IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MWARIJA, J.A., KEREFU, J.A. And KENTE, J.A.)

CRIMINAL APPEAL NO. 306 OF 2019

MUHOJA MAZOYA .....1ST APPELLANT

KAMULI JEREMIAH.....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of High Court of Tanzania at Shinyanga)

(Ebrahim, J.)

dated the 26th day of July, 2019
in
Criminal Appeal No. 105 of 2018

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JUDGMENT OF THE COURT

9th November, 2022 & 6th July, 2023

MWARIJA, J.A.:

The appellants, Muhoja Mazoya and Kamuli Jeremiah (the first and second appellants respectively) were charged in the District Court of Bariadi at Bariadi with the offence of armed robbery contrary to s. 287A of the Penal Code, Chapter 16 of the Revised Laws as amended by Act No. 3 of 2011 (the Penal Code).

It was alleged that on 20/09/2017 at about 21:00 hrs at Malili Village within Busega District in Simiyu Region, the appellants stole TZS 220,000.00, the property of Kija Mazoya and immediately before stealing that amount, they used a machete to cut the said Kija Mazoya and Benadetha Ngasa in order to obtain the said property.

When they were arraigned, the appellants denied the charge and as a result, the case had to proceed to a full trial. Whereas at the trial, the prosecution relied on the evidence of seven witnesses, the appellants were the only witnesses for the defence.

At the conclusion of the trial, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt. It thus proceeded to convict and sentence each of them to an imprisonment term of thirty (30) years. Aggrieved by the decision of the trial court, they unsuccessfully appealed to the High Court hence this second appeal.

The facts giving rise to this appeal may be briefly stated as follows: The 1st appellant and one of the victims, Kija Mazoya (PW1) are siblings. The other victim, Benadetha Ngasa (PW2) was until the

material time, the wife of PW1. The 1st appellant and PW1 were staying in different houses situated in the compound of Mazoya Matunange (PW3), their father. On the night of the incident, on 20/09/2017 PW1 and his wife (PW2) were sleeping in their house while the 1st appellant who had his house within his father's compound, was sleeping in the sitting room of his parents' house (the main house).

At about 21:00 hrs, the door of PW1's house was broken by a person who, after he had entered in the house, attacked PW1 with a machete and injured his little finger. PW2 raised an alarm but was also attacked by being cut with a machete twice on her right hand.

Awaken by the alarm from PW1's house, PW3 also raised the alarm which was responded to by the neighbours who arrived at the scene. At the time of their arrival however, the person who broke into PW1's house and attacked him and his wife had already left. PW1 and PW2 were taken to police where they were issued with PF3 and went to Ngasamo Dispensary for treatment. They were attended by Jerald Charles Mabula (PW5), a Clinical Officer who indicated in their medical

reports that, whereas PW1 had suffered cut wound on his little finger, PW2 sustained a cut wound on her right hand caused by a sharp object.

In his testimony, PW1 stated that, while he was asleep, he heard the dogs barking outside and when he peeped through the window, with the aid of the light from a solar energy outside the house, he saw the 1st appellant. PW1 did not thus think that there could be anything fishy. Shortly thereafter however, a culprit intruded and attacked him and his wife (PW2). It was his evidence that, he identified the intruder to be the 2nd appellant who was known to him before the date of the incident. To save himself and PW2 from more attacks, PW1 disclosed that his money was in his trouser's pocket. The intruder took the money, TZS 220,000.00 and went away.

The evidence of PW1 was supported by PW3 and PW4. According to PW3, when he wanted to get out after hearing the alarm raised by PW1, the 1st appellant who was in the sitting room of the main house and who had acted passively to the incident, obstructed PW3 at the door warning him that he would be killed by the culprit

who was outside the house. The evidence of PW3 was also to the effect that, when he later on managed to get out, he did not find anybody outside but he was told by PW1 in the presence of the mob who responded to the alarm, that he identified his assailant to be the 2nd appellant and that before he broke in, he saw the 1st appellant outside the house.

Similar evidence was given by PW4 who added that, she assisted PW1 to raise the alarm to which many people responded and gathered at the scene of crime. It was her evidence further that, she saw PW1 with a wounded hand and heard him stating that the attack on him and his wife (PW2) was done by the 2nd appellant.

The Malili Village Chairman, Paulo Bujilima (PW6) was one of the persons who went to the scene in response to the alarm. He arrived there at about 22:00 hrs and PW3 briefed him about the incident. In his testimony, PW6 adduced that, at that gathering, PW1 named his younger brother (the 1st appellant) and the 2nd appellant, who was known to him as a resident of Ngunga Village, as the culprits who broke into the victims' house and injured them with a machete.

Following the naming of the suspects by PW1, whereas the 1st appellant was put under arrest, the 2nd appellant was traced at his home and arrested on that night. After investigation which was conducted by No. F. 3690 D/Sgt. Adam (PW7), the appellants were charged as shown above.

In his defence, the 1st appellant who testified as DW1, denied the charge contending that on the material night, he was asleep in the sitting room of the main house when at about 21:00 hrs, the house of PW1 was broken into by a bandit who was later named to be the 2nd appellant. DW1 did not deny the contention that he obstructed PW3 and PW4 from getting out. However, according to him, he did so with good intention of saving them from being attacked by the bandit who was within the compound. He also challenged the evidence to the effect that, he was seen outside PW1's house shortly before the incident. He contended that, the evidence that he was seen with the aid of solar light was doubtful. He added that, in his evidence, PW6 said that he did not see any solar source at the scene of crime. In cross-examination, DW1 disputed the evidence that, apart from preventing PW3 and PW4, he remained passive when PW1 and PW2

were being attacked. He said that, he assisted them by also raising the alarm.

On his part, the 2nd appellant, who testified as DW2 distanced himself from the offence. According to his evidence, on the material date at midnight, while he was asleep in his house, he was awaken by a knock at his door. Shortly thereafter, he heard a mob breaking the window of his house. Before they did anything further, he heard the chairman of his village, the Migunga 'A'. Village, calling him while stopping the mob from continuing with the breakage. DW2 went out and met the Village Chairman and other people who took him to the scene of crime and later to police station. He disputed the evidence of PW1 that he identified him. He contended that, such evidence is unreliable because, according to the said witness, it was the first time that he saw him.

Having considered the evidence, the trial court found that, the appellants were known to PW1 and that during the incident, they were properly identified. The learned trial Senior Resident Magistrate considered also the 1st appellant's conduct of preventing PW3 and

PW4 from getting out for the purpose of offering help to the victims. As to the appellants' defence, the learned trial Senior Resident Magistrate found the same to be an afterthought. As stated above, the trial court was, as a result, satisfied that the charge was proved beyond reasonable doubt. They were consequently convicted and sentenced as shown above.

In upholding the appellants' conviction and sentence, the High Court agreed with the trial court's findings, **first**, that the appellants were properly identified with the aid of solar light, **secondly**, that the 2nd appellant was immediately mentioned at the scene of crime to the persons who had turned out shortly after the incident and **thirdly,** that from his conduct of preventing his parents, PW3 and PW4 from getting out in response to the alarm raised by PW1 and the reluctance to assist during the incident, showed that he jointly acted with the 2nd appellant to commit the offence and thus liable under s. 23 of the Penal Code, Chapter 16 of the Revised Laws.

In their joint memorandum of appeal, the appellants have raised the following three grounds of complaint:

1. That, the High Court erred in law and fact in upholding the decision of the trial court while the case against the appellants was not proved beyond reasonable doubt.
2. That, the High Court erred in law and fact in upholding the decision of the trial court while the appellants' conviction was based on weak evidence of identification.
3. That, the High Court erred in law in upholding the conviction of the appellants which was based on a defective charge.

During the hearing of the appeal, the appellants appeared in person, unpresented while the respondent Republic was represented by Mr. Shaban Mwegole, learned Senior State Attorney. When they were called upon to argue their grounds of appeal, each of the appellants opted to let the learned Senior State Attorney reply first, to the grounds of appeal and thereafter, would submit in rejoinder, should the need to do so arise.

Mr. Mwegole began with the 3rd ground of appeal. He submitted that the appellants were charged with the offence of armed robbery under s. 287A of the Penal Code as amended by s. 10A of the Written Laws (Miscellaneous Amendments) Act No. 3 of 2011. He stressed that, the proper section of the law was cited and the particulars of the

offence were properly stated thus for that matter, the charge does not have any defect.

On the 1st and 2nd grounds, the learned Senior State Attorney submitted that, the case against the appellants was proved beyond reasonable doubt. He argued that, from the evidence of PW1 and PW2, contained on pages 12 - 16 of the record of appeal, both appellants who were known to PW1 before the date of the incident, were properly identified through the aid of solar light and therefore, the possibility of a mistaken identity did not arise. He cited the case of **Lazaro Alex v. Republic**, Criminal Appeal No. 41 of 2003 (unreported) to bolster his argument. Citing also the case of **Hussein Ally @ Fundumu v. Republic**, Criminal Appeal No. 462 of 2007 (unreported), Mr. Mwegole contended that, the fact that the appellants were named immediately after the incident rendered the evidence of PW1 credible.

Submitting further on these two grounds, Mr. Mwegole supported the finding of the two courts below, that the 1st appellant's reluctance and the act of preventing PW3 and PW4 from getting out of

the house was an indication of his being aware and his involvement in the commission of the offence.

With regard to the evidence that, PW1 and PW2 were injured with a machete by the 2nd appellant in the course of the robbery, the learned Senior State Attorney submitted that, although the medical reports of the victims were not read out after their admission in evidence and thus deserving to be expunged, the oral evidence of PW5 sufficiently proved that the victims suffered cut wounds caused by a sharp object.

On those submissions, the learned Senior Attorney prayed to the Court to find that the 1st and 2nd grounds are also devoid of merit. In that regard, he urged the Court to dismiss the appeal.

In rejoinder both appellants challenged the evidence which was acted upon to found their conviction. The 1st appellant argued that, since from their evidence, PW3 and PW4 were in the main house together with him at the time of the incident, the contention by the said witnesses that they saw him outside the house shortly before the incident, should not have been relied upon. On his part, the 2nd

appellant argued that the evidence to the effect that he was properly identified by PW1 is doubtful because the said witness did not describe the intensity of the solar light which aided him to identify the said appellant.

Before we proceed to determine the grounds of appeal in the order in which they were argued, we wish to state that, this being a second appeal based on the decision in which the two courts below had arrived at concurrent findings of facts, we shall be guided by the principle that, the Court should be reluctant to interfere with such decision unless there are sound reasons to do so. In the case of **Dickson Joseph Luyana and Another v. Republic**, Criminal Appeal No. 1 of 2005 (unreported), the Court emphasized on the observance of that principle as stated in the case of **Amrattal D.M. t/a Zanzibar Silk Stores v. A. H. Jariwala t/a Zanzibar Hotel** [1980] T.L.R. 31. The Court restated the principle as follows:

> "*...where there are concurrent findings of facts by two courts below, this court should as a wise rule of practice follow the long established rule repeatedly laid down by the Court of Appeal for East Africa. The rule is that an*

appellate court in such circumstances should not disturb concurrent findings of fact unless it is clearly shown that there has been a misapprehension of the evidence, a miscarriage of justice or a violation of some principle of law or practice...".

With that principle in mind, we now proceed to determine the appeal starting with the 3rd grounds in which the appellants are complaining that, their conviction was based on a defective charge. Having perused the charge, which is on page 1 of the record of appeal, we agree with Mr. Mwegole that the complaint by the appellants is devoid of merit. First, the charge is based on s. 287A as amended by s. 10A of the Written Laws (Miscellaneous Amendments) Act, 2011. Following the amendment, that section reads as follows:

"*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".

With regard to the particulars of the offence, the same were stated in ordinary language with sufficient information to the appellants, including the disclosure of the ingredients of the offence.

In the circumstance, we could not find any material defects in the charge as the same was prepared in accordance with the provisions of s. 135 (a) (i)-(iii) of the Criminal Procedure Act, Chapter 20 of the Revised Laws (the CPA). We thus dismiss that ground of appeal.

On the 1st and 3rd grounds of appeal, from the submissions of the learned Senior State Attorney and the appellants' rejoinder submissions, the discord centres on the issue whether or not the appellants were identified at the scene of crime as the culprits. The crucial evidence to that effect is that of PW1. There was no dispute as regards the fact that, the 1st appellant is the younger brother of PW1 and thus known to PW1. As for the 2nd appellant, both the trial and

the first appellate court believed the evidence that the 2nd appellant was known to PW1 before the date of incident. Having analysed the evidence, we could not find any sound reason to disagree with that finding which was based on credibility of the witness.

The evidence of PW1 as to the identity of his assailants is therefore, one of recognition. According to his evidence, when he heard the dogs barking, he looked outside his house and saw two persons, the 1st appellant and another person. He recognized the 1st appellant through the aid of solar light. As for the person who broke the door, entered and committed the offence of robbery after he had injured him (PW1) and his wife (PW2) with a machete, it was his evidence that he recognized that person to be the 2nd appellant.

In his rejoinder submission, the 2nd appellant faulted the first appellate court for upholding the finding of the trial court that he was recognized by PW1 while the intensity of solar light was not described. On his part, the 2nd appellant challenged that finding contending that, from the evidence of PW6, there was no solar lighting at the scene of crime.

To start with the contention by the 2nd appellant on the evidence of PW6, we find that the 2nd appellant misconceived the evidence of PW6. What he said, when he was being cross examined by the 1st appellant as reflected on page 26 of the record of appeal, is that he (PW6) did not know the source of the energy used to light PW1's house whether it was from solar or electricity. The witness was recorded to have said that:

> *"I don't know the kind of energy which is used at Kija's (PW1's) house (solar or electricity)".*

That answer did not mean that there was no light at PW1's house, but that the witness did not known the source of the light.

On the question of intensity of the light which aided PW1 to recognize the 2nd appellant, as raised by the said appellant, it is true that in his evidence, PW1 did not describe it. However, he stated consistently that he positively recognized the 2nd appellant and proceeded also to describe his attire, that he had put on *"a draft shirt, white in color and black shoe"* and that he even knew that the 2nd appellant was residing at Ngunga Village. The evidence to the effect

that it was the solar light in the house that enabled PW1 to recognize the 2nd appellant is fortified by unchallenged evidence of the victims that, in order to save himself and PW2 from further attacks, PW1 disclosed where the money was; that it was in his trousers' pocket where upon the 2nd appellant took it and ran away. That shows clearly that the light was sufficient as it enabled PW1 to locate PW1's trouser and the money.

PW1's evidence of recognition was also fortified by the fact that he immediately mentioned the appellants to the people who responded to the alarm as the two persons he saw outside his house shortly before the breakage and the 2nd appellant as the person who entered into the house and committed the offence. In the case of **Marwa Wangiti Mwita and Another v. Republic**, Criminal Appeal No. 6 of 1995 (unreported), the Court had this to say on the ability of a witness to name a suspect immediately after the incident:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry".*

For these reasons, we agree with the finding of the two courts below that both appellants were recognized by PW1 shortly before the incident and that, it was the 2nd appellant who entered in the house in question, injured the victims with a machete and stole TZS 220,000.00 from PW1. The 2nd appellant was therefore, properly convicted.

That said, the next matter for our determination is on the involvement or otherwise of the 1st appellant in the commission of the offence. As found above, it was established through the evidence of PW1 that, following the dogs' barking, he peeped out and saw the 1st appellant with another person he later recognized to be the 2nd appellant. Shortly thereafter, the 2nd appellant broke the door of PW1's house, entered therein and committed the offence. There is also the evidence PW3 and PW4 to the effect that, when the victims raised the alarm, the 1st appellant who had returned in the sitting room of the main house, was not only reluctant to render assistance to the victims but through an act which would not be interpreted otherwise than delaying PW3 and PW4 from getting out of the main house in response to the alarm, he obstructed then by pushing back the door

so that they did not get out. Like both the trial court and the first appellant court, the reason given by the 1st appellant, that he was fearing that PW3 and PW4 would be harmed by a person who was outside the house, is not loudable. This is because, as observed by the learned trial Senior Resident Magistrate, the said appellant had the knowledge of the presence of the culprit, otherwise he would not have known that the victims were raising the alarm because of a culprit's intrusion in their house.

That conduct of the 1st appellant corroborated PW1's evidence that the appellants were together at the victims' house few minutes before the incident. As observed in the case of **Pascal Kitigwa v. Republic** [1994] T.L.R, the conduct of an accused person may be acted upon as corroborative evidence to establish his guilt. In that case, the Court stated that:

> *"Corroborative evidence may be circumstancial and may well come from the words or conduct..."*

On the basis of the foregoing reasons, we support the finding of both the trial and the High Court that, the 1st appellant collaborated

with the 2nd appellant in the commission of the offence. We therefore, find that, like the 2nd appellant, his conviction was well founded. The 1st and 2nd grounds of appeal are thus lacking in merit. They are similarly dismissed.

In the event, the appeal is hereby dismissed.

DATED at **DAR ES SALAAM** this 27th day of June, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The Judgment delivered this 6th day of July, 2023 in the presence of the appellants appeared in person via video link from Shinyanga Prison and Mr. Nyamnyaga Magoti, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL