IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 398 OF 2021

KHALIDI RAFII MOHAMED ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam)

(Agatho, J.)

dated the 29th day of June, 2021
in
Criminal Appeal No. 266 of 2020

.....

JUDGMENT OF THE COURT

15th March & 11th October, 2023

MASHAKA, J.A.:

The appellant, Khalidi Rafii Mohamed, was convicted by the District Court of Kibaha of armed robbery contrary to section 287A of the Penal Code, Cap. 16 and sentenced to thirty years' imprisonment. His first appeal to the High Court of Tanzania at Dar es Salaam against the conviction and sentence was fruitless, hence this second appeal.

It is crucial to provide, at the beginning, the facts of the case. Briefly, it was the case for the prosecution at the trial that the appellant, on 24th

January, 2020 at Soga area within Kibaha District in Coast Region, stole TZS. 80,000.00 in cash, the property of Michael Atanas, and that at the time of stealing he used a machete to threaten the complainant in a bid to obtain the said property.

The aforesaid Michael Atanas (PW1) adduced that in the night of 24th January, 2020, around 23:00 hours, he was with his friend, Juma Shahibi (PW4), who had invited him to his home for the night. Upon reaching the home, he was suddenly grabbed by the neck from the back by a person whom he later recognized with the aid of glowing moonlight to be the appellant. He attempted to fight off the appellant, but he hacked him with a machete and ultimately relieved him of TZS. 80,000.00 in cash. The incident was reported to the Village Chairman Fadhili Hassan Miamba (PW2) that same night and later PW1 was taken to Tumbi Regional Referral Hospital for inpatient treatment for five days. At the hospital, he was attended by PW5 Halima Issa, a medical doctor, who tendered a medical examination report (exhibit P1) demonstrating that PW1 sustained cut wounds on his left hand caused by a sharp object.

For his part, PW4 told the trial court that the incident occurred shortly after he had got inside his home to prepare the bedroom for the

night. He then heard PW1 shouting, *"Why are you assaulting me?"* whereupon he walked out and saw the appellant grabbing PW1 by the neck. It was not disputed that the appellant is his nephew. PW4 adduced that he recognized him with the aid of moonlight that illuminated the scene. When the appellant saw him, he ran away from the scene but at that point he had already inflicted cut wounds on PW1 who lay on the ground unconscious. Moments later, PW1 told PW4 that the appellant had stolen his money.

Police Officer WP.5612 Detective Corporal Moshi (PW3) dealt with various aspects of the case. Her evidence was basically that PW1 and PW4 named the appellant as the culprit that they saw and recognized at the scene of crime.

In his defence, the appellant sturdily denied the accusation against him. While stating that he was arrested on 30th January, 2020, he refuted the evidence by PW1 and PW4 that they recognized him at the scene.

The trial court believed the evidence adduced by PW1 and PW4 the identifying witnesses. Acting on it, the court held that the appellant was recognized at the scene, convicted and sentenced him. The High Court upheld that finding on the first appeal.

The appellant now challenges the conviction and sentence on eight grounds, which, we think, raise three main complaints. **One**, that there was a material variance between the charge and the evidence on record; **two**, that visual identification evidence was weak, implausible, and unreliable; and **three**, that the prosecution case was not established beyond reasonable doubt.

At the hearing of the appeal before us, the appellant, who was self-represented, urged us to allow his appeal upon the grounds of appeal filed and as elaborated in the written statement of his arguments in support of the appeal. On the other hand, the respondent, who had the joint services of Mr. Emmanuel Maleko, learned Senior State Attorney, and Mr. Clemence Kato, learned State Attorney, sturdily opposed the appeal.

The appellant's contention on the first ground is essentially that while it was alleged in the charge that he used a machete to threaten PW1 to obtain the stolen money, the testimonies by both PW1 and PW5 indicated that actual armed violence was applied to PW1 who sustained an injury on his left hand. Citing **Director of Public Prosecutions v. Yusuph Mohamed Yusuph**, Criminal Appeal No. 331 of 2014 (unreported), he stated that it is always the duty of the prosecution to make sure that what

is contained in the particulars of the offence including the dates when the offence is committed is proved and supported by the evidence and not otherwise. Further reference was made to **Killian Peter v. Republic**, Criminal Appeal No. 508 of 2016 (unreported) advancing the proposition that when a charge is at variance with the evidence the charge should be amended pursuant to section 234 (1) of the Criminal Procedure Act, Cap. 20. Therefore, non-compliance with that provision is fatal to the prosecution case.

Replying, Mr. Maleko acknowledged the alleged variance but urged us to find it immaterial on the authority of **John Madata v. Republic**, Criminal Appeal No. 453 of 2017 (unreported). We fully agree with him. Although the accusation in the charge was that a machete was used to threaten the complainant during the robbery, the fact that the victim sustained a serious injury caused by a sharp object does not detract from the main allegation by the prosecution that the incident involved the use of a dangerous or offensive weapon or instrument directed against PW1. It does not matter whether the weapon was used to threaten causing harm or that it was used to cause harm. In any event, it is farfetched that the

appellant was prejudiced by the discrepancy. The first ground of appeal fails.

The appellant made a lengthy argument on the second ground. His contention was that none of the identifying witnesses gave a detailed account of the factors such as the assailant's attire, and proximity between the witnesses and the assailant that aided them to recognize him at the scene. That there was no proof PW1 was familiar with him before the incident. Since the incident occurred so suddenly and PW1 was grabbed by the neck from the back, he was impeded from observing his assailant with ease. Furthermore, the two witnesses gave contradictory testimonies in that while PW4 adduced that PW1 was unconscious at the scene after the attack, PW1 did not allude to that fact. And that the prosecution failed to explain why the appellant was not arrested promptly if he was recognized at the scene. In support of his argument, the appellant relied upon **Waziri Amani v. Republic** [1980] T.L.R. 250, **Jaribu Abdalla v. Republic** [2003] T.L.R. 271, **Galous Faustine Stanslaus v. Republic**, Criminal Appeal No. 2 of 2004, **Ramadhani Mangobele v. Republic**, Criminal Appeal No. 76 of 2010, and **Festo Mawata v. Republic**, Criminal Appeal No. 299 of 2007 (all unreported).

On the part of the respondent, Mr. Maleko urged us to uphold the concurrent finding by the courts below that the appellant was faultlessly recognized at the scene of the crime. He reasoned that the identifying witnesses knew the appellant before the incident and that they recognized him at the scene from a close distance with the aid of shining moonlight. He submitted further that the appellant did not challenge the recognition evidence by cross-examination. Citing **Nyerere Nyague v. Republic,** Criminal Appeal No. 67 of 2010 (unreported), he contended that failure to cross-examine a witness on a key aspect is acceptance of the truthfulness of the matter. Finally, he argued that the identifying witnesses were credible and that the subordinate courts believed them.

In deciding the issue at hand, we shall bear in mind that this being a second appeal, we are, under section 6 (7) of the Appellate Jurisdiction Act, Cap. 141, mandated to deal with matters of law only. However, we can intervene on matters of fact if the findings of the courts below reveal a misapprehension of the evidence or misdirections or non-directions or a violation of some principle of law or practice – **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149.

Ahead of resolving the cogency and reliability of the evidence adduced by PW1 and PW4, we would refer to our celebrated decision in **Waziri Amani** (supra) providing the guidelines on visual identification. In that case, we cautioned, at pages 251 – 252, that:

> *"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that 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.****"* [Emphasis added]

The Court acknowledged that although there were no straightforward rules for determining disputed identity, a proper resolution of such a question would involve showing on the record a careful and considered analysis of all the surrounding circumstances of the case. To illustrate the point, the Court stated, at p. 252, that:

> *"We would, for example, expect to find on record questions as the following posed and resolved by him:* ***the time the witness had the accused under observation; the distance at which he***

observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. *These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."* [Emphasis added]

It is in the evidence that the attack on PW1 was executed at night, around 23:00 hours, on 24th January, 2020. PW1 claimed that the appellant grabbed him by the neck, cut him with a machete on his left hand and stole TZS. 80,000.00 from him. PW4 adduced that when he came out to rescue his friend who had made a desperate call for help, he saw and recognized the appellant, who happens to be his nephew, strangling PW1. Both witnesses stated that the scene was illuminated by shining moonlight and that as soon as the appellant saw PW4, he released his victim and fled the crime scene. Admittedly, the witnesses did not mention the assailant's attire and that PW1 did not allude to the testimony by PW4 that he fell unconscious following the attack on him. These facts, in our

view, are trifling details. Since the witnesses stated that they knew the appellant, mentioning his attire at the scene was not a weighty issue.

Our assessment of the evidence in its totality is that while PW1 adduced that at some point he was face to face with the appellant as they were close to each other, PW4 was emphatic that he saw and recognized the appellant at the scene and that the appellant hurriedly fled the scene upon seeing him. As rightly submitted by Mr. Maleko, it is on record that the appellant did not impeach by cross-examination this aspect of the evidence. Besides, it is in the evidence that shortly after incident, PW1 went to the home of the village official (PW2) where he reported the incident and named the appellant as the culprit. This fact resonates with our observation in the case of **Marwa Wangiti Mwita & Another v. Republic** [2002] T.L.R. 39 that the ability of a witness to name a suspect at the earliest opportunity is a crucial assurance of his credibility. Certainly, the appellant was arrested five days later after the incident but in the circumstances of this matter, we do not think that such a short delay was fatal to the prosecution case.

It is also significant that no evidence was led or even a suggestion made that PW1 was prompted or actuated by a wrong motive in his

allegation against the appellant. Furthermore, the peculiar circumstances of this case have left us to wonder whether a person could team up with his friend to set up his own nephew. The trial court which tried the case heard and observed the two witnesses and believed them. In the premises, we find no cause to disturb the trial court's findings, which the High Court upheld. The second ground of appeal lacks merit.

Finally, we turn to the third ground contending that the charged offence was not proved beyond reasonable doubt.

To establish the accusation of armed robbery, the prosecution was enjoined to establish three ingredients: one, there must be proof of stealing. Two, there must be proof of the use of or threat to use a dangerous or offensive weapon or instrument at or immediately before or after such stealing. Three, it must be proven that the use of or threat to use violence was directed against a person for the purpose of obtaining or retaining the stolen property. See, **John Madata** (supra) citing **Shaban Said Ally v. Republic**, Criminal Appeal No. 270 of 2018 (unreported). We are satisfied that all these ingredients were met in the instant case. For it is in the evidence that the appellant was seen and recognized to have robbed PW1 of TZS. 80,000.00 in cash and that during that act he inflicted

cuts on the left hand of PW1 with a machete to obtain or retain the money. On this basis, the third ground of appeal is unmerited.

The upshot of the matter is that for the reasons we have stated, the appeal lacks substance and we dismiss it in its entirety.

DATED at **DAR ES SALAAM** this 7th day of October, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

Judgment delivered this 11th day of October, 2023 in the presence of the Appellant in person vide video link from Ukonga Prison and Ms. Mkunde Mshanga, State Attorney for the respondent is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL