IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 231 OF 2018

JOSEPH S/O CHALLY PRASHID..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Originating from the decision of the District Court of Kinondoni at Kinondoni (Hon F. Moshi RM) dated 28th May, 2019 in Criminal Case No. 200 of 2007)

JUDGEMENT

11th December, 2019 & 20th December, 2019

KISANYA, J

In the District Court of Kinondoni at Kinondoni, the appellant herein stood arraigned for offence of offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 (R.E. 2002) as amended by Act No. 3 of 2011. It was alleged by the Republic that, on the 7th day of April, 2017 at Bunju A, within Kinondoni District in Dar es Salaam Region, the appellant **did steal cash money Tsh. 2, 700,000 and forced MARY MEKO to**

transfer Tsh. 148,800 to his mobile phone the properties of MARY MEKO and immediately before and during such stealing, he threatened one MARY MEKO with a syringe and screw driver. The appellant denied the charges.

In order to prove the guilt of the appellant, the Republic paraded five witness and two exhibits. The appellant relied on his own sworn testimony. He called no other witness. After the trial, the appellant was found guilty of the charged offence and sentenced to service thirty years imprisonment. Aggrieved with the conviction and sentence, the appellant has come to this Court by way appeal. His grounds of appeal can be summarized as follows;

(a) That the trial court erred in law and in facts in convicting the appellant basing on discredited visual identification while the nature of intensity of light was insufficient for proper identification.

(b) The trial court erred in law and facts in taking and relying on mobile phone (Exhibit P1) alleged to have been stolen from PW1 while the same un-procedural tendered and its chain of custody not proved.

(c) The trial court erred in law and in facts in relying on evidence of PW1 who stated that her mobile phone (Exhibit P1) was stolen by PW1 without proof ownership and the doctrine of recent possession.

(d) The trial court erred in law and in facts in taking and relying on cautioned statement (Exhibit P2) which recorded out of the time of for hours prescribed by the law;

(e) The trial court erred in law and in facts in taking relying on cautioned statement (Exhibit P2) which read over to him after being admitted as exhibit.

(f) The trial court erred in law and fact in relying on discredited evidence of PW2 and PW2 who failed to tender to document to prove that the alleged phone (Exhibit P1 was sold by the appellant to PW2.

(g) The trial court erred in law and fact by convicting the appellant while the appellant was not addressed as required by the law after ruling that the appellant had a case to answer.

(h) That the trial court erred in law and fact by convicting the appellant basing on the weakness of evidence of the defence.

On the date when this appeal was called for hearing before me, the appellant appeared in person, unrepresented while the Respondent had the services of Ms Monica Ndakidemi, learned State Attorney. Being a lay person, the appellant adopted the grounds appeal as stated in the Petition

of Appeal. He prayed that the conviction be quashed and the sentence be set aside.

The learned State Attorney supported the appeal on the ground that evidence adduced in the trial court was not water tight due to the following three reasons.

First, there is no evidence to establish how the appellant was identified as the incidence happened in the night. She argued that PW1 and PW3 did not state the physical appearance of the appellant and that since it was the first time for PW1 and PW3 to meet the appellant, there was a need of conducting identification parade. The learned State Attorney was of the view that the appellant was identified in the dock and that pursuant to the case of **Musa Elias and 2 Others vs R, Criminal Appeal No 172 of 1999,** Court of Appeal of Tanzania (Unreported), dock identification of the accused person who is a stranger to witness has no value.

Second, the cautioned statement tendered by PW5 DC Pundu was not read over to the appellant in the trial court. Citing the case of **Emanuel Konrad Josephat vs R, Criminal Appeal No. 296/ 2017, CAT at Mtwara** (Unreported), she argued that failure to observe that procedure is fatal

because the accused was denied information which could assist him in cross examining the respective witness.

Lastly, the chain of custody of the mobile phone (Exhibit PW1) alleged to have been stolen from PW1 was not maintained.

I have read the judgement of the trial court and noted that the appellant's conviction was based on the following evidence;

(a) The appellant was identified by PW1 and PW3 as the one who gave them a ride and stole the money and mobile phone from PW1;

(b) The appellant admitted in his cautioned statement (Exhibit P-2) to have used the syringe and screw driver during stealing properties from PW1;

(c) The mobile phone (Exhibit P-1) stolen form PW1 on the date of incident and sold by the appellant to PW4 was identified by PW1.

Therefore, since the petition of appeal and the Respondent's submissions challenge the said evidence, I wish to dispose this appeal by addressing issues related to the evidence relied upon in convicting the appellant.

Starting with visual identification. It is in record that evidence that implicates the accused in the case at hand due to visual identification. Rules governing visual identification have been established in different cases. For instance, in the case of **Waziri Amani vs R** (1980) TLR 250 (referred to by the trial magistrate), it was held that the visual identification is of weakest point if the conditions of identification are not favourable. Factors to be considering in determining whether conditions of identification are favourable were highlighted in the case of **Mussa Hassan Barie and Albert Peter @John vs R**., Criminal Appeal No. 292 of 2011, CAT at Arusha (Unreported). These include; whether or not it was day light or at night, the type of intensity of light, the closeness of the encounter at the scene of crime; whether there were obstruction to a clear vision, whether the suspect was known to the identifier previously and that the witness of identification would be expected to state the description of the suspect.

In the present appeal, PW1 and PW3 met the appellant for the first time on the date of incident; the tragedy of armed robbery took take place in the night (at about 2000 hours); both PW1 and PW3 testified to have identified the appellant as the person who gave them a ride and stole the properties from PW1.

I have examined the evidence in record; during examination in chief, PW1 did not testify as to how she was able to identify the appellant in that night. It is during cross examination when she replied:

"I saw you in the car for long time".

However, PW1 did not state the source of light which aided him to identify the appellant that night.

On his part, PW3 testified to have identified the appellant at Bunju A when he (the appellant) switched on the light. Upon being cross-examined by the appellant, he stated that there was enough light inside the car. Apart from failing to state the source of light which was inside the car or switched on by the appellant, PW3 did not give description of the appellant when he is quoted;

"I cannot remember the clothes you had that day...It was night I couldn't remember exactly...."

In the light of the above, I am in agreement with the learned State Attorney that visual identification of the appellant by PW1 and PW3 was not water tight. The prosecution failed to establish how the appellant was identified. Since PW1 and PW3 met the appellant for the first time on the date of incident, there was a need of conducting an identification parade to

corroborate their evidence. For the aforesaid reasons, I hold that the appellant was not identified properly.

The next issue for consideration is the cautioned statement (Exhibit P-2). This exhibit was relied upon by the trial court in convicting the appellant. It is a legal requirement that once document is admitted in evidence, the contents must be read out to accused. This position was held in **Issa Hassani Uki vs Republic**, Criminal Appeal No. 139 of 2009, CAT (Unreported) when the CAT stated:

> *"It is fairy settled that once an exhibit has been cleared for admission and admitted in evidence, it must be read out in court."*

I have read page 34 and 35 of the typed proceedings. It is clear that Exhibit P-2 was not read out to the appellant after its admission in evidence. The effect of such failure was stated in the case of **Florence Athanas @ Baba Ali and Another vs The Republic**, Criminal Appeal No. 438 of 2016, CAT at Mbeya (unreported) when the Court of Appeal held:

> "*The failure occasioned a miscarriage of justice to the appellants since they were deprived to understand the substance of the admitted documents."*

In the light of the above, I am of the considered view that failure by the trial court to read out cautioned statement to the accused in the case at hand went to the root of justice. Such failure cannot be cured by section 388 of the Criminal Procedure Act, Cap. 20 R.E. 2002. It denied the appellant with information which could enable him to cross-examine PW5 who tendered the said exhibit and or prepare his defence. Accordingly, I expunge the cautioned statement as it was wrongly admitted and relied upon in convicting the appellant.

I now move to the next issue on mobile phone (Exhibit P-1) which was also relied upon by the trial court in convicting the appellant. It was testified by PW1 and PW5 that the said mobile phone was stolen from PW1 on the fateful day and sold by the appellant to PW4.

I have read the charge sheet and noted that the said mobile phone is not in the list of properties stolen from PW1. According to the charge sheet, what was stolen is "**cash money Tshs. 2,848,800 the property of Mary Meko**" (PW1). I find that failure to include mobile phone in the list of stolen properties creates doubt on evidence related to Exhibit P-1. Thus, if the mobile phone was among of the properties stolen from the PW1, the prosecution ought to have named the same in the charge sheet from the outset. It is also clear as argued by the Applicant and the learned State

Attorney that that chain of custody on the stolen mobile phone (exhibit P-1) was not maintained. This is because there is no evidence as to how PW1 (who tendered it) came into possession of the stolen mobile phone found in possession of PW4. This brings doubts on evidence related to exhibit P1 and which was relied upon in convicting the appellant.

I have noted further that PW1 testified that the appellant stole a total of Tanzania shilling 2, 848, 800. While Tanzania shilling 2,700,000 was cash money, Tanzania shillings 148,800 was transferred from her (PW1) mobile phone to his (appellant) mobile phone on the fateful day. The said amount of money (Tanzania shillings 148,800) transferred from PW1 mobile phone was also stated in the charge sheet and facts tendered read during preliminary hearing. Therefore, there was a need of bringing forensic evidence from the respective telecom companies to prove this fact and implicate the appellant in the charged offence. This was not done thereby creating gaps on the prosecution case in proving the charges.

In criminal case the burden to prosecution is duty bound to prove its case beyond reasonable doubts. Having considered the evidence on record, I am of the considered views that evidence in the case at hand was not sufficient to prove the charge armed robbery filed against the appellant. I therefore find no reasons of considering other grounds of appeal. For the

foregoing reasons, I hold that the appellant conviction was not proper. I accordingly allow the **a**ppeal, quash the conviction and set aside the sentence. The appellant be released from prison unless he is otherwise lawful held. It is so ordered.

Dated at **Dar es Salaam** this **20th** day of **December, 2019**.

E. S. Kisanya
JUDGE