IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: WAMBALI, J.A., FIKIRINI, J.A. And ISSA, J.A.)

CRIMINAL APPEAL NO. 306 OF 2021

DAUDI LOTI MOLLEL @ MASAI.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the Court of the Resident Magistrate of Arusha with Extended Jurisdiction at Arusha)

(Mnguruta, SRM-Ext. Jur.)

Dated the 12th day of March, 2021

in

Criminal Appeal No. 18 of 2021

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JUDGMENT OF THE COURT

16th & 23rd February, 2024

WAMBALI, J.A.:

The District Court of Babati convicted the appellant of the offence of armed robbery, contrary to section 287A of the Penal Code, Cap 16 (the Penal Code). Consequently, he was sentenced to thirty years imprisonment. The conviction of the appellant followed the accusation that on 26th May, 2018, at Majengo Mapya area within Babati District in Manyara Region, he stole cash money TZS. 320, 000.00, one mobile phone make Tecno N8 valued at TZS. 180,000.00 and one wallet make Calvin Clain; the total value being TZS. 504,000.00, the property of Faraja Futimaye. It was further alleged that immediately before and after such

stealing, the appellant did use a knife to threaten the victim in order to retain the said properties. The appellant contested the allegation, hence at the trial, the prosecution paraded ten witnesses and tendered nine exhibits to support its case.

Basically, the substance of the prosecution case and finding of the trial court was that the appellant was identified at the scene of crime on 26th May, 2018 by the victim, Faraja Futimaye, who testified as PW2. Further to that he was found with a mobile phone make Tecno N8 which he robbed from PW2 and that he used the motorcycle make Feconi with registration No. MC 555 BDX (exhibit P3), the property of Saifu Haji Chaka (PW4). Besides, it was the prosecution stand that the appellant was found with the jacket he wore during the commission of the offence.

Essentially, the epicenter of the prosecution evidence is briefly depicted as follows: It was PW2's evidence that on 26th May, 2019 he left Safari bar together with Glory and Eliza at about 02.00 to 03.00 hrs and everybody hired a motorcycle to their destination. On his part, initially, he hired a motorcycle to take him to his friend's home, one John Buguna at Majengo Mapya area but on reaching there he could not easily locate the house. He thus decided to walk to the nearby River Nile motorcycle station.

While PW2 was still on the way, he saw a motorcycle which had a rider and one passenger. A motorcycle rider asked PW2 where he was

going and before he answered him, the said passenger dropped off, got hold of him and tied his neck while pointing a knife on his neck and later put it on his head. As PW2 could not rescue himself, he was ordered to give the said person everything he had in possession. Subsequently, the motorcycle rider approached and searched PW2's trouser pockets and took a total amount of TZS 320,000.00, a Tecno mobile phone N8 worth TZS. 180,000.00 and Calvin Clain wallet which contained; NMB, CRDB, NHIF, LAPF and Voter Identity Cards. Thereafter, the assailants left him at that place helpless.

PW2 testified that at the scene of crime he did not identify the assailants, but was content that the rider wore a black jacket with white and red stripes on the chest and hands. PW2 also stated that through the aid of the motorcycle and electricity light at that place, he managed to identify the registration number of the motorcycle as MC. 555 BDX. PW2 disclosed that before the assailants disappeared, he heard the said passenger calling the rider as Masai. It was further the evidence of PW2 that after the incident on 26th May, 2018, he was called at the police station on 8th June, 2018 to identify the motorcycle and the jacket he managed to identify at the scene of crime on the material date.

F. 2154 D/CPL Saidi, the investigator, testified that the appellant was arrested on 1st June, 2018 in connection with another offence and he was later granted bail until 8th June, 2018 when he was arrested again in

connection with the allegation of armed robbery. That the second arrest followed the search at the appellant's house where he was found in possession of the jacket which he wore during the commission of the offence and a mobile phone Tecno N8 which was robbed at the scene of crime. PW1 testified further that on 7th June, 2018 the motorcycle which was used during the commission of the offence was apprehended being ridden by Jackson Peter (PW7) after G. 2450 D/C Josephat (PW3) hired it from Mama Ango Petrol Station to Babati Police Station. PW7 told PW3 that he was given the motorcycle on that date by the appellant to ride on short time basis.

Saifu Haji Chaka (PW4), the motorcycle owner, testified that he had employed the appellant as a rider of the said motorcycle since February, 2018 and that until 6th June 2018, inclusive of the date of commission of crime was still using it. PW4 tendered the motor vehicle registration card and tax invoice which were collectively admitted in evidence as exhibits P9. The evidence of PW4 on the employment of the appellant was supported by Anael Kinyangusi Mollel (PW8), the appellant's uncle.

The prosecution side therefore maintained that on the strength of its evidence placed before the trial court, the case was proved beyond reasonable doubt.

In his defence, the appellant stated that while he was at home at Nyangumi area at about 9.00 hrs, he was arrested and sent to Babati

Police Station and put in custody in connection with stealing a mobile phone which he denied. He stated that later, he was forced to sign a certain document he did not know using a thumb print as he does not know how to read and write. He testified further that he told the police that he had never been a motorcycle rider and thus PW4 was not his employer in connection with the motorcycle which was found with PW7. The appellant insisted that he did not give PW7 the said motorcycle to be used on temporary basis as alleged. Nevertheless, he was taken to court on allegation of committing the offence of armed robbery. The appellant testified that he was surprised why the person (PW7) who was arrested riding a motorcycle which was allegedly used in commission of the offence was not charged and instead he was made a witness for the prosecution. The appellant categorically disassociated himself with the allegation levelled against him by the prosecution on the contention that he was not identified at the scene of crime by PW2 and that he was not found in possession of the stolen property.

Having heard and evaluated the evidence of both sides, the trial Resident Magistrate believed the prosecution story and found that the defence case had not raised doubt to shake the prosecution evidence. In the circumstances, she found the appellant guilty, convicted and sentenced him to imprisonment as alluded above.

The appellant's first appeal against the trial court decision, which was determined by Mnguruta, Senior Resident Magistrate (SRM) with Extended Jurisdiction at the Court of Resident Magistrate of Manyara at Babati was unsuccessful. He has thus approached the Court on second appeal through two memoranda of appeal containing a total of ten grounds of appeal. However, before the hearing of the appeal commenced, it was apparent and indeed agreed by the parties and the Court that the crucial ground for determination in this appeal revolves on the single ground of whether the prosecution case was proved beyond reasonable doubt.

Hearing of the appeal proceeded in the presence of the appellant in person without legal representation and Ms. Janeth Sekule and Ms. Upendo Shemkole, learned Senior State Attorney for the respondent Republic.

It is noteworthy that though Ms. Sekule had initially indicated the respondent's Republic resolve to contest the appellant's appeal, upon reflection, she supported it based on the single ground that the two courts below wrongly convicted and sentenced the appellant for the offence of armed robbery while the prosecution case was not proved to the required standard of a successful criminal trial.

Submitting in support of the appeal, Ms. Sekule briefly stated that upon scrutinizing the evidence of PW2 on the record, it cannot be

concluded that he identified the appellant among the two assailants at the scene of crime on the material date. She stated that according to the evidence of PW2, it is plain that he did not identify the assailants save for the alleged identification of the black jacket which one of the assailants wore on the material date. She added that PW2 also testified that he identified the motorcycle with registration NO. MC-555 BDX make Feconi by the aid of its light and the electricity light around the scene of crime though its intensity was not disclosed.

In her submission, considering the scanty evidence on the description of the assailants by PW2, who he met for the first time, upon the arrest of the appellant, the police would have conducted an identification parade to enable him to confirm whether it was really the appellant who he identified at the scene of crime. Unfortunately, she stated, the identification parade was not conducted. Besides, she added, there is no indication from the evidence of PW2 on the record concerning when and to who he reported the incident at Babati Police Station immediately after the incident or later. She added that it is also not known whether he gave any description of the assailants to the police after the incident. She argued further that as the prosecution case greatly depended on visual identification of the assailants by PW2, failure to meet the requirement of the law on proper identification weakend the case against the appellant.

On the other hand, Ms. Sekule submitted that since the identification of the appellant at the scene of crime was not watertight, the other prosecution evidence which would have been relied on to connect the appellant with the commission of the offence is that of being found in possession of a jacket he allegedly wore at the scene of crime and a Tecno N8 mobile phone which was stolen during the robbery. However, she argued that the evidence on the matter cannot stand as the documentary exhibits; namely, P1, P4, P5, P6, P8 and P9 on how and when the said items (exhibits P2 and P7) were retrieved from the appellant cannot be relied on in evidence because of procedural irregularity committed by the trial court. This is because, she stated, though the said exhibits were tendered by the respective witnesses and admitted in evidence by the trial magistrate, they were not read over as required by law and thus they deserve being discounted.

The learned Senior State Attorney emphasized that having discounted the said exhibits, the remaining oral evidence on the record in respect of all the prosecution witnesses which greatly centered on how the said exhibits were retrieved from the appellant, cannot be relied upon to ground conviction against him. In the circumstances, she urged the Court to allow the single ground of appeal.

Ms. Sekule concluded her submission in support of the appeal by stating that since the prosecution case was not proved beyond reasonable

doubt, the appeal has merit. Thus, she beseeched the Court to allow the appeal, quash conviction and set aside the sentence imposed on the appellant followed by an order releasing him from prison.

After the appellant heard the submission by the learned Senior State Attorney in support of the appeal, he did not wish to contest it or make a rejoinder submission. He unreservedly joined hands with her and prayed that the appeal be allowed.

Having heard the parties' submissions, we entirely agree that at the trial court, the prosecution failed to prove that the appellant was properly identified at the scene of crime as required by law. It is a requirement of the law that evidence of visual identification has to be watertight before a court can enter conviction basing on it in order to remove the possibility of honest but mistaken identity. For this position, see the decisions of the Court in **Waziri Amani v. The Republic** [1980] T.L.R. 250 and **Raymond Francis v. The Republic** [1994] T.L.R 100, among others.

Thus, in cases entirely depending on identification, the Court has enunciated same factors, among others, to be considered by the trial court before concluding that the victim properly identified the assailant at the scene of crime. These are: **One**, the time the witness had the accused under observation; **two**, the distance at which he observed him; **three**, the conditions in which such observation occurred, for instance whether it was day time or night time, whether there was good or poor lighting at

the scene; **four**, whether the witness knew or had seen the accused before or not; and **five**, all factors of identification considered, it should also be plain whether there were any material impediment or discrepancies affecting the correct identification of the accused person by the witness (see **Kazimiri Mashauri v. The Republic**, Criminal Appeal No. 252 of 2010 (unreported).

It is in this regard that in **Shamir John v. The Republic**, Criminal Appeal No. 166 of 2004 (unreported), the Court observed and held as follows:

> *"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, 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.*

It is now trite law that courts should closely examine the circumstances in which the identification by each witness was made...".

In the present case, as correctly stated by Ms. Sekule, the identification of the assailants by PW2 was not watertight. It is plain in the evidence of PW2 that he did not identify any of the assailants at the scene of crime. In his testimony, PW2 identified the black jacket with white and red stripes which one of the assailants wore on that day. The said jacket is the one allegedly retrieved from the appellant after he was searched at his house. However, this piece of evidence cannot be relied upon, as the seizure certificate (exhibit P1) has to be discounted because it was not read over after it was admitted in evidence.

Moreover, considering that the incident of armed robbery allegedly occurred in the dead of the night according to PW2, the conditions for identification with regard to the intensity of the source of light had to be particularly stated. However, this was not described by PW2.

More importantly, the stressful environment described by PW2 at the scene of crime in which he was held tightly on the neck and a knife pointed on his head could not have enabled him to identify the registration number of the motorcycle (exhibit P3) allegedly used by the appellant during the commission of the offence.

In view of the evidence of PW2 on the record, there is no doubt that during the encounter with the assailants on the material day PW2 was under stressful and terrifying situation whereby the pockets of his trouser were searched by one of the assailants and robbed of his possession before they subsequently left the scene of crime. In the circumstances, it is unlikely that PW2 would have correctly identified the registration number of the said motorcycle. We are however aware that it is not always impossible for a victim of armed robbery to identify the assailant even under stressful and terrifying condition (see **Philip Rukaira v. The Republic**, Criminal Appeal No. 215 of 1994 (unreported). Nonetheless, in most cases, there are difficulties in identifying the assailant by the victim under those conditions. In **Tagara Makongoro and Two Others v. The Republic**, Criminal Appeal No. 126 of 2015 (unreported), the Court was inspired by decision of the Court of Appeal of Kenya in **Wamaliwa and Another v. The Republic** [1999] 2 EA 358, where it was stated:

> *"The Court should always warn itself of the danger of convicting on identification evidence where the witness only sees the perpetrator of an offence fleetingly and under stressful circumstances".*

Therefore, depending on the circumstances of each case, where the victim claims to have identified the assailant even under stressful and

horrifying condition, the evidence on the record must be clear on how he surpassed the fear exerted by the assailants [see **Hassan Juma Kanenyera and Others v. The Republic** [1992] T.L.R. 100 and **Philip Rukaira v. The Republic** (supra)].

Moreover, in the case under consideration, the time when the robbery occurred is not known as PW1 and PW2 differed on this matter. While PW2 testified that robbery occurred on 26th May, 2018 between 2.00 and 3.00 hrs, PW1 stated that the incident occurred at 23.00 hours on the said date. It is thus not clear whether the information on the time of commission of the offence was revealed by PW2 to PW1 in the course of investigation or otherwise. This matter eroded the credibility and reliability of the evidence of PW1 and PW2.

On the other hand, it must be appreciated that the ability of a witness to name the assailant at the earliest possible time to the first person or authority he meets concerning the incident is the assurance of his reliability. Unfortunately, according to the evidence on the record, it is not shown when and to whom PW2 reported the incident of armed robbery on the particular date or soon thereafter. The evidence of PW1, the investigator of the case, reveals nothing on this matter. This fact dented the prosecution case on the issue of identification. Though PW2 met the assailants for the first time, his report to the police coupled with the description of the assailants would have enabled the police to conduct

identification parade for him to identify those he allegedly saw at the scene of crime. This was not done. In **Jaribu Abdalla v. The Republic** [2003] T.L.R. 271, the Court stated as follows:

> *"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness.*
>
> *The conditions for identification might appear ideal but that is not a guarantee against untruthful evidence. The ability of witness to name the offender is in our view reassuring though not a decisive factor".*

[See also **Mafuru Manyama and Two Others v. The Republic**, Criminal Appeal No. 178 of 2007, **John Gilikola v. The Republic**, Criminal Appeal No. 31 of 1999 and **Yohana Dioniz and Shija Simon v. The Republic,** Criminal Appeal No. 114 and 155 of 2009 (unreported)].

In the event, we are settled that the identification of the appellant at the scene of crime was not watertight.

We are also of the view that the evidence that the appellant was the rider of the motorcycle (exhibit P3) during the commission of the offence at the scene of crime cannot be wholly relied upon to ground his conviction. This is because after the incident the said motorcycle was not found in possession of the appellant on 7th June, 2018. On the contrary, it

was found with PW7. Unfortunately, the evidence of PW7 did not sufficiently prove that he borrowed the said motorcycle from the appellant from him on the material date. Moreover, the owner of the motorcycle (PW4) did not also show sufficiently that he was the employer of the appellant who during cross-examination demanded a contract which he entered with him as the rider of the said motorcycle.

Indeed, though PW8 supported PW4 on the issue of the appellant being employed by him, he did not seem to know that the appellant was arrested in connection of the offence charged with while he was riding the said motorcycle on the material day. Besides, the evidence of PW8 did not indicate that he knew that the appellant gave PW7 the said motorcycle to use it before he was arrested on 7th June, 2018. This is in view of his evidence on the record that after the appellant was arrested on 1st June 2018 in connection with stealing a mobile phone and bailed him at Babati Police Station, he sent him again at that Station on 4th June, 2018 and was put in custody by PW1 in connection of the offence of armed robbery until he was charged in court.

Admittedly, going by that evidence of PW8, the appellant was in custody before the motorcycle was found with PW7. Therefore, while he was in custody at the police station, he could not have given PW7 the said motorcycle on 7th June, 2018 as alleged by the later. The doubt on the handling and how the motorcycle was handed over to PW7 certainly

dented the credibility of PW1, PW4 and PW8 on the issue of connecting the appellant with the motorcycle in committing the offence. Besides, the evidence of PW7 was greatly shaken and weakened on this matter.

On the other hand, though the conviction of the appellant could have been associated with the jacket which he allegedly wore on the material date and the stolen mobile phone allegedly found in his possession, the documentary exhibits, P1, P4, P5, P6, P8 and P9 associated with the said items (exhibit P2 and P7) have no evidential value as they were not read over after they were admitted in evidence. We must emphasize that the purpose of reading over the document after being admitted in evidence is to enable the accused to know and understand its contents in connection of his case in order to prepare a meaningful defence. In this regard, we accordingly discount the said exhibits from being relied in evidence.

It follows that, as correctly submitted by the learned Senior State Attorney, having discounted the relevant documentary evidence, the remaining oral evidence adduced by the prosecution witnesses which entirely depended on the search and retrieval and storage of those exhibits, cannot link the appellant with the offence of armed robbery.

In the result, we find that the prosecution case was not proved to the required standard and proceed to allow the single ground of appeal.

Consequently, we allow the appeal, quash conviction and set aside the sentence imposed on the appellant. We accordingly order that the appellant should be released from prison forthwith, unless held for other lawful cause.

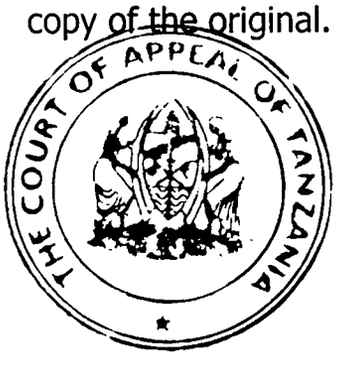
DATED at **ARUSHA** this 22nd day of February, 2024.

F. L. K. WAMBALI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgement delivered this 23rd day of February, 2024 in the presence of the appellant in person and Mr. Godfrey C. Nugu, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL