IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: JUMA, C.J., KWARIKO, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO 62 OF 2022

JOHN MAKUYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal against conviction and sentence from the Judgment of the High Court of Tanzania at Tanga)

(Hon. E. J. Mkasimongwa, J)

dated the 29th day of April, 2021

in

Criminal Appeal No. 12 of 2020

JUDGMENT OF THE COURT

10th & 12th May 2022

JUMA, C.J.:

The appellant JOHN MAKUYA and another SEVERINO THADEI @ KOMBA were before the District Court of Muheza at Muheza, in Criminal Case No. 26 of 2019, charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2002 (now R.E. 2019).

The particulars of the offence are that at about 22:00 hrs. on 24/02/2019 at Mkanyageni Village, Muheza District in Tanga Region, they stole cash Tshs. 400,000/=, the property of Hilda Rumisha Marko, and immediately

before or after stealing, they threatened to use a bush knife to slash Hilda Rumisha Marko to obtain the stolen property.

The trial court convicted the appellant and his co-accused and sentenced them to serve thirty (30) years in prison for their conviction for armed robbery. The appellant and SEVERINO THADEI @ KOMBA appealed against their conviction and sentence in the High Court at Tanga. During the pendency of their first appeal in the High Court, Severino Thadei @ Komba died on 19/11/2020, and his appeal abated. The High Court (Mkasimongwa, J.) dismissed the appellant's appeal, hence this second appeal before us.

Juma Gregory (PW1), a watchman, was at his place of work, guarding a house he described as "*Shayo's Premise*," when bandits pounced. They tied his hands up with ropes and forced him to lie face down while threatening him with a machete. One bandit wore a black shawl (*buibui*) worn by women. The other bandit wore a cap that hid his face. While lying down, he heard women's cries for help inside the house.

The victim of the armed robbery, Hilda Rumisha Marko (PW2), who describes herself as a businesswoman, testified on the moments the bandits arrived. She was in her sitting room at her home in the Mkanyageni area when around 21:45 hours when two men walked in through the kitchen door. The

intruders demanded money. PW2 handed over Tshs. 400,000/= she had collected from her business that day. While they were demanding more money, PW2 heard noises from outside, which scared the two bandits, who rushed out. According to PW1, a police vehicle suddenly arrived with police officers while the two bandits were still inside PW2's house. The police stopped the two bandits at the gate and took them to the police station.

In his defence, the appellant denied that he committed the offence. He recalled that on 24/02/2019, he was walking to a bus stand to receive his wife arriving from Dodoma via Tanga. Four people came over to where he was waiting and placed him in a police vehicle. They drove him to Muheza Police Station, where the police beat him up and tortured him. He accused the police of charging him with another person he did not know. He testified that the police fabricated the charge of armed robbery against him.

After considering the evidence from both sides, the learned trial magistrate (Rutehangwa—RM) concluded that the appellant and his co-accused were armed with machete and rope, which were offensive weapons they used to obtain and retain Tshs. 400,000/= they had stolen.

After convicting the appellant and his colleague in crime, the trial magistrate sentenced both to serve thirty years in prison.

Aggrieved with the trial court's decision, they filed a Petition of Appeal in the High Court at Tanga in Criminal Appeal No. 12 of 2020. On the first three grounds, they challenged the identification evidence, which they blamed the trial magistrate for failing to analyse and scrutinize the intensity of the lights the witnesses relied on identifying them. They raised the issue of prosecution witnesses contradicting themselves on which house, between Mzee Sebastian Charles and Mzee Shayo, they committed the armed robbery. They also complained that the trial court failed to consider their defence.

After concluding that the police arrested the appellant and his colleague at the crime scene while committing the crime, the first appellate court (Mkasimongwa, J.) dismissed the appeal.

Aggrieved with the dismissal of his first appeal, the appellant filed this second appeal. In the Memorandum of Appeal, he filed on 23/02/2022, the appellant raised the following six grounds, which we paraphrase. Firstly, he complains that the prosecution did not prove the armed robbery charge beyond a reasonable doubt. On the second and third grounds, the

appellant complained that he was not correctly identified at the crime scene, significantly when PW1 and PW2 testified that there were two bandits while PW4 claimed there were four. On the fourth ground, the appellant faults the search certificate (exhibit P1), insisting that he neither signed it nor the prosecution read it over before the trial court admitted it. The fifth ground faults the contradictory evidence regarding which house the bandits invaded; between the home of Mzee Sebastian Charles and Mzee Shayo. The final ground faults the failure of the trial and the first appellate court to evaluate the defence evidence.

At the appeal hearing on 10/05/2022, the appellant appeared in person, unrepresented. Mr. Winlucky Mangowi, learned State Attorney, appeared for the respondent Republic. The appellant adopted all his six grounds of appeal and asked us to let the learned State Attorney first address his appeal grounds.

Mr. Mangowi outrightly opposed the appeal. Addressing the Court on the second ground of appeal, where the appellant contends that prosecution witnesses failed to identify him correctly, Mr. Mangowi submitted that the circumstances of the appellant's arrest leave no doubt that prosecution witnesses correctly identified the appellant. He referred us

to the record of appeal and submitted that in their respective evidence, PW1, PW2, PW3, and PW4 all stated that the police arrested the appellant at the crime scene. He referred to the evidence of Inspector Joseph (PW4), who received an anonymous call informing him about the incident. He rushed to the crime scene and arrested the appellant and his colleague, who were just about to flee. According to the learned State Attorney, the victims of the armed robbery (PW1 and PW2) were able to identify the appellant and his colleague under police guard immediately after the armed robbery. Mr. Mangowi urged us to dismiss the second ground of appeal because PW1, PW2, PW3 and PW4 saw the appellant under police guard immediately after his arrest. Kabula Joseph Gonza (PW3) was Ward Executive Officer of Mkanyageni Ward. He was invited to the crime scene to witness the police searching the appellant and his colleague.

The learned State Attorney next dealt with the third complaint, whether there were two bandits as PW1 and PW2 claim, or there were four bandits according to PW4. He submitted this contradiction is minor. He urged that the contradiction is minor because PW4 arrived at the scene later after PW1 and PW2 had faced off the armed bandits. He urged us to be guided by what we said in the case of **CHRIZANT JOHN V. R.**,

CRIMINAL APPEAL NO. 313 OF 2015 (unreported) that minor contradictions by any particular witness or among witnesses that do not go to the root of the matter, is unavoidable. He asked us to dismiss the third ground of appeal because the contradictions in the number of bandits do not go to the root of the fact that the police arrested the appellant at the crime scene.

The learned State Attorney conceded the fourth ground of appeal. He agreed with the appellant that we should take the search warrant (Exhibit P1) off the record because the prosecution failed to read it out as the law demands. He, however, referred us to the case of **ABAS KONDO GEDE V. R.,** CRIMINAL APPEAL NO. 47 OF 2017 (unreported), to support his submission that the oral evidence of PW1, PW2, PW3, and PW4 on the contents of the expunged search warrant, remains as evidence on record.

The learned State Attorney urged us to dismiss the fifth ground of appeal where the appellant faulted the failure of the first appellate court to address contradictions in the prosecution evidence regarding the house which the bandits invaded. He urged us to dismiss this ground because the contradiction was minor. As long as the police arrested the appellant at the crime scene, he submitted, it did not matter whose house it was.

Mr. Mangowi, the learned State Attorney, prefaced his submission on the first ground of appeal by referring to the main elements of the offence of armed robbery under section 287A of the Penal Code. He juxtaposed the evidence of PW1 and PW2 to show that the prosecution proved all the elements of armed robbery beyond a reasonable doubt.

The learned State Attorney pointed at the evidence of these two prosecution witnesses, who stated that the bandits carried a machete and tied them up with a rope, and demanded money. The evidence of PW1 and PW2, he submitted, proves all the essential ingredients of armed robbery against the appellant.

Mr. Mangowi concluded his submissions by urging us to dismiss the sixth ground of appeal, where the appellant complained that the first appellate judge failed to evaluate the defence evidence. He referred us to page 46 of the record, where the trial magistrate evaluated the defence evidence.

When we asked him to respond, the appellant did not have much to counter what the learned State Attorney had submitted. He all the same urged us to allow his appeal.

We have considered the six grounds of appeal and submissions before us. We have also considered the judgments of the trial and first appellate courts.

In his second and third grounds, the appellant raises issue with the trial and first appellate courts' conclusion that he was identified at the scene of the crime. It seems clear from evidence the police under PW4, arrested the fleeing appellant very close to where PW1 and PW2 were assaulted by the bandits. At page 18 of the record, Police Inspector Joseph (PW4) who was on patrol leading a police troupe, testified how after receiving an emergency call, rushed to the scene and arrested the appellant and his colleague-in crime, red handed. According to PW4, when he and other armed policemen arrived at the gate, he stopped two people who wielded machetes. Because the police had firearms, the two bandits quickly surrendered and were arrested. The evidence of PW3 supports that of PW1, PW2, and PW4 that the police arrested the appellant near the crime scene. PW3 testified how, as a Ward Executive Officer, he was woken from his sleep and invited to witness a search. He saw when the police searched the appellant.

Learned State Attorney correctly submitted that the contradictions which the appellant pointed out in the third and fifth grounds of appeal are minor. Contradictions regarding the number of armed robbers and the house where the armed robbery took place do not go to the root of the offence of armed robbery for which the two courts below convicted the appellant.

Our primary concern is whether prosecution evidence proved the offence of armed robbery against the appellant beyond a reasonable doubt. The appellant predicated his first ground of appeal on the complaint that the prosecution did not prove the offence of armed robbery against him to the required standard. In determining the substance of this complaint, we shall always bear our role as a second appellate Court in our minds. The position of the Court restated in several decisions, including **HAMISI MOHAMED V. R.**, CRIMINAL APPEAL NO. 297 OF 2011 (unreported), a second appellate Court should not disturb concurrent findings of fact made by the trial and first appellate courts unless there is a misapprehension of evidence or miscarriage of justice or violation of some principles of law or practice. Hence, our concern is whether there are reasons for this second appellate court to interfere with the conclusion by

the two courts below that it was the appellant who committed the offence of armed robbery.

Section 287A of the Penal Code, Cap. 16 R.E. 2019 discloses the essential ingredients of the offence of armed robbery, which require proof by way of evidence beyond a reasonable doubt:

> *"**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."*
> [Emphasis added].

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.

In relating the evidence to the elements of the offence of armed robbery, the learned trial magistrate concluded first that the bandits who stole Tshs. 400,000/=from Hilda Rumisha Maleka (PW2) were armed with machete which was an offensive instrument. She secondly concluded that the police arrested the appellant and his colleague in crime soon after the stealing. On his part, the first appellate Judge concurred with the finding of fact that the appellant and his colleague were armed with a machete when they stole Tshs. 400,000/= from PW2. And while fleeing from the scene, Police arrested and made them to sign a Certificate of Seizure (Exhibit P1).

We found no misapprehensions on how the two courts below related the evidence to elements of the offence of armed robbery to warrant our interference with their concurrent findings of facts. 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:-

> *"In 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. The Court followed its earlier decision in **JOSEPH MUNENE AND ANOTHER V. REPUBLIC**, CRIMINAL APPEAL NO. 109 OF 2002 (unreported) and stated:

> *"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...."

Therefore, from the evidence, we cannot fault the first appellate court for concluding that the police arrested the appellant and his deceased partner just after committing armed robbery inside a house. It does not matter, in so far as we are concerned, at which place, between the house of "Mzee Sebastian Charles" or that "Mzee Shayo," the police arrested them shortly after that. It seems clear that an escaping appellant was still armed with a machete when the police caught up with him.

On the appellant's complaint that the two courts below did not evaluate the defence evidence, the learned State Attorney is correct to submit that the trial magistrate considered the defence evidence on page 46 and concluded that prosecution evidence outweighed the defence. In his defence, the appellant claimed that police arrested him while on his way to a Bus Stand to receive his home-coming wife. However, just like the

trial magistrate, the appellate judge believed the evidence of prosecution witnesses that the police stopped, searched, and arrested the appellant at the crime scene.

In the upshot of what we have said, we find the appeal without merit and dismiss it entirely. We order accordingly.

DATED at **TANGA** this 11th day of May, 2022.

I. H. JUMA
CHIEF JUSTICE

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 12th day of May, 2022 in the presence of Ms. Donata Kazungu, State Attorney for the respondent and the Appellant in person, is hereby certified as a true copy of the original.

K. D. MHINA
REGISTRAR
COURT OF APPEAL