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

CRIMINAL APPEAL NO. 72 OF 2021
(Originating from Criminal Case No. 32 of 2019 before the District Court of Temeke)

SAID MOHAMED @ SIDE.. APPELLANT
VERSUS
THE REPUBLIC...RESPONDENT

JUDGMENT

Date of Last order: 8/4/2022
Date of Judgment: 13/04/2022

MASABO, J.:-

On 11th November 2020, the District Court of Temeke found the appellant Said Mohamed @ Side guilty and convicted him of the offence of robbery contrary to section 287A of the Penal Code [Cap 16 R.E 2019] and sentenced him to 30 years imprisonment. It was alleged that on 1st January 2019 at Keko Machungwa area within Temeke district, he stole a phone make Tecno valued at Tshs 300,000/= and cash at a tune of Tshs 20,000/= properties of one Mariam Mwabutile and immediately after the theft he cut one WP 9958 Eva Charles with a knife as he was trying to arrest him. Aggrieved by the conviction and sentence, he has come to this court armed with seven grounds of appeal which I summarize as follows:

One, the court erroneously relied upon a caution statement which was only admitted for identification as ID1. *Two,* the court erred in finding that the appellant was arrested at the scene the of the crime whereas the evidence on record show that the person who arrested him was not at the scene. *Three,* there was no proof that he was armed or that he threatened the complainants with a knife as the knife he was suspected to have used in threatening the complainant was not produced. *Four*, PW2, did not prove that she was stabbed thus there was no sufficient evidence for armed robbery. *Five,* PW1 and PW2, did not establish that PW1 owned a phone as she rendered no receipt in proof of ownership of the phone allegedly stolen by the appellant. *Six,* the caution statement ought not to have been relied upon as it was repudiated. And, *seven,* the case against him was not proved to the required standard.

The appellant who was self-represented, preferred to argue the appeal in writing. He opened his submission with a new point not set out in the petition of appeal. He submitted that the case against him was not proved as it was based on visual identification which is the weakest evidence and incapable of grounding a conviction unless all chances of mistaken identity has been eliminated. He supported his submission with the case of **Waziri Aman v R,** [1980] TLR 250 and **Oden Msongela & Others v The DPP,**

Consolidated Criminal Appeals Appeals No, 417 of 2015 and 223 of 2018, CAT (unreported) which set the criteria for consideration in cases where the evidence is overwhelmingly based visual identification. He then argued that, in the present case, the incident happened at night. Therefore, it was important for the prosecution to prove how the victim was identified by demonstrating the nature of the light if any and its intensity. To the contrary, the victims casually stated that they identified the appellant though electricity but they did not state the intensity of the light. Also, they did not state the duration which they spent with the appellant. Thus, in totality, the chances of mistaken identity were not eliminated.

Regarding the 3rd and the 4th ground of appeal vide which he has complained that there was no proof of armed robbery, the appellant argued that, there was no proof that the offence of armed robbery was committed. Although the complainants alleged that he cut PW2 with a knife, the said knife was not tendered in court and there was no PF3 showing that indeed PW2 was injured.

On the first and six grounds of appeal vide which he complained about the credibility of the caution statement, he submitted that not only was the confession statement repudiated but was recorded after the expiry of

the prescribed period of 4 hours and no extension of time was sought/granted, it contravened section 51 of the Criminal Procedure Act. Thus, it should not have been considered as held in **Idd Muhidini@ Kibanmoo v R,** Criminal Appeal No, 101 of 2008, CAT. He also argued that the caution statement was not read out after being cleared for admission. On the fifth ground of appeal, he argued that there was no sufficient evidence in proof that PW1 owned a mobile phone or that on the fateful day she was holding a mobile phone as alleged, in her testimony in court she gave no plausible description of the allegedly stolen phone by color or serial number and she never produced receipts. Thus, there was no basis for the finding that PW1 stole the phone.

Responding to this submission, Ms. Jacqueline Werema, the learned State Attorney who appeared for the respondent supported the appeal. She submitted that since the appellant in the present case was charged of armed robbery, the prosecution was duty bound to prove two major ingredients of this offence, that is, theft and use of force but none of which was proved to the required standard. She argued that in page 8 of the trial court proceedings PW1 merely stated that she was robbed of a mobile phone. She did not show that she was threatened or that the appellant used force. Thus, the second ingredient of the offence of armed

robbery was not proved. In fortification, she cited the case of **Angulile Jackson @ Kasonya v DPP** Criminal Appeal No. 162 of 2019, CAT where it was held that the two ingredients of robbery must be proved.

Further, she argued that PW1 did not prove theft. She merely stated that her phone was stolen but divulged no information that would have assisted in determining whether she owned the phone. She added that, such details as the number used in the phone, the IMEI number of the phone and purchase receipts which were crucial in establishing the existence and ownership of the phone which is necessary in proving the offence of theft. In support, she cited the case of **Ally Nassoro@ Burure v R,** Criminal Appeal No. 94 of 2020 (unreported). Moreover, she submitted that PW1 did not implicate the appellant for stealing the phone. Also, although she said that the appellant was found in possession of a knife but the knife was not produced in court. Lastly Ms. Werema submitted that the incident happened at around 10pm and the overwhelming evidence implicating the appellant is evidence of visual identification. The record did not vividly show how PW1 and PW2 identified the appellant. Thus, there were chances for mistaken identity. In the combination of these, she prayed that the appeal be allowed and the appellant be discharged.

I have considered the submissions by both parties and the lower court record. As the respondent's first point in support of the appeal is premised on the 3rd and 4th grounds of appeal and, I prefer to start with these grounds. Both parties have submitted that the offence of armed robbery was not proved to the required standards as there was no proof that the appellant was armed or that he used force during the theft immediately thereafter the theft and there were no sufficient materials in support of the offence of theft. The offence of armed robbery is a creature of section 287A of the Penal Code which states 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 import of this provision has been extensively litigated. One of the landmark authorities expounded by the pex court, the Court of Tanzania is the case of **Shabani Said Ally v. Republic**, Criminal Appeal No. 270 of 2018 (unreported) where the Court stated that:

"It follows from the above position of the law that in order to establish an offence of armed robbery, the prosecution must prove the following:

1. There must be proof of theft; see the case of **Luvana v. Republic,** Criminal Appeal No. 1 of 2005 (unreported);
2. There must be proof of the use of dangerous or offensive weapon or robbery instrument against at or immediately after the commission of robbery;
3. That, use of dangerous or offensive weapon or robbery instrument must be directed against a person; see **Kashima Mnadi v. Republic**, Criminal Appeal No, 78 of 2011 (unreported).

Echoing this position in **Haji Said Seleman vs Republic** (Criminal Appeal 98 of 2020), the Court stated that:

> It is clear from the above provision that, to prove the offence of armed robbery, the prosecution must establish that, there was an act of stealing; that, at or immediately after the said stealing the perpetrator was armed with any dangerous or offensive weapon or instrument and that, he used or threatened to use actual violence to obtain or retain the stolen property.

A similar position was articulated in **Ally Nassoro @Burule v Republic** (supra) where the Court having cited the provision above proceeded to hold that:

> In the light of the above-reproduced statutory provisions, it will be discerned at once that the offence of armed robbery is committed where, the accused person, while armed with any dangerous or offensive weapon or instrument, steals anything and immediately before or after such stealing, uses or threatens to use violence against the victim. Such violence needless to say, must be meant for obtaining or retaining the stolen property (See **Amani Masunguru v. R**. [1970] H.C.D. n. 213 **Dickson Luvana v. Republic**, Criminal Appeal No. 1 of 2005 and **Shaaban Said Ally v. Republic,** Criminal Appeal No. 270 of 2018 (both unreported). It follows therefore that, in any charge of armed robbery or robbery with violence, before the prosecution can start inviting people over to celebrate a conviction, it must lead evidence showing to the satisfaction of the court, not only that there was violence or threats of violence but also that there was theft which was preceded, accompanied or followed by the said violence or threats of violence aimed at obtaining or retaining the stolen property.

In the present case, the particulars of offence as appearing in the charge sheet divulged that on the 1st January 2019, at Keko Machungwa area within Temeke in Dar es Salaam, the appellant and one Ally Nuhu Rashid @ Kkikoti did steal one mobile phone make Tecno C8 valued at Tshs 300,000/= and cash at a tune of Tshs 20,000, the properties of one Mariam Mwambutili and immediately after such stealing, they cut one WP9958 PC Eva Charles with a knife in order to retain the stolen property.

The victims of the offence, Mariam Mwambutili and WP9958 PC Eva Charles, who eye witnessed the incident, testified for the prosecution as PW1 and PW2, respectively. The investigator of the case also testified as PW3. In brief, PW1's evidence was that the fateful day was a new year eve and they were seated outside their home awaiting for the new year when a group of 10 people appeared and robed her mobile phone make Tecno C8 black in colour with Tshs 300,000/= and cash of Tshs 20,000 which was in the phone cover. Having been robbed they started chasing the culprits who were running away and they managed to get hold of once person (the last person) who stabled PW2 with a knife. After being arrested, the appellant was taken to Kilwa Road police station where he was found with a knife. Two days later, the second accused Ally was arrested and admitted that he stole the phone and sold it to one Biko.

On her part, PW2 narrated that, out of the group of ten people, they managed to arrest one person who threatened her with a knife. He cut her right hand. Thereafter people came to help and wanted to kill the person who cut her with a knife but he rescued him by hiding him in the house. On the next day she reported the incident at Kilwa Road Police station where investigation ensured and one Ally Nuhu Rashid (the first accused who stole the phone) was arrested. PW3, interrogated the appellant and recorded his caution statement which was admitted as Exhibit P1. In this statement which was at first repudiated as it contained a name slightly different from the appellant, the appellant confessed to have stolen the phone and to have stabbed PW2 with a knife

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In my assessment of the evidence as whole I have observed that, there are several contradictions which raises a serious doubt if the offence of armed robbery was proved beyond reasonable doubt as against the appellant. The major discrepancy is between the the oral testimony of PW1 and the caution statement and is to the effect that, PW1 and PW2 implicated the appellant for stabbing PW2 only. None of these two witnesses implicated him for theft. In addition, PW1 told the court that that Ally was the one who robbed the phone and sold it to Biko. To the

contrary, in Exhibit P1, Saidy Mohamed, the maker of the statement, confessed to have stolen the phone and to have stabbed PW2 with a knife. In the view of this discrepancy, even if I was to agree with the trial court's finding that, Saidy Mohamed is one and the same as Said Mohamed (the appellant herein), I would be hesitant to hold that the appellant was responsible for the theft. In my settled view, the discrepancy is material and goes to the root of the case hence should be resolved in the appellant's favour as it is hereby done.

There is yet another doubt stemming from the allegation that the appellant was found with a knife. As argued by both sided since it was alleged that the appellant stabbed PW1 with a knife and PW1 testified that after the appellant was taken to Kilwa road Police Station, he was found in possession of the said knife it was crucial for the knife seized from the appellant to be tendered as exhibit in court. The fact that it was produced in court and no plausible explanation was rendered as to the omission raises a serious doubt on whether the appellant stabbed the PW2 with the knife and whether he was found with the knife as alleged. It is similarly beyond comprehension that, PW2 alleged that the appellant cut her on the right hand and when she went to Kilwa Road Police station she was given a PF3 which she used for treatment purposes at Kilwa Road

hospital but she produced neither the PF3 nor any other medical report showing the injury sustained. In my considered view the omission to render the knife and the PF3 or any other medical report in proof attracts an adverse inference against the prosecution's case.

Based on what has been demonstrated above, I find merit in the 3rd and 4th ground of appeal and hold that the offence of armed robbery was not proved to the required standard. Accordingly, I quash the conviction and set aside the sentence imposed on the appellant by the trial court and I subsequently order his immediate release unless held for some other lawful cause.

Dated at Dar es Salaam this 13th April 2022.

X

Signed by: J.L.MASABO

J.L. MASABO

JUDGE