IN THE HIGH COURT OF TANZANIA

DODOMA SUB-REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 79 OF 2022

(Originating from Criminal Case No. 40 of 2022 in the District Court of Iramba at Kiomboi)

SAMSON EDWARD.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

20th July & 14th September, 2023

HASSAN, J.:

The appellant herein appeared before the District Court of Iramba at Kiomboi where he was charged with the offence of Robbery With Violence contrary to section 285 and 286 of the Penal Code [Cap 16 R. E 2019]. It is in the particulars of offence that, on 22nd day of April, 2022 at about night hours at Mugundu village within Iramba District in Singida Region, the Appellant willfully and unlawfully did steal one bicycle valued at Tshs 120,000/= and cassava valued at Tshs 25,000/=, all stolen properties valued at Tshs 145,000/=, immediately before and after such

stealing did use force in order to obtain and retain the said property of one FELISTA D/O FRANK.

When the charge was read over to the appellant in the trial court, the appellant denied the charge. The prosecution, thereafter, called a total of four (4) witnesses, who testified against the appellant who entered his defence without calling any witness on his case. At the conclusion of the trial, the appellant was convicted and sentenced to serve fifteen (15) years imprisonment. Aggrieved, the appellant preferred an appeal on the following grounds:-

1. *That, the trial magistrate erred in la and in fact by convicted and sentenced the appellant on prosecution evidence which was not water tight enough to prove the charge to the required standard.*
2. *That, I was not positively identified at crime scene.*
3. *That, the learned trial court magistrate erred in law and fact as he did not accord my defence the weight it deserve.*
4. *That, conviction by the trial court based on the weakness of my defence rather than the weight of prosecution evidence.*

When the appeal came for hearing, the layman Appellant appeared in person, whereas the respondent Republic had the service of Mr. Francis Kesanta, Learned State Attorney.

Submitting in support of the appeal the appellant prayed to adopt his petition of appeal to form part of his submissions in support of appeal. He added that, the trial court erred to convict him by using evidence of the victim's mother, village leader and police officer while there was no officer who had testified on the same.

He submitted on the 2nd ground of appeal that he was not properly identified in the scene of crime since he was arrested at 7:00 pm.

In Reply, the learned State Attorney opposed the appeal by arguing against the 1st and 4th grounds of appeal that, prosecution evidence was watertight hence the appellant was convicted. That the victim of crime testified the offence to have been committed at 1900 hours and by that time she was with the appellant who admitted that fact in page 27 of proceedings. The learned State Attorney added that PW2, PW3, and PW4 also testified that the appellant confessed to have committed the offence. That, he also admitted in his cautioned statement, exhibit P3 hence the best witness as decided in **Chande Zuberi Ngayaga & Mohamed Rashid Rupembe v Republic, Criminal Appeal No. 258 of 2020, CAT** (unreported).

Regarding the issue of calling a villager raised by the appellant, the learned State Attorney submitted that the prosecution had the mandate to call a witness of their choice as per section 143 of The Law of Evidence Act.

He submitted against the 2nd ground of appeal that, the appellant was identified at the scene of crime thus this ground should be disregarded.

On the 3rd ground of appeal, the learned State Attorney replied that, the appellant's defence was considered in the trial court's judgment. Thus, he rested his case by praying the appeal to be dismissed, conviction and sentence of the trial court be sustained.

That is what was shared by the parties in support of and against the appeal.

Starting with the provisions of **section 110** and **111 of the Evidence Act, Cap. 6**, the law is clear that the burden of proof lied to the prosecution and the standard of such proof is beyond reasonable doubt. See also; ***Sylivester Stephano v. R. Criminal Appeal No.527 of 2016*** (unreported) and ***DPP V. Peter Kibatala, Criminal, Appeal No. 4 of 2015*** (CAT) Dar es salaam (unreported) at page 18 when the Court held that:

"In criminal cases, the duty to prove the charge beyond doubts rests on the prosecution and the court is enjoined to dismiss the charge and acquit the accused if that duty is not discharged to the hilt."

On that legal position, the prosecution has the duty to prove the charge beyond reasonable doubt. Thus, going through the record in the trial court, the appellant was charged with the offence of Robbery with Violence contrary to sections 285 and 286 of the Penal Code which provides thus:

"285.-(1) Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of robbery."

In the words of this provision of law, for the offence of Robbery with Violence to be proved, an essential element of violence must be proved. In the instant case, although it is shown in the charge sheet that immediately before and after such stealing the appellant did use force in order to obtain the robbed property, such violence or force was not proved in evidence at the trial court. For instance, looking on the evidence of

Felista Frank (PW1) who is the victim in this case and the only eye witness of the incident, she testified that she was robbed by the appellant on the 22nd day of April, 2022 while she was going back home from the market place commonly known as "Gulioni" at Ulemo village. Her evidence of what happened at the scene of crime was as hereunder:

> *"I was on the way home, I met the accused Samson Edward who robbed my bicycle and I raised alarm of help, fortunately two people appeared to help me but the accused was already ran way with my bicycle...."*

Therefore, by observing the extract above, PW1 did not testify on how the appellant used the violence or force, immediately before and after he committed the alleged crime as it appears in the charge sheet.

Additionally, turning to the remaining 6 prosecution's witnesses, neither of them had testified on the violence used by the appellant, if any. Thus, on the circumstances, the position of the law is clear as in **Mwaimu Dismas And 2 Others V Republic, CriminalAppeal No. 343 of 2009** (Unreported), the Court of Appeal while referring to a number of its earlier decisions observed that:

> *"It is trite law that robbery as an offence cannot be committed without the use of actual violence or threat to the person targeted to be robbed. So, the particulars of the*

offence of robbery must not only contain the violence or threat but also the person on whom the actual violence or threat was directed...."

See also the case of **Zubell Opeshutu v. Republic, Criminal Appeal No. 31 of 2003** (unreported), when deciding on the fate of the offence of robbery with violence, the Court of Appeal had this to say:

"The prosecution has to adduce evidence to establish the essential ingredient of the offence, that is, whether actual violence or threat of actual violence was used to obtain or retain the thing stolen. The nature of violence must also be proved. A pre-requisite for crime of robbery is that there should be violence to the person of the complainant. There must be evidence to establish that the appellant used, or threatened to use any actual violence to obtain the stolen property."

In the instant case, none of the witness called to testify has disclosed on how the appellant used or threaten to use force immediately before or after committing the alleged crime. Therefore, according to the principles laid down by the Court of Appeal as herein-above mentioned, in my view, the offence of Robbery with Violence was not proved to the required standard in the trial court.

That said and done, the appeal is allowed accordingly. Under the circumstances I quash the conviction and set aside the sentence meted. More so, I order that the appellant be set at liberty forthwith if he is not detained for other lawful cause.

DATED at **DODOMA** this 14th day of September, 2023

S. H. Hassan

JUDGE