IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KOROSSO, J.A. And MWANDAMBO, J.A.)

CRIMINAL APPEAL N0. 412 OF 2018

KARIMU JAMARY@KESI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salam)

(Luvanda, J.)

dated the 14th day of November, 2018

in

Criminal Appeal No. 26 of 2018

.....

JUDGMENT OF THE COURT

17th March & April, 9th 2021

MWANDAMBO, J.A.:

Karimu Jamari @Kesi, the appellant, was aggrieved by the judgment of the High Court sitting at Dar es Salaam which dismissed his appeal against conviction and sentence involving armed robbery. He is before this Court on a second appeal faulting the first appellate court for concurring with the trial court on the finding of guilt, the ultimate conviction and sentence.

The appellant was arraigned before the District court of Mkuranga (the trial court), on a charge involving armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E 2002]. The particulars of the offence alleged that on 25th December 2016 at about 01: 00 hours, at Kibamba Village, Mkuranga District, Coast Region, the appellant stole TZS 273,000.00 and one cellular phone make Samsung valued at TZS 120,000.00 both belonging to one Selemani S/o Nassoro @Mbena (the victim). The prosecution alleged further that immediately before such stealing, the appellant cut the victim's right hand by a machete in order to obtain and retain the stolen properties. The appellant pleaded not guilty to the charge which culminated into a trial in which five witnesses testified for the prosecution and one for the defence.

The substance of the evidence which the trial court found sufficiently proved the case against the appellant resulting into his conviction was to the following effect: Hadija Nassoro (PW2), a sister to Selemani Nassoro @Mbena who testified as PW1, had a traditional dance (Ngoma) ceremony for her daughter which took place at the house of her brother-in-law at

Kibamba area, Mkuranga District. PW1 was one of the participants in the ceremony till the night of 25th December 2016. After the end of the ceremony, PW1 and PW2 left accompanied by Mariam Hamis. PW1 was to spend the rest of the night in PW2's house. Immediately before their arrival at that house, unknown persons invaded PW1. They clobbered him cutting his right hand with a machete and robbed his mobile phone make Samsung and cash amounting to TZS 273,000.00. Although the incident occurred during the night, the trial court believed the evidence of identification adduced by PW1, PW2 and PW3. The trio testified that they identified the appellant at the scene of crime which was sufficiently illuminated by a bright moonlight and electric bulbs from nearby houses. Besides, the culprit was familiar to PW2 who mentioned his name as she shouted for help. One of the persons who responded to the for help was Masudi Salehe (PW3) a tenant in PW2's house who found PW1's hand injured and helped in covering the wound with a piece of cloth before he was taken to Mkuranga District Hospital for treatment. According to PW3, he saw the appellant running away from the scene as he responded to the cry for help. The appellant was arrested by Sungu Sungu led by PW1 on 27th

December 2016 at a place called Njia Panda, Kibamba; two days after the incident.

It was not controverted that PW1's mobile phone and cash were stolen and that the culprit did so by cutting his right hand by a machete. The only dispute was whether it was the appellant who did so and whether he was positively identified to have been the assailant. The trial court found the evidence of identification by PW1 to have been sufficiently corroborated by PW2 and PW3. It also found the evidence of Dr. Mercy Solomon (PW5) who attended PW1 at the hospital on the material date as corroborative of PW1's evidence on the injury sustained in the course of the robbery incident. It accordingly found the appellant guilty as charged, convicted him and meted out the mandatory sentence of 30 years imprisonment.

The appellant's appeal to the High Court was, by and large, that his conviction was against the weight of evidence which did not prove the case against him on the standard required in criminal cases. He directed his complaint on **one**; unreliable and contradictory evidence of visual

identification through PW1, PW2 and PW3; **two**, failure by the prosecution to call a police officer to whom the victim reported the offence and how he was apprehended in connection with the offence, **three**; contradictory and incredible evidence of PW1 and PW2 on who was the owner of the money stolen in the course of armed robbery and; **four**, disregarding his defence without assigning any reason.

The High Court (Luvanda, J) found no merit in any of the grounds of appeal. In not so many words, it concurred with the trial court that the appellant was positively identified by PW1, PW2 and PW3 that it is him and no one else who committed armed robbery on the material date and time.

Regarding the appellant's complaint against the trial court's failure to consider his defence, the learned first appellate Judge took the view that defence was too weak to cast any doubt on the overwhelming prosecution's evidence. It dismissed the appellant's appeal and hence the instant appeal predicated on eight grounds of appeal. The first six grounds are contained in the memorandum of appeal filed on 11th November 2019 and the rest appear in the supplementary memorandum lodged on 5th June

2020. Essentially, the appellant faults the first appellate court for sustaining his conviction on the following areas of grievance:

1. *The charge was defective for being preferred under a 'dead law';*
2. *The evidence of visual identification was not watertight;*
3. *Failure to call a police officer to whom the offence was reported as a witness before the trial court;*
4. *None of the Sungusungu people who arrested the appellant in connection with the crime was called as a witness;*
5. *In spite of the appellant being familiar to PW1, PW2 and PW3, the prosecution did not adduce sufficient evidence to prove that he was pursued immediately after the incident;*
6. *The case against the appellant was not proved beyond reasonable doubt;*
7. *Error in holding that failure to consider defence evidence did not cast any doubt on the overwhelming prosecution evidence regardless of the material contradictions in PW1's evidence in chief and his statement (exh. D1); and,*
8. *Sustaining the appellant's conviction in the face of the contradictory evidence by PW1 and PW2 in relation to the person to whom the stolen money belonged.*

During the hearing, the appellant who was connected via video link from Songea prison, fended for himself. At the very outset, he adopted his

grounds of appeal and opted to let the State Attorney react to the appeal but he reserved his right to rejoin if need be. However, he had nothing useful in rejoinder after the submissions by the learned State Attorney understandably so because he is a lay person. He simply reiterated his plea to the Court to consider his grounds of appeal and allow the appeal which will result into his acquittal and release from custody. Mr. Emmanuel Maleko, learned Senior State Attorney together with Ms. Elizabeth Olomi, learned State Attorney appeared resisting the appeal on behalf of the respondent/ Republic. It was Ms. Olomi who took the floor to submit on the first six grounds in the memorandum of appeal.

Submitting in response to ground one, the learned State Attorney brushed aside the appellant's complaint for being baseless and argued that, the offence of armed robbery with which the appellant stood charged was predicated under section 287A of the Penal Code; the law in force on 25th December 2016 which was the date of the commission of the alleged offence. At any rate, the learned State Attorney argued, the particulars of the offence sufficiently informed the appellant on the nature of the offence he was charged with. She reinforced her submission with our decision in

Jamali Ally @Salum v. R, Criminal Appeal No. 52 of 2017 (unreported) and urged the Court to dismiss this ground.

For a start, we wish to remark that ordinarily we would not have entertained this ground raised for the first time before this Court. However, since it involves an issue of law which goes to the root of the proceedings before the trial court, we are bound to entertain it guided by section 6(7) (a) of the Appellate Jurisdiction Act [Cap. 141 R.E 2019 (the AJA). That said, we have no difficulty in endorsing the submission by Ms. Olomi being satisfied that this ground was raised out of a misapprehension of the law. It is not in dispute that on 25th December 2016 the appropriate provision for armed robbery was section 287A of the Penal Code following amendments thereto vide Written Laws (Miscellaneous Amendments) Act, No. 3 of 2011. Otherwise, if the appellant meant to fault the charge for not indicating the amendment to section 287 of the Penal Code, we entertain no doubt that he was ill advised to raise the point. We say so having regard to the provisions of section 27 of the Interpretation of Laws Act [Cap. 1 R.E 2019] which stipulates:

> *"Where one Act amends another Act, the amending Act shall, so far as it is consistent with the tenor thereof and unless the contrary intention appears, be construed as one with the amended Act."*

Under the circumstances, the prosecution had no obligation to indicate that the appellant was charged under section 287A of the Penal Code as amended by Act No. 3 of 2011. This ground is destitute of merit and we dismiss it.

Before proceeding to ground 2, we propose to dispose grounds 4 and 5 which Ms. Olomi invited us to decline entertaining because they were neither raised before the High Court and determined as such nor do they involve points of law. Upon examination of the record, it is plain that these grounds never featured before the High Court. Neither are they predicated on points of law. We agree with her guided by section 4 (1) of the AJA which vests this Court with jurisdiction to hear appeals from the High Court and subordinate courts with extended jurisdiction. Naturally, our jurisdiction to hear appeals from the High Court and subordinate courts

with extended jurisdiction presupposes that such courts determined any of the issue complained of as being wrongly decided in line with rule 72 (2) of the Court of Appeal Rules, 2009 (the Rules). In so far as none of the two grounds were dealt with and determined by the High Court in a manner considered by the appellant, the Court lacks jurisdiction to entertain them as they are not founded on issues of law. There is a plethora of authorities on this, represented by our previous decisions amongst others; **George Mwanyingili v. R,** Criminal Appeal No. 335 of 2016, **Thomas s/o Peter @ Chacha Marwa v. R,** Criminal Appeal No. 553 of 2015, **Galus Kitaya v. R**, Criminal Appeal No. 196 of 2015 and **Godfrey Wilson v. R,** Criminal Appeal No. 16 of 2018 (all unreported). The complaints in the two grounds are on factual issues and so they do not have any place for consideration by this Court. We accordingly decline to entertain the two grounds. We shall now turn our attention to ground 2.

The appellant faults the first appellate court in ground 2 for sustaining conviction in a case in which the evidence of visual identification was not watertight. The appellant has made an attempt to punch holes in the evidence of visual identification which he believes, were not taken into

account by the trial court as well as the first appellate court that is to say; failure to describe the intensity of light for an unmistaken identification by PW1, PW2 and PW3, unexplained length of time the identifying witnesses observed the appellant and failure to describe his attire.

Ms. Olomi invited us to dismiss this ground because the first appellate court correctly held that the appellant was positively identified at the scene of crime through the evidence of PW1 and PW2 who described the source of light and its intensity. The learned State Attorney argued that in addition, the appellant was familiar to both PW1 and PW2 as well as PW3 and so their evidence was that of recognition. To bolster her submission, she referred us to our decision in **Chacha Jeremiah Murimi & 3 Others v. R,** Criminal Appeal No. 551 of 2015 (unreported).

We must state at this juncture that the case cited has very remote relevance to the instant appeal particularly so considering the caveat the Court registered in **Said Chally Scania v. Republic,** Criminal Appeal No. 69 of 2005 (unreported). The Court stressed in that case that the evidence of recognition cannot be considered in isolation; there must be clear

evidence of the source and intensity of the light which enabled the witnesses to identify a culprit. Apparently, the learned State Attorney did not go beyond citing the case for our consideration.

That said we shall now consider the merits or demerits of this ground having regard to the fact that this is a second appeal where the Court's interference with the concurrent findings of fact by the two courts below is limited. The Court can only intervene in the interest of justice in rare cases where it is obvious that the concurrent findings of fact were arrived at as a result of clear misapprehension of the evidence. The law is settled on this area from many of our decisions. A few of such cases are: **Dickson S/o Joseph Luyana & Another v. R,** Criminal Appeal No. 1 of 2005, **Felix S/o Kichele & Another v. R.**, Criminal Appeal No. 159 of 2005, **Julius Josephat v. R.**, Criminal Appeal No. 03 of 2017 and **Juma Mzee v. R,** Criminal Appeal No. 19 of 2017 (all unreported) as well as **Edwin Isdor Elias v. Serikali ya Mapinduzi Zanzibar** [2004] T.L. R 294. In **Salum Mhando v. R** [1993] TLR 170 referred in **Edwin Isdor Elias v. Serikali ya Mapinduzi Zanzibar** (supra), the Court stated that its power in second appeals is limited to dealing with questions of law on the premise

that the findings of fact are based on correct appreciation of the evidence. It also stated that nevertheless, it can intervene if the two courts below completely misapprehended the substance, nature and quality of the evidence resulting in unfair conviction. That is the test we shall apply in determining the present appeal.

We have shown above that the first appellate court concurred with the trial court in relation to the appellant's identification. It did so having satisfied itself that the trial court rightly relied on the watertight evidence of PW1, PW2 and PW3 who claimed to have properly identified the appellant as the person who committed the armed robbery. Like the trial court, the first appellate court concurred that the evidence of visual identification was watertight and had eliminated all doubts of mistaken identity. The appellant's complaint is that the evidence of identification was not credible and reliable because the identifying witnesses did not explain the intensity of light, length of time they had the appellant under observation as well as the attire he wore. The learned first appellate Judge concurred with the trial court on the source of light through an electric bulb

which supplied sufficient light together with a bright moonlight. Besides, the appellant was familiar to PW1, PW2 and PW3.

Having closely examined the evidence on record, we do not think that there is any justification in interfering with the concurrent findings of the two courts below. We are alive to the trite law that the evidence of visual identification should not be acted upon by any court unless it is satisfied that such evidence is water tight and all possibilities of mistaken identity have been eliminated. See for instance: **Waziri Amani v. R** [1980] TLR 250 followed in many other cases amongst others; **Omari Iddi Mbezi & 3 Others v. R,** Criminal Appeal No. 227 of 2009 and **Taiko Lengei v. R**, Criminal Appeal No. 131 of 2014(both unreported). As mentioned above, the two courts below rightly concurred that from the evidence of PW1, PW2 and PW3 there was enough light from a big electric bulb light from a distance of 3 paces from where PW1 was, which enabled them to identify the appellant who was quite familiar to all of them. Besides, PW2 is on record having mentioned the appellant by his name as Karimu when crying for help as her brother was being robbed. The evidence by all

identifying witnesses on the source of light and its intensity, familiarity with the appellant was not controverted in cross examination.

For instance, stripped of the inherent grammatical mistakes in PW1's testimony, he stated the following during cross -examination:

> *"When I was attacked and robbed I was conscious that is why I identified you as you stood in front. When I was holding the person, who was on my back and who robbed on my neck, you took a machete and cut me my right hand I felt pain and released your fellow robbers and you ran away...."*
> [at Page 7 of the record of appeal]

Similarly, PW2's evidence in chief which was not controverted in cross examination runs:

> *"I knew Karimu before he committed this crime .... I was shouting that "jamani tunakufa jamani tunakufa..... hee kumbe Karimu ndio unatufanyia hayo". Although it was at night it was easy for me to identify Karimu because there was a big bulb light from my house and there was a moonlight. Karimu after searching my brother took the money and*

cellphone. When my brother holding the person, who was behind him Karimu took a machete which was on his waist he cut my brother on his right hand and they start running away.....[at page 8].

PW3 was a tenant in PW2's house and responded to the cry for help. He said as much that he met the appellant face to face as he was running away from the scene of crime leaving PW1 injured. There is hardly any doubt that from the above testimonies that the source of light as well as its intensity were fully accounted for, PW1 was at a very close from the appellant who had clobbered him and managed to snatch his cell phone and money. It is equally not in dispute that PW2 observed the appellant robbing her brother at a close range. In addition, from the evidence, it is clear to us that the incident is not one that could have taken place within a blink of an eye; it took some time enough for the culprits to succeed in their mission which was sufficient for the witnesses to identify the appellant at the scene of crime.

Curiously, the appellant did not cross examine the identifying witnesses and controvert them on such incriminating evidence against him.

It is settled law that failure to cross examine the prosecution witnesses on material part of evidence adverse to the other party is tantamount to its acceptance. In **Emmanuel Saguda @ Sulukuka and Another v. R,** Criminal Appeal No. 422 "B" of 2013 (unreported), the Court cited with approval an old English case of **Browne v. Dunn** [1893] 6 R. 67 which held that: -

> *"A decision not to cross-examine a witness at all or on a particular point is tantamount to an acceptance of the unchallenged evidence as accurate, unless the testimony of the witness is incredible or there has been a clear prior notice of intention to impeach the relevant testimony".*

See also: **Martin Misara v. R,** Criminal Appeal No. 428 of 2016, **Bashiri s/o John v. R,** Criminal Appeal No.486 of 2016 and **Oscar Justinian Burugu v. R,** Criminal Appeal No. 33 of 2017 (all unreported). With the foregoing analysis and having regard to the safeguards on the treatment of identification by recognition underscored in **Said Chally Scania v. R** (supra), we see nothing to fault the two courts below for concurring that the appellant was positively identified as the culprit who

committed armed robbery on the material night. Undeniably, the first appellate court held that the evidence was reliable which meant that it came from the witnesses who were credible. It is too late to assail the witnesses' credibility at this stage, it being settled law that the trial court is better placed to assess and determine the credibility of witnesses which binds on appellate courts unless there are circumstances on record in an appeal warranting such court to reassess it. See for instance: **Omary Ahmed v. R**. [1983] T.L.R 52, **Richard Matangule& Elia Richard v. R** [1992] T.L. R 5 at p. 9 and **Christian s/o Kale & Rwekaza s/o Bernard** [1992] T.LR 302. Afterall, on the authority of **Goodluck Kyando v. R** [2006] T.L.R 363, the identifying witnesses were entitled to be believed unless there were cogent reasons to the contrary say; giving an improbable or implausible evidence or evidence which is materially contradicted by other witnesses. The trial court as well as the first appellate court found none to warrant disbelieving PW1, PW2 and PW3 on their evidence of identification.

The appellant's effort to punch holes on the prosecution evidence by reason of failure to describe his attire on the material night is of little help

to him. We say so on the strength of the evidence highlighted above. We do not think that failure to describe his attire was consequential to that evidence largely of recognition. That evidence was solid enough and removed all possibilities of mistaken identity. In the upshot, we find no merit in this ground and we dismiss it.

In ground 3 the appellant faults the first appellate court for sustaining his conviction in a case in which the police officer to whom the offence was reported never testified. The learned State Attorney urged the Court to dismiss this ground predicating his argument on section 143 of the Evidence Act [Cap. 6 R.E. 2019] as well as our decision in **Godfrey Gabinus @ Ndimbo & 2 Others v. R,** Criminal Appeal No. 273 of 2017 (unreported). That section is to the effect that no particular number of witnesses is required in any particular case to prove a fact. Put it differently, what is required is quality of the evidence rather than its quantity. In that regard, the learned State Attorney's argument was that the prosecution was not obliged to call any Police Officer to whom the offence was reported and rightly so in our view because the evidence of the witnesses who testified was sufficient to sustain the charge. Since we

have already dismissed the appellant's complaint in ground 2 regarding his identification, the Police officer to whom the offence was reported was not a material witness because the relevance of his evidence was limited to his description to facilitate his arrest in connection with the crime.

As seen above, the uncontroverted evidence of PW1 was that the appellant was arrested by *"Sungusungu"* who were accompanied by him. This happened after a failed attempt the previous day in which PW1 accompanied a police Officer to arrest his assailant after obtaining an RB from the police station. The appellant has failed to persuade us to place his complaint anywhere near the cases involving failure to call a material witness for unexplained reason thereby attracting an adverse inference against the prosecution. See for instance: **Aziz Abdallah v. R** [1991] T.L.R 71. Without further ado, this ground fails for lack of merit.

After hearing Ms. Olomi, it was Mr. Maleko's turn to address us on the two grounds in the supplementary memorandum. The first (which now appears as ground 7) faults the first appellate court for not addressing itself properly on the complaint directed against the trial court's failure to

consider the appellant's defence evidence. The learned Senior State Attorney conceded as much that the trial court wrongly rejected the appellant's defence of alibi. He too conceded that the first appellate Judge glossed over the issue in his judgment. Under the circumstances, Mr. Maleko invited us to step into the shoes of the High Court and do what it omitted to do. We accept the invitation having regard to our previous decisions particularly; **Joseph Leonard Manyota v. R**, Criminal Appeal No. 485 of 2015 (unreported) to which reference was made recently in **Julius Josephat v. R,** Criminal Appeal No. 3 of 2017 (unreported).

Having closely examined the evidence in the record of appeal, we are satisfied that despite the trial court's failure to consider the appellant's defence of alibi, such defence did not raise any doubt let alone reasonable doubt in the prosecution's evidence. In our view, worth for what it was, that defence was an afterthought considering that all the three identifying witnesses positively identified the appellant placing him at the scene of crime on the date and time he claimed to have been at his residence at Buguruni kwa Mnyamani. Upon our serious consideration of it in the light of the prosecution evidence, we think the two courts below could have

rejected it had they directed their minds to it. Consequently, this ground lacks merit and is dismissed.

Lastly on ground 8 (ground 2 in the supplementary memorandum of appeal) which faults the first appellate court for sustaining conviction based on incredible and contradictory evidence between PW1 and PW2 as to whom the money which was stolen in the process of armed robbery belonged. Mr. Maleko urged us to hold that there were no such contradictions and if any, they were too minor to be material to the prosecution's case.

With respect, we agree with the learned Senior State Attorney. In addressing this complaint, the High Court took the view that the issue as to whom the money robbed from PW1 belonged was irrelevant because it did not cast any doubt on the prosecution evidence. We share the learned Judge's view considering PW1's evidence that the money stolen belonged to his sister. PW2 for her part stated that she did not know the amount that PW1 had in his pocket. We do not see any contradiction in the evidence of the two witnesses on who was the owner of the money. It

could have been the property of PW2 as testified by PW1 and granted that PW2 did not know the amount but that did not derogate from the fact that armed robbery was committed involving a machete in order to obtain and retain the money from PW1 who was under the circumstances the special owner in line with section 258 of the Penal Code. This ground is devoid of merit and is equally dismissed.

To conclude, in the light of the foregoing, ground 5 in the memorandum of appeal in which the appellant complains that his conviction was grounded on evidence which did not prove the case beyond reasonable doubt fails. On the one hand we have sustained the lower courts' concurrent findings that the evidence of identification was watertight placing the appellant at the scene of crime. Secondly, although the contents of the PF3 (exh. P1) were not read out loudly rendering it worthless, PW5's oral evidence was sufficient to prove that the victim (PW1) sustained cut injury on his right hand by a sharp object and that at the time he attended him, 01.45 a.m. on 25th December 2016, the wound was fresh oozing blood. That evidence was corroborative of the evidence of

PW1, PW2 and PW3 that the appellant cut PW1 with a machete before taking to his heels after robbing PW1 his money and cellphone.

In the upshot, the appeal is bereft of merit and is dismissed accordingly.

DATED at **DAR-ES-SALAAM** this 6th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

This Judgment delivered this 9th day of April, 2021 in the presence of the appellant in person linked via-Video conference and Mr. Adolt Kisima, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL