IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
HC. CRIMINAL APPEAL NO. 211 OF 2019

(Original Criminal Case No. 463 of 2017 of the District Court of Geita District at Geita)

BAKARI IBRAHIM.....1ST APPELLANT

VERSUS

SADICK MHOZYA @ CHACHA.....2ND APPELLANT

JUDGMENT

15.4.2020 & 29.5.2020

U.E.Madeha J

The appellants were along with one Daniel Yohana, arraigned in the District Court of Geita for the offence of armed robbery contrary to Section 287A of the Penal Code, Cap 16 (R. E. 2002) as amended by Act No.4 of 2004. At the end of the trial, they were found guilty, convicted and sentenced to thirty years imprisonment. Daniel Yohana was acquitted on the trial Court. Being aggrieved, they had come to this Court to appeal.

The case for the prosecution at the trial was briefly to the following effect: It was 01:00 hours, on 26.2.2017 when Gasto Majaliwa heard the door strike, two people appeared and asked to be given some money. They lit a touch while the electric light was lighting up, two phones, TV and Deck

were stolen at the scene of crime. The complainant identified the robbers by using a flickering light. On 23.3.2017, he was called to the police station to identify the stolen items. He found all his belongings were already arrested and are at the police station. The appellants already stand at the identification parade line. The stolen items were tendered and received in evidence as exhibit P1. The certificate of seizure was received in evidence as exhibit P2, the caution statement of the second accused was received in evidence as exhibit P3. The caution statement of the third accused was received in evidence as exhibit P4, PF3 of the victim was received in evidence as Exhibit PF3, the identification parade register was received in evidence as exhibit P6. The trial Court sustained the appellants' convictions, mainly on the basis of identification and the appellants cautioned statement, the learned first magistrate found the electricity light burning in the house to have been sufficiently intense for watertight identification.

On hearing of appeal before me, on 15.4.2020, the appellant appeared in person, unrepresented Ms. Sophia Mgasa, the Learned State Attorney who represented the Republic.

Defending himself, he faulted the decision of the Court below that, evidence on the identification which was insufficient to mount the conviction. He challenged the testimony of PW1 on the issue of identification and the appellant description, the distance between him and PW1 was not mentioned. He prayed the Court to set him free.

For the Republic Ms. Sophia Mgasa expressed her stance that, she supported the appellants' conviction. PW1 correctly identified the appellant because at the scene there were flashes of flaming light. The identification parade was done in connection with the caution statement being received in evidence as exhibits. The PF3, the certificate of seizure, the stolen items were received in court as an exhibit P1, so the appellants' caution statement is the property of the accused and not otherwise.

With the foregoing response of the Learned State Attorney the respondent, Republic, the appellants stated that, the prosecution side must have conducted the identification parade. The prosecution side did not prove this case beyond reasonable doubt.

In view of the grounds of appeal raised the issue here is whether the prosecution side proved its case beyond reasonable doubt. Other reliable evidence is the evidence of the appellant's caution statement. Where after

the inquiry the Court did not state whether the information was given voluntarily, the main responsibility for conducting the inquiry is to assess whether the caution statement was voluntarily made, as shown in **Shija Luyeko V. Republic** [2004] TLR 254, where it was observed that;

(i) *A cautioned statement is admissible in evidence if it is proved that it was voluntarily made.*

(ii) *The court considered and accepted the truthfulness and voluntariness of the cautioned statement and therefore was entitled to convict without corroboration".*

Given that, the lower court did not find if the caution statement was voluntarily or involuntarily made. And the remaining evidence of PW1 which is insufficient to convict the appellant. The prosecution has not proved its case to the required standards without leaving any doubt.

All exhibits were presented in court but were not read in Court, the process of receiving the exhibits was not done and I realize that there were procedural irregularities.

In this case the most reliable evidence is the PW1 evidence, the caution statement of the first appellant, the victim's PF3 and the certificate of seizure. There is no sequence of events showing how the stolen

properties were seized until they were brought to the police for identification. The prosecution should prove all the ingredients of offence without any doubt, as shown in the Court of Appeal when addressed the issue of proving the case to the required standard. In the case of **The Director of Public Prosecutions V Morgan Maliki and Nyasa Makorii,** Criminal Appeal No 133 of 2013 (Unreported) states that:

> *"A prima facie case is made out if, unless shaken, it is sufficient to convict an accused person with the offence which he is charged or kindred cognate minor offence... the prosecution is expected to have proved all the ingredients of the offence or minor cognate are thereto beyond reasonable doubt. If there is a gap, it is wrong to call upon the accused to give his defence so as to fill it in, as this would amount to shifting the burden of proof".*

The prosecution must establish the prima facie case. This is important because if no prima facie case is established the Court could always give an accused person the benefit of the doubt and acquit him. This case was not proved by the required standards that is beyond a reasonable doubt due to the chain of custody. As shown in the case of

Paul Maduka and Four Others V. The Republic, Criminal Appeal No. 110 of 2007 it was stated that:

> *"The presumption of guilt can only arise where there is cogent proof that the stolen things possessed by the accused are the one that was stolen during the commission of the offence charged, and no doubt, it is the prosecution who assumes the burden of proof...."*

PW1's the victims of armed robbery, in his testimony he did not state that he was beaten and raised suspicion. He was beaten what weapons were used to facilitate armed robbery. It is well known that in the case of armed robbery a person should be beaten, the victim did not give the impression that he was beaten. The PF3 was tendered in Court by a doctor indicating that he was beaten with no explanation of the beating to the victim that led to doubt in proving the prosecution case. The victim was supposed to have a chance to talk about the weapon used to carry out the fraud and if he was actually beaten, He was beaten what weapons were used to facilitate armed robbery. Section 287A of the Penal Code as amended by Written Laws (Miscellaneous Amendment) Act, 2011 under which the appellants were supposed to be charged provides as follows:

"287A. A person who steals anything, and at or robbery 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."

The appellants were charged under section 287A of the Code as amended by Act No.4 of 2004. The charge sheet under which Law was committed. The charge is incurably defective. Since the charge is incurably defective, the conviction and sentence cannot stand. Be that as it may, Section 135 of the Criminal Procedure Act, Cap. 20 (R. E. 2002), (the Act) provides the mode in which offences are to be charged. As to what a charge sheet should contain, paragraph (a) (i) and (ii) states very clearly that, a charge sheet should describe the offence and should make reference to the section of the law creating the offence. The Section reads, I reproduce:

"135 (a) (i) A count of a charge or information shall commence with a statement of the offence;

(ii) The statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms and without necessarily stating all the essential elements of the offence and, if the offence charged is one created by enactment, shall contain a reference to the section of the enactment creating the offence".

In this case the charge sheet preferred at the appellant's door reads as follows:

STATEMENT OF OFFENCE: Armed Robbery Contrary to section 287A of the Penal Code (Cap 16 R.E 2002) as amended by Act No. 4 of 2004.

From the above extract it is clear that the statement of offence only refers to Section 287A of the Penal Code as amended by Act No.4 of 2004. The prosecution charged the appellants by using amendment Act No.4 of 2004 which lead to the defective charge, the appellant was supposed to be

indicted by using Section 287A of the Penal Code as amended by Written Laws (Miscellaneous Amendment) Act No.3 of 2011.

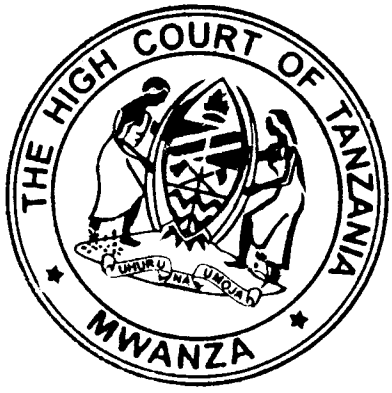
It is clear therefore that, the charge is incurably defective. As such the proceedings are a nullity. I declare the proceedings of the District Court a nullity. The same are quashed and the conviction and sentence set aside.

Generally, a re-trial will be ordered only when the original trial was illegal or defective (See **Fatehali Manji Versus Republic, [1966] EA 341 and Naoche Ole Mbile V. Republic** [1993] TLR 253)

The above considerations suffice to dispose of this appeal and there is no need for me to engage myself on the other complaints raised in the memorandum of appeal. Under normal circumstances, I would have ordered a retrial. However, the evidence of the prosecution side is weak. I do not press for a re-trial.

In the result, I find the appeal by Bakari Ibrahim and Sadiki Mhozya @ Chacha to have been filed with good cause. I accordingly allow it. Conviction entered against the appellants are quashed and sentences imposed on them is set aside. The appellants are to be set at liberty forthwith unless otherwise held in connection to lawful cause.

DATED at **MWANZA** this 29th Day of May 2019.



U. E. MADEHA
JUDGE
29/5/2020