IN THE HIGH COURT OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT IJC MOROGORO

CRIMINAL APPEAL NO 69 OF 2023

(ORIGINAL CRIMINAL CASE NO 159 OF 2021, KILOMBERO DISTRICT COURT AT IFAKARA)

YAHAYA AMRI MKUYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

DATE OF JUDGEMENT- 21/02/2024
LATIFA MANSOOR, J.

This appeal arises out of the judgment dated 24th of August 2022, passed by the District Court of Kilombero at Ifakara in Criminal Case No. 159 of 2021, by which, the Appellant was convicted of the offence of Armed Robbery c/s 287A of the Penal Code, Cap 16 R: E 2022. He was convicted and sentenced to thirty years imprisonment.

The appellant was aggrieved by the conviction and sentence, he appealed to this court raising twelve grounds of appeal, all of which were to the effect that the prosecution had failed to prove the charge beyond reasonable doubt, and that he was arrested based on the hearsay evidence of the victim,

but he did not commit the offence. He also challenged the cautioned statement saying that the cautioned statement violated section 50, 57 and 58 of the Criminal Procedure Act, Cap 20 R: E 2019, and that the cautioned statement was obtained through torture thus involuntary. He challenged his identification by the victim, and that there was no identification parade, that the evidence of the prosecution was contradictory as to the time and date of the occurrence of the crime. That he was not given time and chance to call the defense witnesses, that he was not found with any weapon or property of the complainant, thus there was no proof of armed robbery.

Brief facts of the prosecution case are that on 21st of July 2021 at about 1.00 at night, at Viwanja Sitini Area in Ifakara Town, PW1 one Angiliberth Aghatony @ Libonge was attacked by the appellant, he was restrained and ambushed and he was cut on his shoulders and on the chest using a knife. Libonge, the victim, who also gave evidence as PW1 said he could identify the appellant since he had known him before the commission of the offence as he sees the accused/appellant working as *kuli* at the market, and during the commission of the offence there was lights coming from the nearest Bar called PK Arena. He says, the appellant had attacked the victim with the knife but managed to run away before he was apprehended. PW1 says the

accused/appellant ran away after he saw the lights from a *boadaboda* which was heading towards the crime scene. PW1 says also that the accused/appellant abandoned the bicycle at the crime scene as the bicycle was found at the crime scene in the morning by the students who were heading to school. PW1 says he was rescued by the bodaboda drivers who took him to the police station where he was issued with a PF3, and later on he was taken to the hospital for treatment.

The fact that the victim PW1 was attacked and injured was proved by the evidence of the victim, a PF3 which was admitted in court as evidence as well as the evidence of the Medical Doctor who testified as PW3, and the evidence of PW4, the police officer who interrogated the victim at the hospital.

During the hearing, the State was represented by Josbert Kitale, the Learned State Attorney, the appellant appeared unrepresented, and he simply adopted his grounds of appeal. The appellant's grounds of appeal were that the prosecution case was weak, and could not prove the offence beyond reasonable doubt, and that none of the prosecution witnesses was able to identify him. Mr. Kitale, the State Attorney who appeared for the State stated

that the grounds of Appeal have no merit. He submitted that the evidence of PW1 and PW2 did not contradict each other on the time and date of occurrence and even if there were contradictions the contradictions are minor and did not affect the merits of the case. He said PW1 was able to identify the Accused person by his appearance and the clothes he wore since there was lights coming from the PK Arena, and that the victim knew the appellant before the incident. He said the accused was properly identified by PW1 the victim, since there was tube light few meters from the scene, and that PW1 was able to describe the features of the accused person and the clothes he wore, and that the attack took about some minutes and so it was easy to notice the distinctive features of the attacker. The State Attorney also said that PW1, the victim, had a chance to interact with the accused and had an opportunity to notice the distinctive features of the accused which lends assurance to his testimony in court. There is evidence also that at the time of the commission of the crime there was enough tube light. In these circumstances, the conviction of the accused, on the basis of sworn testimony of witnesses identifying for the 2nd time in court, which was also corroborated by the cautioned statement of the appellant is enough to hold that the accused was involved in the commission of the offence.

Regarding DNA, the Counsel argues that it is not mandatory to carry out the DNA Tests in order to prove a fact, and this was held in the case of **Hamisi Chamashine vs R Criminal Appeal No. 669 of 2021,** Court of Appeal sitting at Morogoro.

Regarding the Cautioned Statement, the Counsel argues that the appellant never objected at trial that the statement was recorded outside the prescribed time of four hours, and that the trial court had made the enquiries and found out that the cautioned statement was recorded freely and voluntarily, thus it was admitted as evidence. On this, the learned State Attorney cited the case of **Nyerere Nyague vs R Criminal Appeal No. 67 of 2010,** Court of Appeal siting at Arusha, that since the appellant did not cross examine the witness on the issue of voluntariness of the cautioned statement, the statement was therefore properly admitted as evidence. The Counsel for the state attacked all the grounds of appeal and stated that they lacked merits, and urged the Court to dismiss the appeal.

The issue is whether the offence of Armed Robbery under Section 287A of the Penal Code was proved beyond reasonable doubt. The appellant was

charged, convicted and sentenced under Section 287A of the Penal Code, Cap 16 R: E 2019, which provides as *follows:*

Section 287A *Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons, and at or immediately before or immediately after the time of the 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.*

So, armed robbery means simply stealing plus violence used or threatened. On the evidence of P.W. 1., it appears to me that although there was enough proof that the incident of being assaulted using the knife took place outside the PK Arena, and that the Victim PW1 was injured and admitted at the hospital as evidenced by PF3 and the evidence of the Medical Doctor and the Victim but there was no proof that there are items that has been stolen. Again, there was no proof adduced before the trial court that the bicycle

presented in court as the item robbed from PW1 and admitted in Court as Exhibit was the item that was stolen from PW1 by the appellant. Although there was proof of assault but there was no proof of stealing and what was stolen remained unproved, and who was the person involved in the stealing, if there was any stealing, was also not proved. There was no stealing which could have amounted to an offence of armed robbery, which was charged. The prosecution was not able to prove beyond reasonable doubt that there was armed robbery through its Four (4) witnesses. There was no proof that the bandit who did not steal anything from the victim was armed with a knife as alleged.

Obviously before there can be robbery there must be first of all an act which amounts to stealing. "Stealing" is defined under the Code Penal as meaning:

> "To take or convert to one's use or the use of any other person anything other than immovable property with any of the following intents:

(a) An intent permanently to deprive the owner of the thing of it;

(b) an intent permanently to deprive any person who has any special property in the thing of such property, the term "special property" here in eluding any charge or lien upon the thing in question, whether by the person entitled to such right or by some other person for his benefit;

(c) an intent to use the thing as a pledge or security;

(d) an intent to part with the thing on a condition as to its return which the person taking or converting it may be unable to perform;

(e) an intent to deal with the thing in such a manner that it can-not be returned in the condition in which it was at the time of taking or conversion:

(f) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner.

So, armed robbery means simply stealing plus violence used or threatened. On the evidence of P.W. 1. It appears to me that there was not enough proof that PW1 was robbed, and there was no proof that a bicycle or some items were stolen from him, and whether he reported to police that he was assaulted or there was armed robbery. There was proof that after an investigation the police apprehended the Appellant but there was no proof that the appellant was found with the stolen items stolen from PW1.

The prosecution ought to have proved that the appellant took the bicycle from PW1, the bicycle belongs to PW1, as taking the items from PW1 in my view amount to stealing. Addition of violence or threat of violence in the circumstances amounted to another offence of armed robbery, which was charged. The prosecution was not able to prove beyond reasonable doubt that there was stealing, but proved that there was the use of the knife and the victim was assaulted. If at all there was offence committed by the appellant, it would not have been the offence charged which amounted to armed robbery.

It was also unsafe to convict the appellant based on the doctrine of recent possession as he was not found with the stolen items. As held in the case of **Joseph Mkubwa and Samson Mwakagenda, Criminal Appeal No. 94 of 2007** (unreported), the Court of Appeal said where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis for conviction, it must be proved first that the property was found with the suspect. Secondly that the property is positively proved to be the property of the complainant, third the property was recently stolen from the complainant, and lastly that the stolen thing constitutes the subject of the charge against the accused."

Nothing of the above existed which enabled the trial magistrate to invoke the doctrine of recent possession. There was no seizure note exhibited in court to prove that Exhibit P1 was seized from the appellant. This is contrary to section 38 (3) of the CPA.

In order to prove the offence of armed robbery, three things must be proved beyond reasonable doubt, **one,** there was an act of stealing, **two,** immediately before or after stealing the assailant was armed with the dangerous weapons, and **three**, the assailant has used the weapon or had threatened to use the weapon in order to obtain or retain the stolen property. This was stated in the case of **Kisandu Mboje vs R, Criminal Appeal no. 353 of 2018,** Court of Appeal sitting at Shinyanga.

None of the ingredients of Armed Robbery was proved as there was no proof that the assailant had stolen any item from the victim, and that the assailant used the dangerous weapon in order to obtain or retain the stolen property.

Regarding the cautioned statement that was admitted as evidence, obviously, the statement was retracted, and for the court to safely use the cautioned statement to convict the appellant for the serious offence of Armed Robbery, the court needed to find corroboration on the fact that indeed there was armed robbery and all the elements of the offence of armed robbery were proved beyond reasonable doubt.

Their Lordships, the Justices of Appeal in the case of **Paulo Maduka & 4 others vs. R, Criminal Appeal no. 110 of 2007, CA at Dodoma** (unreported), had said as hereunder:

"There is no doubt that a confession to an offence made to a Police officer is admissible in evidence. The very best of witnesses in any criminal trial is an accused person who confesses his guilt. However, such claims of accused persons having made confessions should not be treated casually by courts of justice. The prosecution should always prove that there was a confession made and the same was made freely and voluntarily. The confession should have been "free from the blemishes of compulsion, inducements, promises or even self-hallucinations

Also, in the case of **Twaha Ali & 5 others vs. R, Criminal Case no, 78 of 2004 (CAT)** unreported, which was quoted in the **Paul Maduka's** case (supra), The Court had held that: -

> *"... If that objection is made after the trial court 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 a trial within a trial) into the voluntariness or not of the*

alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence ..."

Again, in the case of **Seleman Abdallah and 2 others vs. R, Criminal Appeal No. 384 of 2008,** the Justices of the Court of Appeal had insisted (at page 9) that:

"We wish first to point out that a confession voluntarily made by an accused person to a police officer of, or above the rank of corporal, is admissible in evidence. However, in order for such statement to be admitted in evidence, the prosecution must prove beyond doubt that the same was made voluntarily. If it is not shown it was not voluntary made, the trial court is empowered to reject it. This is provided under section 27 of the Evidence Act, Cap 6 R: E 2002..."

The accused denies to have ever made any confession before any police officer, let alone before PW4. He denied to have ever signed the cautioned statement, and that he was not given the chance to call his witnesses, but after an enquiry the statement was admitted. Despite its admission, the cautioned statement or the confession was repudiated, and as per Section

27 of the Evidence Act, it was the duty of the prosecution to prove that the statement was given by the accused, and it was given voluntarily. Since a confession is a form of admission consisting of direct acknowledgement of guilt in a criminal charge, it must be in express words by the accused in a criminal case of the truth of the guilt fact charged, and if he does not know how to read and write, Section 57 (4) (a) to (e) of the Criminal Procedure Act, Cap 20 R: E 2002 provides for the procedures to be followed by the police officer recording the confession.

Whether a confession is voluntary or not is essentially a question of fact. The confession was retracted, thus it was the duty of the prosecution under Section 27 of the Evidence Act to prove that the cautioned statement was given voluntarily and that the statement was true and it was properly given by the accused and properly recorded by the police officer. The prosecution failed to provide sufficient corroboration in material particulars by independent evidence in order to prove that the confession was true and was given voluntarily.

Since there was no corroboration landed by the prosecution to corroborate the cautioned statement, to prove the offence of armed robbery, this makes the offence unproved beyond reasonable doubt.

Consequently, the offence of armed robbery charged was not proved beyond reasonable doubt by the prosecution, therefore this appeal has merit and is allowed; the conviction for the offence of Armed Robbery is quashed and the sentence is set aside. The Appellant, YAHAYA AMRI MKUYA is ordered to be released from prison unless he is otherwise lawfully held for any other offence.

DATED AND DELIVERED AT MOROGORO THIS 21ST DAY OF FEBRUARY 2024

(LATIFA MANSOOR J)
JUDGE
21ST FEBRUARY 2024