IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF DODOMA

AT DODOMA

DC.CRIMINAL APPEAL NO.81 OF 2023

1. EMMANUEL ALFRED@ SOMBI
2. SELEMAN DAUDI@SABO..... APPELLANTS

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from Judgment of Singida District Court)

Dated 19th May, 2023

In

Criminal Case No. 76 of 2022

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JUDGMENT

Date of last Order: 31st October, 2023

Date of Judgment: 14th November,2023

SARWATT, J.:

In the District Court of Singida at Singida, the appellants **EMMANUEL ALFRED@ SOMBI and SELEMAN DAUDI@SABO,** together with two others, namely **THOMAS HANGO MWAI and GILIGAI JUMANNE**, stood charged with the offence of armed robbery contrary to section 287A of the Penal Code Cap. 16 R.E 2022, and they pleaded not guilty.

Briefly, the prosecution case was as follows: On the 11th May 2022, at about 3:00Hrs, SHABAN KHAMIS(PW1), a businessman dealing with selling crops such as maize and beans, was heading home for lunch in Misuna area after a long work. He was riding a motorcycle with registration No. MC 773 makes Haujue black color. Before reaching home at a corner, he met with two young brothers who stopped him and ordered him to drop down. He refused. They took a knife with the intent to stab him. He ran away toward his house while raising an alarm. One suspect ran away with the motorcycle, and another one with the knife followed him to his gate. He entered his house and closed the gate. His wife (PW2) and tenant came out and asked what happened. He narrated to them and told them that he identified the young men because they did not cover their faces.

PW4, namely H2582 D/C Firiud, interrogated the 4th accused, Gilgal Jumanne, and tendered a caution statement as exhibit P3, which shows that the 4th accused received the motorcycle from the 1st and 3rd accused persons and sold to Mwenda Ganzi (PW5). Thereafter, PW6 E 9937 D/SGT JUMA searched and found the stolen motorcycle with registration No. Mc 773 make Haujue to the house of PW5 and arrested him. PW7 also prepared a certificate of seizure, which was admitted as exhibit P5. PW3 Assistant Inspector Lukas Makaya conducted an identification parade and tendered an

identification register. The same was admitted by the trial court as exhibit P2. The prosecution also tendered a caution statement of the 4th accused (exhibit P3).

In their defence, each accused person, including the Appellants above, denied to have committed the offence.

At the District Court of Singida, the appellants (herein above) were convicted and sentenced to serve thirty (30) years imprisonment, and the two others were convicted and sentenced to serve three years imprisonment. The appellants herein above are aggrieved by both conviction and sentence meted by the trial court, and thus, they have preferred this appeal before this Court.

When this appeal came for hearing on 31st October, 2023 the appellants appeared in person without any representation, whereas the respondent, that is, the Republic, was represented by Ms. Bertha Kulwa, Learned State Attorney.

In supporting the appeal, the first appellant submitted that the evidence contradicts each other and that the charge sheet differs from the evidence testified by the prosecution witness. He added, while PW1 said was threatened by a knife, PW2 said her husband was threatened by a gun. He

submitted further that the identification parade was conducted against Rules 4 and 11 of the Police General Order. The appellant also submitted that the exhibit caution statement was admitted against sections 50,51 and 57(2) (a) (b) of the Criminal Procedure Act (CPA) Cap. 20 R.E 2022. To him, the caution statement was taken in the absence of his relative, and he requested for his relative.

Furthermore, he argued that exhibit P5, which is a search warrant, was signed at the police station instead of the scene of the crime, which is against section 38 of CPA, and also exhibit P6, which is the motorcycle, was admitted against the law. However, he stated that the evidence of prosecution does not show how the accused person was arrested. He then referred this Court to the case of **Abubakar Hamis v Republic, Criminal Appeal No. 253 of 2012 Court of Appeal** (unreported) page 31 to support his point.

The 2nd appellant had nothing to add. He joined hands with what was submitted by the 1st appellant.

Ms. Berta Kulwa, Learned State Attorney, partly supported the grounds of appeal except for the point of identification of the accused, as was conducted correctly. She stated that the Appellants had invaded PW1 in the afternoon and robbed a motorcycle. He added that the appellants were

arrested with the corporation of PW5, who was found with the stolen motorcycle. She further stated that, when arrested, the 4th accused at the trial court confessed that the appellants stole it. To her, the confession of the 4th accused led to the discovery of the stolen motorcycle. She furthermore stated that the motorcycle was seized at the police station instead of the place where it was found, as when the police went there, there was a burial ceremony going there. She concluded by submitting that, and the prosecution failed to prove the offence in as far as the stolen motorcycle is concerned, she thus supported the appeal.

In rejoinder, both Appellants had nothing to add.

Considering the grounds of appeal, submissions from parties, and the entire appeal record, the issue here for determining the appeal is whether the prosecution side proved their case beyond reasonable doubt.

To start with the provisions of sections 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 the case of **Sylvester Stephano v. R. Criminal Appeal No.527 of 2016** (unreported) and **DPP V. Peter Kibatala, Criminal, Appeal No. 4 of**

2015 Court of Appeal Dar es Salaam (unreported) on 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.*

In that legal position, the prosecution has the duty to prove the charge beyond reasonable doubt.

However, section 287A of the Penal Code, Cap 16 (R.E 2022), which the appellants were charged with, reads as follows:

> *"Any person who steal anything and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or robbery instrument; or is in company of one or more persons, and at or immediately before or immediately after the time of 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."*

According to the provision of the law above, it is clear that, for the offence of armed robbery to be established, there must be **one**, stealing, **two**, any dangerous or offensive weapon or instrument ought to be involved at, or immediately before or after such stealing and **three**, the person against whom the threat was directed must be mentioned.

Come to the case at hand, after perusal of the trial court records and reading the charge sheet, I found that in the charge, the particulars of the offence sufficiently disclosed all the essential ingredients of the offence of armed robbery. The charge mentioned that a motorcycle with registration No. MC 773DAG make HAUJUE valued Tshs. 2,600,000/= the property of SHABAN KHAMIS MBUA was stolen. The charge also stated that the weapon used was a knife, which is a dangerous weapon, and the person against whom the violence was directed was also mentioned.

The appellants in this appeal alleged that there are contradictions of evidence between the charge and the evidence adduced by the prosecution witness. After perusal of the trial record, I noted that PW1 testified that he was threatened by a knife while PW2(wife of PW1) stated that her husband was threatened by a gun. The records on page 9 reveal that:

"...They ordered me to drop down. I refused. They issued a knife with intent to stabbing me....."

However, the charge reads as follows:

"...being armed with an offensive weapon to wit; a knife...."

Furthermore, PW2, on page 14 of the trial proceedings, when she was cross-examined by the 2nd accused, she testified that:

"He said you threatened him by a gun."

It is a trite law that the consequence of variance between the evidence and the charge is that the prosecution case was not proved beyond reasonable doubt. See the Court of Appeal case of **Thabit Bakari vs. the Republic, Criminal Appeal No. 73 of 2019** (unreported).

As to the issue of identification, it is now a settled principle that before one can identify a suspect in the identification parade, he must describe such a person prior to identifying him. This was stated in the case of **Francis Majaliwa Deus and 2 Others v.Republic, Criminal Appeal No. 139 of 2005 Court of Appeal** (unreported). However, in the case of **REX V Mohamed bin Allui (1942)19EACA 72,** the Court also insisted on the

witness's importance in describing physical appearance, clothes worn by the suspect, and any other peculiar mark or identity.

Furthermore, in the case of **Emilian Aidan Fungo@ Alex and Another v Republic, Criminal Case No. 278 of 2009 Court of Appeal** (unreported), it was observed that:

> *"It is trite law that for any identification to be of any value, the identifying witness(es) must have earlier given a detailed description of the suspect before being taken to the identification parade."*

In the case at hand, PW1 did not give any detailed description of the 1st appellant at the time he wrote his statement to the police, which could have enabled him to identify the 1st appellant during the identification parade.

However, I agree with the parties' submissions that the identification parade did not comply with the law, which is Police General Order (PGO) 232. My perusal of the record of appeal on pages 17 to 18 has revealed that;

> *"PW3*
>
> *On 12/7/2022 at 10:00Hrs I was at the police station I was called by the OCCID who ordered me to conduct on identification parade*

for the suspects who were in lockup, the names of suspects were Seleman Daud and Emmanuel Alfred. The procedure for identification parade is guided by police general order 232. I was required to ask the suspects if they are ready for identification parade. I asked the accused who said they were ready for identification parade. I asked one police officer PC Yared to look for 10 people who resemble the suspects by appearance. He did so. I ordered him to remove the suspect and joined them with the 10 people. When he completed the procedure and lined them in queu. I went to the area and informed the people that there was a suspect of armed robbery and the complainant was about to identify the suspect. I asked them to choose positions they want to stand. They choose positions. When they finished, I asked CPL Waziri to bring the witness who was supposed to identify the suspects. He brought one Shabani Hamisi. I introduced myself to the complainant and informed him that he was supposed to walk Infront of the line and if he identifies his suspect, he should touch his right shoulder."

PW3 (Ass Insp Lucas Makaya), at the end of his testimony, prayed to tender the identification parade form, which the Court admitted as exhibit P2.

According to the above evidence, PW3 did not explain the rights of the suspects to the appellants as per the law required. However, the law requires after the party tender document before the Court, the same must be read out after being admitted. In the instant case, the identification parade form was read out after admission. This requirement of reading the document after it has been cleared for admission was stated in the case of **Robinson Mwanjisi and 3 Others v Republic (2003) TLR, 218**:

> *"Whenever it is intended to introduce any document in evidence, it should be cleared for admission and be actually admitted, before it can be read out."*

However, it was observed in the case of **Anania Clavery Betale v Republic, Criminal Appeal No. 355 of 2017 Court of Appeal** (unreported) that failure to read out exhibits admitted in Court after being cleared is improper as it becomes prejudicial. In the case at hand, the identification parade register was read over after being admitted before the Court as per Page 20 of the trial proceedings.

Regarding the cautioned statement that was taken in contravention of sections 50,51 and 57 of the Criminal Procedure Act (CPA), The provisions of section 50(1) provide that the cautioned statement be taken within four

hours from the time of arrest. It is on record that the 4th accused was arrested on 10th July 2022, and on 12th July 2022 at 05:30 Hrs, PW4 interrogated him after the expiry of four hours as required by section 50(1) of the CPA. Section 50(1) of the CPA provides that:

> ***50***.*-(1) For the purpose of this Act, the period available for interviewing a person who is in restraint in respect of an offence is-*
>
> *(a) subject to paragraph (b), the basic period available for interviewing the person, that is to say, the period of four hours commencing at the time when he was taken under restraint in respect of the offence;*
>
> *(b) if the basic period available for interviewing the person is extended under section 51, the basic period as so extended.*
>
> *(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence-*

(a) while the person is, after being taken under restraint, being conveyed to a police station or other place for any purpose connected with the investigation;

(b) for the purpose of-

(i) enabling the person to arrange, or attempt to arrange, for the Attendance of a lawyer;

(ii) enabling the police officer to communicate, or attempt to communicate with any person whom he is required by section 54 to communicate in connection with the investigation of the offence;

(iii) enabling the person to communicate, or attempt to communicate, with any person with whom he is, under this Act, entitled to communicate; or

(iv) arranging, or attempting to arrange, for the attendance of a person who, under the provisions of this Act is required to be present during an

interview with the person under restraint or while the person under restraint is doing an act in connection with the investigation;

In the instant case, I agree that the cautioned statement of the 4th accused was recorded out of four hours, which is the prescribed time as per the law.

I would also like to discuss the issue of chain of custody. The law is clear that the prosecution must exhibit the chronological account through documentation and/or paper trail or through an oral account on the seizure, custody, control, transfer, analysis, and disposition of the evidence. This was held in the case of **Paulo Maduka and 3 Others v Republic, Criminal Appeal No. 110 of 2007, Moses Mwakasindile v The Republic, Criminal Appeal No. 15 of 2017, Court of Appeal** (both unreported). However, there is an exception to that general rule according to the circumstances where the exhibit cannot change hands easily. The exhibit can be admitted in evidence and acted upon by the trial court. This position was stated in the case of **Joseph Leonard Manyota v The Republic, Criminal Appeal No.485 of 2015, Court of Appeal** (unreported) that:

> *"It is not every time that when the chain of custody is broken; then the relevant item cannot be produced and accepted by the Court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed or*

polluted and/or in any way tempted with. Where the circumstances may reasonably show the absence of such dangers, the Court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case."

Further, in the case **of Abas Kondo Gede v Republic, Criminal Appeal No. 472 of 2017, Court of Appeal** (unreported), it was stated that:

"Therefore, even where the chain of custody is broken, the court may still receive the exhibit into the evidence depending on the circumstances in every particular case provided it is established that no injustice was caused to the other party."

In this appeal, even though there was no account of how the motorcycle was stored or who kept it at the police station after being brought by the son of PW5, as testified by PW6, I am satisfied that, by its nature, it cannot easily change hands. I am of the view that the chain of custody was not broken, and the District Court correctly received exhibit P6 and acted upon it.

In view of what I have endeavored to explain, I find that the appeal has merit, and it is hereby allowed. I quash the appellant's convictions, and sentences are hereby set aside.

It is so ordered.

S.S. SARWATT

JUDGE

14/11/2023

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

S. S. SARWATT

JUDGE

14/11/2023