IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 119 OF 2021

(Originating from the Court of Resident Magistrate of Songwe, at Vwawa, in Criminal Case No. 65 of 2020)

MUSA SAID KAPUSHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 25.03.2022

Date of Judgment: 13.05.2022

Ebrahim, J.

In the Court of Resident Magistrate of Songwe, at Vwawa the appellant MUSA SAID KAPUSHI was charged and convicted for the offence of armed robbery contrary to **section 287A of the Penal Code, Cap. 16 R.E 2019** (the Penal Code). He was sentenced to a statutory sentence of thirty years imprisonment. He was aggrieved, hence this appeal.

The accusation by the prosecution against the appellant as reflected in the particulars of the offence was that; on 22nd

January, 2020 at Ichenjezya area within Mbozi District in Songwe Region, the appellant unlawfully did steal one NMB POS machine valued at Tsh. 500,000/=, 1 mobile phone make TECNO valued at Tshs. 30,000/=, 1 mobile phone make Itel valued at Tsh. 30,000/=, 1 mobile phone make Nokia valued at tsh. 50,000/= and cash money Tshs. 595,000 all items making a total of Tshs. 1,205,000/= the properties of one Venelanda D/O Basil Tarimo. That immediately before stealing did wound her on the neck by using a machete in order to obtain the said properties. The appellant pleaded not guilty to the charge. The case thus, went to a full trial. The prosecution lined up a total of four witnesses and two exhibits i.e cautioned statement and PF3 (exhibit P.1 and P.2 respectively).

The prosecution evidence led to the conviction of the appellant was that of the complainant/victim who testified as PW1. She testified that she is a business woman dealing with money transactions such as M-pesa, Tigo pesa and NMB agent. The business is carried on at Vwawa near Songwe Region Immigration office. That on the material date at 2000 hrs when she was returning home from her business, she reached at her house, opened the gate but, before she entered inside one person

alleged to be the appellant approached her claiming that he was searching for a lost child. Then other two persons appeared and one of them attacked her and grabbed the luggage containing all of the items mentioned above. She raised an alarm for help where one neighbour appeared and took her to police and to the hospital.

Further evidence is that, the victim identified the appellant with the light of the bulb of 8 watts which was illuminating at the gate. The intensity of the light was that could let a person ready any writing. She also testified that she recognised the appellant since she had firstly saw him during day hours when he went to her shop to buy a voucher.

The appellant made his own defence. He neither called a witness nor tender exhibit. He denied to have committed the offence. His defence was on the account that the case was planted on him due to the quarrel between him and police officers whom he met when he was drinking beer in a bar known as 'Kwa SANYA'. Having considered the evidence of both sides the trial court found the appellant guilty, convicted and sentenced him as hinted before.

Aggrieved by the conviction and sentence, the appellant preferred this appeal. His petition contained a total of seven grounds of appeal. The grounds of appeal can be paraphrased as follows;

1. That the trial court erred in law when it convicted and sentenced the appellant without resolving the issue of visual identification of the appellant.
2. That the trial court erred in law when convicted and sentenced the appellant without taking into account that PW1 failed to give first description of the bandit as soon as she reported the incident to the police station.
3. That the trial court erred in law when it convicted and sentenced the appellant relying in dock identification.
4. That the trial court erred in law when it convicted the appellant basing on the cautioned statement which was recorded in contravention of the law.
5. That the trial court erred when it convicted the appellant relying on the doubtful cautioned statement.

6. That the trial court erred in convicting the appellant without considering that he was neither caught at the crime scene nor found with the alleged stolen properties.
7. That the trial court erred when it convicted the appellant without considering the defence evidence and the charge was not proved to the required standard.

Basing on these grounds of appeal the appellant prayed for this court to allow the appeal, quash the conviction and set aside the sentence and release him from prison.

When the appeal was called on for hearing, the appellant appeared in person, unrepresented, while Ms. Sarah Anesius learned State Attorney appeared for the respondent/Republic. The appellant had nothing to argue, he only prayed for the court to consider his grounds of appeal in their totality.

On her part, Ms. Anesius opposed the appeal. She supported the conviction and sentence passed by the trial court. I will however, not reproduce the replying submission made by the learned State Attorney, I will be referring to them in the cause of determining the merits of the appeal.

For convenience purpose, I will firstly determine ground 4 and 5 of the appeal. The appellant complained that the trial Court convicted him relying on the cautioned statement which was recorded against the law. Ms. Anesius conceded to that complaint on the ground that the trial Court did not conduct an inquiry when the appellant objected the same on an account that it was not freely recorded. Ms. Anesius thus, suggested that the cautioned statement be expunged from the record.

Upon perusing the proceedings of the trial court, I concur with both, the appellant and Ms. Anesius that the cautioned statement did not follow proper procedure. This is because, when prosecution through PW3 prayed to tender the cautioned statement of the appellant, the appellant objected the same on the ground that he was tortured and he was denied of his right like calling his relatives. However, the trial court did not bother to conduct an inquiry as per the requirement of the law. In the case of **Shani Kapinga vs Republic,** Criminal Appeal No. 337 of 2007 CAT at Iringa (unreported), it was observed that when the accused retracts or repudiates his cautioned statement it is the

trial court's role to inquire into it and establish the voluntariness and truthfulness of the cautioned statement.

In the case under consideration, from the allegation raised by the appellant in objecting the admission of the cautioned statement, the trial court was supposed to conduct an inquiry to verify the voluntariness and truthfulness; whether or not cautioned statement was freely made. Short of that, I hereby expunge from the record the cautioned statement of the appellant admitted in the trial Court.

Now, the rest of the grounds of appeal can be smoothly determined by a single issue of whether the prosecution proved the case beyond reasonable doubt. In answering this issue, considering that this is the first appellate court, I am obliged without fail to subject the entire evidence into objective scrutiny while bearing in mind that the trial court had an opportunity to observe the demeanour of the witnesses; see **Charles Mato Isangala and 2 Others V The Republic, Page 5 of 17 Criminal Appeal No. 308 of 2013.**

In the analysis of evidence, it should be remembered that the trial court convicted the appellant by relying on the evidence

of PW1 and a cautioned statement. The latter has been expunged from the record. The scope of analysis now, has been narrowed.

The consideration will thus, be confined on whether in the absence of the cautioned statement the prosecution remained with cogent evidence which would lead to the conviction of the appellant. As I have hinted earlier, the appellant's conviction based on the testimony of PW1. Nonetheless, her testimony was purely on visual identification. The appellant is challenging the fact that he was identified in the dock. That he was not identified at the crime scene since the victim (PW1) did not describe him as the assailant as soon as she reported the incidence to the police station.

On her part, Ms. Anesius argued that PW1 did not only identify the appellant but she also recognized him. Ms. Anesius contended that PW1 knew the appellant as her customer before the incident day. She further contended that the appellant and PW1 had conversation on the fateful date, and there was enough light hence PW1 was able to identify him. Therefore, there was no need of describing him.

It is trite law that visual identification is of the weakest kind of evidence and thus, before it is taken as a basis of conviction, it must be watertight. The CAT in the case of **Waziri Amani v. Republic [1980] TLR 250** held that:

> *"(i) Evidence of visual identification is of the weakest kind and most unreliable;*
> *(ii) No court should act on evidence of visual identification unless all possibilities of mistake identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."*

Equally, in a number of decisions like in the cases of **Raymond Francis v. Republic** [1994] TLR 100; **Emmanuel Luka and Others v. Republic,** Criminal Appeal No. 325 of 2010 **Ramadhani Vincent v. Republic**, Criminal Appeal No. 240 of 2009 **Emmanuel Mdendemi v. Republic**, Criminal Appeal No. 16 of 2007 (all unreported), the Court of Appeal of Tanzania laid down some guidelines to be considered so as to establish whether the evidence of identification is water light. They include the time the witness had the appellant under observation, the distance at which he made the observation, the time the offence was committed and in the event it was night time, if the lighting was

sufficient for a positive identification and lastly, whether the witness knew or had seen the accused before the incident or not. The same guidelines apply in cases of recognition.

In the instant case, the evidence of PW1 was that she met with the appellant at the entrance gate of her home when the two talked to each other. That the appellant asked her about a lost child whom he alleged to have been searching. PW1 also said that there was enough light which illuminated from the bulb of 8 watts. That she was able to remember him since he went to her shop during day time to buy airtime voucher. She described the intensity of light as enough as it could enable a person read. However, when PW1 was examined on the attire of the assailant, she replied that she could not ably identify it since the act/incidence just took a shorter time as hardly as five minutes.

Having gone through the entire evidence, I also noted a piece of evidence adduced by PW2. He said that at the crime scene there was light illuminating from the township. He did not talk about a bulb said by PW1.

Still, there is no evidence on record if PW1 described the appellant when she reported the incidence to the police station.

It is the principle of law that early naming of a suspect is an assurance that the witness reliably identified him. See the case of **Marwa Wangiti Mwita and Another v. Republic, Criminal Appeal No. 6 of 1995** (unreported) where the CAT held that:

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

Moreover, the evidence shows that the incidence occurred on 22/01/2020 and the appellant was arrested on 13/04/2020. There is no explanation in the evidence to justify if PW1 identified the appellant why it took about three months to arrest him. Also, it is not in evidence that the arrest of the appellant was the result of PW1's description. The prosecution did not lead any evidence about the description and the arrest of the appellant. I am alive to the position of the law that, it is the prosecution who have the discretion to choose and call witnesses and that it has no obligation to call each and every witness; see **Yohanis Msigwa vs Republic [1990] TLR 148** and **section 143 of the Evidence Act, Cap. 6 R.E. 2019.** Equally the same, an adverse inference may be made where the persons omitted to call as witness are within

reach, and not called without sufficient reason being shown by the prosecution. See **Aziz Abdallah vs Republic [1991] TLR 71.**

In the present case, no reason let alone a sufficient one was given for not calling the investigator. In my view an investigator was important witness to explain if PW1 mentioned/described the appellant as one of the assailants; and if the description led to his arrest.

In the case of **Yohana Chibwingu vs republic,** Criminal Appeal No. 117 of 2015 CAT at Dodoma (unreported) the court quoted with approval the case of **R. vs Mohamed B. Allui** (1942) 9 EACA where it was observed that:

> *"that in every case in which there is a question as to the identity of the accused, the fact of there having been given a description and the terms of the description are matters of the highest important of which ought always to be given first of all, of course by the person who gave description, or purports to identify the accused and then by person whom the description was given."*

Since in the present case identification is in issue, the above cited rule applies. Failure by the prosecution to lead evidence

showing that PW1 described the appellant; and failure to call any witness to show that the appellant was arrested because he was identified; I find that the case against the appellant was not proved beyond reasonable doubt.

Consequently, I allow the appeal, quash the conviction, and set aside the sentence. I also order the immediate release of the appellant from the prison unless otherwise is held for other lawful cause.

Ordered according.

R.A. Ebrahim

JUDGE.

Mbeya

13.05.2022

Date: 13.05.2022.

Coram: Hon. P.A. Scout, Ag -DR.

Appellant: Present.

For the Republic: Ms. Hanarose – State Attorney.

B/C: Gaudensia.

Ms. Hanarose – State Attorney:

Your honour, the case is coming on for judgment. We are ready to proceed.

Appellant: I am ready too.

Court: Judgement is delivered in the presence of the Ms. Hanarose State Attorney, Appellant and C/C in Chamber Court on 13/05/2022.

Sgd: A.P. Scout

Ag-Deputy Registrar

13/05/2022

Court: Right of Appeal explained.

A.P. Scout

Ag-Deputy Registrar

13/05/2022

DEPUTY REGISTRAR
HIGH COURT OF TANZANIA
MBEYA