IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KEREFU, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 94 OF 2020

ALLY NASSORO @ BURULE .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

(Appeal from the decision of the Resident Magistrate's Court of Dar es Salaam at Kisutu

(Magutu, SRM-Ext. Jur.)

Dated the 14th day of June, 2019
in
Criminal Appeal No. 18 of 2019

JUDGMENT OF THE COURT

15th February, & 1st March, 2022

KENTE, J.A.:

The appellant Ally Nassoro @ Burule together with his alleged criminal workmate one Mwalami Saidi Mgalama who is not a party to this appeal appeared before the District Court of Temeke where they were jointly charged with the offence of armed robbery contrary to section 287A of the Penal Code Cap 16 Revised Edition 2002, now R.E. 2019 (henceforth the Penal Code). The particulars of the offence alleged that, on 21st June 2017, the appellant and his companion stole a mobile phone make Huawei valued at TZS. 250,000.00 the property of one Erick Nuhu and that

immediately before such stealing, they attacked the victim by cutting him with a bush knife in order to gain possession of the stolen phone. That was at Tandika Mabatini area Temeke District, Dar es Salaam Region. Despite denial of the charge, they were found guilty, convicted as charged and sentenced to the mandatory sentence of thirty years imprisonment. Aggrieved by the decision of the trial court they appealed to the High Court. However, the appeal was subsequently transferred to the RM's Court of Dar es Salaam at Kisutu to be heard by Magutu SRM under extended jurisdiction (Ext. Jur.). In that first appeal whose decision was delivered on 14th June, 2019, the appellant's appeal against both conviction and sentence was dismissed. Against the said decision, the appellant appealed to this Court.

In a nutshell, the factual background giving rise to the present appeal may be recapitulated from the evidence on the record, as follows. The complainant one Erick Nuhu (PW1) a young man then aged twenty-two years, was on the material day, at about 6:30 a.m. on the way going to the bus stand with a view to boarding a bus which was to take him to his work place. Looking ahead he saw three men who were armed with a machete coming towards him. Little did PW1 know that after coming closer to him

they would suddenly descend on him cut him several times on the head, grab his phone and, as the sequence of events shows, thereafter, each of them escaped out of sight.

From there PW1 called on the local leader (Mwenyekiti wa Mtaa) to whom he recounted what had befallen him and named the appellant as one of his assailants. It seems that the said leader advised PW1 to report the matter to the police where PW1 was subsequently issued with a Police Form requesting for medical examination commonly known as a PF3 (Exh. P3). Accordingly, PW1 went to Temeke District Hospital after making the report to the police. Having stitched his head which had been cut several times, the surgeon who attended him filled the PF3 and gave it back to him to return it to the police. Meanwhile a manhunt for the appellant and other suspects was launched. According to Juma Hamisi (PW2) a member of the Peoples' militia who also doubled as member of the community policing, the appellant was arrested on 23rd June, 2017 at a place called Mwembeyanga Temeke District. On being questioned, he denied the allegations levelled against him.

In his defence during the trial, he remained steadfast to his stand-point of denying the charges. He told the trial court that, on 23rd June,

2017 he and four other men were rounded up and whisked in a police car to Chang'ombe Police station where he was detained despite his plea of ignorance of any wrongdoing. He said that he remained in custody until the 6th July, 2017 when he was finally charged jointly with a person whom he did not know. Nonetheless, as stated before, after hearing both parties, the trial court was satisfied that the evidence led in support of the prosecution case was sufficient enough to establish the offence of armed robbery with which the appellant and his accomplice stood charged. The two were accordingly convicted and sentenced as stated earlier.

Clearly, being not out of the woods yet, the appellant appealed to the High Court. However, as stated before the first appellate court dismissed the appeal holding as did the trial court that the evidence on the record was sufficient enough to ground a conviction. Exhibiting his grievances with the decision of the first appellate court, the appellant appealed to this Court.

Before this Court, the appellant appeared in person fending for himself. On the other hand, Mses. Mwasiti Ally, learned Senior State Attorney and Mosie Kaima, learned State Attorney joined forces to resist the appeal on behalf of the respondent, the Republic.

In the memorandum of appeal to this Court, the appellant attacks PW1's evidence of identification claiming that, taken as a whole, it was not sufficient to support a conviction. He also challenges the appellate Magistrate for allegedly relying on and upholding the judgment of the trial court which, according to him, was plainly a replication of the evidence on the record utterly bereft of in-depth analysis as required by law. The appellant is also complaining that before reaching the impugned decision, the learned SRM failed to take stock of the prosecution evidence and weigh it against his defence version which was in stark contrast with what the prosecution witnesses had told the trial court.

We wish to say at this juncture that, in view of the route which we intend to take in this judgment, it is not necessary to canvass all what is alleged in the memorandum of appeal. Suffice it to say that this appeal stands or falls with the evidence of identification of the appellant by PW1. We shall finally dispose of this appeal by considering the cross-cutting issue as to whether or not the appellant's guilt was proven to the required standard as to warrant a conviction.

To begin with, on the basis of the evidence on the record, we accept without hesitation that indeed on the material day the victim (PW1) was

attacked as testified by him. The PF3 (Exh P.1) is abundantly clear on this point. It speaks of multiple wounds on the scalp caused by a sharp object. The question as to whether anything was stolen from the complainant will be considered later. In the meantime we will start with the identity of the assailant.

As we have already shown, the appellant's conviction was essentially grounded on the identification evidence by PW1. Submitting in support of the said conviction and sentence, Ms. Kaima maintained that the appellant was positively identified for, according to her, once it was found that PW1 knew him well and that the offence occurred at the break of the day, then the circumstances at the scene of crime were precisely favourable for PW1 to enjoy a correct and impeccable identification of his assailants. The learned State Attorney submitted further that, PW1 and the appellant were, living within the same locality and that he named the appellant to the chairman and PW2 a short time after the occurrence of the robbery. In conclusion Ms. Kaima maintained that, this clearly shows that there was accurate identification of the appellant as one of the persons who attacked the complainant on the material day. She thus implored this Court to dismiss the first ground of appeal in which the appellant complained *inter*

alia, that PW1 did not specifically mention the nature and source of the light which illuminated the scene of the crime and enabled him to see and identify him and that PW1 did not state the duration of the incident, taking cognizance of the fact that it lasted for like one or two minutes before the appellant and his accomplices took to their heels. In support of her arguments the learned State Attorney cited, among others, the cases of **Marwa Mwangiti & Another v. R.** [2002] TLR 29 and **Rashidi Mkono wa Tembo & Another v. Republic**, Criminal Appeal No. 74 of 2016 (unreported).

In disposing of this appeal, we shall first of all revisit, albeit very briefly, the stance of the law on the evidence of visual identification of an accused person in a criminal trial.

Repeatedly courts have been warry of the evidence of identification by a single witness, as happened in the present case. However, we should be quick to point out that, in the majority of cases of the present nature, great worry has been placed on those cases where the conditions for unerring identification were difficult. Invariably, in such cases, corroboration evidence has to be sought and obtained before the evidence

of identification by a single witness can be relied upon to ground a conviction.

It is for that reason that way back in 1967 the erstwhile Court of Appeal for East Africa declined to uphold the appellant's conviction for murder because the evidence led by the prosecution showed that the conditions favouring a correct identification were difficult. (see **Roria v. R.** [1967] E.A. 583. In that case, the raid occurred before dawn, there were many raiders who were awfully armed and the identifying witness was at odds as to how and when she saw the appellant.

However, without doubt, the above cited case is in no way analogous to the instant case. In the present case the evidence shows that the attack took place after dawn, there were only three assailants who came face to face with PW1 and, to crown it all, PW1 knew the appellant very well before the occurrence of the incident. The evidence given by PW1 which was not materially challenged shows that the two lived within the same locality and the appellant was arrested two days later but after he was named by PW1 immediately after the attack. Apart from the principles enunciated in the celebrated case of **Waziri Amani v. Republic** [1980] TLR 250, another principle which is settled law to be followed in the instant

case was clearly laid down by this Court in **Marwa Wangiti Mwita & Another v. R** [2002] T.L.R. 39 to which we were ably referred by Ms. Kaima. It is a settled principle that, the ability of an identifying witness to name a suspect at the earliest opportunity after the incident, is an assurance of the credibility of such a witness. In the present case, it stands to reason that by naming the appellant to the chairman and PW2, PW1 had recognised him as being one of the attackers after having known him before.

In essence therefore, as opposed to identifying a previously unknown person, in which case it could reasonably be suspected that PW1 might have been uncertain due to the vagaries of human perception and recollection, PW1's identification evidence was based on his prior familiarity with the appellant. To our minds, altogether the above-mentioned factors ruled out the possibility of a mistaken identify. We also wish to observe here that, PW1's naming of the appellant before any arrest was made had the effect of relieving him of the evidential requirement to describe and thereafter testify on the description of his assailant as required under section 166 of Evidence Act (Cap 6 R.E. 2019). To this end, we are in

agreement with the two courts below that indeed there was an accurate identification and that the appellant was one of the attackers.

Having held so, we are now in a position to revert to the question as to whether there was stealing after the attack. With due respect to the learned State Attorney, it seems to us that the above posed question was not given sufficient consideration both by the prosecution and subsequently by the trial and the first appellate courts. In saying so, we think it would make matters clearer if we reproduce at this juncture section 287A of the Penal Code which creates the offence of armed robbery of which the appellant was convicted. The said section provides that: -

> *"Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in company of one or more person and at or immediately before or immediately after the time of the 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."*

In the light of the above-reproduced statutory provisions, it will be discerned at once that the offence of armed robbery is committed where, the accused person, while armed with any dangerous or offensive weapon or instrument, steals anything and immediately before or after such stealing, uses or threatens to use violence against the victim. Such violence needless to say, must be meant for obtaining or retaining the stolen property (See **Amani Masunguru v. R.** [1970] H.C.D. n. 213 **Dickson Luvana v. Republic,** Criminal Appeal No. 1 of 2005 and **Shaaban Said Ally v. Republic,** Criminal Appeal No. 270 of 2018 (both unreported). It follows therefore that, in any charge of armed robbery or robbery with violence, before the prosecution can start inviting people over to celebrate a conviction, it must lead evidence showing to the satisfaction of the court, not only that there was violence or threats of violence but also that there was theft which was preceded, accompanied or followed by the said violence or threats of violence aimed at obtaining or retaining the stolen property.

Notably, in the instant case, the evidence shows that PW1 made the first report of the incident to the local leader/chairman who as it turned out, was not called as witness. Significantly, the material part of that report

was the naming of the appellant as one of the attackers. It seems that there was no mentioning of the allegedly stolen phone. The second report was made to PW2 in which PW1's emphasis was still on the identity of his assailants conspicuously with no mention of any loss of property. The best evidence on that aspect ought to have come from the local leader Sharif Jumbe but then we are digressing as he was not called to testify.

If PW1 reported the stealing of his phone to anyone saying that it occurred in the course of the attack, we hasten to say that we are bound by the evidence on the record which makes no reference to the alleged theft. Notably, when PW1 was challenged by the appellant during cross-examination, he told the trial court that he had a receipt to prove ownership of the allegedly stolen phone. But nobody knows why then he could not tender the said receipt as an exhibit. But soon thereafter, he told the trial court, while under cross examination by the second accused that he did not know the serial number of the said phone. With due respect, we have not, in the least been impressed by the testimony of the PW1 on the theft aspect. While there is more to say than space in this judgment, the only observation that presents a compelling choice for us to make is that, this was a fit case for the two courts below to draw an adverse inference

against this witness for non-production of crucial evidence. To sum up, it is tempting to say that the offence of armed robbery of which the appellant was convicted was based on esoteric rather than concrete evidence. Given this lingering uncertainty in the prosecution case, which was not addressed at all, we think it was rather unsafe for the two courts below to find that the complainant owned a mobile phone valued at sh. 250,000.00 which was robbed from him. Without labouring much on the appellant's and his accomplices' real motive when they attacked the appellant, we find it quite precarious for the two courts below to have found concurrently that theft had been conclusively proven.

At this stage, there is no gainsaying that PW1 was attacked and seriously wounded by the appellant and his accomplices. However, as stated before, we are not satisfied that they also stole anything from him. For that reason we quash the conviction for armed robbery and set aside the thirty years imprisonment sentence imposed on the appellant. In lieu thereof, we find him guilty of causing grievous bodily harm contrary to section 225 of the Penal Code.

Considering the gravity and the variables of the harm occasioned to the complainant and, given the circumstances under which the attack was

carried out, we impose the sentence of seven years imprisonment to be reckoned from the 7th December, 2018 when the appellant was convicted and sentenced by the trial court. Only to that extent, the appeal is partly allowed and partly dismissed.

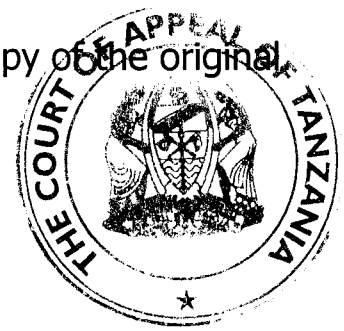
DATED at **DAR ES SALAAM** this 28th day of February, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

The judgment delivered this 1st day of March, 2022 in the presence of appellant in person via video conference and Jackline Werema, learned State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL