IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MBAROUK, J.A., MWARIJA, J.A., And MWANGESI, J.A.)

CRIMINAL APPEAL NO. 548 OF 2016

JUMA ALLY MWERA ---------- APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Tanga)

(Teemba, J.)

dated the 10th day of December, 2010

in

Criminal Appeal No. 72 of 2009

JUDGMENT OF THE COURT

20th & 25th April, 2018

MWANGESI, J.A.:

Juma Ally Mwera who happens to be the appellant in this appeal alongside with one Juma Ally, stood jointly charged at the district court of Tanga at Tanga, with the offence of armed robbery contrary to the provisions of section 287A of the Penal Code, Cap 16 Revised Edition of 2002 as amended by Act No. 4 of 2004. It was alleged by the prosecution that, on the 21st day of July, 2007 at about 22:00 hours

along 13th road within the City district and Region of Tanga, the two accused did jointly and together steal one cellular phone make Nokia 1110 valued at TZs 70,000/=, the property of one Chiku Hassan and immediately before the time of such stealing, they did injure the said Chiku Hassan with a bush knife on her head, neck and left hand in order to obtain the said property.

The brief facts of the case as could be divulged by the testimony of Chiku Hassan, the victim of the incident who gave her evidence in court as PW1 was to the effect that, on the date of the incident which was on the 21st day of July, 2007, while at her home along the 13th road within Tanga City, she received a phone call from one Abushiri and as a result, she did get out of her house, and went to stand at about three paces from the house to talk to the one who had made a call to her. While in deep conversation, she was suddenly attacked by two people who cut her with a bush knife on her head and left hand and furthermore, snatched the cell phone from her. As a result, she raised an alarm that was responded to by some neighbours among whom was Salim Janjala (PW3).

What followed after the alarm which was raised by PW1, was contained in the tale of PW3, which was to the effect that, he was a security guard, who was guarding a house on Plot No. A 137, which is situated along the 13th road within the City of Tanga. On the 21st day of July, 2007 during evening, he was on duty at his place of work. At around 20:00 hours, he heard an alarm that was raised by PW1. Upon rushing to the same to inquire as to what was amiss, he found two persons holding PW1, who on seeing him coming, took to their feet. In the company of other people who responded to the alarm, they pursued the running persons and managed to arrest the appellant after some chase, and found him to be in possession of a bush knife. They thereafter took that person, who happened to be the appellant to the Police Station, where he was ultimately charged with the offence of armed robbery.

In his defence, the appellant argued that, at the material evening, he was just passing at the scene of the incident, when he got arrested and connected to the alleged offence of armed which he had no any idea about it. Regard being to the fact that, it was dark, it was his argument

that, he was mistakenly identified as the one who robbed the complainant (PW1).

On the basis of the evidence that was received by the trial court from the testimonies of PW1 and PW3 and the exhibits that were tendered in evidence, did convict the appellant of the charged offence and sentenced him to the statutory minimum term of imprisonment for thirty years. The appellant unsuccessfully challenged the conviction and sentence in the High Court of Tanzania at Tanga. Still undaunted, the appellant has come to this Court in a second appeal armed with three grounds of appeal namely:

1. *That, both the appellate Judge and the trial magistrate erred in law and in fact in holding that the conviction of the appellant was based on the credibility of the prosecution witnesses and they failed to appreciate that sufficiency of evidence too was equally important.*
2. *That, both the appellate Judge and the trial magistrate erred in law and in fact by failing to analyze that if truly the appellant was caught red-handed at the scene of*

crime, why was he not found intact with the alleged stolen cellular phone.

3. *That, the prosecution side did not prove their case against the appellant to the standard required by law.*

On the date when the appeal was called on for hearing, the appellant entered appearance in person, unpresented and therefore, fended for himself, whereas, the respondent/Republic was represented by Ms Rebecca Msalangi, learned State Attorney. The appellant preferred to let the learned State Attorney react to his grounds of appeal first and thereafter, he would rejoin if need would arise.

In her submission, the learned State Attorney informed the Court from the outset that, she was opposing the appeal. And in responding to the grounds of appeal raised by the appellant, she argued them jointly because they were all about the same thing that is, were challenging the weight of the evidence that was acted upon by the lower courts to found his conviction. It was the argument of the learned State Attorney that, in the case at hand, the appellant was arrested red-handed at the scene of crime. This was according to the testimony of PW1, the victim of the

incident and PW3, who found the appellant actively participating in the commission of the offence and that, was among those who arrested the appellant and took him to the Police Station.

In view of the fact that, the appellant was arrested at the scene of the incident, the learned State Attorney argued that, the question of visual identification complained of by the appellant in his grounds of appeal did not arise. In asserting so, she sought refuge in the decision of this Court in the case of **Patrick Lazaro and Another Vs Republic**, Criminal Appeal No. 229 of 2014 (unreported). In that regard, the learned State Attorney requested the Court to find that, the appeal which has been preferred by the appellant is without merit and as such, it should be dismissed in its entirety.

In his rejoinder, the appellant reiterated his prayers contained in the memorandum of appeal insisting that, his appeal has to be allowed because there was no evidence tendered by PW1, the victim of the alleged armed robbery, to establish that she was in possession of a mobile phone, which got robbed on the material night.

In the light of the submissions from both sides above, the issue for determination by the Court is whether or not, the appeal by the appellant is founded. As argued by the learned State Attorney, the three grounds of appeal which have been presented before this Court, they all hinge on the weight of evidence that was tendered by the prosecution witnesses to establish the guilt of the appellant, which is summarized in the third ground of appeal that, it did not meet the standard required in criminal cases, which is to establish the commission of the offence beyond reasonable doubt. The question therefore, is whether or not, such contention by the appellant is plausible.

From the testimony of PW1, the victim of the incident and PW3 both of which were believed by the two lower courts that they were credible witnesses, and regard being to the cherished principle of practice that, assessment of the demeanour of witnesses is the domain of the trial magistrate/Judge, we are on our part not in a position to doubt such position. We are far from being convinced by the appellant's written submission wherein, he attempted to show that, he was wrongly arrested because at the time of his arrest, he was just innocently passing

at the scene of crime, while PW1 had already been robbed her cellular phone. We have no any flicker of doubt that, the appellant was on the fateful night arrested at the scene of crime.

The kind of defence which has been raised by the appellant, was once raised by the appellant in the case of **Stephen John Rutakikirwa Vs Republic,** Criminal Appeal No. 78 of 2008 (unreported), which was cited in the case of **Patrick Lazaro and Another Vs Republic** (supra). In rejecting the said defence raised by the appellant, the Court held that:

> *"In the present case, even if there was darkness, the appellant was grabbed by and struggled with the complainant, and was arrested at the scene of crime by PW2 and PW3; and immediately taken to the police. If there was any need of corroboration, we would readily find in the appellant's own admission in his testimony that he was within the vicinity at that time."*

In yet another similar scenario in the case of **Luhemeja Buswalo Vs Republic,** Criminal Appeal No. 164 of 2012 (unreported), where

even though the appellant had been arrested at the scene of crime, he still contended that, he had not been properly identified because the offence was committed during night, the Court observed that:

> *"It is for this reason, that we have found ourselves constrained to observe at this early stage that, we agree with the learned first appellate Judge that, in the appeal before her the question of visual identification was immaterial as the appellant was arrested at the scene of fracas, to put it objectively."*

See also: **Rungu Juma Versus Republic** [1994] TLR 176, and **Nikas Desdery @ Oisso Vs Republic,** Criminal Appeal No. 18 of 2013 (unreported).

In the same vein, it is our considered view in the instant appeal that, the complaint by the appellant that, he was not clearly identified at the scene of the incident, is without basis and has to fail. With the foregoing position therefore, the subsequent question that crops is as to whether or not, the offence of armed robbery against the appellant was satisfactorily established.

It was stated by PW1 that, on the fateful evening, she was invaded by people who were armed with a bush knife which was used to cut her on her head and left arm. In corroboration to her contention, she tendered as exhibit PE1, the PF3 which she was given at the Police Station and used to get treated her injuries at the hospital. We have had time of observing the said PF3 which was filled by the Doctor who attended the witness. Therein it has been indicated that, the appellant incurred dangerous harm on the neck, scalp, upper left limb and face. With the foregoing evidence, there can be no doubt that, indeed on the fateful night the witness (PW1) was injured following the invasion that was made to her by the bandits among which was the appellant.

The position stated above was further cemented by the act of the appellant being arrested with a bush knife as per the testimony of PW3, which was tendered and admitted in court as exhibit PE2. That being the case, we reserve no doubt to the fact that, the appellant was justly held culpable to the charge of armed robbery and there is no way in which we can disturb the concurrent findings of the two lower courts. Both the conviction and the sentence imposed which is the minimum sentence

provided by the statute are hereby upheld, by dismissing the appeal by the appellant in its entirety.

Order accordingly.

DATED at **TANGA** this 24th day of April, 2018.

M. S. MBAROUK
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

I certify that this is a true copy of the original

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL