IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB- REGISTRY OF MANYARA)

AT BABATI

CRIMINAL APPEAL NO. 113 OF 2023

(Appeal from the conviction and sentence of the District Court of Mbulu in Criminal Case No. 85 of 2019 Hon. V. E. Kapugi-RM dated 19th May 2020)

PETRO SAFARI @ MANYIKA .....1ST APPELLANT

FRANK PETRO @ KALASONGO.....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

Date of Last Order: 7/2/2024

Date of Judgment: 16/2/2024

JUDGEMENT

MAGOIGA, J.

Petro Safari @ Manyika and **Frank Petro @ Kalasongo (**hereinafter referred as the first and second appellants respectively) were arraigned before Mbulu District Court (hereinafter referred to as the trial court) with armed robbery contrary to section 287A of the Penal Code CAP 16 R.E. 2002 now RE 2022].

The appellants pleaded not guilty, hence, full trial ensued, in which, in attempt to prove the case against the appellants, the prosecution called a

total of six witnesses and tendered several exhibits. The appellants were the sole witnesses for the defence. The appellants were eventually found guilty as charged and convicted for custodian sentence of 30 years imprisonment. Aggrieved with both conviction and sentence, are now appealing against the trial court's decision.

A brief factual background leading to the arraignment of the appellants before the trial court as could be gathered from the record goes thus; on 12th day of August, 2017 at Ayabale area within Mbulu district in Manyara region, the appellants did steal cash Tshs.230,000/=, one cellular phone make Itel valued at Tshs.60,000/=, one cellular phone make Tecno valed at Tshs.30,000/= and one jacket valued at Tshs.10,000/= the properties of HAW DAGHARO and immediately before or immediately after such stealing did cut him on head by using machete in order to obtain the said properties.

The prosecution case was that, PW1 used to do business of carrying passengers using a motorcycle popularly known as *bodaboda.* On 12/8/2017 he was hired to carry the appellants to a nearby village. While on the way, the second appellant asked PW1 to stop for a while so that the former could go for a short call.

PW1 heeded to the second appellant's demand and stopped the motorcycle. All over sudden, one person by the name Abas Pande (not in this appeal and who remained at large to date) emerged from the bush and started cutting PW1 on his head. PW1 stated that the first appellant ordered him to hand whatever he had in possession. PW1 accounted that two of his mobile phones make Itel and Tecno respectively were taken together with jacket and Tshs 230,000/= from him.

According to evidence on record, PW1 managed to outrun the robbers and raised an alarm which was responded by PW4 and he was able to see the second appellant holding a machete. In the course of escaping the scene of crime, the second appellant dropped his sheet commonly referred to as *mgololi* and the same was tendered as exhibit before the trial court.

PW3 and PW6 told the trial court that they recorded the cautioned statements of the second and first appellants respectively in which the appellants claimed to have admitted to have committed the offence with which they stood charged.

On defence the appellants flatly denied to have committed the offence at hand. After a full trial, the trial court was convinced that the case against

appellants was proved beyond reasonable doubt hence it convicted and sentenced them to 30 years imprisonment. The trial court also ordered the appellants to refund PW1 a total of Tshs. 330,000/= being the value of the stolen property.

The appellants were aggrieved with the conviction and sentence meted out against them hence they preferred the instant appeal with 12 grounds of appeal. However, after a careful scrutiny the 12 grounds can be reduced to 6 grounds as follows;

1. *That there was variation between the charge and evidence adduced regarding the date on which the offence was committed.*
2. *Exhibit PE1 was not read after admission.*
3. *Exhibits PEII and PEIII were wrongly admitted.*
4. *The case against the appellants was not proved in which, there was no proof and description of the items alleged to have been stolen, the identification evidence against the appellants was insufficient and unreliable.*
5. *The appellants' defence was not considered.*
6. *The judgment of the trial court is contradictory.*

When the appeal was called on for hearing, the appellants appeared in person and unrepresented while Mr. Benedict Kapela, learned State Attorney represented the respondent.

However, I have noted in the course of composing this judgement that the appellants four times preferred Miscelleneous Criminal Applications for extension of time to appeal as follows: **one,** In Misc. Criminal Application No.28 of 2021 which was before his lordship Robert, J but which was withdrawn on 02/09/2021; **two,** Miscellaneous Criminal Application No. 06 of 2022 before her ladyship Kamuzora, J which was granted on 17/05/2022 for appealing to this court. However, what befallen that intended appeal or an extension is not known; **three**, Misc. Application No.18 of 2023 before his lordship Kahyoza, J which was struck out on 31/05/2023 and the fourth one, is Misc. Application No. 30 of 2023 before me which was granted on 10/10/2023 leading to this appeal. I have given this account on the reason that the appellants were not candid in their last Misc. Criminal Applications a fact which could have denied them an extension of time.

When availed chance to argue their grounds of appeal, the appellants just prayed for the court to adopt their grounds of appeal and decided against the weight of evidence on record. They had nothing of substance to add.

On his part, Mr. Kapela for the Republic, strongly opposed the appeal.

As to the first ground of appeal, the learned State Attorney argued that there was no any variation between the date on which the offence was committed. He argued that the charge sheet indicated the offence was committed on 12/8/2017 but the dates indicated on the typed judgment showing that the offence was committed on 12/8/2019, which, according to the learned Attorney, was just a typing error.

I have keenly gone through the record, indeed the date the offence was alleged to have been committed was on 12/8/2017 and all properties stolen were clearly stated in the charge sheet contrary to what the appellants alleges. This was so clearly stated in the charge sheet as well as by oral account of PW1, PW2 and PW4. I, therefore, agree with the learned State Attorney that the date 12/8/2019 was typing error on the judgment but the proceedings stated the correct date as in the charge sheet. Suffice it to say, I find the first ground of appeal is wanting in merits and it is accordingly dismissed.

As to the second ground of appeal whose complaint was that exhibit PE1 was not read out in court after its admission and prayed for its expulsion

from the records. In this ground, the learned State Attorney readily admitted that exhibit PEI was not read after being admitted. To this he urged the court to expunge it from the record but was quick to point out that despite the expunging exhibit PE1, there was still ample evidence on record that all ingredients of armed robbery were proved which are: stealing, use of dangerous weapon and use of violence. In support of the above stance, the learned Attorney cited the case of **Amos Sita @ Ngili Vs. Republic,** Criminal Appeal No. 438 of 2021 (CAT) (unreported).

As such guided by the above stance, pointed out that the evidence by PW5 at pages 31-33 showed that the victim was injured and the oral testimonies of prosecutions witnesses all proved that armed robbery was committed by the appellants. On the above reasons, the learned Attorney invited this court to find that the second ground of appeal is without any useful merits and dismiss it.

Indeed, going through the record, exhibit PEI was not read out after being admitted. This is contrary to the settled principle that whenever it is intended to introduce any document in evidence, it should first be cleared for its admission, and be actually admitted in evidence, and then be read out loud in court. This settled principle has been underscored in numerous decisions,

to mention but few **Robinson Mwanjisi and Three Others v. The Republic** [2003] T.L.R. 218, **Walii Abdallah Kibuta and Two Others v. The Republic**, Criminal Appeal No. 181 of 2006, **Kurubone Bagirigwa and Three Others v. The Republic,** Criminal Appeal No. 132 of 2015, **Lack s/o Kilingani v. The Republic**, Criminal Appeal No. 405 of 2015 **Issa Hassan Uki v. The Republic**, Criminal Appeal No. 129 of 2017 and **Kassim Salum v. The Republic**, Criminal Appeal No. 186 of 2018 (All unreported)). For instance, in **Lack s/o Kilingani** (supra) the Court of Appeal elucidated the three stages which a trial court has to observe before a document is admitted in evidence; which are it should first be cleared for admission, secondly, it should be admitted in evidence and thirdly, it should be read out in court. The Court of Appeal observed: -

> ***"Even after their admission, the contents of cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful The Court in Robinson Mwanjisi and***

Three Others v. The Republic [2003] T.L.R. 218, at page 226 alluded to the three stages of clearing, admitting and reading out; which evidence contained in documents invariably pass through, before their exhibition as evidence"

In the case of **John Mghandi @ Ndovo v. The Republic**, Criminal Appeal No. 352 of 2018 (unreported) the Court of Appeal stated the reason behind the requirement to read over the admitted documentary exhibits to the accused person. In particular it stated as follows: -

"We think we should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defence. That was not done in the matter at hand and we agree with Mr; Mbogoro that, on account of the omission, we are left with no other

option than to expunge the document from the record of the evidence."

In the circumstances of this appeal, as rightly admitted by the learned State Attorney and rightly so in my own opinion the proper way is to expunge exhibit PEI from the record. Therefore, the said exhibit PE1, is accordingly expunged from the record.

However, as rightly argued and pointed out by the learned State Attorney, I find that despite expunging exhibit PE1, I still find that there was ample evidence on record to prove armed robbery despite the absence of exhibit PE1. On that note, I partly allow ground number two as explained above and partly disallow the same as explained above.

Responding to the third ground of appeal, Mr. Kapela readily admitted that the cautioned statements of the appellants (exhibit PEII and PEIII) were wrongly admitted, hence, the same should be expunged from the record. According to the learned Attorney, the appellants objected against the admission of the said statements but no inquiry was conducted to establish their voluntariness before same were admitted. The trial court ought to have conducted an inquiry. This was not done. Noncompliance of such procedure

in admissibility of exhibits PEII and PEII renders the said exhibits to be expunged from the court's record.

Indeed, going through the record, when the prosecution sought to tender the cautioned statement by the second appellant, he objected its admission maintaining that he never confessed. But the learned trial magistrate overruled the objection and proceeded to admit the said statement as exhibit PEII. Equally when PW6 sought to tender the cautioned statement purported to have been made by the first appellant, the latter objected it advancing a reason that he never made such a statement. The learned trial magistrate overruled the objection and proceeded to admit the said cautioned statement as exhibit PEIII.

In so doing the trial court erred in admitting those cautioned statements. In the case of **Rashid & Another v Republic** [1969] E. A. 138, where the Eastern African Court of Appeal had observed:

> *"The correct procedure when a statement is challenged is for the prosecution to call its witnesses and then for the accused to give or make a statement from the dock and call his witnesses, if any."*

The similar position was underscored in the case of **Twaha Ali & 5 Others v Republic,** Criminal Appeal No. 78 of 2004 (unreported) in which the Court of Appeal held:

> *"...if that objection is made after the trial has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or trial within a trial) into the voluntariness or not of the alleged confession. Such inquiry should be conducted before the confession is admitted in evidence.....**Omission to conduct an inquiry in case an objection is raised is a fundamental and incurable irregularity because if the confession stands out to be crucial or corroborative evidence**, an accused would be convicted on evidence whose source is doubtful or suspicious."*
>
> [Emphasis added].

In the circumstance since the trial court did not conduct an inquiry despite there being objections from the appellants, the two cautioned statements were improperly admitted and therefore are expunged from record.

Arguing the fourth ground of appeal, the learned State Attorney argued that even if the cautioned statements are expunged there is ample evidence to establish the case against the appellants. He argued that there are three ingredients to establish the offence of armed robbery which are stealing, use of dangerous weapon and use of violence to steal. To buttress his arguments, the learned state attorney referred the case of **Amos Sita @ Ngilu v Republic** Criminal Appeal No. 438 of 2021 Court of Appeal of Tanzania (unreported).

He submitted that the evidence of PW1 shows that after he was attacked he run for help but PW4 saw the second appellant. He argued that there is also the evidence of PW3 which shows that PW1 was attacked and injured hence his oral testimony is enough to ground appellants' conviction. He therefore urged the court to dismiss the fourth ground of appeal.

Determination of the fourth ground of appeal calls upon this court sitting on the first appeal to re-evaluate the evidence on record and where necessary this court may come out with its own findings.

According to the evidence adduced, PW1 claimed to have been attacked by his passengers whom he was carrying on the motorcycle. PW4 claimed to

have identified the second appellant as he was chasing PW1. On the other hand, PW2 claimed to have seen the appellants as the passengers who were carried by PW1 on his motorcycle.

However, I have noted that the journey to the Ayarabe village started in the restaurant of PW2 where the appellants and PW1 met and hired him to take them to that village and in between they attacked PW1. I have as well considered the testimony of PW1, PW2 and PW4 were person who eye witnessed what happened in the beginning and in the end. I have also considered the evidence of the accused persons during defence but I find nowhere raises any doubts to the prosecution evidence which to me was cogent and strong evidence and indeed proved the case against the appellants beyond reasonable doubt. The appellants did not deny to be with the PW1 at the restaurant of PW2 on that morning. The appellants did not deny to have been seen by PW4, all these proves that the appellants were the doers of the alleged and proved armed robbery. I have as well considered their testimony and I find that the learned trial Magistrate analyzed evidence on record and arrived at just decision.

The allegations and complaint that the learned trial Magistrate did not analyzed evidence on record is unfounded and is hereby dismissed.

The fifth ground of appeal was that the learned trial Magistrate did not consider the defence at all. Mr. Kapela strongly argued in opposition of this ground and submitted that the learned trial Magistrate considered the appellants' defence and found it wanting and that the appellants did not say on that particular morning and did not deny to have hired PW1 and that were not in the restaurant of PW2.

I have carefully read the judgement of the learned trial Magistrate which the conviction of the appellants was heavily anchored on cautioned statements of the appellants which were fully considered and the trial Magistrate, as correctly argued by the learned State Attorney, went on to consider their defence alongside with the testimony of PW1, PW2 and PW4 and I quite agree with the learned Attorney that what the learned trial Magistrate did was more than what is required in considering the appellants' defence. The appellants' defence was fully considered and correctly found wanting and did not raise any doubts as said above to the cogent and string evidence by prosecution. The appellants never disputed that they were with PW1 and PW2 on that particular morning and that PW4 saw them that morning chasing the victim. This very important piece of evidence remained unshaken and cannot be ignored. With the evidence of PW1 and PW2 even the issue

of mistaken identity does not arise at all, given the fact that they knew each other before, a fact which was not as well disputed nor challenged.

That said and done, I found the 5th ground of appeal devoid of any useful merits in this appeal and same is hereby dismissed in its entirety.

Lastly but not least, is the sixth ground of appeal that the judgement of the trial court is contradictory for failure to prove medical expenses incurred by PW1 but went on to believe PW1. This ground as correctly argued by the learned Attorney and rightly so in my own opinion, is without any useful merits because the issue was on the properties stolen and not on costs of treatment.

Consequently, the appeal is found wanting in merits and is dismissed in its entirety. The conviction and sentence meted out against the appellants are confirmed as I find no reason to fault the trial court's findings.

It is so ordered.

Dated at Babati this 16th day of February, 2024.

S. M. MAGOIGA

JUDGE

16/2/2024