IN THE HIGH COURT OF TANZANIA

DODOMA SUB REGISTRY

AT DODOMA

DC CRIMINAL APPEAL NO. 9035 OF 2024

(Arising from the District Court of Dodoma at Dodoma in Criminal Case No 42 of 2023)

HUSSEIN ABASI HASSANI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of the last Order: 29/05/2024

Date of the Judgment: 13/06/2024

LONGOPA, J.:

The appellant, one Hussein Abasi Hassani appealed against conviction and sentence in two counts: First, armed robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2022. The particulars of the offence revealed that on 13th day of February 2023 at Swaswa Ng'ambo within Dodoma District in Dodoma Region, the appellant did steal cash money TZS 2,300,000/= the property of Samwel S/O Serengeti and immediately before and after such stealing did threaten one Said S/O Omary Hamza with a machete in order to obtain the said property.

On the second count of assault causing actually bodily home contrary to Section 241 of the Penal Code, Cap 16 R.E. 2022 whereas it was alleged that at the same time and place, the appellant did assault one Said S/O Omary Hamza by hitting him with a blunt object on his forehead hence causing him to suffer actual bodily harm.

Upon conclusion of the trial, the District Court entered conviction on the offence of armed robbery and sentenced him to thirty years in prison and suffer twelve strokes of cane. The appellant was dissatisfied with the whole of the conviction and sentence thereof thus on 4th April 2024 the appellant instituted an appeal on the following grounds, namely:

1. That, the trial magistrate erred in law and fact to convict the appellant while knowing that prosecution side failed to prove the case beyond reasonable doubt.

2. That the trial magistrate erred in law and fact by convicting the appellant basing on unreliable and contradicting evidence.

3. *That, the whole proceedings marred by procedural irregularities which led to unwanted judgment and order of the Court which also not proper.*

Therefore, the appellant prays for nullification of proceedings and set aside judgment of the District Court of Dodoma at Dodoma hence quash conviction and sentence imposed on him.

On 29th May 2024, the parties appeared before me for oral submission on the appeal. The appellant enjoyed the legal services of Mr. Majaliwa Wiga, learned advocate and the respondent was represented by Mr. Francis Mwakifuna, State Attorney.

Mr. Majaliwa Wiga took up the mantle by restating that instant appeal is based on grounds of absence of proof beyond reasonable doubt to convict the appellant, sentencing based on an unreliable and contradictory evidence, and the nullity of the proceedings for being marred with irregularities thus improper judgment.

On the first ground, it is submitted that there was contradiction of the charge sheet and evidence of the witnesses. The offence is allegedly to have been committed on 13/02/2023 against Said Omari HAMZA, the victim. PW 1's testimony indicated that offence occurred on 03/02/2023. PW 2 and PW 3 stated that the offence was committed on 13/02/2023 while PW 4 stated that the offence happened on 12/02/2023. This is also reflected on the judgment that offence happened on 03/02/2023. It was

argued that there is variance of the charge sheet and the evidence of the witnesses of the prosecution.

The appellant cited the case of **Issaya Mwanjiku @White versus Republic**, Criminal Appeal No. 175 of 2018 at pages 13-17, the CAT stated that in case of variance between the charge and evidence on record, the remedy is to amend the charge or substitution or alter the charge. Failure to do so amounts to be unproved charge and the accused is entitled to the acquittal. This is because variance of charge and evidence is fatal and not curable under section 388 of the CPA. The only remedy appellate court has is to acquit the appellant.

Also, in the case of **Abel Masikiti versus R**, Criminal Appeal No 24 of 2015 CAT at pages 8-9, it was held among others that failure to amend charge under section 234 of the Criminal Procedure Act regarding discrepancies on the charge and the evidence that respective charge remains unproved, and the accused is entitled to acquittal.

Further, the charge stated that TZS 2,300,000/= was property of Samwel Serengeti (PW 4). However, there is no single evidence of the prosecution who testified about the amount of money that was stolen at the scene of crime. Neither evidence of PW 1, PW 2, PW 3 or PW 4 testified on this aspect. It was appellant's view that the prosecution failed

to prove the allegations on the amount stated to have been stolen which is stated in the charge. Thus, the charge remained unproved thus acquittal of the appellant is the only plausible remedy in the circumstances.

On the other hand, there are also contradictions of the prosecutions witnesses. First, PW 1's evidence revealed he was hit by a stone at the forehead by persons in accompany of the appellant whereas PW 2 stated that appellant attacked the victim using a machete. Second, PW 2 stated that the appellant stole 2,300,000/= while PW 1 stated that the money was stolen by other persons who were in a company of the appellant. This is contradictory evidence. Third, PW 3 stated that there were three people attacking/beating the victim while others in accompany of the appellant were stealing/ robbing/ taking the money from the victim. Fourth, timing of the event differs. PW 1 stated that the timing of incident was almost five minutes while PW 2 stated that time was about 4 minutes. It is contradictory as to the length of time of the incident. The prosecution failed to clear these doubts regarding the commission of the offence. These go to the root of the case. There was no proof to the required standard as the prosecution failed to remove all reasonable doubts.

It was the appellant's further submission that key witnesses, namely the Community Policing officers were not brought to court to testify. The failure calls for adverse inference to be drawn against the prosecution.

Regarding irregularities, it was submitted that there was failure to consider the defence evidence thus serious error was committed as per decision in Abel Masikiti's case where it is stated that failure to consider the defence is fatal and vitiates the conviction.

The appellant submitted that this court be pleased to nullify the proceedings and judgment of the trial court for the weaknesses pointed out with regard to failure by the prosecution to prove their case to the required standard of beyond reasonable doubts.

On the other hand, the respondent does not support the appeal. It reiterated that trial court was correct and right to find out that the case was established against the appellant thus conviction and sentence was appropriate.

The issue of difference between the charge and evidence, it is submitted that the charge states that the offence happened on 13/02/2023 and both PW 2 and PW 3 stated about the same date. These were the eye-witnesses. PW 1 also does not contradict. All the witnesses corroborated the evidence of PW 1 that the matter happened on 13/02/2023. All the witnesses have testified about the incident that is stated in the charge.

According to the respondent, the charge was proved by all the prosecution's witnesses. To amend the charge, there must be divergence of testimony that can warrant the amendment of the charge. PW 4 stated the date correctly to be 13/02/2023.

Regarding TZS 2,300,000/= that was stolen, PW 1 stated that he had been robbed and informed PW 2 and PW 3 who went to assist thus it the amount stolen was well established by the evidence of PW 1.

On the contradiction of the witnesses, it was submitted that: First, PW 1 stated that the appellant had a machete. PW 2 stated that had a machete thus there was no contradiction on instrument used in the commission of the offence of armed robbery.

On timing of incident of robbery, it was submitted that there are no discrepancies on timing. The victim was robbed before raising the alarm. It is therefore proper to state that time was around five minutes or four minutes as the PW 2 came after an alarm was raised thus making it possible for him to observe the incident in a lesser time than the victim from the time of raising the alarm. The respondent cited the case of **Evarist Kachembeho and Another versus R** [1978] LRT No 70 on contradiction, the Court noted that the Court should determine whether the same goes to the root of the case.

Also, in **Said Ali Ismail versus R**, Criminal Appeal 241 of 2008 (TANZLII), it was observed that in case of variance of evidence the Court should determine if it goes to the root of the case.

Regarding defence evidence, it was submitted that the appellant was availed opportunity to fend oneself and the evidence was fully analysed but it did not manage to raise any reasonable doubts. The appellant was caught red-handed at the scene of crime. PW 2 was an eyewitness who went to the scene of crime when the matter was happening. All witnesses PW 1, PW 2, PW 3 and PW 4 recognised the appellant to have been arrested on that material date at the scene of crime. The defence did not bring any witnesses regarding things stated in the testimony. He stated that there were three persons and that two ran away after an alarm was raised.

On failure to bring material witnesses namely Community Policing persons as key witnesses, it was submitted that there was no dispute with regards to arrest of the appellant thus these were not key witnesses. The appellant was arrested and cautioned statement recorded in presence of his mother, there was ample evidence that he was arrested. The offences were proved by the prosecution's side during the hearing of the case. PW 5 testified that there was arrest and interrogations.

In rejoinder, Mr. Majaliwa Wiga reiterated the submission in chief. It was argued that first, charge sheet was supported by PW 2 and PW 3, but not supported PW 1 without whom there could not be any case against the appellant. PW 1 stated that offence was committed on 03/02/2023 and not 13/02/2023.

Appellant further reiterated that it appears there were two different offences, one committed on 03/02/2023 and the other committed on 13/02/2023. It was emphasized that complainant is the most important person in a criminal case and variance of testimonies of PW 1, PW 2, PW 3 and PW 4 would only be corrected by amendment of the charge. Failure to do so goes to the root of the case.

On the contradiction, it is reiterated that use of machete was not stated by PW 1 while PW 2 stated that it is the appellant who hit the victim with the machete.

On TZS 2,300,000/= the property of Samwel Serengeti was not established. No witness' testimony was with regard to ownership of the money. PW 4 did not testify to be the owner of the money.

Also, failure by defence to support its testimony, it was submitted that the appellant never stated to have been with anyone nor had indicated that he would call any witnesses. It was duty of the

prosecution(respondent) to prove their case to the required standard and not otherwise.

Further, it was reiterated that considering the defence testimony is a mandatory legal requirement. It is not correct that there was any analysis of the defence evidence. It was the appellant's prayer that the appeal is meritorious as there was no proof beyond reasonable doubts.

Having heard rival submissions of the parties, it is pertinent for this court to analyse the merits or otherwise of the grounds of appeal advanced by the appellant.

A thorough perusal of the record indicates that the following is the summary of evidence. PW 1 Said Omary Hamza testified that on 13/02/2023 at night hours was invaded by three persons, the appellant inclusive and the appellant is the one who was holding a machete that was used to threaten the victim. On identification, PW 1 stated that there was sufficient electricity light that illuminated all the way and knew the appellant before as the latter used to go to that shop. It was the appellant who held the victim on neck while his companion took TZS 2,300,000/=. The appellant threatened PW 1 with a machete to facilitate stealing of TZS 2,300,000/=.

According to PW 1, the incident took five minutes and he screamed to call for help and the whole incident took around five minutes, and that the appellant was arrested at the scene of crime while his companionship ran away. He was hit on face by a stone.

According to PW 2 Gwakisa Andowile Mwamakula on 13/02/2023 heard the screams from outside and saw three persons who invaded the victim. They had a machete, and the appellant was arrested at the scene of the crime. It was the appellant who was armed with the machete. The lighting from electricity was clear and the appellant was well known before the incident. It took around four minutes.

PW 3 Wilson Mussa on 13/02/2023 around 2245 hours saw the victim being robbed by the appellant who is familiar to PW 3. There was plenty of lights. PW 3 assisted to arrest the appellant at the scene of crime.

PW 4 Samwel Joseph Serengeti stated that on 13/02/2023 he was awakened by call that the victim had been invaded and found out that the appellant had been arrested already. The appellant is familiar. There was sufficient light to identify the appellant. In cross examination, PW 4 reiterated that the date of incident to be 13/02/2023 and that he properly identified the appellant as sufficient light was there.

PW 5 testified that he interrogated the appellant in presence of the appellant's mother. Appellant denied having committed the offence other than assisting the victim. PW 5 tendered Exhibit P 1 that was Sketch map.PW 5 reiterated that appellant was arrested on a scene of crime.

PW 6 stated that on night to 14/02/2023 he received the victim Said Omary who had a wound at his forehead. PF 3 was filed, tendered in Court and admitted as Exhibit P 2. The victim was assaulted by blunt object at his forehead.

DW 1 stated that he acted as a good Samaritan by assisting Said Omary who was being beaten by other persons. After offering his assistance, DW 1 ended up being arrested, tortured, handcuffed and sent him to police station. DW 1 flatly denied any participation in the commission of the offence.

The first ground is whether there was a proof of the case by the prosecution beyond reasonable doubt standard. To so decide it is important state that the appellant was committed at the scene of the crime. Thus, there was proper identification that the appellant as the victim's assailant.

In the case of **Paulo Aloyce @ Mtana & Another vs Republic** (Criminal Appeal No. 422 of 2017) [2021] TZCA 286 (8 July 2021) (TANZLII), at pages 11-12, the Court of Appeal reiterated that:

> *Our decision in **Mabula Makoye** (supra), cited to us by Ms. Meli, is on all fours with the instant matter as the appellant in that case was arrested red-handed while running away from the scene of the crime. We held, in that case, that it was sufficiently incriminating that the appellant was arrested in a paddy field close to the scene of the crime after a hot pursuit.*
>
> *We took the same stance in **Mbaruku s/o Hamisi and Four Others v. Republic**, Consolidated Criminal Appeals No. 141,143 & 145 of 2016 & 391 of 2018 (unreported), where we cited our decision in **Joseph Munene and Another v. Republic,** Criminal Appeal No. 109 of 2002 (unreported), to reaffirm that the issue as to whether the appellant was identified cannot arise where, after committing an offence, the appellant is arrested after a continuous hot pursuit. It would be instructive, we think, to excerpt our holding in **Joseph Munene (supra)**: "PW1 and PW3 said they were robbed at around 17:30 hours, the sun at that time had not yet set, it was a broad*

daylight. They said immediately, after they were robbed by the appellants, they started to chase the appellants with their car and in that pursuit police officers, PW4, PW5, and PW6 joined the pursuit where they managed to arrest all appellants. Thus, there was a hot pursuit of the appellants from when they robbed PW1 and PW3 up to when they were apprehended by PW4, PW5 and PW6...."

There are two witnesses namely PW 2 and PW 3 who confirmed to have arrested the appellant at the scene of the crime and seen appellant and his companion while robbing PW 1 following an alarm raised by the victim.

Similarly, in the case of **John Makuya vs Republic** (Criminal Appeal 62 of 2022) [2022] TZCA 264 (12 May 2022) (TANZLII), at pages 12-13, the Court stated illustratively that:

We reject the appellant's attempt to claim that he was not properly identified at the scene of crime even though police arrested him red-handed. In STEPHEN JOHN RUTAKIKIRWA VS. R., CRIMINAL APPEAL NO. 78 OF 2008 (unreported), the appellant who was arrested red-handed at the scene of crime all the same complained that he was not properly identified at the scene. The Court rejected his

complaints: the present case, even if there was darkness, the appellant was grabbed by and struggled with the complainant and was arrested at the scene by PW2 and PW3; and immediately taken to the police. If there was any need of corroboration, we would readily find it in the appellant's own admission in his testimony that he was within the vicinity at that time (See RUNGU JUMA v R (1994) TLR. 176. We also find no substance in this complaint. "[Emphasis added]. In yet another occasion in MBARUKU S/O HAMISI & OTHERS VS R. [2019] TZCA 266 (TANZLII) this Court made it clear that, the issue of whether the appellant was properly identified cannot arise where, after committing an offence, the appellant is arrested following a continuous hot pursuit.

Evidence of PW 1, PW 2 and PW 3 is that the appellant was arrested at the scene of crime and his companionship disappeared upon arrival of PW 2 and PW 3 to assist PW 1 following an alarm that was raised. Also, evidence PW 5 was to the effect that he interrogated the appellant upon being handed over to police upon arrest. It is PW 5 who drew a sketch map for the scene of crime.

The offence for which the appellant was convicted and sentenced is the armed robbery. It is covered by section 287A of the Penal Code, Cap 16 R.E. 2022. It states that:

> *287A. 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.*

Essential ingredients of the offence are: First, there must be stealing. Second, the use of dangerous weapon or offensive weapon or instrument immediately before or after stealing to retain the stolen property. Third, the offensive or dangerous weapon or instrument was directed to the victim.

These elements of the offence were illustrated in **John Makuya vs Republic** (Criminal Appeal 62 of 2022) [2022] TZCA 264 (12 May 2022) (TANZLII), pages 11-12, where the Court of Appeal noted that:

The provision above envisages two categories of the offence of armed robbery either of which prosecution must lead evidence to prove beyond reasonable doubt. First is stealing, and at or immediately before or after stealing being armed with any dangerous or offensive weapon or instrument. The second category also requires proof of stealing, and at or immediately before or after the stealing the accused person used or threatened to use violence to any person in order to obtain or retain the stolen property.

Further, in recent case of **Amos Sita @ Ngili vs Republic** (Criminal Appeal No. 438 of 2021) [2023] TZCA 17697 (3 October 2023) (TANZLII), at pages 12-13, Court of Appeal stated that:

According to the above provision, to prove the offence of armed robbery three ingredients have to be proved, that is, ***one, that there was stealing; two, that, immediately after stealing, the invader had a dangerous or offensive weapon; and three, that, the invader used or threatened to use actual violence in order to obtain or retain the stolen property.*** *We stated this stance in the case of* ***Shabani Said Ally v. Republic,*** *Criminal Appeal No. 270 of 2018 (unreported)*

when discussing the ingredients of armed robbery as hereunder: "... from the above position of the law in order to establish an offence of armed robbery the prosecution must prove the following: 1. There must be proof of theft; See the case of Dickson Luvana v. Republic, Criminal Appeal No. 1 of 2005 (unreported). 2. There must be proof of the use of dangerous or offensive weapon or robbery instrument against at or immediately after the commission of the offence; 3. That the use of dangerous or offensive weapon or robbery instrument must be directed against a person. See Kashima Mnandi v. Republic, Criminal Appeal No. 78 of 2011 (unreported)."

In the instant appeal, the evidence of PW 1 is to the effect that he took TZS 2,300,000/= from the shop to home which were stolen. The appellant was having a machete that he threatened to injure the victim if there was resistance. Thus, there was stealing as TZS 2,300,000/= was stolen. According to PW 1, PW 2 and PW 3, the appellant used a machete to threat PW 1 immediate before the stealing and immediate thereafter before PW 2 and PW 3 arrived to assist PW 1. In fact, assistance rendered to PW 1 by the duo resulted in arresting the appellant red-handed.

I cannot agree with appellant's contention that PW 4 whose property was stolen did not testify to the aspect of TZS 2,300,000/= nor any other witnesses did testify to that effect. It was the lucid evidence of PW 1 that he is the one working as a shopkeeper in PW 4's shop and on material date PW 1 is the one who took the money from the shop to home and robbed by the appellant and his companionship before reaching home. PW 1 was a proper witness to testify on the amount stolen given that he was the one selling on that shop and it is the one who was robbed by the appellant.

On the issue of variance of the charge and evidence, there are rival contentions. The appellant argued that there was variance between charge and evidence which goes to the root of the case. The respondent was of a different view.

It is pertinent that charge which is a crucial document in administration of justice must be supported by cogent evidence that tally squarely with the particulars of the charge. Disparities between the charge and the evidence have insurmountable effect on the case. To apply the words of the Court of Appeal in **Francis Fabian @ Emmanuel vs Republic** (Criminal Appeal No. 261 of 2021) [2023] TZCA 17936 (12 December 2023) (TANZLII), at pages 4-5, the Court noted that:

Moreover, it is a duty of the prosecution to produce all necessary evidence to each and every allegation made therein. In the case of ***Abdel Masikiti vs. Republic,*** *Criminal Appeal No. 24 of 2015 (unreported) at page 8 thereof, this Court insisted that,* ***it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet, which the accused was expected and required to answer. If there is any variance or uncertainty in the dates or month, then the charge must be amended in terms of section 234 of the CPA. If this is not done as in this appeal, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur.***

The main question is whether there was variance of charge and evidence on record. I have thoroughly analysed the record both typed and handwritten proceedings to find out if any disparities of the dates exist. I am satisfied that there are no disparities. PW 1 evidence reveals that the incident happened on 13/02/2023. Totality of evidence of PW 1 who was the victim, PW 2 and PW 3 who were eyewitnesses reveals that the incident happened on 13/02/2023. Even PW 4 whose evidence is allegedly

that it stated that offence happened on 12/02/2023 reveals that in cross examination he stated categorically that it was on 13/02/2023 when he had been woke up and informed that PW 1 was robbed. He found the appellant already arrested.

What appears apparent in the typed proceeding is what can be termed as slip of pen. It is nothing but a typing error. In **Felix Bwogi t/a Eximpo Promotion & Services vs Registrar of Buildings** (Civil Application No. 26 of 1989) [1990] TZCA 130 (25 July 1990), at page 6, the Court restated that:

> *In our considered opinion, an accidental slip or omission of the court, as distinct from a clerical or mathematical errors. It may take any of the following: First, a fortuitous slip or emission such as occurs in a criminal trial while entering a plea of not guilty the word "Not" is not recorded by a slip of the pen inspite of the trial judge's firm intention to-make or cause to be made a full and correct recording of the plea. In many ways such an error is similar to a clerical mistake, except that the latter usually occurred in the registry or office of the court as envisaged by Lord Ponzanco in the case of Lawrie versus Lee (1881) 7 App C. 35. An accidental slip or omission of the Court however*

occurs in the course of proceedings in court. As our present case does not involve a slip of the pen, we need say no more except that on the available authorities, including the case of Ro Swire (1885) 30 Ch, D 239 this first category of errors, when it occurs, is rectifiable under the inherent jurisdiction of the court without invoking the appellate jurisdiction. It he may also be rectified under an express legal provision.

Having perused thoroughly the typed and handwritten proceedings, I am certain that there was no variance of charge and the evidence on record. This is with an exception to a minor slip of pen i.e. typing error on the date on the evidence of PW 1. The controlling record which is the handwritten is lucid that the date of the incident is 13/02/2023 not otherwise.

It is this court settled view that the prosecution's case managed to prove the case beyond all reasonable doubts. The prosecution managed to prove within the required standard that the appellant who was caught red handed did participate in the commission of the offence of armed robbery against PW 1. Thus, the first ground of appeal on failure to prove the prosecution's case beyond reasonable doubt has no merits. It is hereby dismissed.

In respect of contradiction of the prosecution evidence, it was strongly argued by the appellant that the there are several incidents on contradictions. First, hitting of the victim by stone from appellant or other person. Second, whether the appellant or persons in his companion stole TZS 2,300,000/=. Third, different on timing whether four of five minutes. These are refuted by the respondent.

On timing, it is my settled view that there is no any contradiction. PW 1 testified that the incident took about five minutes while PW 2 stated that incident took about four minutes. The reason is simple and straightforward that PW 1 was invaded by the appellant and his companionship. It upon being attacked and robbed when he raised alarm. It is at this juncture that PW 2 immediately arrived to give assistance to the victim. Thus, a minute difference does not raise any serious contradiction as PW 2 arrived a little bit late as he was not there when the robbery incident began. At this juncture, I am in concurrence with the respondent's view that there was no contradiction.

On whether the respondent was hit by appellant or any other person, it is my humble view that this also is not necessary. The testimony of PW 1 on the incident is that appellant and his companionship robbed him TZS 2,300,000/= and that appellant was in possession of a machete that he

threatened to injury/hit PW 1 if the latter would resist to the stealing of TZS 2,300,000/=. PW 2 corroborated that it was the appellant who was in possession of a machete during the robbery. That is what was important in establishing the offence for which the appellant was convicted of.

On the stolen money, it appears that this need not to detain this Court. It is on record that the appellant was in a company on that material date when the victim was invaded and robbed. In course of the incident, TZS 2,300,000/= that victim was in possession was stolen. Thus, as the appellant was member of the gang that stole from the victim and he was arrested at the scene of crime, he cannot be exonerated from the liability as he was part of the group to execute the plan. Sections 22 and 23 of the Penal Code, Cap 16 R.E. 2022 consider both the principal offenders and the aiders or abettors as offenders without any exception.

In the case of **Priva Constantine Shirima vs Republic** (Criminal Appeal No. 437 of 2020) [2024] TZCA 237 (22 March 2024) (TANZLII), at page 12, the Court of Appeal stated that:

> *The law on this point is clear that the court will only take into consideration contradiction which are not minor which do not go to the root of the matter. The Court has said so in various cases, amongst others, M**ohamed Said Matula v Republic** [1995] TLR 3, **Issa Hassan v. Republic**,*

Criminal Appeal No. 129 of 2017 (unreported) and ***Dickson Elia Nsamba Shapwata & Another v. Republic****, Criminal Appeal No. 92 of 2007 [2008] TZCA 17 (30 May, 2008) TanzLII. In the latter case, the Court stated that: "In evaluating discrepancies, contradictions, and omissions, it is undesirabie for a court to pick out sentences and consider them in isolation from the rest of the statements. The court has to decide whether the inconsistencies and contradictions are only minor or whether they go to the root of the matter."*

As I have pointed out that there is no material contradiction of evidence of the prosecution if the same is considered holistically. The evidence of PW 1, PW 2, PW 3 and PW 4 point out the one and the same direction that appellant was who was part of the persons who stole from PW 1 and used a machete to threatens use of weapon against PW 1 not to resist both stealing and retaining of the stolen property. At this juncture, it is proper to state with certainty that second ground of appeal lacks any tangible merits thus is quashed.

On irregularities, the appellant focus was on failure of the trial magistrate to consider defence evidence. On record, it is indicated that the trial magistrate noted in analysis that the accused person's evidence did

not raise any doubt to the prosecution's case in the offence of armed robbery.

It was the appellant's case that in Abel Masikiti's case failure to consider and analyse the defence evidence is fatal. The respondent on the other hand stated that evidence of the defence was considered but it did not raise any reasonable doubt.

It is true that in **Abel Masikiti vs Republic** (Criminal Appeal 24 of 2015) [2015] TZCA 8 (21 August 2015) (TANZLII), the Court of Appeal had reiterated the need to consider and analyse defence evidence and that failure to analyse the same amounts to fatal error and it vitiates the decision. The Court at page 9 stated that "it is also now trite law that failure to consider the defence is fatal."

However, there are several authorities that have advanced an opposite view. The plethora of authorities are to the effect that where the trial court considers the defence evidence and states to the effect that it has no managed to shaken prosecution evidence, the appellate court should not consider that a failure to analyse the defence evidence thus the decision remains valid and solid.

In the case of **Mathayo Laurance William Mollel vs Republic** (Criminal Appeal No. 53 of 2020) [2023] TZCA 52 (20 February 2023) (TANZLII), at page 18 guided as follows:

> *The record of appeal bears out at p. 116 that the appellant just made evasive denials that he did not commit the offence. That the cautioned statement was not his and that he was just made to sign it. He repudiated it. Given the appellant's defence at the trial which consists of evasive denials, we are afraid, even if the two courts below considered it, they would have arrived at the same conclusion. Consequently, we find no substance in this ground of appeal and dismiss it (Emphasis added).*

It is lucid that where the court considers the defence evidence and finds out that the same contains evasive denials the Court cannot be faulted for disregard of such defence evidence in reaching to its finding as the evasion denials have no substance to weaken the prosecution's case.

Further, in **Metwii Pusindawa Lasilasi vs Republic** (Criminal Appeal No. 431 of 2020) [2024] TZCA 139 (23 February 2024), at pages 20-23, the Court of Appeal stated that:

Comprehensively considered, his conclusion was that the appellants were arrested while in possession of exhibit P3. Upon a finding that the prosecution evidence placed the appellants at the scene of crime, that is red handed, he reasoned that no defence evidence could displace that fact. ***We think, in view of his holding above that the prosecution evidence linked the appellants with the possession of exhibit P3, he was right to hold as he did and he cannot be faulted for using the words "the defence evidence could not negate..."***

Like in two cases above, we cannot therefore afford to let the appellants who were found red handed having the pieces of tusks to evade the arm of justice on flimsy reasons.

This decision has effect that where there is assertion by the trial court in its finding that the defence evidence did not manage to cast doubt on the prosecution especially where the accused person was caught red handed at the scene of crime, such finding should not be reversed on appeal unless the circumstances have compelled otherwise namely that the defence evidence had raised serious holes in the prosecution's case. The defence evidence is to the effect that on material day found people fighting

and went to help the victim and escort him to home. It is at that juncture when the appellant allegedly was arrested.

Finally on this aspect is the case of **Isaya Loserian vs Republic** (Criminal Appeal No. 426 of 2020) [2024] TZCA 138 (23 February 2024) (TANZLII), at pages 21-23, the Court of Appeal noted that:

> *All the same, we have examined the defence evidence, which as earlier demonstrated,* ***constituted of a flat denial in the commission of the offence, a defence of alibi and grudges between him and both PW2 and PW1. Save for the defence of alibi, following our findings above, the two remaining defences are without merit.*** *It is a glaringly truth that the defence of alibi was raised after the prosecution had closed its case and without giving notice. In terms of section 194 (4) 21of the CPA and our decisions in* ***Marwa Wangiti vs Republic*** *(supra) and* ***Charles Samson vs. Republic*** *[1990] T.L.R. 39, a trial court, under section 194(6) of the CPA, may at its discretion either disregard it after taking note of it or accord less weight on it. In the instant case, there was complete omission to consider it without assigning reasons for disregarding it. We think, that was an error.* ***But, exercising our mandate as first***

appellate court as we were invited by the learned Senior State Attorney to evaluate his defence, even if the defence of alibi would have been considered, as we have demonstrated above, the prosecution evidence through PW1 placed the appellant at the scene of crime which fact dispels its significance *[See* ***Edgar Kayumba vs. Director of Public Prosecutions****, Criminal Appeal No. 498 of 2017 (unreported)]. The defence is therefore highly improbable.* (Emphasis added).

My perusal of the evidence on record reveals that the appellant did not raise any serious doubt on the prosecution's case evidence.

In the instant case, the trial magistrate at page 16 of the Judgment of trial Court noted that all three elements of armed robbery were present in this case, and he has considered the defence of the accused. He reiterated that the duty of the accused is simply to raise reasonable doubt. It was the trial magistrate's finding that in this case the accused person failed to raise any reasonable doubt from the prosecution case for the first offence he was charged.

This finding of the trial magistrate is certainly that the trial court considered the defence evidence but found it did not raise any reasonable

doubt on the prosecution case. Thus, lamentation on the irregularities based on the failure to analyse and consider defence evidence is without any cogent merits thus it is hereby overruled.

In the upshot this appeal lacks merits, and it deserves to be dismissed. I shall proceed to dismiss the appeal for being destitute of merits. The conviction and sentence on the offence of armed robbery entered by the District Court for Dodoma is upheld.

It is so ordered.

DATED at DODOMA this 13th day of June 2024

E.E. LONGOPA
JUDGE
13/06/2024