IN THE COURT OF APPEAL OF TANZANIA

AT SHINYANGA

(CORAM: MUGASHA, J.A., KITUSI, J.A. And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 253 OF 2017

SAMSON SAMWEL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Tanzania

at Shinyanga)

(Makani, J.)

dated the 21st day of April, 2017

in

DC Criminal Appeal No. 138 of 2015

JUDGMENT OF THE COURT

20th & 27th August, 2021.

MASHAKA, J.A.:

Before the District Court of Kahama, the appellant Samson Samwel was arraigned with the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E 2002] (the Penal Code). Upon conviction, he was sentenced to serve thirty years imprisonment. Aggrieved, the appellant unsuccessfully appealed to the High Court, where the decision of the trial court was upheld and confirmed, hence this appeal.

Still contesting his innocence, the appellant lodged a memorandum of appeal comprising of five grounds which we have paraphrased as follows: -

1. *That, there is a variance between the evidence adduced by the prosecution and the charge sheet*
2. *That, the first appellate court erred in law and fact to believe that PW1 was credible despite shortcomings regarding the conditions of identification.*
3. *That, the first appellate court erred in law and fact to rely on the evidence of PW1 in the identification using moon light.*
4. *That the first appellate court erred in law to convict and sentence the appellant without evaluation of circumstantial evidence in the absence of corroboration.*
5. *That, the first appellate court erred in law to convict the appellant on a balance of probabilities instead of an objective appreciation of the entire evidence on record based on fairness of the law.*

Before us when the appeal was called for hearing, the appellant appeared in person unrepresented, while the respondent Republic enjoyed the services of Ms. Wampumbulya Shani and Ms. Immaculata Mapunda, both learned State Attorneys.

According to the charge against the appellant it alleged that on the 23rd February, 2014 at about 01.00hours at Nyihogo area within Kahama District in Shinyanga region did steal one cellular phone make Nokia

valued at TZS 100,000/= the property of one Ntabo Masunga (the victim PW1) and immediately before and after such stealing the appellant did stab the victim on his stomach by using a knife in order to retain the said stolen property.

The appellant denied the charge. To prove its case, the prosecution lined up witnesses and tendered documentary evidence. From a total of three witnesses, the prosecution account was as follows: On 22/2/2014 at night around 9:20pm Ntabo Masunga (PW1) was in Nyihogo area drinking local beer with the appellant. PW1 left the place and headed to his sister's place. On his way, he met two young men who attacked him, took TZS. 20,000/= and was stabbed with a knife on his left side of the ribs. He claimed, with the aid of moonlight he identified the appellant whom he was drinking with at the local beer pub. PW1 then headed to his sister's place, where his sister called Senga Zakaria (PW2) took him to the police station. He was given a PF3 and went to the hospital where he was admitted. Sometimes later, the appellant also was admitted in the same ward. Upon PW1 seeing the appellant, PW1 informed his relatives that he was the one who stabbed and robbed him, they called the police, the WP 5875 DC Luli (PW3) came and arrested the appellant. PW3 took the appellant to the police station and recorded his cautioned statement.

In his defence, the appellant disassociated himself with the commission of the crime and stated that he was assaulted by two young men, then he was taken to hospital where he was admitted, later arrested and taken to the police station.

Upon the completion of the trial, as earlier stated the appellant was convicted as charged.

At the outset, when Ms. Mapunda took the floor to address the Court supported the appeal arguing that, the charge of armed robbery under section 287A of the Penal Code, [Cap 16 R. E 2002] was not proved beyond reasonable doubt against the appellant.

On this point, she pointed out that: one, the evidence adduced by the prosecution is at variance with the charge of armed robbery as the proper offence that ought to have been preferred against the appellant is assault causing actual bodily harm. Two, while the conviction by the lower courts was based on visual identification, there was no evidence to corroborate the same as the intensity of moon light was not stated by the victim. This was also not remedied by the cautioned statement of the appellant. Thus, it was argued that the appellant was wrongly identified from the start hence no stealing was committed by the appellant. The learned State Attorney concluded and prayed to the Court, to allow the appeal and the appellant be set free.

Rejoining, the appellant being a lay person, had nothing to add apart asking the Court to allow his appeal and to set him free.

From a total of five grounds of appeal, the record before us and submissions of learned counsel, the issue for determination is whether the charge was proved against the appellant beyond reasonable doubt. Before determining the appeal, it is crucial to state the obvious. This being a second appeal, this Court is cautious against interference with concurrent findings of facts by the two courts below. The Court rarely interferes with the concurrent findings of fact by the lowers courts except where there has been misapprehension of the nature and quality of the evidence and other recognized factors occasioning a miscarriage of justice. We guard against unwarranted interference and we will only interfere with such concurrent findings of facts only if we are satisfied that they are on the face of it unreasonable or perverse, leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law. See: **Raymond Mwinuka v. The Republic**, Criminal Appeal No. 366 of 2017 and **Daniel Matiku v. The Republic**, Criminal Appeal No. 450 of 2016 (both unreported).

The scope of our deliberations will depend on whether or not we find rationale for interfering with the findings of facts by the trial and first appellate courts. We take up the issue of visual identification as forming the bedrock of

the case considering that the offence is alleged to have been committed at night.

We start with the complaint regarding identification of the appellant. The main issue is whether the appellant was properly identified. We are mindful of the settled legal principle that, the evidence of visual identification is the weakest kind, and thus before it is taken as a basis of conviction, it must be watertight. **The Court in Waziri Amani v. Republic [1980] TLR 250, held that: -**

> *"(i) Evidence of visual identification is the weakest kind and most unreliable;*
>
> *(ii) No court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight."*

A number of factors have to be considered by the Court to ensure that the evidence is watertight, which includes, the time the witness had the accused under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance whether it was day or night time, whether there was good or poor lighting at the scene and whether the witness knew or had seen the accused before.

In this case, PW1 claimed to have identified the appellant as they were earlier drinking together at the local pub, and was assisted by the moon light. Also, soon after the incident PW1 first went to his sister whose evidence was vital to establish if he had mentioned to her the name and terms of description of the appellant. However, the sister was not paraded as a prosecution witness. Even when the matter was reported to the police, he could not mention his name or the terms of description to the police at the earliest opportune time. As PW1 did not mention the appellant at the most opportune time, the reliability of his evidence that he identified the appellant is highly doubtful. This was emphasized by the Court that it is trite principle that the ability to mention the suspect at the earliest opportune time is of the utmost importance as it proves reliability of the witness. See: **Makende Simon v. the Republic,** Criminal Appeal No. 412 of 2017, **Elisha Edward v. The Republic**, Criminal Appeal No. 33 of 2018 and **Bahati Mtega and Flowin Mtweve v. The Republic,** Criminal Appeal No. 481 of 2015 (all unreported).

Pertaining to identification by moonlight, in the case of Pontian Joseph vs the Republic, Criminal Appeal No. 200 of 2015 (unreported), the Court had this to say on general assertion by a witness that there was sufficient moon light or enough moonlight without describing its intensity":

"Though under certain circumstances, identification by moonlight may be possible, it was imperative in the circumstances to explain the intensity of the moonlight. Whereas PW2 merely said there was moonlight, the complainant said there was enough moonlight: It is our considered view that it does not suffice to say there was moonlight or enough moonlight. Its brightness had to be explained."

In the case at hand, PW1 did not state the intensity of the moon light. This is cemented by PW1's own account that at the time he was robbed, the moon was in the mid of the clouds as it was around 8:00 and 9: 00 pm. Yet, on the surroundings at the scene of crime, he elaborated that it was a small path where there were houses with no electricity. Also, he stated that at the scene of crime there were three people, the appellant and two other young men who robbed him Tshs. 20,000/= and a phone.

With this state of evidence, can we safely vouch that the appellant was positively identified? The answer is in the negative and we shall give reasons. One, the appellant was a stranger to PW1 and fell short of naming him and stating terms of a description of the appellant at the scene of crime. Two, when

the matter was reported to the police, PW1 did not mention the name and terms of description of the appellant thereto. In the circumstances, the conviction of the appellant was not based on a proper evaluation of the evidence be it by the trial court or the first appellate court.In a nutshell, we agree with the learned State Attorney that, the appellant was not properly identified at the scene of crime and it was wrong for the courts below to act on weak visual identification which did not eliminate possibilities of mistaken identity.

Pertaining to the variance between the charge and the evidence it is not in dispute that the appellant was charged with armed robbery whereby the appellant was alleged to have stolen a NOKIA mobile phone which belonged to the victim. However, PW1 in his testimony fell short of proving he owned the said phone as he failed to state the description, make or peculiar marks of the phone and the IMEI number which is unique to every mobile phone. That apart, while the charge stated that only the phone was stolen, apparently, PW1 came with different story having stated the appellant stole Tsh.20,000/= which renders the charge not supported by the evidence.

Since the evidence of PW1 on identification is discrepant, we shall now scrutinize the appellant's cautioned statement which was tendered and admitted as exhibit P2. In the said statement, the appellant did not confess to have robbed anything from PW1 be it money or a mobile phone. In this regard,

it cannot be said that the cautioned statement was the appellant's confession within the meaning provided under section 3 of the Tanzania Evidence Act [CAP 6 R.E.2002].

In view of our discussion, it is clear there was a misapprehension of the substance, nature and quality of evidence, misdirection on the evidence that occasioned a miscarriage of justice by the trial court which necessitated the intervention of the High Court decision at the hearing of the first appeal. Thus, in this second appeal having re-evaluated the trial evidence, we find the appeal is merited and accordingly allow it. We quash and set aside the conviction and sentence. Therefore, we order the immediate release of the appellant unless otherwise held for another lawful cause.

DATED at **SHINYANGA** this 26th day of August, 2021.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

This Judgment delivered this 27th day of August, 2021 in the presence of the Appellant in person, unrepresented and Mr. Jukael Reuben Jairo, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL