IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NDIKA, J.A., LEVIRA, J.A., And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 556 OF 2017

MOHAMED HUSSEIN PAGWEJE.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Moshi, J.)

Dated 28th day of September, 2017
in
Criminal Appeal No. 45 of 2017

JUDGMENT OF THE COURT

23rd November, & 1st December, 2021

MWAMPASHI, J.A.:

Before the District Court of Babati at Babati (the Trial Court) the appellant, Mohamed Hussein @ Pagweje was charged with and convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2002 [Now R.E. 2019] (the Penal Code). He was sentenced to a term of thirty years imprisonment. Aggrieved, the appellant unsuccessfully appealed to the High Court of Tanzania at Arusha hence, this second appeal.

According to particulars of the offence, on 24.07.2016 at Kwere area within the District of Babati in the Region of Manyara, the appellant

stole Tshs. 150,000/= and a radio valued at Tshs. 45,000/= the property of one Abdul Juma @ Tandu and that immediately before and after such stealing, he threatened the said Abdul Juma @ Tandu by using a panga, in order to obtain and retain the said property.

During the trial, the prosecution paraded a total of four witnesses while, the appellant was a sole witness in his defence. Briefly, the evidence before the trial court was as follows; on the fateful night between 21.30 hours and 22.00 hours, Abdul Juma @ Tandu (PW3) was in his house when the appellant knocked and demanded for the door to be opened. PW3 refused to open the door, as a result, the appellant broke it and got in. Then, the appellant who had a panga and a piece of an iron bar in his hands, attacked and cut PW3 on his head, an eye and mouth. Thereafter, the appellant took Tshs. 150,000/= and a radio from PW3 before he disappeared. PW3's evidence is also to the effect that he positively identified the appellant because he knew well him as they both lived in the same village and also because in the house there was light from an electric bulb. PW3 did also testify that the alarm he raised was responded to by his neighbour Yeromini Lazaro (PW2) who came to his rescue by taking him to the police station and then to the hospital.

According to PW2, he was at his home when he heard his neighbour PW3 screaming that he was dying and raising an alarm for help. He rushed to PW3's house and found the door to the house open. He was still outside when he saw the appellant getting out with a panga in his hands. The appellant had in his hands something else he could however not recognise. After getting out the appellant disappeared into the darkness. PW2 insisted that he properly identified the appellant because he was about 5 steps from the appellant and that outside, PW3's house was illuminated by tube light. After getting in, he found PW3 bleeding from his head and mouth and while still therein, one Tatu Juma (PW1) appeared and joined them. PW2 did also testify that PW3 told them that the appellant had taken from him Tshs. 150,000/= and a radio. He also told the trial court that the appellant is his neighbour and therefore that he properly identified him at the scene.

The evidence from PW1 was to the effect that at the material time she was on her way home when she passed close to PW3's house and saw the appellant at the door to PW3's house. Suspiciously, she decided to take cover in a farm in front of the house so that she could observe and see what would happen. While there, she saw the appellant breaking the door by using a big stone, saw him getting in and then heard PW3 screaming and raising an alarm that Pagweje was killing him.

She adduced further that outside the house there was light from a big tube light that is why she managed to see the appellant who had a panga in his hands when he was getting in the house and when he got out and ran away. PW1 did also tell the trial court that she saw when PW2 appeared and when he was getting in the house before she got in and joined PW2. While in the house PW3 told them that the appellant made away with Tshs. 150,000/= and a radio. She lastly testified that she used to well know the appellant as her neighbour and that the two had no misunderstandings.

There was also evidence from D/C Jery of Babati Police Station (PW4) who testified that the case was assigned to him for investigation on 28.07.2016. He then visited the appellant's home and the crime scene and drew a sketch map which was tendered in evidence as exhibit PE1. He also told the trial court that after the arrest of the appellant he interrogated him and that when he wanted to record the appellant's cautioned statement, the appellant refused.

In his affirmed defence the appellant claimed that on the material date he was in Arusha till 28.07.2016 when he returned home and that he was arrested on 06.08.2016. The appellant's attempt to substantiate his claim that he was nowhere close to the scene on the material time

by tendering a bus ticket was blocked by an objection on the ground that the appellant had not complied with the provisions of section 194 (4) and (5) of the Criminal Procedure Act, [Cap 20 R.E. 2002] (the CPA).

After a full trial, the trial court found that the appellant was positively identified by PW1, PW2 and PW3 who used to know him because he was their neighbour. The appellant's defence of *alibi* was considered by the trial court but was rejected. The case against the appellant was therefore found proved and the appellant was accordingly convicted and sentenced as we have earlier alluded to. On the appellant's first appeal, the findings and conclusion by the trial court were confirmed and upheld by the first appellate court hence this second appeal.

In his memorandum of appeal, the appellant has raised a total of six grounds as follows:

1. *That, the first appellate court grossly erred in upholding appellant's conviction relying on faulty identification evidence.*
2. *That, both the trial court and the first appellate court erred in law for failing to notice a variance between the charge sheet and the evidence adduced by the complainant (PW1).*

3. *That, both the trial court and the first appellate court erred in law and in fact when they failed to see the contradictions and inconsistencies in the testimonies of prosecution which should have been resolved in favour of the appellant.*
4. *That, both the trial court and the first appellate court did not consider the fact that the appellant was arrested fourteen days after the alleged offence had been committed while the prosecution witnesses claimed in their evidence that they knew him before the date of the incident.*
5. *That, the first appellate court erred in law and in fact by its failure to hold that the Prosecution did not prove the case against the appellant beyond all reasonable doubts.*
6. *That, the trial court and the first appellate court erred in law and in fact by failing to consider the appellant's defence.*

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas, the respondent/Republic was represented by Ms. Janet Sekule, learned Senior State Attorney and Ms. Tusaje Samwel, learned State Attorney.

When invited to argue his grounds of appeal, the appellant opted to let the learned State Attorneys respond to his grounds first. He however reserved his right to respond later, should the need arise.

In response, Ms. Sekule prefaced by declaring that she was not supporting the appeal because the case against the appellant was proved to the required standard. As for the first ground, Ms. Sekule submitted that the identification evidence from the complainant PW3 which was corroborated by PW1 and PW2 and on which the trial court relied in convicting the appellant, was watertight. She insisted that the appellant who was not a stranger to the three identifying witnesses was positively identified at the scene of the crime because there was enough light from the electricity tube light and bulb outside and inside the house respectively. She insisted that the prevailing condition was favourable for positive identification and that there was no any possibility of mistaken identity. Ms. Sekule acknowledged the fact that the witnesses did not disclose the intensity of the light. She however firmly argued that under the circumstances of this case, the failure to disclose the intensity of the light, did not water down the identification evidence given by PW1, PW2 and PW3. Still insisting that the appellant was properly identified, Ms. Sekule lastly submitted that the evidence show

that the appellant did not wear a mask to disguise his identity. She thus prayed for this ground to be dismissed.

Turning to the second and third grounds of appeal which she combined and argued them together, Ms. Selule contended that there was no variance between the charge sheet and evidence as complained by the appellant. She explained that as it was stated in the charge sheet, the evidence that was given was to the effect that the offence was committed by the appellant at Kwere on 24.07.2016 against PW3 and also that the appellant who was armed with a panga robbed Tshs. 150,000/= and a radio from PW3. She also contended that there are no discrepancies in the prosecution evidence and further that if there is any, then it is minor and immaterial not going to the root of the case. She further argued that if the discrepancy complained of concerned the words PW3 uttered when screaming and raising an alarm during the robbery, then the same is very minor and immaterial.

Regarding the fourth ground, Ms. Sekule conceded that, indeed there was a delay of 14 days in arresting the appellant. She also conceded that there is no evidence that the appellant was named to the police and therefore that his arrest resulted from him being so named. It was however argued by Ms. Sekule that the delay in arresting the

appellant was caused by the fact that after committing the offence, the appellant disappeared. Ms. Sekule further argued that the delay did not raise any reasonable doubt in the prosecution case that it is the appellant who committed the robbery in question and that he was positively identified by PW1, PW2 and PW3. She urged the Court to dismiss this ground as well.

As for the sixth ground on the complaint that the appellant's defence of *alibi* was not considered, Ms. Sekule submitted that the defence was considered. She contended that the defence was rejected for not being raised in accordance with the provisions of section 194 (4) and (5) of the CPA. It was he further argument that the trial court's rejection of the *alibi* defence was confirmed by the High Court.

Lastly, Ms. Sekule submitted that the trial court did not err in concluding that the case against the appellant was proved beyond reasonable doubt. She contended that the charge was proven to the hilt. She thus urged that the appeal be dismissed.

On his part, the appellant argued, in rejoinder, that the identification evidence from PW1, PW2 and PW3 was not watertight and therefore that the conviction ought not to have been based on it. He contended that, if properly identified, he would have been

arrested promptly, not after a lapse of fourteen days. He also maintained that there was a material variance between the charge sheet and the evidence on recordin that while according to PW4 he was arrested for committing the offence in question on 08.05.2016, it was stated in the particulars of the offence that the offence was committed on 24.07.2016. The appellant did lastly argue that the case against him was not proved to the required standard and therefore that the appeal be allowed.

The issue for our determination is whether the concurrent finding of the two lower courts that the case against the appellant was proved beyond reasonable doubt is sustainable.

We propose to begin with the second and third grounds of appeal on the complaints that the charge sheet was at variance with the evidence and that the prosecution evidence had material discrepancies and contradictions. On this, we hasten to agree with Ms. Sekule that these two grounds are baseless.

On the issue of the variance between the charge sheet and evidence, it is our finding that according to the original record, which was also shown to both the appellant and the learned State Attorneys during the hearing, what was stated by PW4 in regard to the date the

appellant was arrested, is that the appellant was arrested on 08.08.2016 and not on 08/05/2016 as shown at page 20 of the record of appeal. The appellant's complaint that there was such a variance was therefore based on the above pointed typing error. As it has also been rightly argued by Ms. Sekule, the appellant has exhibited no contradiction or discrepancy on the prosecution evidence. If his grievance in regard to the complaint on discrepancies is on the words uttered by PW3 when screaming and raising an alarm which were heard by PW2 and PW1, that is, "*I am dying please help me*" as testified by PW2 and "*help me Pagweje is killing me*" as testified by PW1, then we do not find any serious discrepancy on the same. The purported discrepancy is very minor. It neither goes to the root of the case nor does it deflect from the essence of the prosecution evidence that it was the appellant who invaded PW3 on the material night. We also find the complaint baseless because there is no evidence on record which is to the effect that when screaming and raising an alarm PW3 uttered such words once, and that those words are the same words both PW1 and PW2 heard at the same time. The second and third grounds of appeal are therefore dismissed for want of merits.

Next for our consideration is the sixth ground of appeal contending that the appellant's defence was not considered. His defence, apart from

the general denial, as it can be gathered from his evidence in defence from page 23 to 26 of the record of appeal, was an *alibi*. It was the appellant's claim that on the material night he was at Arusha. It is on record that the appellant raised this defence at the stage when the prosecution case had been closed hence in contravention of section 194 (4) and (5) of the CPA. In such circumstances and in terms of section 194 (6) of the CPA the trial court had to consider it but it had the discretion to accord it no weight or lesser weight- see **Mwita s/o Mhere and Ibrahim Mhere v. R** [2005] T.L.R. 107 and also **Sijali Juma Kocho v. Republic**[1994] T.L.R. 206.

In the judgment of the trial court, at page 33 of the record of appeal, the defence was considered but it was accorded no weight. Likewise, the High Court in its judgment at page 49 of the record of appeal, considered the defence by concurring with the trial court that the defence was without due notice having been given and that the trial court rightly exercised its discretion to reject it. We find no reason for faulting the concurrent findings of the two lower courts. The defence raised by the appellant did not shake the credible prosecution case that the appellant was at the scene of the crime at the material time. This ground of appeal fails too.

We now turn to the first and fourth grounds of appeal which we think can conveniently be combined and tackled together. The two grounds correlate and revolve around a single issue which we find it to be the central in this appeal. The issue is whether the evidence on record established beyond reasonable doubt that the appellant was positively identified at the scene of the crime.

There is no dispute that the offence in question was committed at night, that PW3 was attacked by a panga and was injured. It is also clear that in the course of that attack Tshs. 150,000/= and a radio got stolen from PW3. The issue is whether it was the appellant who was involved in the robbery in question. It is clear, from the record, that the prosecution case against the appellant and consequently the conviction hinged on recognition evidence from PW1, PW2 and PW3. The law on visual identification is settled. Courts should only act on visual identification or evidence of recognition after all the possibilities of mistaken identity are eliminated. The evidence of visual identification is of the weakest kind and most unreliable and thus before it is acted upon as a basis of conviction, it must be watertight. his, was pronounced by this Court in the landmark case of **Waziri Amani v. R** [1980] T.L.R 250, where it was held that:-

"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 watertight. The following factors have to be taken into consideration, the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night (whether it was dark, if so was there moonlight or hurricane lamp etc) whether the witness knew or has seen the accused before or not".

The principles enunciated in **Waziri Amani** (supra) were not meant to be rigidly applied. In the case of **Njamba Kulamiwa v. Republic**, Criminal Appeal No. 460 of 2007 (unreported), the Court made the following observations:-

"As is clear, from the above passage WAZIRI AMANI's case just gave broad guidelines, and it is for the trial court, in each case to assess and apply those guidelines, in the light of the circumstances of each case. However, those principles were developed against the backdrop of an old and cherished principle that generally, it was dangerous to convict on the evidence of a single witness of identification where the

conditions for such identification were unfavourable".

It is also not true that once an offence is committed at night, identifying an assailant is always impossible. The Court in **Njamba Kulamiwa** (supra) cited the case of **Philip Rukaza v. Republic**, Criminal Appeal No. 215 of 1994 (unreported) in which it was held among other things that:-

"We wish to say that it is not always impossible to identify assailants at night and even where victims are terrorized and terrified. The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled".

Guided by the positions of law set in the above cited cases, our immediate task is to examine the evidence on record and find, not only whether the appellant was positively identified but also whether the delay in his arrest had any negative effect to the identification evidence. We have carefully re-examined the evidence of PW1, PW2 and PW3 and considered all the relevant prevailing conditions and reached at a firm

conclusion that the concurrent findings of the two lower courts that the appellant was positively identified at the scene of crime is unassailable.

In the present case the appellant was not a stranger to PW1, PW2 and PW3 as there is undisputed evidence that the appellant and the said three witnesses used to live in the same village or street. In the fateful night PW3's room was illuminated by an electric bulb and PW3 spent considerable time with the appellant in that room. These circumstances were very favourable for a positive identification. In support of PW3's evidence there is evidence from PW1 and PW2. According to PW2, he rushed to PW3's house in answer to PW3's alarm where he saw the appellant getting out of the house and running into the darkness. The evidence from PW1 and PW2 was that PW3's house was lit up by a tube light outside. PW1 who happened to be passing by PW3's house and who was hiding in the farm in front of the house, saw the appellant breaking the door and entering into the house and she also saw him when getting out. PW1 and PW2 did also hear PW3 naming the appellant when screaming and raising an alarm.

The evidence from PW1, PW2 and PW3 who saw and identified the appellant who was not a stranger to them, from different vantage positions, leaves no grain of doubt in our minds that the appellant was

positively identified. The claim of non-disclosure of the intensity of light is, under the circumstances of this case, where we are told that there was light from electric tube light and bulb inside and outside the house, of no significance. We have also taken into consideration the fact that there is no evidence that any of the three witnesses held grudges against the appellant which does not only make their respective evidence more credible and reliable but it also fortifies our firm finding that the appellant was positively identified.

The appellant's complaint has also been that the delay in arresting him had no other meaning but that he was not identified at the scene of the crime. It has also been his argument that he was not identified at the scene of the crime because non of the three identifying witnesses named him to the police. First of all, it is our finding that though there is no clear evidence that the appellant was named to the police and that his arrest resulted from such naming, going by the evidence of PW4 (the police investigator)it is inferable that the appellant was named to the police who then went about looking for him. In his evidence, at page 20 of the record of appeal, PW4 is on record telling the trial court that on the day he visited the scene of the crime at Kwere area, he also visited the appellant's home. We think that this piece of evidence shows that the appellant was named to the police and his arrest resulted from that

naming. In fact, we do not think that when reporting the incident to the police and when they were being issued with the PF3, PW2 and PW3 could have not named the appellant.

As to what caused the delay of 14 days in arresting the appellant, it is our finding from the evidence on record that the evidence and circumstances of the case show that after committing the offence, the appellant disappeared. The fact that the appellant went missing and therefore that he could not be arrested at the earliest time is supported by his own evidence that he was at Arusha and that he did not come back till 28.07.2016.

It is therefore our firm finding on the first and fourth grounds of appeal that, as it was found by the two lower courts, the appellant was positively identified at the scene of the crime. Under the circumstances of this case where the identification evidence from PW1, PW2 and PW3 is watertight, the fact that there was delay in arresting the appellant or that there is no clear evidence that the appellant was named to the police, does not raise any doubt or disturb the positive identification evidence given by PW1, PW2 and PW3. The first and fourth grounds of appeal are therefore dismissed for lacking substance.

On the basis of our findings on the first, second, third, fourth and sixth grounds of appeal, the fifth grounds of appeal on which it is complained that the case against the appellant was not proved beyond reasonable doubt, crumbles naturally. We are fully satisfied that, on the evidence on record, the case against the appellant was proved to the hilt.

That said and done, we find that the appeal is without merit and we accordingly dismiss it in its entirety.

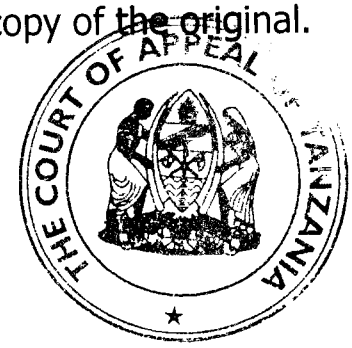
DATED at **ARUSHA** this 30th day of November, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 1st day of December, 2021 in the presence of the Appellant in person, and Ms. Tusaje Samwel, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL