IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: MWAMBEGELE, J.A., MWAMPASHI, J.A., And MASOUD, J.A.)

CRIMINAL APPEAL NO. 315 OF 2020

RIZIKI ALLY MFINANGA @ KICHECHE .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Moshi)

(Mkapa, J.)

dated the 8th day of November, 2019

in

Criminal Appeal No. 1 of 2019

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JUDGMENT OF THE COURT

16th & 24th August, 2023

MWAMBEGELE, J.A.:

The appellant, Riziki Ally Mfinanga @ Kicheche, was convicted by the District Court of Moshi sitting at Moshi of the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002. The Charge sheet comprised three counts of armed robbery. He was convicted in all the three counts and sentenced to imprisonment for thirty years in each count. The sentences were ordered to run concurrently. His appeal to the High Court of Tanzania (Mkapa, J.), also sitting at Moshi, was

barren of fruit, for it was dismissed in its entirety on 8th November, 2019. Undeterred, he has come to this Court on a second appeal. His appeal has been premised on seven grounds of appeal comprised in a memorandum of appeal lodged on 13th July, 2020 and other six grounds comprised in a supplementary memorandum of appeal lodged on 10th October, 2022.

In order to appreciate the appeal before us, we find it appropriate to narrate a brief background to the matter. On 12th June, 2013 at about 0200 hours, a group of about five armed robbers invaded a petrol station belonging to one Christopher Kamwana (PW5) situate at Chekereni Area, Moshi District in Kilimanjaro Region and made away with an assortment of items including cash; Tshs. 10,360,374 /=, the property of the said Christopher Kamwana (PW5) and two mobile phones belonging to Hamad Ramadhan (PW1) and Jenipher Peter Ndune (PW3). The robbery of cash comprised the first count of the charge, while the robbery of the mobile phones comprised the second and third counts.

The appellant was arrested in connection with the robbery. It is not clear in evidence why he was suspected for the commission of the offence. But in an identification parade conducted on 9th July, 2013, the appellant was identified to be among the robbers on the material night. The other two

robbers had never been apprehended. The appellant was prosecuted, convicted and sentenced in the manner stated above.

When the appeal was called on for hearing before us on 16th August, 2023, the appellant appeared in person, unrepresented. The respondent Republic had the services of Ms. Cecilia Mkonongo, learned Principal State Attorney, assisted by Messrs. Henry Chaula and Isack Mangunu, learned State Attorneys. When we invited the appellant to address us on his grounds of appeal, fending for himself, he sought to adopt the substantive and supplementary memoranda of appeal and prayed to hear a response of the respondent Republic. He reserved his right of rejoinder after the response of the Republic, need arising.

It was Mr. Mangunu who addressed us for the respondent Republic. At the outset of his address, Mr. Mangunu expressed his stance that the Republic supported the appeal. He premised his support of the appeal on three aspects; first, that the visual identification of the appellant was not watertight, secondly, that the prosecution case was marred with material inconsistencies and contradictions and, thirdly, that the prosecution case left a lot to be desired.

In elaborating the above reasons supporting the appellant's appeal, Mr. Mangunu submitted in respect of the first reason that the identification of the appellant at the scene of crime was not watertight in that despite the fact that the prevailing condition at the scene of crime might have been favourable, the identifying process is watered down by the commotion during the robbery and the identification parade conducted thereafter as well as the contradictions in the evidence of the identifying witnesses. He submitted that PW1, PW3 and PW4 testified that they identified only one robber but in the identification parade, PW3 and PW4 identified more than one assailant. As regards inconsistencies and contradictions in the testimony of the prosecution witnesses, the learned State Attorney testified that according to PW2, PW4 told him that he identified three suspects but PW4 in his testimony stated that he identified only the appellant. Likewise, PW2 testified that PW3 told him that she identified two suspects but PW3 herself testified that she identified the appellant only. Also, PW2 testified that the participants in the identification parade were of the same height but according to PW4, they were of different heights.

The learned State Attorney added that the evidence for the prosecution also left a lot to be desired in that it was not stated in evidence why the

appellant was arrested in connection with the robbery. It is for these reasons, he submitted, the respondent Republic was constrained to support the appeal and had no qualms if the appeal would be allowed and the appellant set free.

Given the response by the learned State Attorney, the appellant had nothing useful to add in rejoinder. He simply prayed that the Court should allow his appeal and set him free.

We have considered the arguments by the learned State Attorney in agreement with the appeal. We, on our part, agree with both parties to this appeal that the evidence adduced by the prosecution in support of the prosecution case was shaky; it fell short of meeting the threshold of proof beyond reasonable doubt, the standard set in criminal law. This case stood or fell on the evidence of visual identification. The law relating to visual identification is settled in this jurisdiction. In the oft-cited **Waziri Amani v. Republic** [1980] T.L.R. 250, the Court sounded a warning that the evidence of visual identification is of the weakest kind and most unreliable and that it 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 absolutely watertight. In the case at hand, it is not disputed that the offence

was committed deep in the night; at about 0200 hours. In the circumstances, evidence regarding visual identification becomes of paramount importance.

Indeed, the evidence in the record of appeal is positive that the petrol station belonging to PW5 was invaded by armed robbers as explained at the beginning of this judgement. PW1, PW3 and PW4 who were at the scene of crime at the time of the robbery, did not identify the assailants positively. PW1, for instance, simply mentioned the physical appearances of the assailants as being:

> *"... all black, two were tall, one was short, the one who was short was a bit fat, the tallest was thin ..."*

So did PW3 who was also there during the robbery who testified that she identified only one person who was "short, fat, black in colour". Likewise, PW4 who also was an eyewitness, testified that he also managed to identify one bandit who was "short, black, fat, not that fat but was a bit fat". This kind of identification is of general nature and cannot, in our view, be relied upon in concluding that the said assailants were positively identified.

That is not all with the shortcomings in the prosecution case; the identification parade also left a lot to be desired in favour of the appellant. From the evidence on record, it is not clear how many parades were

conducted. While the register shows that five of them were conducted, the witnesses say only one was conducted. This shall become apparent infra when discussing the inconsistencies and contradictions in the prosecution case.

As if the foregoing is not enough, the prosecution evidence was not free from material inconsistencies and contradictions. These have been stated above by the respondent Republic when agreeing with the appeal. The identifying witnesses are not at one on the visual identification of the appellant. They are also not at one on the conduct of the identification parade. Likewise, the manner in which the identification parade was conducted did not follow the prescribed procedure and the witnesses are not at one on how many were conducted. While the identification register shows that five of them were conducted, the testimonies of PW3 and PW4 show that it was only one. Similarly, the eyewitnesses – PW3 and PW4 – who were called to identify the culprits at the identification parade, claim to have identified only one assailant at the scene of crime but in the identification parade, they identified three of them; the appellant, one Frank Jonas and another one going by the name of Nuru Damson. The evidence is silent as to what happened to the said Frank Jonas and Nuru Damson, for the trial

appeal was lodged with justifiable complaints. We accordingly allow it. Consequently, we quash the conviction of the appellant and set aside the flanking sentence imposed against him. We order that the appellant, Riziki Ally Mfinanga @ Kicheche, be released from custody forthwith unless he is held there for some other lawful cause.

DATED at **MOSHI** this 23rd day of August, 2023.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2023 in the presence of the Appellant appeared in person and Mr. Innocent Exavery Ng'assi, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL