IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TABORA SUB-REGISTRY
AT TABORA
DC. CRIMINAL APPEAL NO. 35 OF 2023
(Arising from Criminal Case No. 05 of 2022 in the District Court of Tabora)

ASEDI BAKARI..... 1ST APPELLANT
SWEDI NASSIBU..... 2ND APPELLANT
RAMADHAN MUSSA..... 3RD APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: 08/04/2024
Date of Judgment: 13/05/2024

KADILU, J.

The appellants namely, Asedi Bakari, Swedi Nassibu, and Ramadhani Mussa were arraigned before the District Court of Tabora facing the charge of armed robbery contrary to Section 287A of the Penal Code, [Cap. 16 R.E. 2019]. It was alleged in the particulars of the offence that, on the 13th day of December 2021 during night hours in Mwinyi area within Tabora Municipal in Tabora Region, the appellants did steal TZS. 42,500/=, a Techno mobile phone worth Tshs 47,000/=, all valued at Tshs. 89,500/= the property of one Abdallah Mihayo, and at, or immediately before stealing threatened and injured the said Abdallah Mihayo using a machete in order to obtain and retain the stolen properties.

When the charge was read over and explained to the appellants, they all dissociated themselves from having committed the charged offence. The prosecution paraded four witnesses and tendered an identification parade register (Exhibit P1). The appellants fended

themselves and had no other witnesses or exhibits to tender. After a full trial, the appellants were convicted as charged and sentenced to serve thirty (30) years imprisonment each. Aggrieved by the decision of the trial court, they filed a joint petition of appeal containing six grounds as follows:

1. *That, the case for the prosecution was not proved against the appellants beyond reasonable doubt as required by the law.*
2. *That, the learned trial magistrate erred in fact and law to find and hold that the ingredients of the offence of armed robbery were established by the prosecutions in the absence of both the alleged weapon used and, or the medical examination report (PF3) issued to PW1.*
3. *That, the circumstances obtaining at the scene of the crime as testified by PW1 and PW2 were such as could not enable positive identification of the suspects.*
4. *That, the identification parade allegedly conducted by PW3 in the circumstances put by PW1 was extrajudicial and unnecessary since PW1 could not be set to identify a person familiar to him.*
5. *That, the identification parade was not properly conducted and that its register (PF 184) was not tendered in court as exhibit.*
6. *That, the person who arrested the appellants was/were not summoned to testify whether their arrest had any connection with the offence charged since the appellants completely dissociated themselves and attributed their arrest to causes not related to the charged offence.*

When the matter was called on for hearing, the appellants appeared in person while the respondent was represented by Ms. Tunosye Luketa, learned State Attorney. The appellants simply adopted their grounds of appeal for consideration by the court. The first appellant added briefly on behalf of them all that, since they were charged with armed robbery, the weapons used were supposed to be tendered by the prosecution

witnesses. He argued that in the absence of those weapons, their conviction and sentence become unjustified.

He contended more that the victim told the court the incident occurred at *Mwisho wa Lami Makaburini* but PW2 stated that it occurred around *Mwinyi* Secondary School. According to him, they did not know PW1 before he testified in court, but the identification parade that was conducted affected them because PW1 said the first appellant was a motorist (*boda-boda)* whereas he was a businessman selling fruits. Concerning the fifth ground of appeal, they insisted that the identification parade was not conducted properly and no exhibit that was tendered in court to show that the parade was conducted according to the law. Regarding the sixth ground, the 1st appellant submitted that if the prosecution had concrete evidence that the appellants committed the offence, it could have produced it in the trial court, which it did not.

Submitting against the appeal, the learned State Attorney stated that the first ground of appeal is baseless because the prosecution proved its case through 4 witnesses and one exhibit. She argued that the law does not compel the prosecution to produce a certain number of witnesses or exhibits to prove any fact. She referred to Section 143 of the Evidence Act, [Cap. 6 R.E. 2022].

On the second ground of appeal, the learned State Attorney submitted that the non-production of the weapon used in armed robbery does not mean that the offence was not committed. According to her, proof of the crime does not depend on the production of the weapon used

or a PF3 because the evidence presented by prosecution witnesses showed clearly that the appellants used weapons in committing the charged offence.

Concerning the third ground of appeal, the learned State Attorney argued that from pages 12 to 13 of the trial court's proceedings, it is shown that the 1st appellant was identified very well as the victim was familiar with him and he mentioned him by his name. With regard to the identification parade, Ms. Tunosye conceded that in the circumstances, the identification parade was unnecessary. She added that although it was conducted, it did not prejudice the appellants in any way because PW1 mentioned the 1st appellant even before the identification parade was held.

About the fifth ground of appeal, the State Attorney argued that the identification parade was conducted according to the PGO, and the identification parade form was tendered as the only exhibit in this case. She thus, opined that the fifth ground of appeal is also baseless. On the last ground of appeal, the learned State Attorney submitted that the prosecution was not bound to call a witness who did not consider his evidence as essential. Therefore, the witnesses called by the prosecution were sufficient to justify the conviction of the appellants. According to Ms. Tunosye, the arresting officers' testimonies could not add any value because the appellants admitted during the preliminary hearing that they were arrested and arraigned in court.

I have considered submissions made by both parties, grounds of appeal, and the trial court's record. I will start with the second ground of

the appeal. I have pointed out that the appellants were charged for contravening the provisions of Section 287A of the Penal Code which stipulates as hereunder:

> *"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."*

Thus, to secure a conviction under Section 287A of the Penal Code, the prosecution must prove that there was theft, the thieves were armed with dangerous or offensive weapons or instruments, and that at or immediately before or after stealing, they used or threatened to use violence to any person to obtain or retain the stolen property. *See* the case of ***Shabani Said Ally v R.,*** Criminal Appeal No. 270 of 2018, Court of Appeal of Tanzania at Mtwara. In the case at hand, PW1 informed the trial court that during the incident, the appellants assaulted him using a club (*rungu*) and machete forcing him to give them TZS. 42,500/= and a mobile phone worth TZS. 47,000/=.

I wish to observe albeit in passing that in the present case, the prosecution did not lead any piece of evidence in proving theft. I hold this view after having examined the proceedings of the trial court and found nothing establishing that the victim (PW1) was the owner of the said Tecno mobile phone and the TZS. 42,500/=. In ***Ally Said @ Tox v R.***,

Criminal Appeal No. 308 of 2018, Court of Appeal of Tanzania at Dar es Salaam, held *inter alia* that:

> *"It is trite law that the offence of armed robbery is not complete unless there is proof of key ingredients namely; stealing facilitated by the use of actual or threat of violence by the perpetrator at or immediately thereafter using any dangerous or offensive weapon or instrument or by the use of or a threat to use actual violence to obtain or retain the stolen property."*

The appellants have complained that the weapons allegedly used in the commission of armed robbery were not presented in evidence during the trial. They argued more that the victim testified that he was wounded during the incident and was given a PF3, but the same was not produced in evidence. The State Attorney responded that failure to tender weapons used in armed robbery does not mean that the offence was not committed. It should be noted here that it is not a legal requirement that in proving armed robbery, the prosecution must tender the weapons used. Nonetheless, the prosecution should show that efforts were made to secure the alleged weapons but proved futile. The position was stated in ***Daniel John Mwakipesile v R.,*** Criminal Appeal No. 449 of 2019, Court of Appeal at Mbeya:

> *"... it is not always that exhibits have to be brought in court to prove an offence. The act of not tendering a weapon in court does not amount to failure on the prosecution side to prove the case beyond reasonable doubt. The prosecution can still be able to prove a case of armed robbery even without tendering the weapon used in court,* ***especially when the weapon is nowhere to be found,*** *but there is some other evidence connecting the accused to the crime charged."*

In the instant matter, the record is silent whether the alleged weapons were found on the crime scene or the appellants were searched and the said weapons were retrieved from them. Worse still, there is no clue about the whereabouts of the club or a machete alleged to have been used by the appellants in committing armed robbery. As for the PF3, I fail to comprehend the appellants' complaint because armed robbery may be proved even without any injury to the victim. A mere threat to use violence suffices. Notwithstanding, I am unable to agree with the learned State Attorney's view that the circumstances of this case did not need the tendering of weapons allegedly used by the appellants in the commission of armed robbery. I thus, find the second ground of the appeal meritorious and I allow it.

I will determine collectively the third, fourth, and fifth grounds of appeal in which the complaint is on the identification of the appellants. This point shall not detain me much as the parties are in agreement that the identification parade was unnecessary in this case. It is undisputed that the decision to conduct an identification parade in a specific case depends on the circumstances and evidence available. PGO No. 232 of the Police Force and Auxiliary Services, 2021 does not tell much as to when it is necessary to conduct the identification parade. Section 60 (1) of the Criminal Procedure Act [Cap. 20 R.E. 2022] makes it optional for any police officer investigating the offence to hold an identification parade to ascertain whether a witness can identify a person suspected of the commission of an offence.

So, whether an identification parade is necessary in a particular case, depends on whether a person allegedly identified and the identifying

person did not know each other before the incident. Suppose the two were familiar with each other before the occurrence of a crime, an identification parade becomes unnecessary because the essence of conducting an identification parade is to avoid the mistaken identity of the accused. In the case at hand, PW1, PW2, and the appellants were the only persons who were present at the crime scene. As such, PW1 and PW2 alone were in a position to recognize the appellants in connection with the crime because the appellants were not arrested at the scene.

PW1 and PW2 testified during the trial that they were familiar with the 1st and 2nd appellants before the date of the complained incident. They explained that they knew each other since the appellants were the motorists whereas PW1 and PW2 were *bajaji* drivers and they used to pack at nearby places. I thus, agree with the submissions by the parties that the circumstances of this case did not need the identification parade to be conducted. For these reasons, the questions as to whether the identification parade was conducted according to the law and whether or not the identification parade form was tendered in evidence, become irrelevant. To this end, I allow the third, fourth, and fifth grounds of appeal.

On the sixth ground of appeal, the appellants contended that a person who arrested them was not summoned to court to testify on whether their arrest had any connection with the offence charged since they associated the arrest with causes not related to armed robbery. Ms. Tunosye argued that the prosecution was not bound to summon a particular number of witnesses to prove their case. She challenged the

appellants' argument by referring to Section 143 of the Evidence Act, [Cap. 6 R.E. 2019]. In her view, the arresting officers were not material witnesses for the prosecution particularly because no cautioned statement was tendered.

In ***Azizi Abdallah v R.***, [1991] TLR 71, it was stated that:

"The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

I fully agree with the stated position of the law by Ms. Tunosye, that under Section 143 of the Evidence Act, there is no particular number of witnesses required to prove a fact. However, in the case of ***Wambura Marwa Wambura v R.***, Criminal Appeal No. 115 of 2019 the Court of Appeal held that whether or not to call a certain person as a witness depends on the circumstances of each case and the relevance of the evidence of such witness to a case. It was stated further that, Section 143 of the Evidence Act was not intended and cannot be applied as a readymade answer to every question regarding failure to call a witness(s).

In the present case, the appellants claimed they were arrested by the police officers and taken to Tabora Central Police Station where their cautioned statements were recorded. In such a situation, one of the police officers who arrested the appellants needed to be called as a witness as rightly submitted by the appellants. I think any of the arresting police officers was a material witness who could tell the court whether or not

the appellants were arrested in connection with armed robbery or other offences they had alleged. In the absence of the said material witness, I have no hesitations in finding that in the circumstances of the present case, the police officer was a material witness and the prosecution was duty-bound to call him as a witness.

This is because the law is settled to the effect that if in a case a certain witness is considered to be material, it shall then have adverse consequences for the party failing to call such a witness without plausible explanations. *See* the case of ***Hemed Said v Mohamed Mbilu*** [1983] TLR 113. For failure to summon material witnesses, I find the sixth ground of appeal meritorious so, I allow it.

Considering the discussion above, I am of the view that the prosecution did not prove the case against the appellants beyond reasonable doubt. In the final analysis, the appeal succeeds. The conviction of the appellants and sentence are hereby quashed and set aside. I order their immediate release from the prison custody unless held for some other lawful cause. The right of appeal is fully explained to any party aggrieved by this decision.

It is so ordered.

KADILU, M.J.,
JUDGE
13/05/2024

Judgement delivered in chamber on the 13th Day of May, 2024 in the presence of appellants and Ms. Suzan Barnabas and Ms. Aziza Mfinanga (State Attorneys).

KADILU, M. J.
JUDGE
13/05/2024