IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 78 OF 2021
(Original Criminal Case No. 371 of 2019, District Court of Kinondoni at Kinondoni)

SALUM AMIRI SUIE.....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGMENT

22/9/2021 & 27/10/2021

MASABO, J.:-

On 26/3/2020, the District Court of Kinondoni found the appellant liable of armed robbery contrary to section 287A of the Penal Code [Cap 16 RE 2019] and sentenced him to a prison term of 30 years. Aggrieved, he has come to this court challenging both, the judgment and the sentence inflicted on him. His four grounds in support of the appeal are summarised as follows: the trial court erred in holding that the case against him was proved beyond reasonable doubt; the magistrate used the weakness of his defence to convict him and in doing so it erred in law; there was no proof of the machete allegedly used by him in the robbery, thus the case against him was weak; and lastly, he was wrongly convicted for robbery of a television phone and mobile phones as none of the prosecution witnesses rendered any evidence as to ownership of these items.

When the appeal was called on for hearing, the appellant represented by Mr. Abdul Azizi, Advocate argued that the case against the appellant was not

proved because the machete which he allegedly used in committing robbery was not produced in court. He also argued that there was no independent witness as the prosecution witness was the victim and her sister and police officers. In his view, there ought to have been a neutral/independent witness who would have established the prosecution's case. In fortifying his point, he submitted that, considering that PW1 stated that he raised an alarm and neighbours came to his help, it would have been prudent for the prosecution to summon as witness, the neighbours who went to the scene or the militia who escorted him to the police station. He concluded that, the neighbours and the militia were material witnesses and failure to summon them weakened the prosecution's case.

Regarding the issue of ownership, he argued that none of the prosecution witnesses rendered proof of ownership of the robbed assets. All what the prosecution contains is casual averments by PW1 and PW2 who averred that they owned the items but produced no receipt or other evidence as to ownership.

Mr. Aziz contended further that, the prosecution evidence had disparities and contradictions especially the evidence of PW3 who told the court he arrested the appellant at 9am on 19/8/2019 but at the same time he stated that at the material time, he was at his workplace. He also argued that as per the court record the incident happened at 4am on 19/8/2019. It was further argued that, the testimony of PW1 and PW3 were contradictory. Whereas PW1 told the court that after the incident they went to the appellant's home

but they did not find, PW3 testified that on the same date at 9am, they went there and found the appellant. In the counsel's view it is incomprehensible that after commission of the offence the appellant went back to his house. Thus, in totality the prosecution's case was week.

For the Respondent, Ms. Jacqueline Werema, the learned State Attorney contested the appeal. She submitted that, for the offence of robbery to be proved it must be established that there was theft and that there was use of violence. This requirement was satisfied as the prosecution witnesses and especially PW2, eloquently narrated what transpired on the material date. It was argued that, through the evidence of this witness it was established that, there was theft and that the appellant had a machete which he used to threated PW1. Ms. Werema argued further that, although the evidence of the prosecution is based of virtual identification, it was watertight against the accused as the victim named the appellant at the earliest opportunity; the appellant was familiar to PW2 as they know each other and the ownership of the item was proved through PW1's disposition before the court. She argued that the fact that the machete was not produced in court is irrelevant as the appellant was not arrested at the scene. Lastly, she argued that, the fact that there was no independent witness is misplaced as the law does not prescribe the total number of witnesses per case and there is nothing prohibiting relatives from standing as witness for a case involving their relatives. In rejoinder the applicant reiterated his earlier submission. This marked the end of submissions.

This court has given a due consideration to these submissions and the original record placed before it. This being a first appeal, the main task before the court is to re-evaluate the evidence on record and form an opinion on whether the prosecution's case was proved to the required standard. It is cardinal principle of that in criminal trials the burden of proof rests on the prosecution and the standard of proof is beyond reasonable doubt. The burden never shifts. All what the accussed has to do is to raise a reasonable doubt (**Julius Matama @Babu Mzee Mzima** v R Criminal Appeal No. 137 of 2015 CAT (unreported) and **Said Mohamed Mtula v Republic** [1995] T.L.R 3. Thus, in this case, the prosecution had to lead evidence and establish beyond reasonable doubt that the offence of armed robbery was committed and that the person who committed the armed robbery is none other than the appellant.

Starting with the first aspect as to whether the offence was proved, Section 287A which established the offence of armed robbery stated that:

> 287A. A person who steals anything, and at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or immediately before or after stealing uses or threatens to use violence to any person in order to obtain or retain the stolen property, commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment

The term 'dangerous or offensive weapon or instrument' have been broadly interpreted to include such things as machetes, knives etc. (See **Iddi Salum Vs R**, Criminal Appeal No. 29 of 2009, CAT and **Simon Kanoni @ Semen v R**, Criminal Appeal No. 145 of 2015, CAT (unreported). Thus, if after re-evaluation of the evidence it is established that there was theft and that the appellant threatened PW1 with machete, the conviction shall be upheld.

The record reveal that, out of the 4 prosecution's witness, only one was an eye witness to the incident. Evidence of the remaining witnesses was merely hearsay as none of them was at the scene. Their dispositions and assertions were solely based on what they heard from the victim, Said Rashid, who testified in court as PW2. The record reveal further that, as observed by the trial court, the evidence of this witness is overwhelmingly based on visual identification. In brief, PW2's narration before the court was that the incident happened on 19/6/2019. On that day, he was sleeping in PW2's (the scene of crime). At around 10am he went to respond to a call of nature and on his return, he found the accussed stealing PW1's television and mobile phones. The appellant was armed with a machete which he used to threaten PW1. Fearful of his life, he kept quite while the appellant executed his mission undisturbed to completion after which he left and disappeared. After the appellant's departure, PW2 raised an alarm which was respondent by her maternal uncle with whom they tried to follow up Salum with no avail. Asked how he identified the appellant, PW2 answered that, there was a bulb light in the room, the distance between them was short, just two paces apart and that the appellant was familiar as they knew each other.

Before I proceed further, I have noted some errors in the typed proceedings. Whereas the charge sheet and the written proceedings show that the incident happened on 19/6/2019; the typed proceedings show that it was on 19/8/2019. The second problem is on the time of the incident. When read in totality the proceedings show that the incident happened in the night, the time appearing in the handwritten proceedings is 10am thus suggesting that it happened around mid-morning. None of the parties complained about these and it appeared to me that, they had a common understanding that the incident happened on 19/6/2019 at 4 am.

Going to the merit of the appeal, I will outright reject the suggestion by the appellant's counsel that evidence rendered by the prosecution should be disregarded simply becausePW1 and PW2 are relatives and that the other witnesses are police officers thus there was no independent witness. This reasoning seriously departs from the rule under section 127(1) of the Evidence Act, Cap 6 RE 2019 as to the competence of witness and section 143 of the same Act, which categorically states that, *no particular number of witnesses shall in any case be required for the proof of any fact*. As per section 127(1) a witness's competency or credence is not any how affected by his relationship to the victim. All what matters is the credibility of his/her testimony. The prosecution's case will therefore not flop by a mere reason that the witnesses were biologically related to the victim. Similarly, it would not flop simply because only one witness testified in court as what matters in law is not the numbers but the quality of the evidence rendered.

Since as alluded to earlier on, the crucial evidence on record was visual identification by PW2, I will now direct my mind to this evidence if it sufficed to warrant a conviction. The trial court had an opportunity to revisit the principles governing evidence of this nature as articulated in landmark case of the **Waziri Amani v R** [1980] TLR 252 and in the case of **Raymond Francis v R** [1994] TLR 100 and **Mwalimu Ally & Another v R** Criminal Appeal No. 39 of 1991, CAT (unreported). I need not reproduce them, suffice it to just state that, the trial court correctly addressed itself to the law on visual identification. As stated in these cases and in a plethora of other cases, evidence of visual identification is the weakest evidence and should be cautiously acted upon as is prone to mistakes and fabrication. The Court of Appeal has stated these principles in countless times that, as identification cases can bring about miscarriage of justice, whenever the evidence implicating the accussed is wholly or substantially dependent on the correctness of the identifications of the accused, courts should warn themselves of the special need for caution before convicting the accused. A conviction should only be entered if the evidence on record is absolutely watertight.

Looking at the record, I find the evidence not be absolutely watertight. Much as PW2 tried to aver how he identified the appellant, his evidence does not pass the test. Although he told the court that he wasknown to the appellant as they live in one village and that the room had *a bulb*, his story leaves some questions and is somehow contradictory. Oneof such contradiction is that, in the course of examination in chief, he told the court that after he

had screamed to raise an alarm, only his maternal uncle responded but in cross examination he stated 'people gathered'. Although this does not go to the root of the case, I have noted with concern that, neither the maternal uncle nor the other people who gathered, were called as witness. Needless to say that, much as the law does not set the minimum number of witnesses, under the circumstances of this case, it was crucial for the prosecution to call the maternal uncle or any other person who came to the scene in response to the alarm raised by PW2. I entirely agree with the appellant's counsel that these were crucial witnesses in corroborating PW2's account that the incident did happen on the material date and time. Failure to summon these as witnesses weakened the prosecution's case.

With this finding, I see no need to proceed to the remaining ground as this ground sufficiently resolves the appeal. Accordingly, the appeal is allowed. The conviction and sentence of the trial court are quashed and set aside. The appellant shall forthwith be discharged unless he is held for another lawful purposes.

DATED at DAR ES SALAAM this 27th day of October 2021.

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE