IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

CORAM: MKUYE, J.A. GALEBA, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 243 OF 2018

MARWA CHACHA @ NYAISURE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Bukuku, J.)

dated the 25th day of July, 2017

in

Criminal Appeal No. 107 of 2016

JUDGMENT OF THE COURT

2nd & 9th May, 2022

MKUYE, J.A.:

The appellant, Marwa Chacha @ Nyaisure was charged and convicted of armed robbery contrary to section 287A of the Penal Code, [Cap. 16 R.E. 2002; now R.E. 2019] by the District Court of Tarime at Tarime and was sentenced to thirty (30) years imprisonment. In addition, he was awarded a corporal punishment of twelve (12) strokes of the cane which were ordered that six strokes be inflicted forthwith and the remaining part be inflicted upon expiration of six (6) months. Aggrieved by that decision, he appealed to the High Court but his appeal was dismissed. Hence, this second appeal to this Court.

Before embarking on the merit of the appeal we find it appropriate to narrate, albeit briefly, the background of the appeal. It goes thus:

The complainant, Yusuph January (PW3) (also to be referred to as a "victim") was a disco joker (DJ) at an establishment known as Masubo Lodge. On the material day, there was an ongoing entertainment event which invited the general public upon payment of an entrance fee of Tshs. 2,000/= each. The entrance was manned by PW1. Then came the appellant at the said establishment and wanted to gain ingress forcefully without paying the entrance fee. PW1 baffled such move and appellant left.

Later, the appellant arrived and stood beside the complainant, but alas! as PW3 was attending people who were paying the entrance fee, the appellant suddenly cut him with a machete on the right side of his head. The complainant fell on the ground. As if that was not enough, the appellant stepped on his hand and took away the victim's mobile phone and the money he had in his person and left.

Meanwhile, as all these were happening, Juma Sinda, the Manager of Masubo Lodge (PW4) and Emmanuel John Zakaria the son of the proprietor of Masubo Lodge (PW5) witnessed. They tried to chase the appellant while raising alarm but in vain. They then took the victim to Nyamongo Police Station where a PF3 was issued for treatment. They

went to Nyangoto Health Centre but were advised to take him to Tarime District Government Hospital. They took him there. Fiti Kakomanga (PW1) who was a Clinical Officer attended the victim and filled the PF3 which was admitted in court as exhibit PE1. On the other hand, No. G. 8319 DC Nikolaus (PW2) investigated the case and eventually charged the appellant as alluded to earlier on.

In his defence, the appellant admitted to be a resident of Kewanja Village but denied to know PW1 and distanced himself from the commission of the offence.

In this appeal, the appellant has fronted a memorandum of appeal consisting nine (9) grounds of appeal which can be paraphrased as follows:

1. ***THAT**, the appellant being a layman and indigent was not represented by a lawyer or counsel to assist him of the case.*
2. ***THAT**, the charged offence against the appellant was not proved beyond reasonable doubt.*
3. ***THAT**, the charge sheet differed with an evidence adduced in court as to the actual place where the crime was committed, as to whether Mjini Kati Village within Tarime District or at Nyangoto Village.*
4. ***THAT**, PW2 (Police Investigator) did not testify that PW3 had reported the crime at the police and named the appellant to have committed the crime.*

5. ***THAT,*** *failure by the complainant (PW3) to name his assailant at earliest possible moment required the prudent court to hold an inquiry.*
6. ***THAT,*** *the arresting officer did not testify in court as to how, when, where and in what connection the appellant was arrested, and there was nothing to show that the appellant escaped promptly after the commission of the offence.*
7. ***THAT,*** *the condition for identification was not conducive for a proper identification of the appellant, in the congestion of the people at the Disco-tech, and lack of proper source of light that illuminated.*
8. ***THAT,*** *the intensity of light, was not squarely determined as to where it came from, what size, voltage and where it was placed, and that the appellant's identity must have been made under honest mistaken identity.*
9. ***THAT,*** *the prosecution's evidence was poor and weak which only tended to incriminate the innocent appellant as there was no any independent witness who came to testify in court.*

At the hearing of the appeal, the appellant appeared in person and unrepresented; whereas the respondent Republic enjoyed the services of Messrs. Tawabu Yahaya Issa and Donasian Joseph Chuwa, both learned State Attorneys.

When called upon to amplify his grounds of appeal, the appellant adopted his memorandum of appeal and exercised his right to let the State Attorneys submit first then rejoin later, if need would arise.

Mr. Issa prefaced by declaring their stance and submitted that they supported both the conviction and sentence meted out against the appellant. He then went on to submit that out of the nine grounds of appeal raised by the appellant, grounds 1, 2, 3, 4, 5, 6 and 9 were new as they were not heard and determined by the first appellate court. While citing our decision in the case of **Makende Simon v. Republic**, Criminal Appeal No. 412 of 2017 (unreported), he argued that this Court has no jurisdiction to entertain the said grounds and urged us to disregard them except grounds 7 and 8 of appeal.

Thereafter, Mr. Chuwa took over and argued the remaining grounds 7 and 8 which he sought to argue together since they hinge on the issue of identification. He started by pointing out that those grounds are unmerited and ought to be dismissed. In elaboration, he submitted that PW3, PW4 and PW5's identification evidence was watertight. He pointed out, that although the offence was committed at night there were favourable conditions which enabled clear identification. He mentioned such conditions to be **one,** the time spent in observing the appellant was reasonable citing examples that PW3 saw him when they conversed on the entrance fee; and when he obstructed him from entering in the hall forcefully without paying. Further to that, he said, PW3 also saw him when he left and came back and stood beside him. **Two,** the

distance between the victim and the appellant was considerably short as the appellant stood beside him and managed to cut him with a machete whose length reasonably suggested the proximity. **Three,** there was sufficient electricity light which illuminated the entire premises as was testified by PW4 and PW5. **Four**, PW3 knew the appellant by his name even before the incident and the latter's village Kewanja where he resided. To bolster his argument, he referred us to the case of **Makende Simon** (supra). In this regard, he implored the Court to find that the visual identification evidence was watertight and dismiss the appeal.

In rejoinder, the appellant strongly contested that the identification evidence was not watertight. He challenged the prosecution for not calling the people who were at the club or even the local village chairman to testify in court. He also denied knowing the victim. Lastly, he prayed to the Court to assist him and release him from prison.

Having heard the submissions from either side, we think, the issue for this Court's determination is whether the appeal is meritorious. In our determination we shall adopt the approach that was taken by the learned State Attorneys in responding to it. We shall begin with the issue of new grounds to which essentially, we agree with Mr. Issa that grounds 1, 2, 3, 4, 5, 6 and 9 in the memorandum of appeal are new as

they were not raised, heard and determined by the first appellate court. It is trite law that, unless they are on points of law, the Court cannot deal with matters which were not raised and determined by the trial court or the High Court on its appellate jurisdiction - See **Hassan Bundala @ Swaga v. Republic,** Criminal Appeal No. 386 of 2015; **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (both unreported) and **Makende Simon** (supra). For instance, in the latter case of **Makende Simon** (supra), the Court cited the case of **Julius Josephat v. Republic**, Criminal Appeal No. 3 of 2017 and stated as follows:

> *"...those three grounds are new. As often stated, where such is the case, unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction".*

In this regard, grounds 1, 2, 3, 4, 5, 6 and 9 being based on matters of fact, cannot be entertained by this Court for lack of jurisdiction. We, thus, disregard them.

The major complaint by the appellant as can be gleaned from grounds 7 and 8 is that the visual identification was not watertight as there was no condusive environment for proper identification or rather the conditions favouring a proper identification were not available. In

particular, the appellant's complaint is that the source of light and its intensity were not stated; and that the distance from the witness and the appellant was not explained.

This Court, in the case of **Waziri Amani v. Republic**, [1980] T.L.R. 250 propounded principles to guide favorable visual identification of the accused person. It specifically warned the courts that such evidence is of the weakest kind and most unreliable and that the court should not act on it unless all possibilities of mistaken identity are eliminated and the courts are fully satisfied that the evidence is absolutely watertight.

The Court went further to prescribe some conditions or factors to be taken into account in considering visual identification including the time spent by the witness in observing the accused; the distance between the witness and the accused; the conditions where the observation took place, such as whether it was during day or night time and whether there was good or poor light at the scene of crime; and whether the witness knew or had seen the accused before.

In this case, it is not disputed that the incident took place at night as stated by PW3 in his evidence. Nevertheless, we go along the learned State Attorney's line of argument that there were favourable conditions

to enable unmistaken identification. We say so because, PW3 testified that he knew the appellant by his name of Chacha Nyaisure who resided in Kewanja Village, the fact which was admitted by the appellant in his defence. Apart from that, there were other factors which also enabled identification. PW3 had ample time in observing the appellant. He observed him when he came to ask for the amount of entrance fee for the disco whereby, they conversed and prohibited him when he tried to force entry into the disco hall without paying entrance fee; PW3 also saw him when he came back later and stood beside him while he was attending people who had paid entrance fee and was looking for a change. On top of that, the proximity between PW3 and appellant was short at the time they had conversation on the entrance fee and when he stood beside him, which we think, made it possible for the appellant to cut him with a machete. More importantly, there was electricity light which was illuminating the entre premises which enabled PW3, PW4 and PW5 to identify the appellant. This was testified by PW4 and PW5 who were together with PW3 and witnessed all what was happening at the scene of crime. It is our considered view that, although none of the witnesses explained the intensity of the light or where it was placed, the fact that the said light illuminated the entire premise, it must have been enough for purposes of identifying the appellant, as it also enabled PW3

who was collecting the entrance fee to see the kind and amount of money paid to him and know how much change was required to be returned to those who did not pay exact Tshs. 2,000/=. And, if it enabled PW3 to see the money, then its intensity was sufficient to enable him clear identification of the appellant.

We also note that the appellant complained against the failure to call any of the people who were at the disco hall and the village chairman to testify in court as he thinks that it vitiated the prosecution evidence. However, we think that contention has no basis. This is so because, such issue neither featured during the trial nor is it in the decisions of the two courts below; and more importantly, the appellant did not convince us on the relevance of their evidence. But again, regarding the number of witnesses required to testify in court is well settled under section 143 of the Evidence Act, [Cap 6 R.E. 2002; now R.E. 2019] that there is no specific number of witnesses required to prove the fact in issue. What is required is the credibility of witnesses and not their number – (See also **Yohanis Msigwa v. Republic** [1990] T.L.R 148). We consider such arguments to be a mere afterthought. As such, it is our finding that grounds 7 and 8 have no merit and we dismiss them.

In the final analysis, we are satisfied that the appellant was properly identified. Thus, this appeal is devoid of merit and we hereby dismiss it in its entirety.

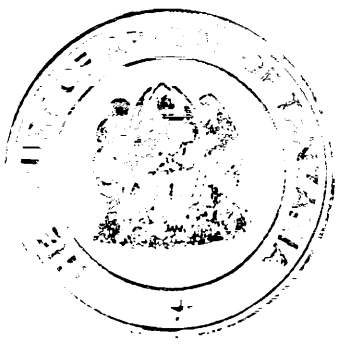
DATED at **MWANZA** this 7th day of May, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The judgment delivered this 9th day of May, 2022 in the presence of the appellant in person and Mr. Tawabu Yahya Issa, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



A. L. KALEGEYA
DEPUTY REGISTRAR
COURT OF APPEAL