

TANZANIA / JUDGMENT

MUSA LUHENDE AND ANOTHER V

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA SHINYANGA SUB REGISTRY AT SHINYANGA CRIMINAL APPEAL NO. 10016 OF 2024 (Originated from Criminal Case No. 56 of 2023, Kishapu District Court at Kishapu) BETWEEN MUSA S/O LUHENDE..... 1ST APPELLANT BENJAMIN EMMANUEL @ MWANAUKULA.....2ND APPELLANT VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

19th June & 28th June, 2024 MASSAM, J.: The District Court of Kishapu at Kishapu (hereinafter trial court) tried and convicted the appellants herein, of the offence of Gang Robbery c/s 285 (1) and (2) and 286 of the Penal Code, Cap 16, [R.E 2022]. It was the allegation by the prosecution that, on the 25 th day of March 2023 at Ukenyenge Village within Kishapu District in Shinyanga Region, the appellants did steal one (1) smart phone, make Samsung 1 valued Tshs. 800,000/= 57 tigo sim cards valued Tshs. 28, 500/=, cash money Tshs. 15,000/=, one (1) sim machine make Mobigo valued Tshs. 600,000/=, one (1) sim machine make famoco valued Tshs. 600,000/=, 34 Airtel sim cards valued Tshs. 17,000/=, 13 Vodacom Sim cards value Tshs. 6,500/=, 12 Halotel sim cards valued Tshs. 6,500/= one (1) scanner wire valued Tshs. 70,000/=, 1 sweater valued Tshs 15,000/=, 1 boxer valued Tshs. 3,000/=, 1 cap valued Tshs, 3,000/=, 2 sim charges valued Tshs. 30,000/= 2 shirts valued Tshs. 10,000/= 1 trouser valued Tshs. 25,000/=, 1 pair of short (pensi), valued Tshs. 10,000/=, 1 bag black in colour make Pona 500 valued at Tshs. 25,000/=, 1 pair of shoes valued Tshs. 10,000/= 1 tigo Apron, 2 Clinic Cards all total valued Tshs. 2, 274,500/= the property of Yohana s/o Kulwa and immediately before and after stealing they did use actual violence against Yohana s/o Kulwa in order to retain the said properties. Upon entering conviction, the trial court sentenced the appellant to the term of life imprisonment. Aggrieved by both conviction and sentence, the appellant has knocked the doors of this court advancing four grounds of appeal notably: 2

1. That the learned trial Magistrate erred in law and fact when he conducted the trial of the appellants on a defective charge sheet. (See the case of Iliney Molaskus & Another v. Republic, Criminal Appeal No. 23 of 2022 HC (T) Morogoro) (Unreported).
2. That the learned trial Magistrate erred in law and fact when he properly failed to properly evaluate the evidence on record, thereby reaching on a wrong decision.

3. That my lord, there was no any identification parade conducted to explore the robberies.
4. That the learned trial Magistrate erred in law and fact in totally misapprehending the nature and quality of the prosecution evidence against the appellants which did not prove the charge beyond reasonable doubt. When this appeal came for hearing before this 1st appellate court, the appellant had no legal services he represented himself whereas Mr. Saguya, the learned counsel appeared for the Republic. Nevertheless, the appeal was 3 disposed orally. This court will accordingly consider the parties' oral submission while determining the grounds of appeal. Starting with the 1st ground of appeal, the appellant complained that he was convicted based on the defective charge sheet. On his side, Mr. Saguya stated that the charge sheet was prepared according to the law as per Section 135 (a)
 - (1) – (iv) of the Criminal Procedure Act, Cap 20 R.E 2019 (CPA). He added that even the evidence submitted by the witnesses at the trial court connected the appellants with the charge as per Section 285 (1) and (2) of the Penal Code. I have gone through the charge sheet filed on 14th day of November, 2023 and noted that it was not defective as the section and the law used was the right ones, and even the evidence given by the prosecution's witness was as per the charge sheet. Further to that as the appellants did not elaborate more as to what defective they were taking about. So, this court finds no merit on this ground. As for the 3rd ground of appeal, the appellant complained that there was no any identification parade conducted to explore the robberies. Mr. Saguya replied that the identification 4 parade was not conducted as the victims identified the appellants after being with them for one hour before the incident took place. Further, the victim saw the appellants more than once and where there is enough light. He referred this court to the case of Ngalu Joseph and Another v. Republic, Criminal Appeal No. 172 of 2019 (CAT at Mbeya reported at Tanzlii). In Ngalu Joseph and Another v. Republic (supra) the court held that: "In so far as the case may concerned, apart from the appellants' complaint that it was irregularly conducted, Mr. Mwita also challenged it and, we think rightly so, that the said identification parade was unnecessary in view of the fact that the witnesses were familiar with the appellants and also for failure to read over the identification parade registers in court after they declared for admission." Being guided by the cited authority and as far as the victim was familiar with the appellants and he was able to 5 identify them, the identification parade was unnecessary, and this ground has no merit. Now in respect of the 2nd and 4th grounds of appeal, the appellant complained that the evidence was not properly evaluated by the trial court and the charge was not proved beyond reasonable doubt. I am aware that this being the first appellate court it is entitled to re-evaluate the entire evidence on record by reading it together and subjecting it to a critical scrutiny. As it was held in Philipo Joseph Lukonde vs. Faraji Ally Saidi, Civil Appeal No. 74/2019 (CAT – Dodoma Unreported) that: "This being a first appeal, this Court has a duty to subject the entire evidence on record to a fresh re- evaluation and come to its own conclusions." However, the same will be done if the trial court failed to properly evaluate the evidence presented before it. In this Case, Mr. Saguya stated that the evidence was properly evaluated by the trial court as evidenced by page 2 to 10 of the trial court's judgment. This court do agree with Mr. Saguya that the evidence was properly evaluated at the trial court

whereby 6 the victim (PW2) and police officer (PW1) explained what happened and even the appellants admitted to have committed the offence as evidenced by Exhibit PE3 and PE4 (Caution statements of the appellants). Thus, these ground stand dismissed for want of merit. Lastly, Mr. Saguya was of the view that the punishment given to the appellants were too excessive. The appellants were supposed to be punished under Section 287 C of the Penal Code, so he prayed for the court to interfere and made proper sentence. This court after heard the submission from the respondent counsel revisited Section 287 C of the Penal Code, provides that: "A person who takes part in gang robbery commits an offence and, on conviction is liable to imprisonment for a term of not less than thirty years with or without corporal punishment." Guided by the cited authority, this court do support the issue raised by the counsel for the respondent that the sentence imposed to the appellants was against the law. As per the cited law the appellant were supposed to be sentenced to thirty (30) years imprisonment and not life imprisonment. 7 That said, the appeal is partly allowed. The appellants are now sentenced to serve thirty (30) years imprisonment instead of life imprisonment as per Section 287 C of the Penal Code. Ordered accordingly. DATED at SHINYANGA this 28th day of June, 2024. R.B. Massam JUDGE 8

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