

IN THE HIGH COURT OF TANZANIA

TABORA SUB-REGISTRY

AT TABORA

DC CRIMINAL APPEAL NO. 13 OF 2023

(Originating from Criminal Case No. 9 of 2021 of Nzega District Court)

MACHIYA KAFULA @ LYUBA ----- 1ST APPELLANT

MASANJA NKUBA @ SHIMBA ----- 2ND APPELLANT

CHARLES JOHN @ KAROLI ----- 3RD APPELLANT

WILLIAM JEREMIAH ----- 4TH APPELLANT

JUMA SOSPITA MACHIBYA ----- 5TH APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

JUDGMENT

06/11/2023 & 30/11/2023

MANGO, J:

In the District Court of Nzega at Nzega (the trial Court), the appellants were charged with four offences to wit conspiracy to commit an offence c/s 312(1)(b) of the Penal Code [Cap 16 R.E 2019]; armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E 2019], Possession of Goods Suspected of having being stolen contrary to section 312 (1) (b) of the Penal Code [Cap 16 R.E 2019] and Causing Grievous Harm contrary to Section 225 of the Penal Code [Cap 16 R.E 2019].

It was alleged by the prosecution that, the Appellants together with other persons not a party to this appeal, on 06th day of January 2021 at Urasa area within Mambali Ward, Nzega District conspired to commit the offence of stealing. It was alleged

further that, on the following day, that is, 07th January 2021 during night hours at the same village they stole cash money Tsh 726,000, one Tecno mobile phone valued Tshs 80,000 and motorcycle keys the properties of Ufumbe s/o Kisinza. Immediately before and after the said stealing they used bush knives and heavy sticks against Ufumbe s/o Kisinza in order to obtain or retain the stolen items.

It was further alleged that subsequent to the said armed robbery one Jenipha d/o Jacobo was found in possession of the mobile phone which was alleged to be the one stolen from the victim.

Moreover, the allegations went further that on the same occasion the appellants unlawfully caused grievous harm to one Ufumbe s/o Kisinza @ Mapuri on various parts of his body.

After a full trial the appellants, with exception to Jenipha, were convicted and sentenced to serve 30 years imprisonment for the offence of armed robbery, one year imprisonment for each offence on Conspiracy and Grievous harm. Jenipha d/o Jacobo was convicted for the offence of Possessing goods suspected of having being stolen was discharged on condition that she should not commit criminal offence for the period of 12 months.

Aggrieved, the appellants appealed to this Court against the decision and sentence meted against them by the trial Court. The appeal is grounded on six grounds of appeal namely;

1. *That, the case for the prosecution was not proved against the appellants beyond reasonable doubt as required by the law*
2. *That PW2 in his testimony before the trial Court did not establish the ingredients of the offence of armed robbery*

namely use of weapon as required by section 287A of the Penal Code Cap 16 R.E 2022

- 3. That the appellants having established elements of torture the learned trial magistrate erred in fact and law to admit exhibit P2 collectively into evidence.*
- 4. That, the cautioned statements allegedly made by the appellants before PW7 (Exhibit P2 Collectively) upon which the learned trial magistrate placed much reliance in convicting the appellants (without warning himself) were made after expiry of the time prescribed in the law.*
- 5. That PW7 did not comply with the requirements of section 57 (4)(a) and (b) of the CPA.*
- 6. That exhibit P2 contains material falseness knowingly made by the maker on account of the number of invaders and weapons employed vis-à-vis the testimony of PW2 and that the prosecution did not remove the falsity from the body of the confession.*

During hearing the appellants appeared in person unrepresented while the Republic was represented by Ms Idda Lugakingira learned State Attorney. The appellants prayed the Court to consider their grounds of appeal to form part of their submissions and allow the respondent's attorney to submit first.

It was submitted by Ms Lugakingira that, the three elements that forms the offence of armed robbery was proved against the appellants because the victim himself proved the first element to the effect that, money and two phones were stolen from him and immediately after the incident of stealing he was stabbed on his

face by a heavy object the fact which was supported by the evidence of a doctor who examined the victim.

Regarding the offence of grievous harm Ms Lugakingira submitted that, the victim proved before the trial Court that he suffered grievous harm and his testimony was cemented by that of PW6 a medical doctor who examined him immediately after the incident. She added that, cautioned statements of all appellants prove that they conspired the fact that

As to the third ground of appeal where the appellants challenged the admission of exhibit P2, MS Lugakingira had firm standing that it was proved during the inquiry proceeding that the appellants were not tortured, none of them requested for treatment while in custody and all the statements were recorded on time, she prayed the Court to dismiss the grounds of appeal for being meritless.

Rejoining to the respondent attorney's submission, the second appellant stated that, the victim (PW2) proved to have been attacked but he didn't prove that he was attacked by the appellants and among nine prosecution witnesses, none of them identified the appellants to be responsible for the crime.

Regarding cautioned statements, the appellant stated that the same were obtained after being tortured and forced to sign without being afforded a chance to call a relative, lawyer or any other person therefore the cautioned statements were not properly taken.

Moreover, the second appellant displayed astonishment as the trial Court released other accused persons citing the reason that, their statements were acquired after the stipulated time limit.

He added that PW2 and her son stated at the Police station that one of the stolen phones was found at Jenifa's place but she was not called as a witness. He prayed the Court to allow the appeal.

On his part, the 1st respondent stated that the house of one Jeremiah William was searched, two mobile phones were found therein and PW2 identified the same to be her stolen properties but strangely the said Jeremiah William was not among the accused persons.

I have painstakingly gone through the records and the submissions made by the parties, the question for determination is whether the present appeal has merit. I will analyse each offence that the appellants stood charged in connection to the levelled grounds of appeal.

The appellants have lodged six grounds of appeal, however having carefully examined them I find that they can be paraphrased and merged into one ground that;

1. The case against the appellants was not proved beyond reasonable doubt

Starting with the first offence that the appellants stood charged, the prosecution alleged that on the 6th day of January 2021 at Urasa area and Village, Mambali Ward, Bukene division within Nzega District in Tabora Region the appellants conspired to commit an offence to wit Stealing.

Before I delve into the substance of the offence, I find it pertinent to make it clear that the offence of Conspiracy is created under section 384 of the Penal Code [Cap 16 R.E 2022] not section 312 (1) (b) as the charge stipulates. I assume that the appellants were not prejudiced by anyway because the particulars of the

charge underneath the statement of the offence constitutes the offence of conspiracy.

Assuming that the error was not apparent, section 384 of the penal Code states that;

384. Any person who conspires with another to commit any offence, punishable with imprisonment for a term of three years or more, or to do any act in any part of world which if done in Tanzania would be an offence so punishable, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of an offence, and is liable if no other punishment is provided, to imprisonment for seven years or, if the greatest punishment to which a person convicted of the offence in question is liable is less than imprisonment for seven years, then to such lesser punishment.

I have carefully gone through the entire evidence adduced by prosecution side there is no speck of evidence that states the appellants met somewhere and conspired to commit the offence of stealing. There is no evidence of conspiracy even from the conduct of the Appellants. On that basis I have the reason to believe that the offence of conspiracy was not proved beyond reasonable doubt by prosecution.

Moreover, in the case of **John Paulo @ Shida vs Republic (Criminal Appeal 335 of 2009)** [2011] TZCA 114 (24 March 2011) the Court of Appeal of Tanzania stated that;

... the first count is related to the second count in that it is alleged that the appellants and others conspired

to commit armed robbery which is the subject of the accusation in the second count. To this end the first count is cognate to the second count. That being the case, since the first count is similar or related to the second count, and therefore cognate for that matter, there was no need of preferring the two counts in the same charge.

Since conspiracy is an offence capable of standing by itself as it was alleged to have been committed on a different date before the commission of the target offence it was wrong for the prosecution to combine the two offences committed on different dates in one charge sheet.

Regarding the offence of armed robbery, I have paid good attention to the evidence adduced by the prosecution side and it is my considered view that; had the trial Magistrate carefully analysed the evidence adduced by the prosecution witnesses, he could have identified the discrepancies that exist between the evidence adduced by PW3, P4 and PW5 upon which the judgment was founded.

In the evidence, there are two versions of story upon which the appellants were said to have connection to the alleged act of armed robbery. PW3 one Asteria Francis a Village Executive Officer stated before the trial Court that she witnessed the search which was conducted in Jenipher's house wherein one mobile phone make Tecno was found, the victim identified the said phone to be the one that was stolen during the act of armed robbery.

The evidence adduced by PW4 one G. 3279 PC Alihafidh regarding the same phone contradicted the evidence of PW3. He

stated that they searched Jenipher's house and they did not obtain anything. Stating about the same phone PW4 narrated that it was obtained upon setting a trap and the same was bought from Jenipher. see page 23 of the typed proceedings

"the said young person was used to trap Jenipher by buying the said phone, he did that, he came with said phone after the agreement with Jenipher"

Another piece of evidence that cemented the discrepancy is the evidence of PW5, at first during examination in chief PW5 stated that the mobile phone that they obtained from Jenipher's home is connected to the act of armed robbery but in the same speech this witness contradicted himself by stating that he is the one who arrested Jenipher Jacob but the phone was obtained from the buyer who bought it from Jenipher.

The question that pops in my mind is whether the cited discrepancy render the testimonies of the said witnesses and the admitted exhibit unworthy. The Court of Appeal of Tanzania in ***Dickson Elia Nsamba Shapwata and Another vs Republic*** (Criminal Appeal 92 of 2007) [2008] TZCA 17 (30 May 2008) while defining the terms Normal discrepancy and Material discrepancy quoted the writing of Sarkar, **The Law of Evidence** 16th edition, 2007, which says

"Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time due to mental disposition such as shock and horror at the time of the occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are

those which are not normal and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a parties case, material discrepancies do."

In the case at hand, it is my considered view that the discrepancies that exist in the prosecution evidence are material directly affecting the credibility and reliability of PW3, PW4 and PW5 making their testimonies unworthy.

In their submissions, the defendants faulted the trial Magistrates for not considering the anomalies that exist in exhibit P2 (Cautioned statements) and founding a base on the same for their conviction.

Starting with the alleged anomalies, it is evident in the record as exhibited by exhibit P2 that the 4th and 5th appellants were arrested in Arusha region and immediately after their arrest they were taken to Ngaramtoni Police station but their statements were recorded after they had been transferred to Nzega contrary to section 50(1) (a) and (b) of the Criminal Procedure Act Cap 20 R.E which provides;

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.

In the statement of Juma Sospita Machiba he stated that, I quote;

"Tukiwa Arusha tulikamatwa na ndugu yake na William na kutupeleka Polisi Ngaramtoni Arusha na Baadaye tuliletwa hapa Polisi Nzega"

Also, in the statement of William Jeremia he narrated that

"Baada ya siku mbili tulikamatwa na kuwekwa polisi Arusha kisha tulifuatwa na askari wa Polisi Nzega"

Taking a note from the above quoted statements and in absence of evidence showing a prayer for extension of time under section 50(1) (b) of the CPA it goes without saying that the two statements were recorded far beyond the basic period set under section 50 (1) of the Criminal Procedure Act, therefore, the only option I have in hand is to expunge the same from the record as I hereby do.

After expunging the two cautioned statements from the record, the question is whether the remaining evidence is sufficient for holding the appellants accountable for the offence of armed robbery. It is worth noting that the trial magistrate relied on cautioned statements in convicting the appellants, the statements which were objected during trial.

In **Hemed Abdallah vs Republic** [1995] TLR 172 the Court of Appeal of Tanzania observed that;

"It is trite law that generally it is dangerous to act upon a repudiated or retracted confession unless it is corroborated in material particular or unless the court

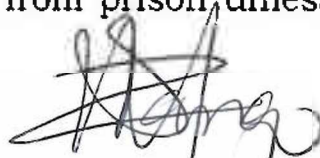
after full consideration of the circumstances is satisfied that the confession cannot but be true."

Blending the facts of this case to the position of the law observed by the Court of Appeal of Tanzania in the above cited case it is obvious that the prosecution evidence was not strong enough to ground conviction against the appellants for the offence of armed robbery because there is no evidence on record that corroborates the repudiated confessions of the appellant therefore that evidence alone cannot hold the pillar of conviction.

As to the offence of Grievous harm, this Court has in numerous occasions decided that it is wrong and contrary to the principle that prohibit duplicity to charge the accused persons for offence of grievous harm when committed in the course of armed robbery, the same cannot stand alone. Armed robbery entails all the use of violence by offensive weapons that might include grievous harm.

In the circumstances, I find that the prosecution failed to prove the case against the appellants beyond reasonable doubt therefore the appeal is allowed. The appellants conviction and sentence meted against them in three counts is set aside. I order their immediate release from prison unless held for other lawful cause.




Z. D. MANGO
JUDGE

30/11/2023

Date: 30/11/2023

Coram: Hon. N. W. Mwakatobe, DR

Appellants: Present

Respondent: Idda Lugakingira, State Attorney


B/C: Grace Mkemwa, RMA

Court: Judgment is delivered in chamber this 30th day of November, 2023
in presence of appellants and Idda Lugakingira (State Attorney) for Republic

Order

- Right of appeal is hereby explained




N. W. MWAKATOBÉ
DEPUTY REGISTRAR
30/11/2023