IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

AT TABORA

DC. CRIMINAL APPEAL NO. 10 OF 2020

(Originating from Nzega District Court in Criminal Case No.310 of 2017)

BALAI S/O JOSEPH .....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date 21/06/2021- 6/8/2021

BAHATI, J.:

Before Nzega District Court, the appellant **BALAI S/O JOSEPH** was arraigned, tried, and found guilty of the offence of Armed Robbery c/s 287A of the Penal Code, Cap. 16 [R. E. 2019] and Grievous Bodily Harm c/s 225 of the Penal Code, Cap. 16 [R. E. 2019].

As the appellant pleaded not guilty to all counts, the prosecution paraded witnesses. After the full trial, the appellant was found guilty and convicted of all counts of offence and sentenced to serve a custodial sentence of thirty (30) years and one (1) year respectively.

The appellant now seeks to impugn the decision of the District Court upon a petition of appeal comprised of six grounds as follows;

1. *The ingredients of the offence of armed robbery under section 287A of the Penal Code, Cap 16 [R.E. 2002] were not cogently established by both PW1 and PW2 in that:-*
    a. *The particulars of the offence in the third count as regards the type of weapon employed in the commissioning of the offence namely "club and bush knife" Are at variance with the testimonies of both PW1 and PW2 who are silent on the kind of weapon used.*
    b. *The nature of injuries inflicted to both PW1 and PW2 are suggestive of a sharp object being used per the PF3s which were even admitted into evidence in violation of Section 240 (3) of the Criminal Procedure Act, Cap 20 [R.E. 2002], also not read in court allowed in the hearing of the appellant after they were cleared for admission.*
2. *That, the presiding magistrate erred in law for holding that the appellant was positively identified at the scene of the crime by PW2 because of the following.*
    a. *That PW2 was not descriptive on the intensity of the flashlight shorn on the appellant and for how long.*

b. *That PW2 did not explain how she was able to shine a flashlight on the appellant amid a confrontation between herself and a group of robbers while being outnumbered.*

3. *That the presiding magistrate did not address her mind to the material discrepancy between PW2 and PW4 on how PW2 obtained the flashing which she used to shine it on the appellant. While PW2 testified that she grabbed it from one of the robbers and pointed it toward the appellant, PW4 testified to the effect that the flashlight fell off from one of the robbers in the process of which PW2 identified the appellant.*
4. *That, PW2 in her testimony was not descriptive on where the flashlight was on, because there is a difference between directing it toward the appellant and shining it on the appellant.*
5. *That PW1 did not testify to the effect that he saw his wife (PW2) grab a flashlight from one of the robbers and pointed it toward the appellant and no account in his testimony is forthcoming on whether his wife (PW2) told him that she identified the appellant nor heard her tell responders of alarm (PW3, PW4, and PW5 inclusive) that she identified the appellant.*
6. *That, PW3 did not testify anything to the effect that he informed PW4, through the phone, of the invasion at PW2's house as aptly put by PW4 himself.*

At this juncture, I find it pertinent to highlight the facts leading to the arraignment of the appellant. On 15/2/2019 during the night hours at Mwashina Mbogwe within Nzega, the accused broke the house of one Esther Kisiza and stole therein cash amounting to TZS. 40,000/=, two bicycles, two plastic chairs, one pair of leather shoes, a mobile phone valued at TZS 50,000/=, shop commodities valued at TZS 120,000/=, and after such stealing assaulted Ester Kisiza with the bush knife and a club to obtain stolen properties.

The accused denied all the allegations and the prosecution side had to call a total of six witnesses to prove the allegation and at the conclusion, he was found guilty.

When the matter was called on for hearing, the appellant appeared in person. On the other hand, the respondent was represented by Mr.Rwegira Deusdedit, learned State Attorney.

Submitting first the appellant averred that he is dissatisfied by the decision of the lower court and urged this court to adopt his grounds of appeal to form part of his submissions.

Responding, Mr. Rwegira Deusdedit objected to the appeal. He submitted that the appellant was well identified at the scene of the crime. He submitted that PW2, Esther Kisiza identified the accused person as the cause of confrontation with the aid of a torch and the

accused was his neighbour who used to buy cigarettes at her shop. He further submitted that PW2 evidence was credible because he mentioned him to PW3, Matala Kisinga, and PW4, Mwika Kisinza, the hamlet chairman.

He submitted that the victim mentioned him at first. Hence the identification has no doubt. To fortify his submission he cited the case **of Marwa Wangiti and another [2007] TLR 39** where the court observed that;

> *"The ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of his reliability."*

Since the complainant mentioned him at the earliest possible opportunity, it was his view that it was evident and true.

On the second ground, he submitted that when the appellant was arrested he demonstrated the guilty conscience, PW3, and PW4 who went to arrest the accused; he refused to go out after the alarm was raised *"Ng'wano"* until the police arrived.

Hence the act of refusing to go to where the "Ng'wano" was he knew what he did. He submitted that the accused person was well identified in this case.

On the strength of his submissions, the learned State Attorney insisted that the case was proved to the required standard and beckoned upon to uphold the conviction.

In his rejoinder, the appellant had no much to say he reiterated his submission in chief to this court to adopt the grounds of appeal to form part of his submissions.

After a careful review of the record and the submissions made by parties, the main issue for consideration and determination in this appeal is whether or not the appeal has merit. I will deal with all grounds collectively since they are interrelated. The appeal is solely based on visual identification of the appellant.

Section 287A of the Penal Code defines, armed robbery to mean;

> *"Any person who steals anything and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument or is in the company of one or more person and at or immediately before or immediately after the stealing threatens to use violence to any person."*

Beginning with the first ground of appeal that the *ingredients of the offence of Armed Robbery under section 287A of the Penal Code, Cap 16 [R.E. 2019] were not cogently established by both PW1 and PW2 in that:-*

a. *The particulars of the offence in the third count as regards the type of weapon employed in the commissioning of the offence namely "**club and bush knife.**" Is at variance with the testimonies of both PW1 and PW2 who are silent on the kind of weapon used.*

The court having keenly perused through the court records found that PW1, Mayunga Malingila stated that the robbers were armed with a machete, club, and a stone. PW2, Esther Kisinza also stated that other robbers had sticks, machetes, and clubs. According to the evidence by PW1, Mayunga Malingila testified that they were invaded by a group of four bandits who went to rob them and PW2. Esther Kisinza testified that she managed to grab the flashlight and directed it to them. The group of bandits comprised four people.

In this case, it was only the appellant who was arrested and duly charged for the offence of robbery with violence while the rest of the bandits vanished and could not be traced for their arrest and trial. Hence in my view variance with the testimonies of both PW1 and PW2 did not affect justice since the victim was attacked by many people armed differently. The court in **Luzaro Sichone Vs. Republic Criminal Appeal No. 213 of 2013 (Unreported)** held that,

"We shall remain alive to the fact that not every discrepancy or inconsistency in witnesses' evidence is fatal to the case. Minor discrepancies on details due to lapse of memory on account of passages of time should always be disregarded. It is only fundamental discrepancies going to discredit the witness which counts as contradictions."

Therefore I find no merit on this ground.

Again in respect of admission of PF3 as exhibits needs to be read over to appraise the accused on its contents. It is a trite law that it must be read in court after being admitted.

This court went and examined the record of the trial court and noted that it was not read over to the accused person. Hence being admitted in court is fatal and the same ought to be expunged from the court record. Applying the principle laid in the case of **Robinson Mwanjisi and three others versus Republic [2003] TLR 218**

I am of the view that for failure to read the contents of the PF3 (exhibit Pl) the only remedy is to expunge them from the record. Therefore the PF3 which was admitted as exhibit P1 is hereby expunged from the record of the trial court.

On the second ground of appeal that *the presiding magistrate erred in law for holding that the appellant was positively identified at the scene of the crime by PW2 because;*

a. *PW2 was not descriptive on the intensity of the flashlight shorn on the appellant and for how long.*
b. *PW2 did not explain how she was able to shine a flashlight on the appellant during a confrontation between herself and a group of robbers while being outnumbered.*

I am aware of the cardinal principle laid down in the case of **Erstwhile Court of Appeal of East Africa in Abdallah Bin Wendo and Another V Rex (1953) E.A.C.A 116** and followed by this Court in the celebrated case of **Waziri Amani V Republic [1980] TLR 250** regarding the evidence of visual identification. The principle laid down in these cases is that in a case involving evidence of visual identification, no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is watertight.

To eliminate the possibility of mistaken identity, courts of law have developed a list of factors or guidelines to be considered when examining such evidence. In **Mathew Stephen @ Lawrence V Republic, Criminal Appeal No. 16 of 2007, the Court of Appeal of Tanzania** listed

the following factors for consideration in identification cases: *First;* the period under which the accused persons were under observation by these witnesses. *Second;* the distance separating the two during the said observation. *Third*; as the incident occurred during the night, whether there was sufficient light. *Fourth;* whether the identifying witnesses have seen the accused before and if so, when and how often. *Fifth;* in the course of examining the accused, whether the witnesses faced any obstruction which might interrupt their concentration, and *Sixth;* the ability of the witnesses to name a suspect at the earliest possible opportunity.

According to the court records, it was revealed that when the appellant was arrested he demonstrated the guilty conscience, PW3 and PW4 who went to arrest the accused; he refused to go out for the alarm raised *"Ng'wano"* until the police arrived. Hence the act of refusing to go to where the "Ngwano" was he knew what he did. He submitted that the accused person was well identified in this case.

Upon perusal of the court records, the court also noted that PW3, Matala Kisinga explained to the court that the accused person refused to go out after he was informed by her wife that people were looking for him. This also creates doubts as to if he knew what was behind the curtains.

Having stated the position of the law and factors to be considered in cases of identification, the records of the trial court noted that PW2's testimony properly recognized the accused person. But before I do so, I find it prudent, for ease of reference, to reproduce some extracts from the testimony on how she encountered the criminals:

> *"I managed to grab the flashlight and I directed it to them. I was able to see the robbers and I was able to identify Balai Joseph. He was the one who had the flashlight first. Other robbers had sticks and a machete. Both men had black sweaters with long sleeves. But during the confrontation, the sweater of Balai that covered him fell off. I know Balai he lives at the neighbor village and he is my customer who buys cigarette. I have known Balai since I was growing when he was almost 17 years. It was four days passed since I had seen him when he came to buy cigarette... the struggle between me and Balai took almost 4 minutes, the whole lasted about half an hour."*

Therefore I am of the considered view that this ground has no merit since the appellant was well identified by the victim and also mentioned the appellant at the earliest possible opportunity.

Moreover, the ability of a witness to name a suspect at the earliest opportunity is all but important assurance of his reliability. Failure to

name a suspect for a long time may as well shake the credibility of a witness. This was stated in the case of ***Marwa Wangiti Mwita and Another Vs Republic, Criminal Appeal No. 6 of 1995 CAT (unreported*)**.

In respect of the third, fourth, fifth and sixth grounds of appeal which centers on identification, the court believed that the appellant was properly identified despite some variance in the evidence of PW1 and PW4 in **Mwaimu Dismas And 2 Others V Republic, CriminalAppeal No. 343 of 2009 (Unreported**), the Court of Appeal while referring to a number of its earlier decisions observed that:

> *"It is trite law that robbery as an offence cannot be committed without the use of actual violence or threat to the person targeted to be robbed. So, the particulars of the offence of robbery must not only contain the violence or threat but also the person on whom the actual violence or threat was directed...."*

Therefore according to the principles laid down by the court in my view, the appellant was well identified by the victim since he admitted to having known the Esther's Shop and he never called any witness stating that he has lost contact with them. He could not prove to the court.

For the above reasons, I am satisfied in this case that the appellant was proved beyond reasonable doubt. Consequently, I find that the appeal lacks merit. It is accordingly dismissed in its entirety.

Order accordingly.

A. A. BAHATI

JUDGE

27/8/2021

Judgment delivered under my hand and seal of the court in Chamber, this 27th day August, 2021 in the presence of both parties.

A. A. BAHATI

JUDGE

27/8/2021

Right of appeal fully explained.

A. A. BAHATI

JUDGE

27/8/2021