IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MUGASHA, J.A., MWANDAMBO, J.A., And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 44 OF 2017

NCHANGWA MARWA WAMBURA.....APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(Mlacha, J.)

dated the 31st day of January, 2017
in
Criminal Appeal No. 33 of 2016
.....

JUDGMENT OF THE COURT

28th November & 11th December, 2019.

LEVIRA, J.A.:

In the District Court of Tarime at Tarime the appellant, Nchangwa Marwa @Wambura was charged with Armed Robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2002 (as amended by Act No. 3 of 2011) (the Penal Code). It was alleged that on the 14th day of March, 2015 at about 11:00hrs, at Remagwe Village, within Tarime District in Mara Region, the appellant did steal cash Tshs. 350,000/= the property of one Weinani Nyakiranganyi and at the time of such stealing he threatened to

injure him by using a knife in order to obtain the said amount of money. The appellant denied the charge and hence the full hearing.

After a full trial, the appellant was found guilty and accordingly convicted and sentenced to a mandatory term of thirty (30) years in jail plus 12 strokes of cane. Six of them were to be inflicted forthwith and the remaining had to be executed in six months' time from the date of the decision. Dissatisfied, the appellant unsuccessfully appealed to the High Court. His appeal was dismissed and in exercise of revisional powers, the High Court found the execution of the corporal punishment to be inappropriate and it ordered the 12 strokes to be executed forthwith subject to the law governing execution of corporal punishment. Still aggrieved, the appellant has filed the instant appeal challenging the concurrent findings of the lower courts.

At this juncture, we find it apposite to explore, albeit briefly, the factual background giving rise to this appeal. On 14th March, 2015 at /about 11:00 hours PW1, the victim was with his colleagues, namely; Nyamuhanga Magera (PW2) and Mwita Joseph at Nyabichune village excavating sand for sale, whereby each trip sold at Tshs. 18,000.00. While at the site, the appellant appeared, approached PW1 and threatened him

with a knife demanding to be given money. PW1 testified further that, being scared he surrendered to the appellant Tshs. 350,000.00. The appellant took the said money and escaped. PW1 raised an alarm seeking assistance. PW1 accompanied by PW2 and others chased the appellant towards the forest and eventually, he was apprehended and surrendered to PW3, the Chairman of Nyabichune Village. In addition, PW2 stated that, he knew both the appellant and the complainant (PW1). He saw PW1 while giving the appellant some money; but, did not mention the amount.

According to PW3, while in the office he heard PW1's alarm and within no time, a group of villagers including the appellant arrived at his office. They informed him about the incident; they also surrendered a knife allegedly to have been used by the appellant in threatening PW1. PW3 reported the incident to the police and immediately they responded. The police officer, No. G.9298 DC John (PW4) investigated the incident after being assigned the case file and entrusted the allegedly appellant's knife (Exhibit P1) on 15th March, 2015. He also interrogated the appellant who admitted to have been at the scene of crime on the fateful day, but denied to have committed the offence.

In his defence, the appellant (DW1) admitted to have met PW1 in the company of PW2 on the fateful day; but, PW1 stopped and asked him (DW1) whether he was still having sexual relationship with his (PW1's) wife. The appellant denied and PW1 rose alarm for assistance. Shortly thereafter, villagers gathered and arrested the appellant who denied to have stolen PW1's money.

As intimated earlier, both the trial and first appellate courts were satisfied that the prosecution proved its case to the required standard and hence, his conviction and sentence. Aggrieved, the appellant has preferred this appeal raising the following grounds:-

1. *That, the alleged scene (village) of the incident as per charge sheet is in variance to the prosecution evidence while it is a basic matter of the offence. Thus the evidence was not proved the charge (sic).*

2. *That, the appellate judge was fallen to upheld the appeal without consider (sic) that the scene and its circumstances was very hard a person to rob a person who has surrounded by his co-several fellows at day time.*

3. *That, the appellate judge also was erred to prejudice without to decide the strong argise (sic) of the second ground of the petition that if the I was robbed the said money why it had not seized from him while he was chased and arrested at the scene of crime.*

4. *That, the appellate judge was grossly erred to satisfy as the trial court that the prosecution side proved its case beyond reasonable doubt while it had fallen to present the case facts at present hearing through it was ordered severally (sic).*

At the hearing of the appeal, the appellant appeared in person, unrepresented, whereas, the respondent/ Republic was represented by Mr. Robert Kidando, learned Senior State Attorney.

The appellant adopted his grounds of appeal without more reserving his right to make a rejoinder if such need arose.

On his part, Mr. Kidando readily supported this appeal on account of the fact that there was misapprehension of the evidence by the courts bellow. He urged us to interfere with the concurrent findings of the lower courts.

Mr. Kidando submitted that the appellant's case was not proved beyond reasonable doubt by the prosecution. He contended that the incident occurred on 14/3/2015 at 11:00 am and the appellant, PW1 and PW2 were not strangers to each other, so identification was not a problem, but the evidence on record does not indicate that the appellant threatened the victim (PW1) with a knife before stealing from him Tshs. 350,00.00 which was not recovered. It was his argument that if the appellant was chased without disappearing until when he was apprehended, why then it became impossible to find him with the said money. He argued that theft being an essential ingredient of Armed Robbery was not proved. He submitted further that the first appellate Judge did not consider that the appellant admitted to have met PW1 and PW2 on the fateful day blaming him for having sexual relation with his (PW1's) wife.

Mr. Kidando faulted the first appellate Judge for not considering that the trial Magistrate made his decision based on the defence of *alibi* which was an extraneous matter not pleaded by the appellant. The learned counsel argued that, both the trial and the first appellate courts did not consider the defence case in their respective decisions and that, the trial court did not evaluate evidence before it.

According to Mr. Kidando, the issue of alleged stolen money was raised before the first appellate court, but was not determined. Instead, what was determined is the issue of identification which was not contested. He argued that, the first appellate court was required to determine whether or not the offence was committed which was not the case and therefore, urged us to allow this appeal, quash the conviction and set aside the sentence.

In rejoinder the appellant supported Mr. Kidando's submission and urged us to allow the appeal.

We have considered the grounds of appeal, record of appeal and the parties' submissions. The main issue calling for our determination is whether the appellant's conviction which was upheld by the High Court was based on strong prosecution account.

It is trite law that the burden of proof against the accused always lies on the prosecution and no conviction shall be entered on account of weak defence but upon proof of the case beyond reasonable doubt. (See **John Makolebela Kulwa Makolobela and Eric Juma alias Tanganyika,** [2002] T.L.R. 296). To prove Armed Robbery under Section 287A of the Penal Code, the prosecution had to establish that, there was an act of

stealing; that at or immediately after the stealing the perpetrator was armed with any dangerous or offensive weapon or instrument and that, he used or threatened to use actual violence to obtain or retain the said stolen property. Discussing ingredients of Armed Robbery in **Fikiri Joseph Pantaleo @ Ustadhi v. R**, Criminal Appeal No 323 of 2015, the Court stated that:-

> "Next, we agree with Ms. Mdegela the learned State Attorney over her doubts whether the element of stealing in the offence of armed robbery was proved at all. For purposes of instant appeal the main elements constituting offence of armed robbery section 287A are first, stealing. The second element is either using firearm to threaten in order to facilitate the stealing..."

In **Zubell Opeshutu v. R**, Criminal Appeal No. 31 of 2003 cited with approval in **Dickson Joseph Luyana and Another vs. R,** Criminal Appeal No. 1 of 2005 (both unreported), the Court held that:-

> "The prosecution has to adduce evidence to establish the essential ingredient of the offence, that is, whether actual violence was used to obtain or retain the thing stolen. The nature of violence must also be proved. A

prerequisite for the crime of robbery is that there should be violence to the person or the complainant..."

It is common ground that both lower courts made similar findings that the appellant committed the offence of Armed Robbery. It is trite law that in a second appeal, like the present, the Court is not entitled to interfere with the concurrent findings of facts by the two courts below except in rare occasions where it is shown that there has been a misapprehension of the evidence or misdirection causing a miscarriage of justice. In **Mbaga Julius vs. R,** Criminal Appeal No. 131 of 2015, the Court emphasised that:

> "We are alive to the principle that in the second appeal like the present one, the Court should rarely interfere with concurrent findings of fact by the lower courts based on credibility. This is so because we have not had the opportunity of seeing, hearing and assessing the demeanor of the witnesses. (See **SEIF MOHAMED E.L ABADAN vs REPUBLIC,** Criminal Appeal No. 320 of 2009 (unreported). However, the Court will interfere with concurrent findings if there has been misapprehension of the nature, and quality of the

evidence and other recognized factors occasioning miscarriage of justice".

In the instant appeal, the evidence of PW1 and PW2 was to the effect that having been threatened, PW1 gave the appellant Tshs. 350,000.00. The appellant fled to a forest, he was chased and arrested. However, the appellant was not found with the alleged stolen money. With respect, we think the evidence of PW1 and PW2 in respect to stealing is wanting. It is on record that PW1 was selling sand and perhaps at the time of the incident he was having the alleged 350,000/=. The record is silent on how was it possible for the appellant to steal such amount in a broad day light in presence of many people without being intercepted; and yet, the alleged stolen money could not be recovered and the prosecution side did not prove that the appellant was found with the same.

As rightly stated by Mr. Kidando, the record does not show that the appellant disappeared while being chased by PW1, PW2 and others. In our considered opinion, the evidence of PW1 and PW2 was suspicious and the proof of stealing remained wanting.

We need also to consider whether the appellant was armed and used violence to obtain the money alleged to have been stolen. It was alleged that the appellant threatened PW1 by using a knife to steal money. The evidence by PW1, PW2, PW3 and PW4 regarding how the knife changed hands to its admission before the trial court is doubtful. PW3 stated that the villagers surrendered a knife alleged to have been used by the appellant when stealing. PW1 and PW2 did not tell the trial court that they arrested the appellant with a knife and none of them testified to the effect that they surrendered the appellant to PW3 with the alleged knife. That being the case, it is our respectful opinion that the prosecution was under obligation which they did not discharge to prove how the alleged knife landed into PW3's hands despite the same being admitted as exhibit P1.

However, PW4 who tendered exhibit P1 did not explain the chronological movement of the said knife to prove that it was the very same collected at the scene of crime and its peculiar features (if any). We find that the prosecution failed to prove that the appellant had the alleged knife at the time of incident. Had the lower courts considered this evidence gap, it could not have grounded conviction by relying on the said knife.

We now move to determine whether the defence case was considered by the trial court before convicting the appellant. Mr. Kidando submitted that both the trial court and the first appellate court did not consider the defence case in their respective decisions. With respect, we think the learned Senior State Attorney missed the point. At page 24, paragraph 7 of the record of appeal, the trial Magistrate made the following observation:-

> *"I have carefully perused the evidence on record. The circumstances of this case have proved satisfactorily how the accused alibi did not introduce any scintilla of doubt to his identification by PW1 and PW2 at the locus in quo to wit,* ***even his allegations about relationship grudges with PW1 are unfounded and rejected****. The accused cannot escape the clutches of law. In view of the above, I have no hesitation to believe that the prosecution side has proved the charge of armed robbery beyond reasonable doubt."*

On our part, we find that the trial Magistrate did not lose track of the defence case though he considered it together with extraneous matters as indicated earlier.

In view of the foregoing reasons, we are satisfied that the prosecution failed to prove its case against the appellant beyond reasonable doubt and the High Court was not justified to uphold the trial court's decision. We therefore, allow this appeal, quash the conviction and set aside the appellant's sentence. We order the immediate release of the appellant from prison unless otherwise lawfully held.

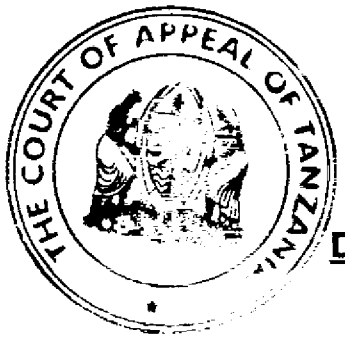
DATED at **MWANZA** this 6th day of December, 2019.

S .E. A. MUGASHA
JUSTICE OF APPEAL

L. S. J. MWANDAMBO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered this 11th day of December, 2019 in the presence of the Appellant in person and Mr. Emmanuel Luvinga, Senior State Attorney for the Respondent, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL