution called six witnesses and tendered three exhibits in an effort to establish that it was the appellant who committed the charged offence. On his part, the appellant dissociated himself from the

alleged offence. At the conclusion of the trial, the appellant was convicted as charged and sentenced to serve 30 years imprisonment on each count. Aggrieved by the conviction and sentence, he preferred an appeal to this court on the following grounds:

1. *That, the trial court erred in law and facts to convict the appellant on the counts of armed robbery while the elements of the offence were not proved.*
2. *That, the trial court erred in law and facts by relying on evidence of witnesses who stated that their properties were stolen without proof of ownership and the doctrine of recent possession.*
3. *That, the trial court erred in law and facts to convict the appellant on the counts of armed robbery without proper identification.*
4. *That, the trial court abdicated its duty of subjecting the entire evidence to objective scrutiny as a result, it ended up not considering the appellant's defence.*
5. *That, the trial court erred in law and facts to convict the appellant basing on the weaknesses of defence evidence.*
6. *That, the trial court erred in law and facts in holding that the prosecution proved the case beyond reasonable doubt without considering that the evidence presented was weak.*

The appellant implored this court to allow the appeal, quash the conviction and set aside the sentence imposed on him by the trial court and subsequently, order his immediate release. When the appeal was called for hearing, the appellant was represented by Advocate Kashindye Lucas whereas the respondent was represented by Ms. Suzan Barnabas and Ms. Upendo Florian, the State Attorneys.

Submitting in support of the appeal, Mr. Kashindye prayed to argue the first and second grounds of appeal jointly and the fourth and fifth grounds together as well. On the first and second grounds of appeal, the learned Advocate submitted that the case against the appellant was not proved beyond reasonable doubt. He explained that the prosecution was not only required to establish that force was used, but also that there was theft. He referred to the case of ***Ally Nassoro @ Burule v R.***, Criminal Appeal No. 94 of 2020, Court of Appeal of Tanzania at Dar es Salaam. Mr. Kashindye elaborated that it was necessary for the prosecution to prove ownership of the stolen properties by for example, identifying their International Mobile Equipment Identity (IMEI) numbers.

Concerning identification of the appellant, Mr. Kashindye argued that the source of light used to identify the appellant was solar power, but witnesses did not tell the court about the intensity of the prevailing light during the incident. They did not as well describe the weather condition of that day despite the fact that strength of solar light depends on the prevailing weather. The learned Advocate relied on the case of ***Waziri Amani v R.*** [1980] TLR 250 and concluded that in the absence of proper description of the existed state of light, there is a possibility of mistaken identity of the appellant.

On the fourth and fifth grounds of appeal, Mr. Kashindye urged this court to step into the shoes of the trial court and analyze the evidence properly so as to reach to a fair decision. He cited the case of ***Hussein Idd***

& Another v Republic, [1986] TLR 166 in which it was held that failure to deal with evidence of both parties is a serious misdirection. Regarding the last ground of appeal, Mr. Kashindye made reference to Section 110 (2) of the Evidence Act, [Cap. 6 R.E. 2022] and the case of ***Joseph John Makune v R.,*** [1986] TLR 44 in which it was stated that a duty to prove the case against the accused person lies to the prosecution.

Responding to the submissions by Advocate for the appellant, Ms. Upendo Florian stated that all ingredients of armed robbery were well established. According to her, prosecution witnesses managed to prove that the appellant committed theft and had used force to facilitate the stealing. He referred this court to pages 15 and 16 of the trial court's proceedings in which according to her, PW1 testified about how the appellant used machete to steal the phones. She also made reference to pages 20-22 of the proceedings in which she argued that PW3 testified about how the appellant injured her by using a machete before stealing from her. The learned State Attorney concluded that the offence was sufficiently proved against the appellant.

Ms. Upendo submitted further that ownership of the stolen properties was properly proved by PW as shown on pages 15-16 of the proceedings and the appellant was identified as the assailant. It was argued by the learned State Attorney that since PW1 was invaded in his home and his properties were stolen, there is no dispute that the properties belonged to

him as testified by PW3. She said, in that situation there was no need to prove that the stolen properties belonged to PW1 and PW3.

With regard to identification of the appellant, Ms. Upendo stated that page 16 of the proceedings is clear about how PW1 explained the intensity of light which existed in the scene of the crime and enabled him to identify the appellant properly. According to Upendo, PW1 managed to name the appellant immediately after the incident. Lastly, the State Attorney submitted that all prosecution witnesses linked the appellant with the charged offence so, the case against him was proved sufficiently. She referred to the case of ***Goodluck Kyando v R.***, [2006] TLR 363 in which it was held 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 the witness.

I have carefully examined the arguments for and against the appeal. I find the issue for determination is whether the appeal is meritorious or otherwise. In my determination, I will resolve the grounds of appeal in the order of submissions made by the Advocates. In the first and second grounds of appeal, the appellant complains that ownership of properties alleged to be stolen was not clearly established by the prosecution during the trial. The learned State Attorney argued that there was no need of proving ownership of the stolen properties since theft was committed in the victim's home.

The offence of armed robbery is provided under Section 287A of the Penal Code, [Cap. 16 R.E. 2019] which provides:

*"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."*

From the above provision, it is evident that stealing is an important element in proving the offence of armed robbery. In the case of ***Shaaban Said Ally v. R.,*** Criminal Appeal No. 270 of 2018, it was held that:

*"The offence of armed robbery is committed where, the accused person, while armed with any dangerous or offensive weapon or instrument, **steals anything** and immediately before or after such stealing, uses or threatens to use violence against the victim. Such violence must be meant for obtaining or retaining the stolen property."*

Under section 258 (1) of the Penal Code, one is required to establish ownership of the stolen property if he is to prove the offence of theft. I therefore agree with argument by Advocate for the appellant that it was vital for the prosecution to establish clearly that the stolen properties belonged to PW1 and PW3. The record shows that the offence was committed in July 2020 and it was reported timely. The culprits escaped up to August 2021 when the appellant was arrested, but his co-offender was nowhere to be found. When the public prosecutor was challenged by the appellant during cross examination, he told the trial court that, there was no search which

was conducted in the house of the accused or that of his accomplice. Stolen properties were not presented to the court as exhibits. The stolen phones' IMEI numbers were not listed in evidence and purchase receipts of any of the stolen properties were not produced in court. In this situation, it is difficult to hold with certainty that PW1 and PW3 owned the properties alleged to been stolen by the appellant. Theft was not therefore established so as to constitute an offence of armed robbery. Consequently, this ground of appeal is meritorious.

The appellant complains that he was wrongfully convicted as he was not identified properly. The basis of his argument is that the light from solar power is usually weak especially where the weather condition is not conducive. It is alleged that the appellant committed the offence together with his other three criminal workmates including one Alphan Shabani who was identified, but is still at large. Evidence shows that the robbery took place during the night and the appellant came face to face with PW1 and PW3. The appellant was known very well to PW1 and PW3 before the occurrence of the incident.

Evidence of PW1 and PW3 which was not materially challenged show that the appellant, PW1 and PW3 live within the same locality and are relatives. Thus, apart from the identification at the scene of the crime, PW1 and PW3 were familiar with the appellant before the incident. It is a settled principle that, the ability of an identifying witness to name a suspect at the earliest opportunity after the incident, is an assurance of the credibility of

such a witness. See the case of ***Marwa Wangiti Mwita & Another v. R.***, [2002] T.L.R. 39. By naming the appellant to the Village Chairman and VEO, PW1 and PW3 had recognised him as being one of the assailants after having known him before. For these reasons, I am of the view that there was no possibility of mistaken identity as alleged.

The appellant further challenges evidence of the prosecution which led to his conviction. He complains that the trial court failed to analyze evidence objectively and it did not consider his evidence. He thus, concluded that his conviction was based on the weak evidence. With due respect, not much can be deduced from the appellant's evidence as shown from pages 34 to 36 of the proceedings. All he said was that the prosecution witnesses did not identify him at the scene of the crime because there was poor light from the solar power and that he had grudges with PW3. He did not however, disclose to the court the nature of grudges he had with PW3.

On being cross examined by the prosecutor, the appellant conceded that before the incident he was present in the Village, but after the incident he went to Bariadi. He did not as well inform the court the reasons for leaving the village after the incident and what he was doing in Bariadi from July 2020 to August 2021. In the trial court's judgment, the appellant's evidence is presented on page 7 and a thorough analysis of the entire evidence proceeds from page 8 to 12 of the judgment. In this regard, there is nothing to fault the trial court concerning evidence presented before it.

The last question to be resolved is whether the case against the appellant was proved beyond reasonable doubt. It was the testimony of PW2, PW3 and PW4 that Upendo Abel (PW3) was attacked and seriously wounded by the appellant and his accomplices. However, as stated before, it was not proved that they also stole anything from her. For that reason, I quash the conviction for armed robbery and set aside the thirty years imprisonment sentence imposed on the appellant. In lieu thereof, I find him guilty of causing grievous bodily harm contrary to Section 225 of the Penal Code. Considering the vulnerability of the injured part (forehead) and given the circumstances under which the attack was carried out, I impose the sentence of seven years imprisonment to be reckoned from the 11th July, 2022 when the appellant was convicted and sentenced by the trial court. Only to that extent, the appeal is partly allowed and partly dismissed. Right of appeal is explained for any party aggrieved by this decision.

It is so decided.

KADILU, M.J.
JUDGE
21/08/2023

Judgment delivered in chamber on the 21st Day of August, 2023 in the presence of the appellant and Suzan Barnabas, State Attorney for the respondent.

KADILU, M.J.,
JUDGE
21/08/2023