

TANZANIA / JUDGMENT

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CRIMINAL APPEAL NO 10894 OF 2024 (Originating from the Criminal
Case No. 30 of 2023 of the District Court of Chunya at Chunya) ATHUMANI HILARY
ISSA.....1ST APPELLANT MICHAEL PATRICK
CHIKAO.....2ND APPELLANT VERSUS THE
REPUBLIC.....RESPONDENT

JUDGMENT

Date: 5 September 2024 & 31 October 2024 SINDA, J.: The first appellant was charged with the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E 2022] (the Penal Code). The District Court of Chunya at Chunya (the District Court) convicted and sentenced each to serve thirty (30) years imprisonment. 1 The particulars of the offence are that on 5 January 2023 at Chunya bus stand Kibaoni Village within Chunya District and Mbeya Region, the appellants did steal cash money Tsh. 39,764,378.00/=, different airtime vouchers valued at Tsh. 32,933,225.00/= and one laptop make HP valued Tsh. 1,800,000.00/= all total valued at Tsh. 74,497,603.00/=. Properties of one Mnasi Communication Ltd Chunya Branch. Immediately before and after the time of stealing they threatened to kill one Sostenes s/o Shaibu Thephu by using a machete and a toy pistol in order to obtain and retain the stolen properties. Upon being arraigned before the District Court, the respondent successfully defended the charge and secured conviction against the appellants. Dissatisfied with the said decision, the appellants challenge their conviction and corresponding sentence on the following grounds:

1. That – the trial court erred in law when convicted and sentenced the appellants without evaluating deeply the contradiction of the evidence of pw1 and pw2 that pw1 was a liar as himself was got some information of this allegation from pw2.
2. That – the trial court erred in law when convicted and sentenced the appellants relying on the evidence of pw1 as a victim of such crime 2 without regarding the evidence of pw2 and warning itself that why pw1 failed to tendered bandage and threads which he cut as evidence including PF3 filled by the doctor who treated him?

3. That – the trial court erred in law when convicted and sentenced the appellants without taking into account that the evidence of pw9 and 11 were contradicted itself as pw9 mentioned that the back side gate was broken and pw11 mentioned as the back wall of the shop was broken this means that the case of armed robbery was not proved as per law.
4. That – the trial court erred in law when convicted and sentenced the first appellant relying on the evidence of pw12 and exhibit PE12 since the said evidence and exhibit was not proved the offence of Armed Robbery rather than ordinary theft and the said disc of CCTV was full of doubts of its picture relating to the appellant.
5. That – the trial court erred in law when convicted and sentenced the second appellant relying on the evidence pw8 and exhibits PE11 without taking into account the said pw8 and exhibit PE11 was not proved the offence of armed robbery as per law. 3
6. That – the trial court erred in law when convicted and sentenced the appellants relying on the prosecution evidence without regarding that as none of the appellants arrested in the area of crime or arrested with the stolen properties of the complainant the case of armed robbery was lacks legs to stand before the court of justice.
7. That – the defense of the appellants was not considered deeply by the trial court as the prosecution was not proved its case as per law. At the hearing of the appeal, the court was informed that the second appellant had escaped prison. Therefore, the appeal proceeded with only the first appellant who appeared in person, unrepresented. The respondent was represented by Mr. Salmin Zuberi and Miss Elisia Paul, both learned State Attorneys. The appellant opted for the respondent to reply to the grounds of appeal first, and he would rejoin in case such need arose. Submitting against the appeal, Ms. Paul prayed to consolidate the first and third grounds. She explained that there is no contradiction that goes to the root of the case. That PW1, PW2, PW9 and PW11 all provided detailed account on the circumstances surrounding the offence. Thus, the counsel emphasized that there is no contradiction. In support she cited the case of 4 Haji Maneno Bonye vs Republic, Criminal Appeal No. 338 of 2008, CAT at Mtwara. Moving to the second ground, the Learned State Attorney submitted that it is not a requirement of the law for a bandage and PF3 to be brought to court as evidence. She added, the ingredients for armed robbery were proved i.e there was theft, use of dangerous weapon and the weapon was used to scare the victim. PW1 stated the appellants had machete and a pistol when they invaded the shop. That, they scared him and covered his mouth with a bandage. She cited the case of Fikiri Joseph Pantaleo @ Ostadh vs Republic, Criminal Appeal No. 323 of 2015, Court of Appeal at Dar es Salaam. As for the fourth ground, Miss Paul termed the same to be baseless. Because the first appellant agrees that the evidence of PW12 and Exhibit PE12 confirms the ingredients of theft. That, theft is one of the ingredients of armed robbery. She added, armed robbery in this case has been proved since it is clear there was theft and other ingredients of the said offence. Regarding evidence, Miss Paul submitted that the CCTV (Exhibit PE12) tendered by PW12 clearly featured the first appellant. Also, she added, the 5 first accused did not object or cross examine when the said exhibit was tendered in court. Arguing the sixth ground, the

Learned State Attorney submitted it is not a requirement of the law for the appellant to be caught at the crime scene to prove the offence of armed robbery. That, the evidence from the CCTV footage collaborates with the evidence of PW1 to prove the offence of armed robbery. Miss Paul, emphasized that the first appellant did not cross examine or object when the CCTV footage was tendered in court. She referred the court to the case of Paulo Anthony vs Republic, Criminal Appeal No. 189 of 2014, Court of Appeal at Bukoba and that of Goodluck Kyando vs Republic [2006] TLR No. 363. On the seventh ground, the State Attorney argued that the defence by the first appellant was considered by the District Court at page 5 and 6 of the District Court judgment (the Judgment). As the court went through the defence by the first appellant and found it to be baseless. Miss Paul urged this court to reevaluate the evidence on record, being the first appellate court. She referred the court to the case of Peter John @ Nyambabe vs Republic, Criminal Appeal No. 4 of 2021, HC at Musoma. 6 For reasons of the second appellant not being in attendance, the State Attorney did not wish to submit on the fifth ground. Mainly, because the ground focused on him. In his short rejoinder, the first appellant only prayed for his grounds of appeal to be considered. I have gone through the arguments, laws, case laws and the District Court records. It is upon me to determine whether this appeal is with merit. For the purpose of my deliberation, I will only focus on the first appellant, seeing he is the one present. To begin, I will address the fourth ground of appeal. In doing so, I wish to reproduce what is provided under Section 287A of the Penal Code. To wit: "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". According to the above provision, for the offence of armed robbery to be established the following three ingredients must be proved; one, the accused person must have stolen something; two, at or immediately before or after stealing, he must be armed with a dangerous or offensive weapon or instrument; and three, at or immediately before or after stealing, that person must have used or threatened to cause violence. See: Juma Charles @ Ruben & Another vs. Republic, Criminal Appeal No. 566 of 2017. In the matter at hand, and based on records, the eye witness (PW1) claimed the appellants came to his place of work carrying machete, pieces of iron bar and a pistol. They handcuffed him and closed his mouth by a bandage. He also stated, he could not recognize the invaders because they flashed a torch to his face. For recognition purpose therefore, the prosecution solely depended on Exhibit PE12, a CCTV footage and still pictures that were tendered before the District Court by PW12 a police officer who specializes in picture and forensic science. After investigation, PW12 confirmed that the person in the said Exhibit PE12 is the first appellant. Due to resembling features and similarities present. At this juncture, I believe I am in the right to assume the first appellant was convicted based mostly on evidence provided by the prosecution witness PW12. In collaboration to other prosecution witnesses' evidence, such as that of PW2 a worker at the Crime Scene, where she provided evidence to prove properties were indeed stolen. 8 From where I am standing, a fact that is

undisputed is that theft really occurred. However, I wonder if that is enough to prove the offence that the first appellant was charged and convicted with, that of armed robbery. As stated in the case of Juma Charles @ Ruben & Another vs. Republic (Supra), aside from there being theft, another key element in the offence of armed robbery, is the use of dangerous or offensive weapon or instrument before or/and after commission of the crime. As I revisit the proceedings of the District Court (the Proceedings), especially the evidence of the eye witness, PW1. The said witness mentioned he did not recognize any of the offenders. Further, there is a high degree of vagueness in his evidence since it generalized all the accused persons arraigned before the District Court. In page thirty-three (33) second paragraph of the Proceedings PW1 said, and I quote: "They ordered me not to raise alarm otherwise they shall kill me. Some of those bandits were carried machete and others piece of iron bag. They handcuffed me and closed my mouth by a bandage. They took me to another place to hide me. One of them carried a bastola (pistol) fire arm. One of the person who carried a machete was the one left to watch me." From the above, due to the frequent use of 'they' and 'them', it becomes rather uncertain what was the role of, say, the first appellant in the whole 9 operation. Unfortunately, this court is left second guessing whether the first appellant actually had a weapon or whether he used the same against PW1 in the pursuit to steal the properties. Additionally, Exhibit PE12, CCTV footage did not shade any light on the matter. The evidence on the exhibit, as stated, shows the first appellant entering the shop and conducting the offence. Nowhere on the CCTV footage does it show that the first appellant had weapons. It was also not mentioned by PW12 that the first appellant had weapons on him or whether there were any signs of violence during commission of the crime. The same was discussed in the case of Hassan Idd Shindo & Another vs. Republic, Criminal Appeal No. 324 of 2018, where the Court of Appeal stated: "...it is obvious that the absence of the element of use of a weapon to threaten a person in order to obtain or retain the stolen property as per section 287A of the Penal Code, makes the offence of armed robbery in the present case, unproven. ... In our judgment, in the absence of the evidence showing that violence was used by the appellants against the said Adam Mwankuga, either immediately before, or after stealing the alleged property with a view to obtaining or retaining the same, we are constrained to hold that the offence of armed robbery was not proven." That being the case, and as I stated earlier, I am of a firm view that the said properties were stolen. But after what I have discussed above, I think the 10 offence of armed robbery was not proved at the required standard by the prosecution i.e beyond reasonable doubt. See: Pascal Yoya @ Maganga vs. Republic, Criminal Appeal No. 248 of 2017. The first appellant should have alternatively been convicted of the lesser of offence of theft Contrary to Sections 258(1) and 265 of the Penal Code. Mainly because the available evidence proved the offence of theft and not armed robbery. The court of appeal when it was faced with a similar situation in the case of Jaffary Saidi Mwalimu vs. Republic, Criminal Appeal No. 497 of 2019, had this to say: "...Consequently, we allow the appeal and hereby hold that the offence of armed robbery was not proved. The evidence proved theft. We accordingly quash the appellant's conviction for the offence of armed robbery and set aside the sentence meted by the trial court and sustained by the High Court. Instead, we

substitute for it with a conviction with the offence of theft contrary to sections 258(1) and 265 of the Penal Code which is a cognate and minor offence to the offence of armed robbery. We accordingly sentence the appellant to serve four (4) years imprisonment and the same takes effect from the date he was first convicted and sentenced by the trial court, that is to say the sentence to be counted to have started from 2/7/2019.” From the foregoing, I find the fourth ground of appeal with merit and do not wish to discuss the remaining grounds. 11 In consequence therefore, the appeal is allowed. I proceed to quash and set aside the conviction and sentence of the District Court for the offence of armed robbery. Instead, I substitute for it with a conviction with the offence of theft contrary to sections 258 (1) and 265 of the Penal Code which is a cognate and minor offence to the offence of armed robbery. For that reason, the first appellant is sentenced to serve seven (7) years imprisonment and the same should take effect from the date he was first incarcerated by the District Court, that is on 24 November 2023. It is so ordered. Right of appeal explained. DATED at MBEYA on this 31 day of October 2024. A. A. SINDA JUDGE 12

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