IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 3 OF 2022

(Originating from Kilwa District Court at Masoko in Criminal Case No.48 of 2021 before Hon. I. M. Sotter, SRM)

RAMADHANI HAMISI MKWEMBYA@ KIGI..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order:4/4/2022
Date of Judgment: 8/6/2022

LALTAIKA, J:

The appellant, **RAMADHANI HAMISI MKWEMBYA @ KIGI** was arraigned to the District Court of Kilwa at Masoko where he was prosecuted on allegation of armed robbery contrary to section 287A of the Penal Code, [Cap. 16 R.E. 2019]. According to the trial court records, five prosecution witnesses, namely, Binasi Alid Moradi (PW1), Ramadhani Yasini Hussein (PW2), Alfred Michael (PW3), Amin Jaffar Ibrahim (PW4) and G 3232 CPL Adslaus Kilaka Masaba (PW5).

It was alleged that the appellant was arrested for stealing cash money Tshs1,015,000/=, one cell phone *make*: TECNO F1 valued at Tshs. 180,000/= the properties of Binas Halid Moladi with the total value of Tshs.1,195,000/= but immediately before or after such stealing the appellant did grievous harm by using a knife to the victim in order to retain

the properties he stole. The prosecution also strengthened its case by tendering at the trial only one (1) exhibit, a PF3 of the victim which was admitted as evidence.

In his defence, the appellant vehemently distanced himself from the allegation and contended that on 12.12.2020 he was at Nanjate village in Ruangwa where he was involved in mining activities. He maintained that on 8/4/2021 he returned to Somanga to attend his sick mother. On 18/4/2021 he was arrested at the grocery situated at Somanga while waiting to be served with dinner. Police from Somanga arrested and searched the appellant and allegedly, found him with Tshs.2000/= and one cell phone make TECNO. The appellant also denied to have known the victim and involved in the incident of stealing and causing grievous harm on the same victim. The appellant testified further that on the first arraignment in court whereby was charged with the offence of causing grievous harm, the prosecution entered a nolle prosequi and thus, was acquitted. However, he was rearrested and charged with the offence of armed robbery which he denied to have been involved.

The trial Magistrate evaluated and considered the evidence for both sides and in the end, he found the appellant guilty of the offence he was charged with. Consequently, he convicted and sentenced him to serve imprisonment for a term of thirty (30) years. Aggrieved, the appellant has appealed to this court to contest both the conviction and ssentence. To express his dissatisfaction with the trial court's findings and sentence, he lodged a substantive petition of appeal comprised of five grounds of appeal followed by three Supplementary grounds which were brought into my attention during hearing orally. For ease of reference, the grounds of appeal are reproduced as hereunder:

1. *That the trial court erred in law and fact to convict and sentence the appellant basing on the evidence of prosecution side which had a lot of reasonable doubts while the appellant pleaded not guilty to the offence charged.*
2. *That the trial magistrate erred in law and fact to convict and sentence the appellant without directing its minds that the prosecution side had failed to prove their case beyond reasonable doubts.*
3. *That the trial magistrate erred in law and fact to convict and sentence the appellant basing on the standard of proof on probability which is used in civil cases instead of basing on the proof of the case beyond reasonable doubts which is used in criminal cases.*
4. *That the trial court erred in law and fact to convict and sentence the appellant for failure to give a maximum consideration to the evidence of PW2 in conviction as the evidence itself had full of reasonable doubts since what was presented before the trial court was a mere assertion. It does not come into mind of a reasonable court to accept that PW2 at the material time and place of alleged event did scream to the point of recognizance of the appellant by using an electric light only with unknown voltage which are not enough because they requirement is the spotlight about 1/500 volts by the law of our land.*
5. *That the trial court erred in law and fact to convict and sentencing the appellant without being satisfied on the identity of the appellant. This is due to the fact that the alleged offence was committed during the night time hence it is a trite law that when*

the offence is committed at night there must be a proper identification on the identity who committed the offence.

During hearing the appellant appeared in person and unrepresented whereas the respondent Republic was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney. Hearing commenced by submission by the appellant. The appellant submitted that on 21/4/2021 he was arraigned in the trial court and was charged with causing grievous bodily harm against Binasi Saidi Moladi. However, the appellant asserted, the republic entered a *nolle prosequi* and he was immediately acquitted. The appellant went further and argued that after his acquittal, he was rearrested and charged with armed robbery.

It is the Appellant's submission that the prosecution had brought two witnesses namely the victim and his friend. The appellant asserted that it was based on the evidence adduced from the two witnesses that he was convicted and sentenced to thirty years imprisonment, the conviction and sentence which he objects. He stressed that the main reasons for his disagreement had been advanced through his petition of appeal which he prayed that they are adopted and made a part of his submission.

The appellant submitted that the trial magistrate did not allow him to ask questions. He insisted that he had expressed not to have confidence with the trial Magistrate since and asked him to recuse himself from the trial. However, the Appellant stated, the trial Magistrate replied that since the appellant looked troublesome, he would not recuse himself and instead, he promised to teach him a lesson. The appellant went further and quoted what he was told by the trial Magistrate thus: "Nitaisikiliza

mimi utake usitake na nitakunyoosha ili iwe fundisho". To that end, the appellant submitted that the trial magistrate displayed signs of predetermined decision since the day he asked him to recuse himself.

Another additional ground is on the testimony of PW2 who testified that he heard noises of people saying "Kigi anaua". The appellant argued that PW2 was 40 meters away at 03:00 night hours. He stressed that 40 meters are too far for one to be able to identify a person during the night. In the light of that submission, the appellant argued that he was dissatisfied by that testimony. In addition, the appellant insisted that the trial Magistrate said it did not matter whether there was enough light or not.

Submitting on the third additional ground, whereby the appellant complained that the trial court failed to bring two defence witnesses. He went on and submitted that these were the people he was with at Ruangwa in the mines. He argued that he prayed the trial court to issue summons to his witnesses who could come to testify that he was in Ruangwa. Surprisingly, the appellant stated, the trial Magistrate closed the defence case and sentenced him to jail on the same day. The appellant insisted that it was on the day he was found with the case to answer that he was sentenced. To that end, he prayed this court to consider his additional grounds.

In response, Mr. Ndunguru argued all original grounds and the third additional ground collectively. The learned Senior State Attorney argued that the appellant was charged with armed robbery whereby the prosecution proved the main issues that is theft and use of force or arms. He stressed that the additional element linked the appellant with the offence which touches upon identification which is the central issue in this

case. Mr. Ndunguru stressed that the incident took place during night hours at 03:00 am.

To substantiate his argument, he referred this court to the evidence of PW1 who had testified that he knew the appellant which signifies that the appellant was not new to PW1 at that moment of the incident. In addition, PW2 also testified that they knew each other with the appellant. He further referred this court to page 10 and 11 of the typed proceedings of the lower court whereby PW2 had testified that he saw the appellant injuring PW1 with a knife while he was 40 meters away.

The learned Senior State Attorney submitted further that PW2 had testified that light was shining from different places and it was bright enough "inaangaza kama mchana" (light brilliantly as if it was during the day). Mr. Ndunguru submitted further that PW4 (Amini Jafari Ibrahim) and PW2 had testified that they wanted to go and save the victim but the appellant told them that they should dare not come close while holding a knife.

Mr. Ndunguru argued that when PW2 was testifying on the light the appellant did not make any cross examination as it was reflected at page 11 of the typed trial court's proceedings. He further argued that failure to cross examine signified that the appellant had totally agreed with the testimony of PW2. It is the learned Senior State Attorney's submission that the testimony of PW2 was in line with section 61 and 62(1) of the Evidence Act [Cap. 6 R.E. 2019] as it was direct evidence meaning PW2 had heard and witnessed the incident.

It is Mr. Ndunguru's submission that there was evidence that a weapon was used particularly a knife because PW1 and PW2 had seen it. Moreover, the learned Senior State Attorney argued that the testimony of

Alfred Michael, a medical doctor who attended the victim confirmed that the victim had cut wounds in different parts of the body including the face, neck and back of the stomach occasioned by a sharp object. To that end, the learned Senior State Attorney submitted that the medical report corroborated the testimony of PW1 and PW2 that the appellant had used the knife. In view of that, Mr. Ndunguru argued that the first to fifth grounds and third additional grounds were baseless and should be disregarded.

Responding on the first supplementary or additional ground in the appellant's complaint which was on the fair trial, Mr. Ndunguru argued that there was no any record in the file to the effect that there were exchange of words between the appellant and the trial Magistrate. He stressed that was an afterthought which intended to rescue the appellant from punishment. The learned Senior State Attorney opined that court could only entertain the ground if there was record to that effect. In that regard, Mr. Ndunguru prayed this court to strongly warn the appellant for his behaviour of bringing in matters not in the trial court records.

As for the second supplementary ground of appeal is on *alibi,* Mr. Ndunguru submitted that what he saw in the records was that the appellant was given a chance to call his witness but he did not want to use it as reflected at page 23 of the lower court proceedings. In that regard, the learned Senior State Attorney argued that the appellant had explained that he would testify on oath and without calling any witness. He further stated that the trial court had rejected the defence of alibi because the evidence of PW1, PW2 and PW4 were direct evidence of people who went to the incidence and saw what happened. Mr. Ndunguru concluded on these grounds by opining that the prosecution evidence was

so watertight that the trial court was justified to refuse the appellant's defence of alibi. He also argued that the trial court took consideration of identification which is reflected at page 10 of the impugn judgment. In view of that submission, learned Senior State Attorney argued that the prosecution had proved the case against the appellant beyond reasonable doubt.

In a short rejoinder, the appellant argued by objecting that PW2 was not cross examined. He stressed that he was asked if he had questions and he replied affirmatively but he had no faith in the magistrate anymore having asked him to recurse himself.

Having carefully considered the rival arguments for and against the appeal, the grounds of appeal and the trial court records placed before me, I am inclined to determine the merits or demerits of the appeal.

I have noted that the grounds of appeal have mainly covered the complaint that the case against the appellant was not proved beyond reasonable doubt. Another major complaint is on the identification of the appellant which culminated into his conviction arrived by the trial court. However, reading the petition and submission of the appellant more closely, there are other complaints raised by the appellant as follows, **one**, contradiction in the trial court proceedings due to the fact that the appellant prayed the trial magistrate to recuse himself but he refused. **Two**, failure of the trial court to assist the appellant to call his witness who could prove his presence at Ruangwa District in Lindi Region when the offence was, allegedly, committed at Somanga-Kilwa District in Lindi Region.

I will start deliberating on the two pin pointed issues. With regards to contradictions in the court proceedings especially on the prayer of the appellant for the trial magistrate to recuse himself, I have made a very close check on the trial court proceedings availed to me and came to the realization that that nowhere is it indicated that the appellant had raised asked the trial Magistrate to recuse himself from the trial. Instead, sometimes during the trial the appellant prayed not to proceed with trial because he was sick. At some other time, he requested to be supplied with copies of the charge sheet and facts of the case. This is reflected at page 5 and 6 of the typed proceedings of the trial court. In the light of that deliberation, I find the appellant's complaint is devoid of merit hence it is dismissed.

The complaint that the trial court had failed to assist the appellant to call his witness who could have proved his presence at Ruangwa District in Lindi Region while the offence was allegedly committed at Somanga-Kilwa District in Lindi Region prompted this court to go through the trial court records even more ambitiously and curiously due to the fact that such a complaint touches upon the right to be heard which I consider a lifeline of criminal trials and the bedrock of our justice system.

Upon going through the trial court proceedings, however, it turns out that at page 23, the appellant had told the trial court that it was difficult for his witnesses to come and testify in court because he had lost contact with them. To that end, the appellant elected to testify without summoning his witnesses and also told the trial court that he was ready to defend himself. The appellant did indeed defend himself and at page 26, he prayed to close his case and the same was done exactly as prayed.

I now turn to the issue of identification and recognition. As the first appellate court, I am empowered to re-evaluate the evidence presented in the trial court. To this end, I would state on the outset that the evidence on recognition came from PW1 and PW2.For instance, PW1 at page 9 of the typed proceedings testified that:

> *"It was during the night, but I was able to identify the assailant because it is the place with many lights as it is the business place. Before I passed out, I identified the accused -my assailant.* ***I knew the accused before the incident as he used to go at that place to buy food; to buy chips.*** *"*

From the above piece of evidence, I convinced that the appellant was not a stranger to the prosecution witnesses. I am aware that mistakes in recognition of close relatives or friends are sometimes made but not in this case. See: **Gimbu Masele and Another vs Republic**, Criminal Appeal No.491 of 2017 CAT-Tabora. The Court of Appeal at page 17 stated:

> *"We are aware that mistake in recognition of close relative or friends are sometimes made-see, Philimon Jumanne Agala@ J4 vs Republic, Criminal Appeal No.187 of 2015(unreported). However, we entertain no doubt that through the aid of lamp light, torch light and moon light the prosecution witnesses were able to identify the appellants who invaded their bedrooms in village houses. We think lam and torch lights are far brighter than a match. Besides, the appellants had conversation with the identifying witnesses while demanding*

to be given money, we entertain no doubt that they were close that is why the appellants managed to injure them by clubs and pangas, time spent together was sufficient as for instance...In the circumstances, as it was in ***Abdallah Rajabu Waziri's case*** *(supra) we are satisfied that the appellants were properly identified and credibility of prosecution witnesses remained intact throughout, as such, they are entitled to credence..."*

Following the above discussion, I am satisfied that the appellant was properly identified and recognized by the prosecution witnesses and in that regard, I concur with what the learned trial Magistrate found on identification and recognition.

In the upshot, I have no any justifiable reason to fault the findings of the trial court to the effect that the prosecution proved the case against the appellant beyond reasonable doubt and not on balance of probabilities as alleged by the appellant. Thus, I find no merit in this appeal. Consequently, I dismiss the appeal in its entirety and thus I do endorse the conviction and sentence of thirty (30) year imprisonment meted by the trial court.

It is so ordered.

E.I. LALTAIKA

JUDGE

8.6.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 8th day of June,2022 in the presence of Mr. Wilbroad Ndunguru, the learned Senior State Attorney and appellant who has appeared unrepresented.

E. I. LALTAIKA

JUDGE

8.6.2022