IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA

(CORAM: MKUYE J.A., GALEBA, J.A., And KAIRO, J.A.)

CRIMINAL APPEAL NO. 353 OF 2018

KISANDU MBOJE .....APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Makani, J.)

dated 19th day of October, 2018
in
DC Criminal Appeal No. 81 of 2016

JUDGMENT OF THE COURT

5TH & 14th July, 2022

MKUYE, J.A.:

Before the District Court for Bariadi District, the appellant Kisandu Mboje was arraigned for the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E. 2002; now R. E. 2022]. Upon a full trial, he was found guilty, convicted and sentenced to imprisonment for a term of thirty years. On appeal to the High Court, his appeal was dismissed. Still protesting his innocence, he has now appealed to this Court.

Before embarking on the merit of appeal, we find it apt to give a brief sequence of events leading to this appeal.

The victim, Magembe Ngoloma (PW1) was a motorcycle rider (bodaboda man) who used to ferry passengers at a fee. He used a motorcycle with Reg. No. MC 688 AFF SUNLG which belonged to David Nika (PW2) who had entrusted it to him for business whereby he was required to remit Tshs. 30,000/= per week.

On 6th August, 2015 at about 8:00 p.m., PW1 was hired to ferry a passenger to a place known as Kidinda, Majengo Mapya. When they reached at a secluded area, the passenger told PW1 to stop and he complied to the request and switched off the motorcycle while leaving the head light on. Then, two persons emerged ahead of them and approached where they had stopped, while one of them was holding a gallon. According to PW1, among those people he was able to recognize the appellant. Meanwhile, as the appellant and his accomplice came closer to them, the passenger held PW1's hands by his back and the appellant started attacking him with a panga on his head, cheek, nose and mouth whereupon PW1 fell down and lost consciousness.

Thereafter, the appellant and his accomplices stole the motorcycle which was ridden by the victim. They also took from him two mobile phones and cash amounting to Tshs. 20,000/=.

Upon gaining consciousness, PW1 was assisted by a certain passerby who happened to know him together with No. G.1722 Paul (PW4) and was taken to the police station and then Somanda Hospital where he was attended by Lameck Lushinde (PW3) and was hospitalized.

At about 9:00 p.m. on the same date, PW2 was informed by other motorcycle riders about PW1's being robbed of his motorcycle. He went to the hospital and found that the victim was admitted while he was unconscious. According to him, when PW1 regained consciousness, he named the appellant to be among the robbers.

On 8th August, 2015, the victim's statement was recorded by PW4 and mentioned the appellant to be among his assailants. According to PW3, PW1 was hospitalized for one month then he was referred to Bugando Hospital for further treatment.

In defence, the appellant disassociated himself from the offence. He testified that on the material date he was engaged on his own errands and at about 9:30 he got information that PW1 was assaulted and taken

to the hospital. That, he did not visit the victim as he had gone to reconcile a couple which was quarreling. His evidence was supported by DW2 Ng'anguruwe Manumbu Igoyo who said that, at about 5:30 p.m. he was together with the appellant; and also, Samson Mashimo (DW3) and Kija Maduhu (DW4) who told the trial court that the appellant was called by a certain woman to solve a problem with her husband which task ended at 9:00 p.m.

In convicting the appellant, the trial court was satisfied the appellant was sufficiently identified and rejected his defence of *alibi* since no notice was issued as required by the law; and that the people whom he went to reconcile did not testify as to when he went there.

In upholding the trial court's decision, the High Court was also satisfied that the appellant was properly identified and that there was proof of actual violence and stealing which are the ingredients for the offence of armed robbery. It also accorded no weight on the appellant's defence of *alibi* because there was no prior notice to rely on it before.

The appellant has lodged a memorandum of appeal consisting of six (6) grounds of appeal which can be extracted as follows:

1) *The appellant was convicted on the basis of a cautioned statement that was obtained under coercion, intimidation and threats.*

2) *There was no trial within trial (inquiry) conducted to ascertain the confession which was retracted by the accused (appellant).*

3) *The High Court Judge did not warn himself on the danger of convicting the accused (appellant) on the basis of identification of appellant during the night.*

4) *The defence of* ***alibi*** *was ignored on the basis of legal technicalities.*

5) *The evidence of four witnesses was upheld while there were no exhibits tendered in Court.*

6) *The prosecution failed to prove the case beyond reasonable doubt.*

When the appeal was called on for hearing, the appellant appeared in person without representation, whereas the respondent Republic was represented by Ms. Verediana Peter Mlenza, the learned Senior State Attorney assisted by Mr. Nestory Mwenda and Ms. Rehema Sakafu, both learned State Attorneys.

When availed an opportunity to expound his grounds of appeal, the appellant beseeched to the Court to adopt them and opted to let the learned State Attorneys respond first while reserving his right to rejoin later, if need would arise.

In response, Ms. Mlenza declared their stance that they supported both the conviction and sentence meted out against the appellant. Then she sought the indulgence of the Court for Ms. Sakafu to proceed with responding to the appeal.

Ms. Sakafu took off by submitting that grounds 1, 2 and 5 of appeal are new as they were not canvassed by the High Court. In this regard, while relying on the case of **Marwa Chacha @ Nyeisule v. Republic,** Criminal Appeal No. 243 of 2018 (unreported), she implored the Court to disregard them.

As regards the 3rd ground of appeal relating to identification during the night, Ms. Sakafu submitted that the Court warned itself on the danger of relying on identification evidence. She reasoned that PW1 had explained on how he identified the appellant by using the light from motorcycle headlights which had shone ahead where the appellant and his accomplice came from. Apart from that, the learned State Attorney

contended that PW1 was able to mention the appellant and described the clothes he wore on that day. She added that PW1 also knew him before the incident as they lived in the same village the fact which was supported by the appellant in his defence and DW4 as shown at page 26 of the record of appeal.

Ms. Sakafu submitted further that PW1 also mentioned the appellant at the earliest possible time to PW2 once he had regained consciousness at the hospital which is an assurance of his reliability as was held in the case of **Charles Nanati v. Republic,** Criminal Appeal No. 286 of 2017 (unreported).

As regards ground no. 6 on the proof of the case, it was Ms. Sakafu's submission that the offence of armed robbery was proved beyond reasonable doubt since all the ingredients of the offence were explained. She pointed out that, PW1 explained on how he saw the appellant holding a panga, which was an offensive weapon while together with his accomplices and how they assaulted him with it. She explained that PW1 was injured on various parts of his body as was stated by him and PW3 (doctor) who attended him. Besides that, she said, PW2 also saw him at the hospital unconscious while admitted. She was of the view

that, the evidence proved that the panga was directed to PW1 who was injured on various parts of his body. To bolster her argument, she referred us to the case of **Haji Said Seleman v. Republic,** Criminal Appeal No. 98 of 2020 pg 11 – 12 (unreported). Apart from that, the learned State Attorney argued that, it was proved that the appellant and his accomplices stole a motorcycle, two mobile phones and cash amounting to Tshs. 20,000/= from him.

With regard to the 4th ground of appeal, Ms. Sakafu dismissed the appellant's claim that his defence of *alibi* was ignored. It was the learned State Attorney's argument that the High Court considered the defence of the appellant despite the fact that it did not comply with the requirement of the law of giving prior notice to the court under section 194 (4) and (5) of the Criminal Procedure Act, [Cap. 20 R. E. 2002, now R. E. 2022] (the CPA). To support her argument, she referred us to the case of **Kubezya John v. Republic,** Criminal Appeal No. 488 of 2015 pg 21 – 25 (unreported) which explains how the defence of *alibi* can be relied upon. She insisted that, although these requirements were not met, the High Court considered it but did not accord it any weight. She, thus, urged the Court to find that the appeal has no merit and dismiss it.

In rejoinder, the appellant having nothing useful to add, insisted to the Court to consider his grounds of appeal and release him from prison.

Having considered the grounds of appeal, the submissions by the parties and examined the entire record of appeal, we wish to tackle this appeal by beginning with the issue of new grounds of appeal, followed by grounds 3 and 6 together because are interrelated and lastly, ground number 4.

Regarding the issue that grounds No. 1, 2 and 5 in the memorandum of appeal are new because they were not dealt with by the High Court we are basically, in agreement with Ms. Sakafu. Times without number, this Court has pronounced that according to section 6 (1) and (7) of the Appellate Jurisdiction Act, [Cap 141 R.E. 2019] (the AJA) the Court has jurisdiction to hear appeals from the High Court or the court of the Resident Magistrate with extended jurisdiction on matters which have been dealt with by them. Just to mention a few cases, they include **Haji Seleman v. Republic,** Criminal Appeal No. 98 of 2020 (unreported) in which the Court cited with approval the case of **Samwel Sawe v. Republic,** Criminal Appeal No. 135 of 2004 (unreported) and stated as follows:

> *"As a second appellate court, we cannot adjudicate on a matter which was not raised as a ground of appeal in the first appellate court. The record of appeal at page 21 to 23 shows that this ground of appeal by the appellant was not among the appellant's ten grounds of appeal which he filed in the High Court. In the case of* ***Abdul Athuman v. Republic,*** *(2004) TLR 151 the issue on whether the Court of Appeal may decide on a matter not raised in and decided by the High Court on the first appeal was raised. The Court held that, the Court of Appeal has no such jurisdiction. This ground is therefore struck out."*

Also, in the case of **Marwa Chacha @ Nyaisure** (supra) which was cited by Ms. Sakafu, while dealing with an akin scenario the Court relied on among other cases, the case of **Julius Josephat v. Republic,** Criminal Appeal No. 3 of 2017 (unreported) and stated that:

> *"... 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, applying the above cited authorities we will not entertain the 1st, 2nd and 5th grounds of appeal because they raise

matters of facts which were not raised and determined by the High Court. We, therefore, disregard them.

Regarding the 3rd and 6th grounds of appeal where the appellant's complaints are on visual identification evidence and the proof of the offence of armed robbery, we wish to state at the outset that in order to prove the offence of armed robbery three elements must be met. The said offence is provided for under section 287 A of the Penal Code which states as follow:

> *"Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or robbery instrument, or is in company of one or more persons, and at or immediately before or immediately after the time of stealing uses or threatens to use violence to any person, commits an offence termed armed robbery and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."*

As was correctly submitted by Ms. Sakafu, according to the above provision for the offence of armed robbery to be proved the prosecution must prove that, **one,** there was an act of stealing; **two,** that,

immediately after stealing the assailant was armed with a dangerous or offensive weapon or robbery instrument; and **three,** that the said assailant used or threatened to use actual violence in order to obtain or retain the stolen property - see **Haji Said Selemani's** case (supra).

This position was also stated in the case of **Shabani Said Ally v. Republic,** Criminal Appeal No. 270 of 2018 (unreported) where the Court in discussing the ingredients of the offence of armed robbery stated as follows:

> *"It follows from the above position of the law that in order to establish an offence of armed robbery, the prosecution must prove the following:*
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> 1. *There must be proof of theft; see the case of* ***Dickson Luvana v. Republic,*** *Criminal Appeal No. 1 of 2005 (unreported).*
>
> 2. *There must be proof of the use of dangerous or offensive weapon or robbery instrument against at or immediately after the commission of the offence;*

3. *That, use of dangerous or offensive weapon or robbery instrument must be directed against a person. See* ***Kashima Mnandi v. Republic,*** *Criminal Appeal No. 78 of 2011 (unreported)".*

In the case at hand, the prosecution relied on the evidence of PW1, PW2, PW3 and PW4. PW1 explained in the trial court on how he was hired by a passenger and stopped at a certain place. He also testified on how he saw the appellant whom he knew before because they lived in the same village, approaching them while holding a panga. PW1 testified further that as the appellant came closer to where they were, his passenger held his hands by the back and that is when they started cutting him with a panga on the face, nose, cheek and mouth until he fell unconscious and that, in the course, the assailants stole a motorcycle with Reg. No. MC 688 AFF SUNLG red in colour, two mobile phones make TECNO and his money to the tune of Tshs. 20,000/=.

PW1's evidence that he was injured and fell unconscious was corroborated by PW3 who received him at the Hospital and admitted for him for a month and latter referred to Bugando Hospital in Mwanza. PW2 also confirmed to have seen PW1 being injured and unconscious at the

hospital where he visited him. To a certain extent, even PW4 corroborated the same.

Although the appellant admitted to have not visited PW1 at the hospital despite the fact that he had notice on the ground that he had grudge with him over a girl he wanted to marry, DW4 denied that there was such a grudge.

Now looking at the evidence generally, it shows that, indeed, the appellant was seen by PW1 while holding a panga which was a dangerous weapon. The said panga was used to inflict injuries to PW1 as was testified by PW1. The injuries were seen by PW1, PW2, PW3 and PW4, as they saw PW1 with multiple injuries on his face. This means that the weapon was directed to PW1. In addition, there was proof that the motorcycle which was ridden by PW1 together with his two mobile phones and money amounting to Tshs. 20,000/= were stolen at the time of the said incident. We, therefore, agree with Ms. Sakafu that the ingredients of the offence of armed robbery were proved.

The other evidence which was relied upon by both the trial court and the first appellate court was the evidence of identification of the appellant at the scene of crime. The complaint by the appellant is that the

trial court did not warn itself before relying on it especially the evidence on identification at night. In the case of **Samwel Thomas v. Republic,** Criminal Appeal No. 23 of 2011 (unreported) the Court observed that:

> *Where the offence is committed at night, the issue of observing closely the principle laid down in the famous case of **Waziri Amani** is of paramount importance. In strengthening the argument, the case of **Waziri Amani** held that:*
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> > *"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 before it is absolutely watertight."*

In order to establish that the identification evidence is watertight there are several factors which need to be considered and they include the time the witness had an occasion to observe the accused; 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 of crime, and whether the witness knew or had seen the accused before. (See **Charles Nanati's** case (supra).

In this case, we do not think that the appellant is right. This is so because, PW1 clearly testified on how on the material date at about 20:00 hrs he was hired by a passenger who wanted to go to Kidinda Majengo Mapya and stopped at a secluded area after having been told by the passenger to stop. He also explained that as he switched off the motorcycle while leaving the head light on, he was able to see the appellant and his companion coming to where they were from ahead of them while the appellant was holding a panga. That, as those people were coming closer to them the passenger held his hand by the back and that is when they (the appellant inclusive) started cutting him with a panga, until he fell unconscious. PW1 described the clothes the appellant had worn which were a gray T- shirt and a blue jeans trouser. He also explained that he identified him at a close distance of ten pieces. Moreover, the appellant explained the other factor which enabled him to identify him being that, the appellant was familiar to him as they lived in the same village. This fact was corroborated by the appellant and DW4 who testified for the appellant. PW1 also mentioned the appellant to PW2 immediately after he regained consciousness. In the case of **Godfrey Gabinus @ Ndimba and 2 Others** (supra), this Court while citing the

case of **Swalehe Kalonga & Another v. Republic,** Criminal Appeal No. 45 of 2001 (unreported) observed that:

> *"The ability of a witness to name a suspect at the earliest possible opportunity is an all-important as assuarance of his reliability."*

This position was also taken in other cases among them being the celebrated case of **Marwa Wangiti Mwita and Another v. Republic,** [2002] TLR 39, where the Court in addition to a similar stance observed that unexplained delay or complete failure to name the suspect at the earliest opportunity should put a prudent court to enquiry - See also **Jaribu Abdallah v. Republic,** [2003] TLR 271; and **Yohana Dioniz and Another v. Republic,** Criminal Appeal No. 114 and 115 of 2009 (unreported).

On the basis of what has been explained above, we entertain no doubt that the appellant was property identified. This ground is therefore, unmerited and we hereby dismiss it.

The last complaint is on the issue that the courts below did not consider the defence of *alibi* but it is our firm view that it was considered. As was rightly submitted by Ms. Sakafu the issue of defence of *alibi* is

governed by section 194 (4) and (5) of the CPA requiring a person intending to rely on that kind of defence to give prior notice to the court and the other party (the prosecution). In the case of **Charles Nanati** (supra), the Court while relying on the case of **Hamisi Bakari Labani v. Republic**, Criminal Appeal No. 108 of 2012 (unreported) explained the requirement to be met by such a person as follows:

> *"The law requires a person who intends to rely on the defence of alibi to give notice of that intention before the hearing of the case (section 194 (4) of the Criminal Procedure Act, Cap 20). If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish the prosecution with the particulars of the alibi at any time before the prosecution closes its case, short of that the court may on its own discretion accord no weight to that defence."*

In this case, it is notable that the appellant relied on defence of *alibi*. His testimony in his defence was to the effect that at the material time he had been called and went to reconcile a couple which had quarreled. Incidentally, his evidence was corroborated by DW3 and DW4 who claimed that he had gone there and DW4 added that the task ended

at 09:30 p.m. Unfortunately, none of the people who were involved in the dispute was called to testify in court although we admit that it was the duty of the prosecution to prove the involvement of the appellant in the offence. On the other hand, it is not in question that the evidence of *alibi* was given without being proceeded by notice as per section 194 (4) and (5) of the CPA.

Nevertheless, despite the fact that no prior notice was given in court as required by law, both the trial court and the first appellate court considered the appellant's *alibi* evidence as we have stated earlier on. In the trial court the said evidence was considered at pages 35 to 36 of the record of appeal and was rejected for failure to give a prior notice and that his witnesses were not worthy considering their evidence. The other reason for its rejection was failure to bring the couple he went to reconciled to testify in court. Similarly, the first appellate court considered the appellant's defence of *alibi* at page 63 of the record of appeal and it rejected it on similar reasons as the trial court and accorded no weight on it. On that basis, we find the appellant's complaint lacking merit and we dismiss it.

Consequently, having examined the whole evidence, we are satisfied that the prosecution managed to prove the case beyond reasonable doubt.

In the event, we uphold the decisions of both the trial and first appellate courts and, hereby, dismiss the appeal in its entirety.

DATED at **SHINYANGA** this 14th day of July, 2022.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The judgment delivered this 14th day of July, 2022 in the presence of the appellant in person, and Ms. Verediana Peter Mlenza, Senior State Attorney assisted by Mr. Nestory Mwenda and Ms. Rehema Sakafu, State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL