IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

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

CRIMINAL APPEAL NO. 551 OF 2021

LUKUMAN SAID LAILA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Mtwara)

(Dyansobera, J.)

dated the 8th day of October, 2021

in

Criminal Appeal No. 92 of 2020

JUDGMENT OF THE COURT

16th & 28th March, 2023

MWANDAMBO, J.A.:

The appellant was aggrieved by the judgment of the High Court (Dyansobera, J) sitting at Mtwara sustaining conviction and sentence entered and passed by the District Court of Mtwara at Mtwara in Criminal Case No. 31 of 2020. He has appealed against the decision of the first appellate court on various grounds of appeal in his quest to vindicate his innocence.

Briefly, on 7/10/2019, one Haji Mbaraka (PW1), a motorcycle rider was hired by someone to a place called Mtuwasa and later on to another

destination called Mibuyu Mitatu in Likonde area within Mtwara Municipality. Before reaching the destination, PW1 was allegedly told by his passenger to stop for him to attend a short call which he obliged. No sooner had Haji Mbaraka (PW1) stopped in compliance with the wishes of his passenger than two men surfaced armed with a panga ordering PW1 to surrender his motorcycle and, despite his reluctance, he succumbed to the threats and surrendered the motorcycle. Immediately thereafter, PW1's passenger resurfaced joining the assailants and the trio made away with the motorcycle to unknown destination. Afterwards, PW1 informed the owner of the motorcycle (PW2) and later on a report was allegedly made to the police at Mtwara.

The appellant was subsequently arrested and arraigned before the trial court in connection with the incident together with Mussa Kassim and Rashid s/o Justin Nanjope @ Tall, second and third accused respectively on two counts of conspiracy and armed robbery involving a motorcycle with Registration No. MC 277 CCN make TVS Star. All accused distanced themselves from the accusations. The trial court found no evidence to link the second and third accused persons with the charged offence. It acquitted them but convicted the appellant on the offence of armed robbery which earned him 30 years' imprisonment.

In convicting the appellant, the trial court relied on the evidence of visual identification and doctrine of recent possession. It was common ground that a motorcycle with Reg. No. MC 277 CCN make TVS Star which PW1 rode on the material date and time was stolen by three persons who threatened him with a machete before fleeing with it. The dispute revolved around the identity of the persons responsible for the stealing with violence and/or use of violence or threat to use violence constituting the offence armed robbery within the ambit of section 287A of the Penal Code.

Since PW1, the only identifying witness did not lead evidence linking the second and third accused persons, except the appellant, the trial court acted on his evidence to convict the appellant and acquitted the co accused persons. The trial court was satisfied that PW1's evidence of identification met the threshold of positive identification underscored by the Court in **Waziri Amani v. Republic** [1980] T.L.R. 250. Besides, the trial District Court relied on the doctrine of recent possession acting on the evidence of G. 1224, DC Florence (PW3) who allegedly conducted a search in the appellant's rented room where he is said to have retrieved a number plate of the robbed motorcycle; MC 277 CCN. That number plate was tendered in evidence and admitted as exhibit P3 while a certificate

of seizure witnessed by Ivo Wilfred Ng'itu (PW4) was admitted as exhibit P2. Apparently, the search was triggered by a tip from G. 1559 PC Moshi (PW5) who intercepted a conversation between the appellant and his wife at a police station and heard the appellant allegedly instructing his wife to shift the plate number from where it was hidden to another place.

On appeal, the first appellate court concurred with the trial court in its findings on which the appellant's conviction was grounded. Like the trial court, the first appellate court accepted that the appellant was properly identified at the scene of crime considering that the incident took place during afternoon and the fact that the appellant spent considerable time with his assailant. Aside, the learned first appellate judge accepted that the doctrine of recent possession was rightly invoked in convicting the appellant having been found with a number plate, subject of the robbery incident with no plausible explanation how he came into its possession. On the whole, the learned first appellate judge was satisfied that, based on the trial court's finding, PW1, the victim of the offence was a credible and truthful witness of identification.

As alluded to earlier, the appellant assails the conviction sustained by the High Court on various grounds all boiling down to the complaint

that his conviction was against the weight of evidence to prove his guilt on the offence beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person to prosecute his appeal. The respondent Republic had Mr. Joseph Mauggo, learned Senior State Attorney who expressed his stand point to support the appeal.

The learned Senior State Attorney urged that, the evidence of visual identification and the doctrine of recent possession relied upon by the trial court to convict the appellant did not meet the threshold of evidence required to found conviction. Mr. Mauggo argued that, neither the evidence of visual identification nor the doctrine of recent possession was capable of proving the case against the appellant on the standard required in criminal cases; proof beyond reasonable doubt. We respectfully agree with him.

To start with, it is trite, as submitted by Mr. Mauggo that, to convict an accused on the evidence of visual identification, such evidence must meet the conditions for an unmistaken identity underscored by the Court in **Waziri Amani v. Republic** (supra) and a host of other decisions. It is significant that the Court in that case stated in no uncertain terms that

the evidence of visual identification is the weakest kind which should not be acted upon unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is watertight. That the evidence of visual identification should be acted very cautiously in grounding conviction is not unique to our jurisdiction. In **Philimon Jumanne Agala @ J4 v. Republic**, Criminal Appeal No. 187 of 2015 (unreported) the Court made an extensive discussion drawing experiences from other jurisdictions on the attendant risks associated with the evidence of identifying witnesses. At the risk of making this judgment longer than it ought to have been, we shall reproduce part of a passage from our decision in **Shamir John v. Republic,** Criminal Appeal No. 166 of 2004 (unreported) quoted in **Philimon Jumanne Agala** (supra) thus:

> *"Admittedly, identification in cases of this nature, where it is categorically disputed, is a very tricky issue. There is no gainsaying that evidence in identification cases can bring about miscarriage of justice. In our judgment, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the courts should warn themselves of the special need for caution before*

convicting the accused in reliance on the correctness. This is because it often happens that there is always a possibility that a mistaken witness can be a convincing one. Even a number of such witnesses can all be mistaken..."

In **Omari Iddi Mbezi & 3 others v. Republic,** Criminal Appeal No. 227 of 2009 (unreported), the Court underscored the tests to be applied by the courts before convicting accused person in cases where the only evidence is that of visual identification. It was stressed that, to prove positive identification, the identifying witness must make full disclosure of the source of light and its intensity, proximity to the culprit and the witness, the time witness had in encounter with the assailant, description of the assailant in terms of his physique in terms of complexion, size, height and attire. Besides, the witness should mention any peculiar features of the assailant to the next person he comes across which should be repeated at his first report to the police on the crime who would in turn testify to that effect to lend credence to such witness's evidence of identification of the suspect at an identification parade and during the trial to test the witness's memory (At page 7 and 8). It has also been held that, naming the culprits at the earliest serves an assurance of the identifying witness's credibility - see for instance, **Wangiti Marwa**

Mwita & Others v. Republic [2002] T.L.R. 39. On the other hand, in **Taiko Lengai v. Republic,** Criminal Appeal No. 131 of 2014 (unreported), the Court underscored the identifying witnesses' credibility and stated:

> *"It is not enough to look for factors favoring accurate identification, equally important is the credibility of witness. The condition of identification may appear ideal but that is no guarantee against untruthful evidence..."* (At page 9).

It is common cause in this appeal that, the incident occurred in the afternoon on a broad day light which would suggest that the factors for a positive identification were ideal as held by the learned first appellate judge. The learned appellate judge took the view that, although credibility of the identifying witness was an important consideration in such cases, he was satisfied that it was in the domain of the trial court which heard PW1 testifying and satisfied itself that he was a credible witness who observed the incident. According to the learned judge, PW1's credibility was impeccable.

As rightly submitted by Mr. Mauggo, the evidence shows that, PW1 was not familiar to the appellant prior to the incident. Despite the incident occurring during broad day light and the claim that PW1 spent

considerable time with his assailant, the witness did not provide any description of the appellant in terms of his complexion, size, height or any other peculiar feature than the attire which was too general to enable the police mount investigation and arrest him. Apparently, there is no evidence that the appellant's arrest was a result of the description made by PW1 to the police.

Besides, the learned State Attorney argued, and correctly so in our view, the fact that PW1 claimed to have positively identified the appellant at the material time of the day, he did not describe him in his evidence in chief. He did so during cross examination which exhibited doubts in his evidence. Indeed, unlike the learned first appellate judge, such gaps in PW1's evidence were inconsistent with impeccable credibility. At best, what PW1 did was to give evidence of dock identification which has been held to be worthless in the absence of an identification parade – see for instance; **Omari Said @ Habibu & Another v. Republic**, Criminal Appeal No. 302 of 2014 and **Mussa Elias & 3 Others v. Republic,** Criminal Appeal No. 172 of 1993 (both unreported). With respect, upon our own examination of the evidence on which the trial court grounded conviction and sustained by the first appellate court, we are hesitant to agree with the learned first appellate judge in his reasoning. On the

contrary, we are satisfied that, the evidence of visual identification through PW1 was too weak to place the appellant at the scene of crime. On this ground alone, had the learned first appellate judge subjected the evidence on record to a proper scrutiny, he should have not have concurred with the trial court in its finding. Since the concurrence of the finding of fact by the two courts below was a result of misapprehension of the evidence on record, the Court is entitled to interfere with it by reversing it as we hereby do.

Next we shall briefly discuss the doctrine of recent possession invoked by the trial court in convicting the appellant and sustained by the first appellate court. Mr. Mauggo urged that the two courts below erred in invoking the doctrine of recent possession to ground the appellant's conviction based on a number plate allegedly found and seized from his room. Mr. Mauggo had several arguments against the invocation of the doctrine of recent possession. First, the search was illegal it being conducted without a search warrant as required by section 38 (1) and (3) of the Criminal Procedure Act (the CPA). So was the resultant seizure. Secondly, the mere presence of the number plate, Reg. No. MC 277 CCN did not suffice to invoke the doctrine of recent possession considering that

there was no evidence that PW1 reported the incident to the Police in connection with the robbery of the motorcycle, subject of the charge.

It will be noted that, during the trial, although the appellant objected to the admission of the certificate of seizure as well as the number plate, the trial court admitted them, without assigning reasons for overruling the objection. The number plate and the certificate of seizure were respectively admitted in evidence as exhibits P3 and P4. Incidentally, it turned out during cross-examination that, PW3 conducted the search in the appellant's room without any permission from his boss neither did he have any search warrant on a search which was not an emergency one in contravention of section 38 (1) and (3) of the CPA. Consequently, the search was as illegal as the seizure. As urged by Mr. Mauggo, the number plate (exhibit P3) and the purported certificate of seizure (exhibit P4) were wrongly admitted in evidence to ground conviction on the basis of the doctrine of recent possession. The purported exhibits P3 and P4 are accordingly expunged from the record. Having expunged the said exhibits, there will no longer be any evidence on the basis of which the doctrine of recent possession could be invoked to ground conviction.

In the light of the foregoing, we find merit in the appeal as prayed by the appellant and supported by the respondent Republic. In consequence, we quash the appellant's conviction and set aside the resultant sentence. In its stead, we substitute an order acquitting the appellant with an order releasing the appellant forthwith from custody unless lawfully held therein.

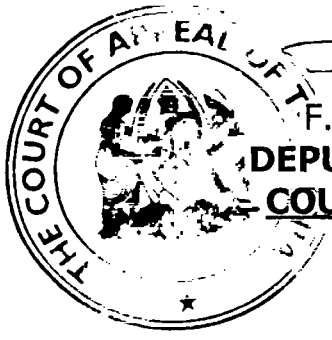
DATED at **MTWARA** this 22nd day of March, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

This Judgment delivered this 28th day of March, 2023 in the presence of the Appellant in person and Mr. Enoshi Gabriel Kigoryi, State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL