IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

PC. CRIMINAL APPEAL NO. 9 OF 2021

(Appeal from the Criminal Appeal No. 23 of 2019 in the District Court of Ukerewe at Nansio (Selemani, RM) dated 28th of January, 2020.)

HUSSEIN S/O HAMZA ..... APPELLANT

VERSUS

HAPPNESS D/O KITITU ..... RESPONDENT

JUDGMENT

16th, & 23d August, 2021

ISMAIL, J.

This is a second appeal, preferred by the appellant, seeking to set aside concurrent decisions of the lower courts in respect of the conviction and sentence that saw him serve his jail term. This began with his arraignment in the Primary Court of Ukerewe at Nansio, in respect of a charge of robbery with violence, contrary to sections 285 and 286 of the Penal Code, Cap. 16 R.E. 2019. The allegation was that on 8th of August, 2019, at 03:00 hours at Kasarani Bar in Nansio, Ukerewe District, Mwanza Region, the appellant and others whose whereabouts were not established, forcefully robbed, Happyness Kitiku, the respondent herein, of his mobile phone, make Tecno

T349, valued at TZS. 25,000/-. The appellant pleaded not guilty to the charges, necessitating a trial in which two witnesses for the prosecution, against one for the defence testified. With respect to charges, the appellant's contention was that he did not rob the respondent. Instead, the appellant and the respondent were involved in a brawl that came as a result of their drunkenness. The trial court was convinced that the appellant's culpability had been established and that the defence testimony did little to blur his guilt. He was convicted and sentenced to imprisonment for 15 years. The trial court ordered a refund of the sum constituting the value of the robbed phone.

This decision was received with outrage by the appellant. Feeling aggrieved, he took an appeal to the District Court of Ukerewe at Nansion. His five-ground appeal was heard *ex-parte*, following the respondent's non-appearance in court. The 1st appellate court was convinced that the trial court's decision was unblemished, and that the appeal was lacking in merit. Consequently, it dismissed the appeal and upheld the conviction and the sentence passed.

The decision on appeal was not to the appellant's liking. He, once again, preferred an appeal, this time to this Court. The petition of appeal has six grounds, paraphrased as hereunder:

1. *That the appellate magistrate erred in law and in fact for failing to note that that the testimony of PW1 and PW2 was not credible and that it failed to connect the appellant.*
2. *That the evidence adduced in court did not prove the prosecution's case beyond reasonable doubt.*
3. *That the 1st appellate court erred in law and in fact for failing to consider the environment of the scene of the crime and make a comparison with the testimony adduced by the prosecution witnesses.*
4. *That the evidence that led to the appellant's conviction was not corroborated.*
5. *That the prosecution's failure to avail for testimony, the Kasarani bar manager, watchman and other people who witnessed when the appellant was beaten rendered the respondent's testimony suspect.*
6. *That the 1st appellate court failed to comprehend the nature and quality of the prosecution evidence and failed to the fact that failure to tender as evidence a cell phone allegedly stolen was fatal.*

When the matter came up for hearing, only the appellant was present. The respondent, who was absent when the matter came up in the 1st appellate court, was absent, yet again. It is for that reason, that the Court ordered that the matter be heard *ex-parte*.

The appellant, who fended for himself, unrepresented, did not have anything to submit. He only prayed that his grounds of appeal be accepted and that he be set free.

Before I get to the substance of the matter, I behooves me to state two key principles. These are in relation to the status of concurrent findings of lower courts in a second appeal. The other one is the status of an appeal whose grounds of appeal were not the subject of discussion in the 1st appeal. With respect to concurrent findings of the lower courts, the settled position is that such findings cannot be meddled in or interfered with, unless the 2nd appellate court is satisfied that such decisions were arrived at in a misapprehension of evidence, miscarriage of justice or violation of some principle of law or procedure. The decisions in ***Amratlal Damodar Maltaser & Another t/a Zanzibar Silk Stores v. Jariwalla t/a Zanzibar Hotel*** [1980] TLR 31; ***Samwel Kimaro v. Hidaya Didas***, CAT-Civil Appeal No. 271 of 2018 (unreported) attest to this fact. It is in the same vein, that in ***Fatuma Ally v. Ally Shabani***, CAT–Civil Appeal No. 103 of 2009 (unreported), the Court of Appeal of Tanzania made the following observation:

> *"Where there are concurrent findings of fact by two Courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been*

a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure. In other words, concurrent findings of facts by lower Courts should not be interfered with except under certain circumstances."

Deducing from the cited excerpt the question that follows is, whether the decisions of the lower courts are tainted with any of the maladies that may justify interference by this Court. This question will be tackled in due course.

The next nagging question touches on the grounds of appeal. Glancing through the grounds of appeal preferred in this Court, it is gathered that only two of the six grounds of appeal were grounds of appeal in the 1st appeal. This means that four of the six are new grounds which were not the subject of discussion by the 1st appellate court. This implies, therefore, that a majority of the grounds of appeal in the instant matter are new points of contention which were not deliberated upon by the 1st appellate court. The small question to be resolved is whether the Court can entertain and deliberate on what was not a subject of contention in the appeal whose decision is impugned. The answer to this question is NO! The position, as dictated by the current legal holdings, is that matters raised anew are not to be entertained in the second appeal. This firm position was underscored in ***Ng'waja Joseph Serengeta @ Matako Meupe v. Republic***, CAT-

Criminal Appeal No. 417 of 2018 (unreported), wherein the Court of Appeal of Tanzania quoted with approval, its earlier decision in ***Asael Mwanga v. Republic***, CAT-Criminal Appeal No. 216 of 2018 (unreported). It was held in the latter as follows:

> *"Now all those grounds, whatever may be their merits, should have been argued in the High Court had the appellant lodged an appeal to that Court. In the event the High Court failed to discuss and decide them satisfactorily, the appellant could resort to this Court. What the appellant is now trying to do is to turn this Court to the first appellate court after the judgment of the District Court.*
>
> *We must, therefore decline to turn this Court into a first appellate court from decisions of the District Court. in the result, we express no opinion on the grounds of appeal which the appellant brought to this court."*

The upper Bench cemented its position in its most recent subscription in ***Ng'waja Joseph Serengeta @ Matako Meupe v. Republic*** (supra), when it held that *"the appellant's attempt to challenge the conviction at this stage is therefore not only legally untenable but illogical too."*

Guided by these splendid holdings, I choose to disregard all other grounds and confine my discussion on grounds 3 and 6 of the appeal.

The appellant faults the 1st appellate court's failure to consider the environment of the scene of the crime relative to the evidence adduced by two witnesses. It is a shame that this ground has not been clarified in order to pick what would be considered to be the appellant's ground of contention. The absence of back up facts has left the Court to wonder if there is any nexus between the environment and what the witnesses testfied. The testimony of both of the witnesses was unanimous on the fact that the appellant was involved in an incident that led to misappropriation of the respondent's mobile phone. While the appellant has denied robbing the respondent, he has admitted that he used violence by biting the respondent's breast in the process. This fact was corroborated by PW2 whose assistance was enlisted by the respondent. This is the view which was concurrently held by both of the lower courts. I find nothing wrong with that view. I hold that this ground of appeal is hollow and I dismiss it.

Ground six queries the quality of evidence used to convict the appellant, particularly the absence of a cell phone, allegedly the subject of the robbery incident. It is true that the testimony adduced during trial did not indicate that the appellant was found in possession of the cell phone that was allegedly robbed from the respondent. Certainly, the said phone was not tendered in court as evidence in support of the respondent's case. No

explanation was given for such failure notwithstanding the fact that appellant was apprehended at the scene of the crime.

While tendering of the said phone would cement the respondent's case, it cannot be said that absence of such testimony rendered the case against the appellant unproven. This is in view of the fact that all ingredients of the robbery with violence were proved satisfactorily, and none of them would require tendering of the cell phone as an exhibit. As rightly alluded to by the lower courts, proof that there was use of violence was abundant, corroborated by the appellant's own account. This, together with the respondent's testimony that the said phone was grabbed from her and passed on to the appellant's co-assailants, was enough to prove the offence of robbery with violence. In my considered view, tendering of the phone as evidence would only serve as an icing on a cake, and nothing more than that.

It is my conclusion that a case against the appellant was made out and that his guilt was proved. It was quite in order that the 1st appellate court found nothing flawed in the trial court's decision, and I read no misapprehension of evidence, miscarriage of justice, or any violation of some principle of law or procedure, to justify any possible departure from the concurrent findings of the lower courts.

In consequence, I hold that the appeal is barren of fruits and I dismiss it. Accordingly, I uphold the lower courts' conviction and sentence.

Order accordingly.

DATED at **MWANZA** this 23rd day of August, 2021.

M.K. ISMAIL

JUDGE