IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: JUMA, C.J., MZIRAY, J.A. And WAMBALI,J.A.)

CRIMINAL APPEAL NO 19 OF 2017

JUMA MZEE..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Hon. Dr. F. A. Twaib, J.)

dated the 16th day of December, 2016

in

Criminal Appeal No. 80 of 2016

JUDGMENT OF THE COURT

18th & 21st February, 2019

JUMA, C.J.:

This is a second appeal to this Court, arising from the decision of the High Court at Mtwara (F. Twaib, J.) dated 16th December, 2016 whereby the High Court concluded that the charge of armed robbery against JUMA S/O MZEE was proved beyond reasonable doubt and his conviction and the sentence of thirty years (30) imprisonment which the District Court of Lindi had imposed earlier, was proper.

The particulars of the charge for armed robbery contrary to section 287A of the Penal Code Cap 16 (R.E. 2002 as amended by Act 3 of 2011) for which the appellant was convicted by the trial court, were that on 5th November 2015, at Milola Village in Lindi District of Lindi Region, he stole one Radio (RISING), one Solar Panel and cash in the sum of Tshs. 345,000/= belonging to the complainant Said s/o Selemani Mpomoka (PW1). It was further alleged that immediately before and after the stealing, he threatened the complainant with a bush-knife. At his trial before the Resident Magistrate, A.O. Nzowa; the appellant denied the offence. The prosecution brought three (3) witnesses to prove the charge.

As a background, the complainant (PW1) testified that he was at home that eventful night when two men wielding a machete smashed through his door. They placed him under their custody and demanded his silence. They assaulted him using the blunt sides of the machete and ordered him to hand over his money. The bright solar light in the room enabled to see and identify the intruders, the appellant and Juma Sefu. The intruders were in fact his fellow villagers. The complainant saw when Juma Sefu lifted up the

mattress, and took away his Tshs. 345,000. He also saw the appellant taking away his solar panel.

Somehow the complainant managed to shout for help, which came from his neighbours, Athuman Juma (PW2) and Issa Nampila. But by the time his two neighbours arrived, the two intruders had vanished into the night. Because he knew their identities, the complainant mentioned the names of the appellant and Juma Sefu to his two neighbours. PW1 and his neighbours immediately set the search to look for the two robbers. Thirty minutes later they found the appellant at the nearby market and arrested him. The appellant took the team that had arrested him to his room where, in the presence of a local leader, the appellant handed the stolen solar panel back to the complainant. The complainant was able to identify his solar panel because of the three different wires he had used and a cut-mark he had earlier made on the solar panel. The appellant, together with the recovered solar panel, was taken to the village chairman's office.

PW2, one of the two neighbours who had responded to PW1's call for help, confirmed in material particulars the complainant's version of events which led to the arrest of the appellant at the market. PW2 testified that

upon learning that it was the appellant who was responsible for the armed robbery, he is the one who advised the complainant to mount an immediate search. PW2 confirmed that their local chairman was present when the appellant took them back to his room where he surrendered the solar panel.

G3366 PC Simon (PW3) testified on how the police became involved when the appellant was handed over to the police. PW3 recalled that on 05/11/2015, he was at Milola police post when the chairman of Liwapi locality came to report the arrest of the appellant, who was then still locked up in the village office. The local chairman handed the appellant together with the solar panel, over to the police. PW3 also made a point of visiting the scene of the crime where he saw for himself the door to complainant's house, which had been smashed down.

When called to his defence, the appellant gave an affirmed testimony. He stoutly denied any role in the stealing of the solar panel and armed robbery. He testified how as he was heading to the market that night, the complainant called him out to inform him that some children had accused him of stealing. The complainant asked him to accompany him back to the

appellant's house. They beat him up, labelling him a thief as they walked him back to the children who had witnessed the alleged theft. He stated that it was on the following day when the solar panel was allegedly brought to the police post, leaving him to wonder why he was not shown in the previous night of his arrest.

In this second appeal before us, the appellant assembled a list of seven grounds of appeal each of which he expounded and supported with written submissions, statutory provisions and case law thereon.

His **first** ground of appeal, the appellant faults the two courts below, for upholding his conviction and sentence despite the failure of the prosecution to prove its case beyond reasonable doubt. Under his **second** ground of appeal, he contended that the sketch map, which was admitted as exhibit P2 had little weight in the eyes of the law because the contents of the sketch map were not read out to inform him of the contents. For this stance, he referred us to the decision of the Court in **MT SGT 74795 BENJAMIN HOLELA V. R.** [1992] TLR 121.

In the **third** ground, the appellant faulted the two courts below for concluding that the items or properties which were found in the appellant's

possession were positively identified as belonging to the complainant. The **fourth** ground claims that without a certificate of seizure obtained under section 38 (3) of the Criminal Procedure Act the prosecution evidence of finding the stolen items in the appellant's house should not have sustained his conviction. The **fifth** ground of appeal faults the prosecution for failing to tender the bush knife which was used in the armed robbery. He wondered why PW1 could not show any injuries if any bush knife was used at all.

The **sixth** ground relates to the sentence, the appellant faults the two courts below for imposing a sentence of thirty years imprisonment without taking into account his status as a first offender. Under his **seventh** ground of appeal, the appellant attacks the identification evidence of PW1, claiming that it had little weight and should not have relied upon to sustain his conviction.

At the date of the hearing of this appeal before us, the appellant appeared in person and fully relied on his grounds of appeal while Mr. Joseph Mauggo, learned Senior State Attorney represented the respondent

Republic. The appellant preferred to let Mr. Mauggo the learned Senior State Attorney to first submit in response to the grounds of appeal.

In reacting to each ground of appeal the learned Senior State Attorney supported the conviction.

With regard to the first and seventh grounds of appeal, he argued that although the evidence of identification is regarded as of weakest kind, because the appellant was his fellow villager and they knew one another quite well, the complainant was able to identify the appellant at the scene of crime. There was sufficient light, he added, which enabled the complainant to identify both the appellant and his colleague. Mr. Mauggo also argued that close proximity which the complainant had with his attackers that night, and the duration the appellant and his colleague spent attacking PW1 using the butt of their bush knife, demanding money and taking his solar; all enabled positive identification.

Mr. Mauggo conceded that the identification evidence ordinarily requires corroboration. He nevertheless argued that there was ready corroboration in the evidence of PW2 together with the evidence that a few

moments after the armed robbery, the appellant was found in possession of the solar panel that had just been stolen from the complainant. The learned Senior State Attorney highlighted the significance of the appellant's evidence when, while objecting the exhibition of the solar panel as evidence, he blamed it on his colleague (Juma Sefu) as the thief. He insisted that the very short time separating the theft of the solar panel during an armed robbery, its being found in possession of the appellant and identified by the complainant, and the appellant's lame explanation of possession that it was Juma Sefu who had stolen it; all indicate that the prosecution case against the appellant was proved beyond reasonable doubt. To cement his argument that the trial and the first appellate courts had properly applied the doctrine of recent possession, Mr. Mauggo referred us to a decision of the Court in **OMARI IDDI MBEZI, VICTOR CHARLES, JOHN ANDREW & JAFARI IDDI MBEZI V. R.**, CRIMINAL APPEAL NO. 227 OF 2009 (unreported).

On the second ground of appeal over the sketch map (exhibit P2), Mr. Mauggo readily conceded that contents of this exhibit were not read over to the appellant and should as a result be expunged from the record.

Despite his concession, the learned Senior State Attorney was quick to downplay the significance of this ground of appeal for the main reason that the appellant did not raise it for deliberation by the first appellate High Court.

Mr. Mauggo went on to brush off the third ground of appeal which in essence alleges that the solar panel that was found in the appellant's possession was not properly identified as belonging to the complainant. He referred us to page 7 of the record of appeal where the complainant identified the panel, stating: *"I recognize the solar panel as I made a mark on it I used three different wires and a cut mark in every corner of the panel."*

With regard to the fourth ground regarding failure to produce a Certificate of Seizure to prove that solar panel was found in the appellant's possession, the learned Senior State Attorney argued that section 38 of the CPA governing issuance of certificates of seizure by police officers did not apply to the circumstances of the case at hand where the appellant was not arrested by the police, but by ordinary citizens, PW1 and PW2.

Mr. Mauggo urged us to dismiss the fifth ground of appeal wherein the appellant had asked why the prosecution failed to exhibit the bush-knife which was allegedly used to facilitate the armed robbery. He argued that the reason why the prosecution did not tender the bush knife is simply because it was never traced. Mr. Mauggo similarly scoffed off the appellant's sixth ground of appeal challenging the sentence of thirty years imprisonment imposed to a first offender he was. In so far as the learned Senior State Attorney is concerned, the sentence of thirty years imprisonment was proper for the appellant even in his status as a first offender.

When asked to offer his response to the respondent Republic's submissions, the appellant only urged us to allow his appeal and set him free.

On our part, after considering the evidence on record in light of submissions made on grounds of appeal, we found it appropriate to first note that grounds of appeal invite the Court to interfere with matters of facts wherein both the trial District Court and the first appellate High Court had made concurrent findings.

It is an accepted practice when determining a second criminal appeal; unless there are exceptional circumstances, the Court will not readily interfere with concurrent findings of facts because it is taken that all matters of fact were resolved and settled by the time a criminal appeal left the first appellate High Court: **see FELIX S/O KICHELE & EMMANUEL s/o TIENYI @ MARWA V. R.**, CRIMINAL APPEAL NO. 159 OF 2005 (UNREPORTED). This settled practice of the Court is borne out of Section 6 (7) (a) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002] which governs criminal appeals reaching up to the Court of Appeal from trial District Courts or Courts of the Resident Magistrate.

The trial and the first appellate courts made concurrent findings on the question whether the appellant was properly identified at the scene of crime. There was also concurrence on the facts that the evidence of the neighbour, PW2, confirmed that the complainant mentioned the appellant's name to him, which was almost immediately after the appellant had escaped from the scene. The appellant, PW2 and the complainant lived in the same village and were well known to one another well before the night of the armed robbery. There was similar concurrence of facts that the

circumstances in the complainant's room that night were conducive for the appellant to be positively identified. There is also a concurrent finding that the appellant was found in possession of the solar panel which he blamed on his escaped colleague.

The appellant's ground of complaint over the sketch map (exhibit P2) should not take much of our time. As correctly submitted by Mr. Mauggo, the appellant never raised this complaint in his grounds of appeal in the High Court. And, even if the sketch map is taken out of the evidential equation, there is still other remaining evidence of positive identification, recognition of fellow-villagers, together with evidence of the appellant being found in recent possession of stolen property. These are sufficient to sustain his conviction without the sketch map.

We also agree with the learned Senior State Attorney, that the appellant's contention that the solar panel which was found in the appellant's possession was not properly identified by the complainant is not borne out of the evidence appearing on page 7 of the record of appeal which Mr. Mauggo referenced us to. This evidence shows how PW1 actually identified the solar panel:

"We called the local leaders and Juma Mzee too us to home where they live together the chairman then opened the door and Juma Mzee showed us the solar panel and told us other properties were with Juma Sefu who was not at home. I recognize the solar panel as I made a mark on it I used three different wires and a cut mark in every corner of the panel."

We think the attempt by the appellant to clear his culpability after being found in possession of a stolen solar panel by blaming it on Juma Sefu was if anything, a lame excuse, which does not amount to his innocent possession of the solar panel.

Like Mr. Mauggo, we do not think that the lack of the Certificate of Seizure envisaged under section 38 (3) of the CPA can help the appellant to explain away the fact that he was found in possession of the solar panel.

Before we conclude, we must say a few words about a novel question of law which the appellant raised relating to appropriateness of the sentence of thirty years imprisonment for a first offender convicted of

armed robbery. This question can be answered by according S. 287A of the Penal Code a plain and straightforward meaning:

> *"**287A.** - A person who steal 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 the stolen property, commits an offence of armed robbery and **shall, on conviction be liable to imprisonment for term of not less than thirty years with or without corporal punishment**."* [Emphasis added].

A plain reading of above cited section prescribing punishment following conviction for the offence of armed robbery does not categorize any specific sentence for first offenders or recidivists or repeat offenders. Conviction for an offence under this provision attracts a minimum sentence of thirty years imprisonment even where the person concerned is a first offender. The only discretion that is left open is whether or not to impose additional sentence of corporal punishment.

Accordingly, and for the above reasons, we find no merit in this appeal, and dismiss the same.

DATED at **MTWARA** this 20th day of February, 2019.

I. H. JUMA
CHIEF JUSTICE

R.E.S. MZIRAY
JUSTICE OF APPEAL

F.L.K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

A.H. MSUMI
DEPUTY REGISTRAR
COURT OF APPEAL