IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IRINGA SUB - REGISTRY

AT IRINGA

CRIMINAL APPEAL NO. 64 OF 2023

(Originating from the District Court of Iringa at Iringa
in Criminal Case No. 72 of 2022)

GODFREY WILLIAM LUGONGO ..... 1ST APPELLANT

SEIF SAID MOKEA ..... 2ND APPELLANT

DAUD LAMECK CHUBWA ..... 3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of last order: 06/05/2024
Date of Judgement: 29/05/2024

LALTAIKA, J.

The appellants herein **GODFREY WILLIAM LUGONGO, SEIF SAID MOKEA** and **DAUD LAMECK CHUBWA** were arraigned in the District Court of Iringa at Iringa charged for two counts of 1. Armed Robbery contrary to section 287A of the Penal Code Cap 16 RE 2019 (for all accused persons)

and 2. Neglect to Prevent Offence contrary to section 383 and 35 of the Penal Code (supra) for the 2nd Appellant.

When the charge was read over and explained to the appellants (then accused), they denied wrongdoing. This necessitated the conducting of a full trial. To prove the allegations, the prosecution paraded a total of seven (7) witnesses. Halfway through the trial, the learned trial Magistrate made a finding that the Appellants had a case to answer. They were placed on the witness box as the only defense witnesses.

On 8/6/2023, upon completion of the trial the trial Court reduced the offence of armed robbery to breaking into a building and committing an offence therein contrary to section 296 of the Penal Code (supra). The appellants were then convicted and sentenced to 5 years imprisonment for the first count and the 2nd appellant was sentenced to 2 years for the second count.

Dissatisfied, the appellants have appealed to this court on five grounds and later added additional nine (9) grounds. For reasons that will become apparent shortly, I choose not to reproduce the grounds.

When the appeal was called on for hearing on the **6th of May 2024**, the appellants appeared in person, unrepresented. The respondent Republic, on the other hand, appeared **through Mr. Nashon Simon**, learned State Attorney.

The first appellant submitted in support of the appeal on behalf of the other appellants, stating that they had submitted five original grounds and later added nine more, which were joint grounds. The first appellant began with the original grounds.

The first ground concerned a defective charge sheet. The appellants were arraigned in court for armed robbery but were convicted under section 300 on the allegation that a minor offense was proved. The appellants believed this minor offense was not proved because they were not identified.

For the second ground, the complaint was about poor identification. The first appellant decided to skip this and address it while arguing the eighth additional ground. The third ground concerned the lack of exhibits to prove the offense. The first appellant was never found with anything, and although it was alleged that the other accused persons were found with stolen items, these items were never tendered in court as exhibits.

The fourth ground asserted that the trial court erred in law and fact by failing to consider that the arresting officer was also the one who recorded the cautioned statement. The appellants were arrested by more than one police officer. On the fifth ground, the appellants decided to abandon it.

The first appellant then addressed the additional grounds. He averred that the appellants were arraigned in court for armed robbery and were sentenced to a five-year jail term after a full trial, with the second appellant receiving two additional years for failure to prevent a crime.

In the first additional ground (AG1), the first appellant claimed that the trial court used extraneous issues in its decision, as seen on pages 11 and 12 of the proceedings. The learned trial magistrate wrongly asserted that the defense agreed the evidence was on housebreaking for the purpose of committing an offense and falsely stated that PW5 had arrested the appellants. On AG2, he asserted that the trial court erred in convicting the second and third appellants without an independent witness to the search, as required by the warrant submitted as exhibit P2 by PW5, a police officer.

AG3 involved the reliance on unreliable and contradictory evidence from PW1. This witness described a suspect as tall and light-skinned, which

did not match any of the appellants. Furthermore, PW1 did not mention the intensity of the light or the physical description of the person. On page 16, PW2 mentioned sufficient lighting due to electricity, making the place appear like daylight but admitted failing to properly identify the persons. On page 39, PW5 claimed to have found people masked and unmasked them, contradicting PW1 and PW2 who said they unmasked themselves without police assistance.

AG4 concerned the cautioned statement of the first appellant admitted as PW3. Since it was retracted, the first appellant asserted, the court was supposed to conduct a trial within a trial, which it did not. Additionally, the learned trial magistrate failed to comply with section 169 of the Criminal Procedure Act Cap 20 RE 2022. The cautioned statement, used by the magistrate, was not about the offense of armed robbery. There was also a contradiction on page 44 regarding the time of the first appellant's arrest, indicating the statement was recorded out of time.

AG5 involved the reliance on the statement of the landlord without summoning him to court. The trial court gave weight to this evidence without

any employment contract of PW3 or certificates proving PW2's employment and training as a security guard, relying instead on a job application letter.

AG7 argued that the trial court erred in convicting the second appellant for two counts, ignoring the impossibility of committing theft while also preventing a crime. There was no documentary evidence proving the second appellant was at the crime scene.

AG8, combined with the second original ground, highlighted the lack of an identification parade to clear doubts about the appellants' identification. The features described by PW1 did not match any of the appellants, and PW2 also failed to identify the culprits, as noted on pages 12 and 16 of the trial court's proceedings.

AG9 complained about the trial court's failure to consider the defense evidence. The defense evidence, referenced on pages 71 (PW1), 75 (PW2), and 81 (PW3), was referred to in a reverse manner in the judgment. The first appellant prayed that the appeal be allowed.

The second appellant added that he was never employed by anyone and was surprised to be charged with failure to prevent a crime as if he were a watchman. He supported the first appellant's arguments and added that

the trial magistrate failed to ensure the landlord was summoned to prove the ownership of the searched room. The second appellant also mentioned that no employment contract was tendered to prove his employment and reiterated the error in convicting him for theft and preventing a crime simultaneously. There was no evidence of his presence at the crime scene. PW4, the petrol station manager, and PW3, the security company manager, failed to recognize the appellants or prove PW2's employment at the petrol station. The second appellant's sentence was to run concurrently.

The third appellant pointed out that PW1 and PW2 described the invaders as brownish, indicating that none of the appellants matched this description, as noted on pages 12 and 16 of the proceedings.

Taking up the podium, Mr. Simon, the learned State Attorney for the Respondent, supported the appeal. He concurred with the appellants' submissions for the following reasons:

Identification: Mr. Simon argued that the prosecution failed to prove the identity of the culprits, as demonstrated on page 2 of the typed proceedings. This failure, reasoned Mr. Simon, was further corroborated by the testimony of PW2 on page 16 of the proceedings of the trial court. He

cited the case of **Waziri Amani v. Republic** [1980] TLR 250, where the court emphasized the importance of proper identification, stating that the evidence of identification must be watertight to sustain a conviction.

Failure to produce relevant exhibits: Mr. Simon highlighted that the prosecution failed to produce the items claimed to have been found in the appellants' house after a search, as stated by PW3. The absence of these crucial exhibits, reasoned Mr. Simon, undermined the prosecution's case. He referenced the case of **Paulo Maduka and 4 Others v. Republic** [2007] TLR 188, where the court held that failure to tender exhibits casts doubt on the prosecution's evidence.

Failure to summon a material witness: Mr. Simon pointed out that the prosecution did not summon an independent witness who had witnessed the search. The learned State Attorney considers this "a critical oversight." He cited the case of **DPP v. Peter Kibatala** [2008] TLR 348, which established that the failure to call a material witness without a sufficient explanation can lead to an adverse inference against the prosecution.

Reduction of the offense: Mr. Simon argued that the reduction of the offense from armed robbery to breaking into a house was inappropriate. He

stated that it would have been more logical to reduce it to robbery with violence. He referenced the case of **Ali Mohamed v. Republic** [1994] TLR 207, where the court emphasized that the nature of the offense must be accurately reflected in the charges and subsequent conviction.

Irregularity in proceedings: Mr. Simon observed that the proceedings did not indicate that the cautioned statements were read out before being admitted, as shown on pages 47 and 59 of the impugned trial court's proceedings. He argued that this omission constituted a procedural irregularity that affected the fairness of the trial. To buttress his argument, the learned State Attorney cited the case of **Twaha Ally and 5 Others v. Republic** [2004] TLR 250, which stressed the necessity of reading out cautioned statements in court to ensure the accused fully understands the evidence against them.

Based on these reasons, Mr. Simon prayed that the entire appeal be allowed. He emphasized that the cumulative effect of these issues undermined the integrity of the trial and warranted the overturning of the convictions and sentences.

When the appellants were asked if they had any rejoinder to make, they were in total shock. Apparently, they did not expect that Mr. Simon would support their appeal. Had the appellants (or this court) knew what was in store, the proceedings would have been much shorter if not outrightly (and deliberately) truncated to reduce the appellant's submission.

Be it as it may, concurrence between the appellants and counsel for the respondent notwithstanding, this court is duty bound to play its part as an appellate court by reevaluating the evidence adduced in the trial court and come up with its own position if necessary (see the Court of Appeal of Tanzania's case of **Leornard Mwanashoka v. Republic** Crim Appeal No 226 of **2014 CAT**, Bukoba).

Apparently, not many people know that it is equally wrong to acquit a guilty person as it is to convict an innocent one. The Bible states clearly: **"Acquitting the guilty and condemning the innocent, the Lord detests them both."** (See Proverbs 17: 15)

After careful consideration of the submissions and the record of the trial court, I entertain no doubt that the the identification evidence provided by PW1 and PW2 was insufficient to establish the appellants' identity beyond

a reasonable doubt. This failure is critical as proper identification is paramount in criminal cases (see **Waziri Amani v. Republic** [1980] TLR 250).

As correctly argued by Mr. Simon, the prosecution's failure to produce the items allegedly found in the appellants' house significantly undermines the case against them. The importance of exhibits in proving the prosecution's case cannot be overstated. I should also add that the failure to read out the cautioned statements before admission into evidence constitutes a procedural irregularity that affects the fairness of the trial. See **Twaha Ally and 5 Others v. Republic** (supra). The Court of Appeal of Tanzania have been emphatic on the importance of observing tenets of fair trial especially in the lower courts.

Given the numerous deficiencies in the prosecution's case, including the defective charge sheet, insufficient identification, lack of exhibits, failure to summon a material witness, improper reduction of the offense, and procedural irregularities, this court finds that the convictions and sentences of the appellants cannot be sustained.

In the upshot, I allow the appeal. I quash convictions and set aside the sentences. I hereby order that the Appellants **GODFREY WILLIAM LUGONGO, SEIF SAID MOKEA** and **DAUD LAMECK CHUBWA** be released from prison forthwith unless lawfully held for other reasons.

It is so ordered.

E.I. LALTAIKA
JUDGE
29/05/2024

Court

Judgement delivered under my hand and the seal of this Court this 30th day of May 2024 in the presence of **Ms. Muzzna Mfinanga**, learned State Attorney for the Respondent and the Appellants who have appeared in person, unrepresented.

E.I. LALTAIKA
JUDGE
29/05/2024