IN THE COURT OF APPEAL OF TANZANIA
AT TABORA

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

CRIMINAL APPEAL NO. 438 OF 2021

AMOS SITA @ NGILI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of Resident Magistrate's Court of Tabora at Tabora)
(Kato, SRM-Ext. Jur.)

Dated the 5th day of August, 2021
in
Criminal Appeal No. 16 of 2021
.....

JUDGMENT OF THE COURT

21st September & 3rd October, 2023

MKUYE, J.A.:

Before the District Court of Tabora at Tabora, the appellant Amos Sita @ Ngili was prosecuted with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 [R.E. 2002 now 2022] (the Penal Code). It was alleged that, on 25/9/2018 during night hours at Manoleo Village, Itonjanda Ward within the Municipality and Region of Tabora, the appellant did steal cash Tshs. 202,700/=, a motorcycle make SANLAG with Registration Number MC 189 BSC worth Tshs. 2,000,000/=, and a Techno phone worth Tshs. 50,000/= all valued at

Tshs. 2,252,700/=, the property of Khamis s/o Said and immediately before such an act of stealing, being armed with stick and machete threatened and struck the said Khamis s/o Said by a stick in order to obtain the said properties.

Upon the conclusion of the trial, the trial court found that the prosecution failed to prove the offence of armed robbery and found the appellant guilty of a minor and cognate offence of burglary contrary to section 294 (1) of the Penal Code and eventually sentenced him to twenty years imprisonment.

The facts leading to the appellant's conviction are that:

On the fateful night of 25/9/2018, Khamis Said (PW1) who was also a motorcycle rider, was asleep at his house. At about 01:00 am, the appellant invaded PW1 by knocking at his window apparently requesting him to take his patient (his wife) to Kitete Hospital. PW1 opened the door, but immediately after opening the door, the invader struck him with an iron bar on his face, nose and injured him on his head and right side of the mouth. According to PW1, he was able to identify the appellant with the aid of solar power lightning the place.

Meanwhile, the assailant dragged PW1 who pretended dead inside the house. When he left, PW1 went to his neighbour, Juma Manyenye, (PW4) for help. They together went to the owner of the stolen motorcycle, one, Said Juma Athuman (PW2) to report about its being stolen. Thereafter, PW1, PW2 and PW4 went back to PW1's house. Both PW2 and PW4 testified to have seen PW1 wounded and blood spread on the ground and that at his house, as there was light from solar power. They also testified that PW1 mentioned the appellant as his assailant. They then raised alarm for help and reported the matter to the police.

On 26/9/2018 G. 373 D/C Mussa was assigned to conduct investigations over the matter. He visited PW1 at the hospital who mentioned the appellant as a robber. He also recorded the cautioned statement of the appellant (Exh. P3) following his arrest by his brother, one, Charles Sita Mwigulu (PW3), after one year.

In his defence, the appellant denied involvement in the commission of the offence but he admitted having been arrested on 31/10/2019 at new Bus stand at Tabora, taken to the police and recorded his caution statement on 2/11/2019.

His appeal to the Resident Magistrates' Court of Tabora, (Kato, SRM-Ext. Jur) was not successful as it was dismissed for want of merit on 5/8/2021. However, it reversed the conviction and sentence on the offence of burglary to that on armed robbery and sentenced him to thirty years imprisonment.

Aggrieved with that decision, the appellant has brought this appeal to this Court on four grounds of appeal as follows:

1) *That, the case for the prosecution was not proved against the appellant beyond reasonable doubt as required by the law.*

2) *That, the two courts below erred in law to hold that the appellant was positively identified to be a "particep criminis."*

3) *That, there was an unexplained delay in arresting the appellant.*

4) *That, the two courts below erred in law to convict and sentence the appellant in a case where it was not cogently established whether his arrest had any connection with the commission of the offence charged.*

When the appeal was called on for hearing, the appellant appeared in person without any legal representation whereas the respondent Republic had the services of Mr. Merito Ukongoji, learned

Senior State Attorney teaming up with Ms. Grace Lwila, the learned State Attorney.

Upon being invited to expound his appeal, the appellant sought to adopt his memorandum of appeal and opted to let the State Attorney respond first while reserving his right to rejoin later, if need would arise.

On his part, Mr. Ukongoji prefaced his submissions by declaring their stance that they did not support the appeal but supported both the conviction and sentence.

Beginning with ground no. 2 in which the appellant's complaint is that he was not properly identified, Mr. Ukongoji argued that the appellant was properly identified. He cited factors enabling identification as testified by PW1 such as: **one**, PW1 identified him by name. **two**, he knew him even before the incident. **Three**, there was solar light lighting outside the house.

He added that, PW2 and PW4 also corroborated PW1's evidence that at the victim's house there was solar power which means that when someone is outside could be seen clearly and that the light came from PW1's house. While citing the case of **Chacha Jeremiah Murimi and Others v. Republic**, Criminal Appeal No. 551 of 2015 (unreported)

which propounded conditions for proper identification, Mr. Ukongoji added that; **one**, PW1 had ample time to observe the appellant since the incident took a considerable length of time from when the appellant hit him with an iron bar, dragged inside by the appellant and stealing the motorcycle, money and the mobile phone. **Two**, the distance between the victim and assailant was minimal as he hit him with an iron bar and dragged him inside. **Three**, there was sufficient light from the solar power; **four**, PW1 mentioned him to PW2 and PW4 as he knew him even before the incident. **Five**, there was no impediment hindering proper identification as there was no such evidence.

In times without numbers, this Court has repeatedly held that it is trite law that courts should be careful in relying on evidence of visual identification in circumstances impairing human visibility since it is dangerous on its own. It warned the court not to rely on it unless all the possibilities of mistaken identity are eliminated - See **Waziri Amani v. Republic** (1980) T.L.R. 250. Again, in the case of **Hamisi Ally and Others v. Republic**, Criminal Appeal No. 546 of 2015 (unreported), the Court emphasized that:

> *"Time and again this Court has insisted that when a case is centered on evidence of visual*

identification, such evidence must be watertight before arriving at a conviction. This insistence is bone out of the fact that visual identification is of the weakest kind and hence the necessity of ruling out any possibilities of mistaken identity."

Yet, in the case of **Chacha Jeremiah Murimi** (supra) cited by the learned Senior State Attorney, the Court restated the factors to be considered in visual identification as follows:

"How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering he accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other people(s) give evidence to confirm it.... Evidence of recognition may be more reliable than identification of a

stranger. See ***Issa Ngara @ Shuka v. Republic****, Criminal Appeal No. 37 of 2005 and* ***Magwisha Mzee Shija Paulo v. Republic****, Criminal Appeal Nos. 465 and 467 of 2007 (both unreported."*

In this case, though the appellant did not come clearly to show in which areas the identification evidence is challenged, we agree with the learned Senior State Attorney that the visual identification evidence was watertight. This is so because, PW1 clearly explained how he identified the appellant. He explained on how he identified the appellant whom he knew, and how he invaded his house pretending to request him to take his sick wife to Kitete Hospital by a motorcycle, the victim being a motorcycle rider. PW1 explained that there was solar light lightning outside which enabled identification. This issue was corroborated by PW2 and PW4 who said that there was solar light which was sufficient to enable clear vision outside the victim's house. PW1 also testified that he knew the appellant by names which he mentioned to PW2 and PW4, the fact which was confirmed by them. Without losing sight, it is cardinal law that the ability to name the suspect at the earliest opportune time is an assurance of the reliability of the witness - See **Marwa Wangiti Mwita and Another v. Republic**, [2002] T.L.R. 39, **Mafuru**

Manyama and 2 Others v. Republic, Criminal Appeal No. 256 of 2007 and **Yohana Dioniz and Another v. Republic**, Criminal Appeals No. 114 and 115 of 2009 (both unreported).

Apart from that, we look at other factors enabling clear identification. We agree with Mr. Ukongoji that, PW1 must have had ample time to observe the appellant from the time when he was requesting for transport to take his wife to the hospital; at the time the appellant hit him with an iron bar; when dragging him inside; and picking the motorcycle, the money and the mobile phone which he stole. Moreover, the distance from where PW1 observed the appellant must have been minimal considering the fact that he hit him with an iron bar and dragged him inside the house. All these factors suggest that the distance was minimal. But again, in his testimony, PW1 did not show that there was impediment preventing clear vision of the appellant.

Basing on the evidence which was adduced by PW1, PW2 and PW4, we are settled in our mind that, the appellant was properly identified and therefore, this ground is not merited and we dismiss it.

In grounds nos. 3 and 4, the appellant's complaints are that there was unexplained delay in arresting the appellant and that there was no

connection between his arrest and the commission of the offence. However, we think, these issues should not detain us much. As was correctly submitted by the learned Senior State Attorney, the delay was caused by himself as was testified by PW3. It is undisputed that while the offence was committed on 25/9/2018, the appellant came to be arrested by his brother (PW3) on 31/1/2019 at the Bus Stand at Tabora. That, he was arrested at the bus stand on 31/1/2019 was confirmed by the appellant in his defence. The delay in his arrest had an explanation. In his testimony, PW3 clearly explained that the appellant had fled away after the commission of the offence which was his habit after committing an offence.

As regards the connection between his arrest and the offence he was charged with, much as it is not a requirement of law, PW3 also explained that he was arrested for allegations that he had burnt houses, stolen maize after breaking the storage and stole a motorcycle which, we think, linked directly with the offence he was charged with. We, therefore, find that grounds nos. 3 and 4 are misplaced. We dismiss them.

The complaint in ground no. 1 is that the prosecution case was not proved beyond reasonable doubt as required by the law. Mr. Ukongoji was confident that the offence was proved. He elaborated that the ingredients which were required to be proved under section 287A of the Penal Code under which the appellant was charged which are stealing, possession of offensive or dangerous weapon by invader and using such offensive or dangerous weapon at, before or after the commission of the offence in order to retain the stolen properties were all proved. Mr. Ukongoji argued that, all ingredients were proved since it was testified by PW1 that a motorcycle, money and mobile phone were stolen during the incident. He added that, according to the evidence available, the appellant had an iron bar which he used to injure PW1 in order to obtain and retain the stolen properties.

The offence of armed robbery to which the appellant was charged is stipulated under section 287A of the Penal Code as follows:

> *"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."

According to the above provision, to prove the offence of armed robbery three ingredients have to be proved, that is, **one**, that there was stealing; **two,** that, immediately after stealing, the invader had a dangerous or offensive weapon; and **three**, that, the invader used or threatened to use actual violence in order to obtain or retain the stolen property. We stated this stance in the case of **Shabani Said Ally v. Republic**, Criminal Appeal No. 270 of 2018 (unreported) when discussing the ingredients of armed robbery as hereunder:

"... from the above position of the law in order to establish an offence of armed robbery, the prosecution must prove the following:

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, the 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 this case, the offence of armed robbery was proved by PW1. PW1, explained on how the appellant went at his house and knocked his window requesting him to pick his sick wife and take him to Kitete Hospital. He testified on how he opened the door but the appellant struck him with an iron bar on his face, nose (right side), head and on the right side of his mouth. He said he pretended to be dead. He testified further that he was dragged inside the house by the appellant who left while locking the door from outside. He said, in the course, the appellant stole a motorcycle, MC 109 BSC SANLAG, money to the tune of Tshs. 227,700/= and a mobile phone make Techno. In addition, it was testified that PW1 was injured which was corroborated by PW2 and PW4 who saw him injured after he went to inform them about the incident.

Examining the evidence of PW1 critically, it depicts that the appellant had a dangerous or offensive weapon of iron bar which was

used to injure or to inflict injuries to PW1. The injuries were seen by PW2 and PW4 to whom the incident was reported. PW2 said he saw PW1 wounded and PW4 said that PW1 was bleeding and on reaching at his house he saw blood scattered on the ground. This evidence not only proves that the appellant had a dangerous or offensive weapon but also that it was directed to PW1 who sustained injuries upon having been applied to him.

Besides that, it was proved that the motorcycle MC 109 BSC SANLAG which was owned by PW2 but ridden by PW1 for hire was stolen at the time of incident together with cash amounting to Tshs. 227,700/= and a mobile phone, make, Techno valued at Tshs. 50,000/=. This evidence was not controverted much by the appellant. We, therefore, agree with the learned Senior State Attorney that the ingredients of offence of armed robbery were proved.

That said and done, in view of our finding that the ingredients of the offence of armed robbery were proved and that the evidence of visual identification was watertight, we are satisfied that the prosecution proved the offence against the appellant beyond reasonable doubt.

Consequently, we uphold the concurrent findings of both the trial and first appellate courts and, hereby dismiss the appeal in its entirety.

It is so ordered.

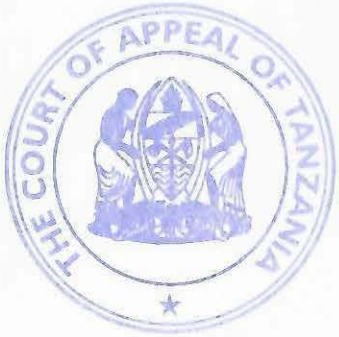
DATED at **TABORA** this 2nd day of October, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 3rd day of October, 2023 in the presence of the appellant in person and Mr. Nurdin Mmary, learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL