

TANZANIA / JUDGMENT

ally ngakenya beba chokolade vs lepore loloru 2023 tzhc 16916 28 april 2023

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TZHCDECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA IN THE DISTRICT REGISTRY OF ARUSHA AT ARUSHA PC CRIMINAL APPEAL NO. 7 OF 2022 (Arising from Original Criminal Case No. 144/2020 at Loliondo Primary Court, C/F Criminal Appeal No. 6 of 2021 at Ngorongoro District Court) ALLY NGAKENYA BEBA @ CHOKOLATE..... APPELLANT VERSUS LEPORE LOLORU..... RESPONDENT EX-PARTE JUDGMENT 06 & 27/04/2023

MWASEBA, J. Being aggrieved by the whole decision of Ngorongoro District Court at Loliondo, the appellant appealed to this court based on the following

reasons:

1. That the trial Magistrate erred in law and fact in convicting me on contradictory and unreliable evidence of the prosecution witnesses.
2. That the decision based on a manifest error on the face of the record resulted in a miscarriage of justice since the Primary Court had no jurisdiction to pass such offence. Page 1 of 8
3. That the sentence of 15 years imprisonment was manifestly excessive to me as I am a first-time offender.
4. That during the trial the prosecution side did not prove the case beyond a reasonable doubt. . Briefly, the appellant was charged at Loliondo Primary Court for two counts, firstly, Common Assault contrary to Section 240 of the Penal Code, Cap. 16 R.E 2019 and secondly, Robbery contrary to Section 285 and 286 of the Penal Code, Cap 16 R.E 2019. The prosecution alleged that on 9/08/2020 at 17:00 the appellant assaulted the respondent and thereafter he robbed him of his Tshs. 350,000/= the act which is contrary to Tanzanian Laws. After a full trial, the trial court was satisfied that the charges were proved beyond reasonable doubt and found the appellant guilty on both offences. Thereafter he was convicted and sentenced to serve 1-year imprisonment for the first offence and 15 years for the second offence. Being aggrieved by the said decision the appellant unsuccessfully appealed to Ngorongoro District Court at Loliondo, hence, the present appeal based on the grounds adduced herein above. During the hearing of the appeal, the appellant appeared in person, unrepresented. The

matter proceeded ex parte as the respondent was Page 2 of 8 nowhere to be found. With the leave of the court, the appeal was heard by way of written submission. Supporting his appeal, on the first ground the appellant complained that the prosecution witnesses failed to explain how he invaded them and took Tshs. 350,000 as all three witnesses were present at the scene of crime. He argued further that they failed even to explain the clothes he was wearing on the material day which creates doubt if they saw him or if it was another person. Further to that as he was arrested on the same day, they did not find him with the alleged money, therefore, the story against him was a fabricated one. Coming to the second ground of appeal, the appellant submitted that the primary court had no power to pass the sentence of 15 years, therefore, he prayed for the court to allow this ground of appeal. On the fourth ground of appeal, the appellant complained that the prosecution failed to prove their case beyond a reasonable doubt due to the failure to call material witnesses such as District Commissioner, the Doctor who attended the victim, and Police Investigator. He argued further that even the stolen money, weapon used by the appellant to threaten the respondent were not tendered in court. f\ Page 3 of 8 Having heard the submission of the appellant as well as the records before this court, the issue for consideration before this court is whether this appeal is meritorious. I wish to start with the fourth ground of appeal in which the appellant alleged that the prosecution failed to prove the offence beyond all reasonable doubt. In his submission he challenged the prosecution evidence that material witnesses were not called to testify including a doctor to prove the injuries. Also, the alleged stolen money was not tendered in court despite that the appellant was arrested on the same date of commission of the offence. In criminal cases, the prosecution side has a duty to prove the charge beyond all reasonable doubt. See the case of Pascal Yoya @ Maganga vs the Republic, Criminal Appeal No. 248 of 2017 (CAT at Arusha, Unreported). In our present appeal, the appellant was charged and convicted of the offences of Assault and Robbery in which at the trial court three eyewitnesses testified on the prosecution side and tendered one exhibit which is the PF3. Before determining this issue, I wish to warn myself that this being a second appellate court I cannot interfere with the concurrent findings of the two courts below only if there is a misdirection or non-direction made. (See Mussa Mwaikunda vs The Page 4 of 8 Republic, [2006] TLR 387 and Noel Gurth Aka Bainth and Another vs Republic, Criminal Appeal No. 339 Of 2013 (unreported) in which it was held that: "...on second appeal this Court is mostly concerned with matters of law but not matters of fact. The Court can however interfere with concurrent finding of facts by courts below only where there is misapprehension of the evidence, or where there were mis-directions or non-directions on the evidence, or where there had been a miscarriage of justice or violation of some principle of law or practice." In the case at hand the two courts below held that the case was proved beyond reasonable doubt against the appellant. However, the elements for proving the respective offences were not addressed in order to ascertain whether the appellant committed the charged offences or not. Looking at the second offence which is robbery, there was an allegation that the appellant invaded the respondent and robbed of his Tshs 350,000/=. With due respect I don't think if this offence was proved to the required standard. The ingredients of the offence of robbery under Sections 285 and 286 of the Penal

Code for which the prosecution was required to prove beyond reasonable doubt were basically two. First the prosecution had to prove that appellant stole Tshs 350,000/=. Page 5 of 8 Secondly, prosecution had to show that at time of stealing or immediately before stealing or immediately after stealing, appellant used or he threatened to use actual violence on SMI in order to obtain the stolen item or in order to retain the thing stolen or to prevent or overcome resistance to its being stolen or it being retained. In this case, there is no proof as to the first ingredient of stealing. The SMI told the court that when the appellant invaded him he robbed of his money. Yet, there is no proof that he had such amount in his pocket on the material date. SM2 who was an eyewitness testified that he was told by SMI that the said money was taken by the appellant. On cross examination he changed his mind and said he saw the appellant taking money in the victim's pocket. SM3 was of the same view that he was just told by victim about the said money being stolen by the appellant. The story ended there as the court was not informed on how the appellant was arrested and whether he was found with any stolen money. From this evidence it goes without saying that the offence of robbery was not proved at all. Regarding the first count which is an assault causing bodily harm, my starting point is Section 241 of the Penal Code which creates the said offence. It provides as follows: Page 6 of 8 "Any person who commits an assault occasioning actual bodily harm is guilty of an offence and liable to imprisonment for five years. " (Emphasis added) Due to the above provision, for the offence of assault causing actual bodily harm, proof of the said actual bodily harm is necessary. In the case at hand the prosecution evidence is still wanting to prove this. The three eye prosecution witnesses testified that the appellant attacked the victim. SMI said he was attacked by using a machet, sticks and arrows to his neck, legs and ribs. SM2 said the victim was attacked by using arrows and "mbogoro" but he did not point out the specific part of the body that the victim was attacked. The same happened to the SM3 who told the court that he saw the victim being attacked by using stick, "mbogoro" and club but he did not specify where he was attacked. All three witnesses did not specify the harm caused due to the said attack. The only prosecution evidence to prove these facts is the PF3 which was tendered in court. However, it was the doctor's observation that there was "internal multiple injuries bitten by rungu and stick" I wonder how the doctor who was not present at the scene of crime diagnosed or knew the specific object that was used, to invade the Page 7 of 8 victim. It is unfortunate that he was not called to testify on the harm that was caused to the victim. Due to the pointed-out gaps, I find that the proof of assault causing bodily harm is still wanting. Thus, the fourth ground has merit. And so long as it disposes of the case I will not go for other grounds of appeal. For the reasons submitted herein, this second appeal is with merit. The conviction meted by the two lower court is quashed and sentence is set aside. The appellant should be set free unless otherwise lawfully held. Ordered accordingly. DATED at ARUSHA this 28th day of April, 2023. N.R. MWASEBA JUDGE

Pago 8 of 8

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