IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[MOROGORO SUB-REGISTRY]

AT MOROGORO

CRIMINAL APPEAL NO. 6306 OF 2023

(*Appeal from the judgement of Resident Magistrate's Court of Morogoro at Morogoro in Criminal Case No. 36 of 2021 dated 10th May 2022 before Hon. E. J. Mrema, SRM*)

MAXSON JOHN@MACK ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

29/05/2024 & 06/06/2024

KINYAKA, J.:

In Criminal Case No. 36 of 2021, the appellant was prosecuted at the Resident Magistrate's Court of Morogoro at Morogoro hereinafter the "trial court" for an offence of armed robbery contrary to section 287A of the Penal Code Cap. 16 R.E. 2019 hereinafter "the Penal Code". It was alleged before the trial court that on 7th February 2021, at Daraja la Kidogobasi area within Kilosa District in Morogoro Region, the appellant stole one mobile phone make TECNO K7 worth TZS 250,000 and cash money TZS 40,000 properties of Fadhili Ally, and immediately before such stealing, he threatened the victim with knife in order to obtain the said properties.

The trial court convicted the appellant and sentenced him to serve thirty years imprisonment in jail upon being satisfied with the prosecution's proof of the offence against the appellant beyond reasonable doubt. Dissatisfied with the conviction and sentence, the appellant appealed to this Court by preferring nine (9) grounds of appeal as listed below: -

1. That the learned SRM erred in law and fact to convict and sentence the appellant while the prosecution side failed to prove that the offence of Armed Robbery was committed by the appellant;
2. That the learned SRM grossly erred in law and fact to convict the appellant basing on the evidence of PW1 without giving opportunity to the appellant to cross-examine PW1 (complainant) which is against procedure of law, as no any indication that the appellant waived the right, as shown on page 10 and 11 respectively of the typed court proceedings;
3. That the learned SRM erred in law and fact to convict the appellant based on contradictory prosecution evidence;
4. That the learned SRM erred in law and fact to convict and sentence the appellant as he failed to consider the appellant's defence that there was conflict between complainant PW1 and the appellant was found

fighting and not appellant robbing PW1, as evidenced by the testimony of PW2 who said in his testimony he saw two people fighting on page 11 of the court's typed proceedings;

5. That the learned SRM erred in law and fact to convict the appellant when failed to realize that PW1 and PW2 knew each other before the incident and no any other independent witness was called to testify while it was alleged the scene of crime was crowded by people who wanted to kill the appellant;
6. That the learned SRM erred in law and fact when there is no factual or legal point of determination in accordance with mandatory provision of section 312(1) of the Criminal Procedure Code;
7. That the learned SRM erred in law and fact by convicting the appellant without giving weight to the defence testimony which raised reasonable doubt;
8. That the learned SRM erred in law and fact to convict and sentence the appellant of the offence of Armed Robbery as the appellant was not found with anything which connects him with the offence alleged to be committed i.e nothing was tendered in court as exhibit, phone,

money or weapon as the appellant did not leave the scene of crime; and

9. That the SRM erred in law and fact to convict the appellant as the prosecution case was not proved to HILT.

Throughout the proceedings, the appellant appeared in person unrepresented. The respondent was duly represented by Mr. Shabani Kabelwa, learned State Attorney.

The appellant began by praying to the Court to determine his grounds of appeal, careful read, analyze, evaluate and scrutinize the prosecution and his defence evidence and set him free as he did not commit the offence. As regards to the first ground, he submitted that PW2 testified to have witnessed a fight between him and the complainant, and not robbing him. He pointed out that PW1 informed the trial court that he found him with a bush knife/panga but the bush knife was not presented to court. He added that there was nothing that was stolen. He contended that PW1 informed the police that he frightened him with a knife but in court, he testified that he was cut by a panga which is not true. He stated that the testimony of PW1 in court is different from the statement he gave at the police.

The appellant further submitted that PW3 testified that he did not investigate as to whether the incident was a fight or armed robbery but acted upon the information he received from the PW1 and PW2. He contended that PW1 and PW2 testified that on 07/02/2021 they provided their statements at 8:00 pm when he was handed to the police at 8:00 but PW3 testified that he took PW2's statement at 8:00 am. Again, he said PW1 testified that the weapon used was panga but PW3 testified that the weapon used was a knife. He added that there was no armed robbery committed but a fight for a woman called Ester between him and the complainant.

In respect of the second ground of appeal in which the appellant had initially lamented that the trial court convicted him basing on the evidence of PW1 without giving him the opportunity to cross-examine the witness, the appellant had nothing much to submit in support of the ground as he admitted to have cross examined PW1.

Mr. Kabelwa, learned State Counsel opposed the appeal and consolidated the first, seventh, eighth and ninth grounds of appeal while the third, fourth and fifth and the sixth grounds were argued separately. He intimated not to labour on the second ground of appeal as the appellant has admitted that

he was given the opportunity to cross examine PW1 as shown in the original file.

He opposed the third ground on contradictions of the prosecution witnesses by submitting that the statement of PW1 given at the police and admitted in evidence as Exhibit D1 was improperly admitted in evidence by the trial court. He said, even if the Court finds that Exhibit D1 was properly admitted, the statement has no weight as the procedure of impeachment of the complainant statement *vis a vis* the evidence testified in court was not complied with. He added that the procedure to impeach the statement and testimony was explained in the case of **Lilian Jesus Fortes v. R, Criminal Appeal No. 151 of 2018** on page 25, where the Court of Appeal laid down three requirements namely, that the previous statement must be read to the witness; the attention of the witness must be drawn to those parts which are intended to demonstrate contradictions; and the statement should be tendered in evidence.

He argued that the evidence was received during the defence case which denied PW1 the right to speak on the contradictions, and that the appellant did not cross examine PW1 on the contradictions as he later on testified in his evidence which means that he accepted the testimony of PW1 on the

aspect. He prayed for expunction of Exhibit D1 from the record or in the alternative, it should not be given any weight. He argued further that PW1 was a credible witness and the trial court believed him by looking at his demeanor.

Against the fourth ground, he referred to page 10 of the typed proceedings when PW1 was testifying in connection with the testimony of PW2 on page 11 of the proceedings. He submitted that PW1 testified that when the robbers were running away, he was able to hold the appellant down while shouting for help where another person came to help him, the testimony which was corroborated by the testimony of PW2 that he saw two persons fighting and he saw a motorcycle running after seeing him and assisted PW1 to arrest the appellant at the scene of incident.

He argued that the testimonies of PW1 and PW2 were credible hence believed by the trial court, adding that the appellant was arrested at the crime scene immediately after commission of the offence with his colleagues.

Relying in the case of **Mohamed Selemani Kidali @Ndwata v. R., Criminal Appeal No. 82 of 2022** on page 28, he stated that the Court of Appeal articulated four tests of credible evidence, namely, that the evidence must be legally obtained; it must be credible and accurate; the evidence

must be relevant, material and competent; and it must meet the standard of proof requisite in a given case, otherwise referred to as weight of evidence or strength of believability. He concluded that the prosecution witnesses satisfied the above test articulated by the Court of Appeal.

He opposed the fifth ground by submitting that the evidence adduced by PW1 and PW2 was weighty and credible and was sufficient to prove the offence against the appellant beyond reasonable doubt. He relied on the case of **Juma Justine Hamis Juma Chamashine v. R., Criminal Appeal No. 669 of 2021** on page 24, where the Court of Appeal held that the prosecution is free to determine which form of evidence to prove its case and which however probative to discard, and the defence enjoyed similar latitude to determine the form of evidence.

Mr. Kabelwa conceded to the sixth ground by submitting that as reflected on page 5 of the judgment of the trial court, the trial magistrate proceeded to determine the case after his analysis of the prosecution and defence evidence without a point of determination. He told the court that the error is fatal and contrary to section 312(1) of the Criminal Procedure Code Cap. 20 R.E. 2022 though it does not lead to setting free the appellant as held in the case of **John Naoyo & Another v. R., Criminal Appeal No. 308 of**

2021 where the Court of Appeal held on page 11 that upon contravention of section 312(1) of Criminal Procedure Act, the entire proceedings and judgement becomes a nullity and the remedy is to remit the file to the trial court for composition of a fresh judgement as according to him, the evidence of the prosecution was weighty.

Opposing the first, seventh, eighth and ninth grounds of appeal, Mr. Kabelwa argued them in two groups namely, that the offence against the appellant was proven beyond reasonable doubt; and that the evidence of the defence, the appellant herein was considered by the trial court. Relying on the case of **Amos Sitta @ Ngiri v. R., Criminal Appeal No. 438 of 2021** on page 12 to 13 of the judgement, he contended that the prosecution ought to have proven theft; that during or after the theft, the accused used dangerous or offensive weapon; and that he used force or threats to retain the property stolen, which the prosecution did through the of PW1, and PW2. PW1 testified on page 10 of the typed proceedings on how the accused stole his TECNO valued at TZS 250,000 and TZS 40,000, the testimony which was corroborated by PW2 on page 11 of the proceedings which proved theft.

He contended further that the second element was proven by PW1 who testified that the thieves beat him by using panga when taking his items. He

stated that as the appellant was apprehended at the scene of crime, and PW1 testified on the manner the incident occurred, the evidence was credible. He proceeded that the third element was proven by PW1 that not only they took his properties but they beat him with a panga and run away in a motorcycle corroborated by PW2 who saw PW1 and the appellant fighting while the motorcycle run away after those who boarded the same saw PW2.

He argued that even if the bush knife was not tendered in court, it does not disapprove the offence of armed robbery as due to the chaos at the scene of crime, PW1 and PW2 could not watch or take the panga which was dropped by the appellant. He submitted that the appellant's claim that his evidence was not considered, has no merit as on page 6 to 9 of the judgement, the trial court considered the evidence of the appellant including the trial court's analysis of the contradictions that the appellant raised in his testimony as reflected on page 7 of the judgement. He reiterated his prayer for nullification of the proceedings and judgement and remittance of the file to the trial court for the same to compose the judgement afresh.

In his rejoinder, the appellant reiterated that the prosecution did not prove the offence against him. He argued that if PW1 was beaten by panga, why

was he not given PF3 to go to the hospital for treatment but went straight to the police and gave his statement. He added that even PW3 did not state that he found the complainant to have been beaten by panga.

He submitted that he cross examined the witnesses including PW2 who testified that he did not see anything at the crime scene, though he was expected to see the bush knife at the scene of crime as he claimed to have been the first person to arrive at the scene of crime. He added that PW3 testified that the offence against PW1 was committed by one person, he did not mention the type of a phone stolen and testified that PW1 was robbed TZS 250,000.

He informed the Court that he is not a lawyer to know the procedure of tendering witness statement as he was being guided by the trial magistrate. He contended that he wanted the statement to be used in court as evidence but the trial magistrate guided him to tender the same during his defence. He added that he did not commit the offence as it is impossible for one person to fight two persons who had two bush knives. He reiterated his prayer for the court to consider his evidence and set him free.

In my consideration of whether or not the appeal is merited, I will start with determination of the sixth ground of appeal. If need be, I will then proceed to determine the remaining grounds of appeal.

The appellant's complaint in the sixth ground of appeal that the decision of the trial court was made without factual or legal points of determination contrary to section 312(1) of the Criminal Procedure Code Cap. 20 R.E. 2022, hereinafter "the CPA", was admitted by the respondent. As a consequence, Mr. Kabelwa, learned State Counsel prayed for nullification of the judgement and remittance of the file to the trial court for a fresh composition of the same as according to him, the evidence of the prosecution was weightier.

I have thoroughly read the trial court's judgement. As correctly submitted by the state counsel, the same does not contain factual or legal points of determination. It is apparent on page 5 of the judgment that, upon the trial court's conclusion of the summary of testimonies of the prosecution and defence witnesses, it proceeded to make determination of the case which was contrary to section 312(1) of the CPA which provides:-

> *312 (1)* ***Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and***

> ***superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination,*** *the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.* [Emphasis added]

As the word 'shall' connotes a mandatory requirement, the absence of the point or points determination justifies the nullification of the judgement and remittance of the file to the trial court for composition of a new judgement. Insisting on compliance to section 312(1) of the CPA, the Court of Appeal in the case of **Abubakari I.H. Kilongo & Another v. Republic (Criminal Appeal No. 230 of 2021) [2022] TZCA 722 (21 November 2022)** stated:-

> *"Generally, there is no problem with regard to the style and the brevity of the court's judgment. However, the judgment of the court must contain relevant materials and be consistent with the evidence laid before it in relation to the law. In short, it should comply with the requirement stipulated by the law, in this case, section 312 (1) of the CPA. It follows that a judgment of the trial court which does not conform to the requirement of the provisions of section 312 (1) of the CPA is not a judgment in law and will often run the risk of being quashed"*

In view of the above authority and the omission by the trial court that has rendered its purported judgment to fall short of what a proper judgment in the eyes of the law ought to contain as envisaged under section 312 (1) of the CPA, I find merit in the sixth ground of appeal and I allow the same.

Since the determination of the sixth ground has the effect of disposing the entire appeal, I do not deem it appropriate to embark on testing the merit or otherwise of the remaining grounds of appeal.

Consequently, I hereby nullify the judgement of the Resident Magistrate's Court of Morogoro at Morogoro dated 10th May 2022 in Criminal Case No. 36 of 2021. The trial court's conviction against the appellant as well as the sentence imposed on him are also quashed and set aside.

It is further ordered that the case file be remitted to the trial court before the Resident Magistrate In charge for reassignment before another Magistrate of competent jurisdiction in order to compose a proper judgment in accordance with the law. In the meantime, the appellant should remain in custody as a remandee pending the composition and delivery of a fresh judgment.

It is so ordered.

Right of Appeal fully explained.

DATED at **MOROGORO** this 6th day of June 2024.

H. A. KINYAKA

JUDGE

06/06/2024