IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGGISTRY

AT MOSHI

PC. CRIMINAL APPEAL NO. 3 OF 2021

(C/F the District Court of Moshi in Criminal Appeal No. 29 of 2020 Original Criminal Case No. 44 of 2020 Mwika Primary Court)

GIFT SEBASTIAN MREMA..... APPELLANT

Versus

CLEMENCE JOSIA MLAY.....RESPONDENT

Last Order: 26th June, 2022

Date of Judgment: 25th July, 2022

JUDGMENT

MWENMPAZI, J.

This is a second appeal from the appellant Gift Sebastian Mrema. At the Primary Court of Mwika the Appellant was charged and convicted for the offence of robbery with violence contrary to section 285 and 286 of the Penal Code, Cap 16 R.E 2019. Based on the testimony of the complainant and his witnesses, the trial court found the appellant guilty and proceeded to convict and sentence him to fifteen (15) years imprisonment. Aggrieved, the appellant appealed to the District Court of Moshi in Criminal Appeal No. 29 of 2020. The District Court upheld the trial court's decision. Dissatisfied

the appellant appealed to this Court having five (5) grounds of appeal as follows;

1. That the first appellate court erred in both law and in fact in joining hands with the trial court which wrongly convicted the appellant in finding that the respondent's evidence was proved to the standard while shifting the burden of proof contrary to the principles of Evidence Act.

2. That the lower courts erred both in law and in fact when finding that the possibilities of mistaken identity were eliminated while in the whole evidence there was no plausible explanation on how the respondent and his witnesses identified the appellant unmistakably.

3. That the first appellate court grossly erred in failing to properly re-asses and re-evaluate the whole evidence objectively in a scrutiny manner consequently the credibility of the respondent and his witnesses remained wanting in proof of their allegations.

4. That both the courts below erred in law and in fact in failing to discover in substance that there were some ongoing grudges between respondent's side versus the bodaboda (bike) riders which might have led to the allegations raised.

5. That the first appellate court erred in both law and in fact in failing to notice that the trial primary court magistrate withheld the appellant's right of appeal as seen on record consequently the whole trial became vitiated.

The grounds of appeal were basically challenging the failure by prosecution to prove its case beyond reasonable doubt. The issues complained of included unreliable evidence of identification, credibility of witnesses and in part the procedure at the trial court.

Brief facts of the case on record are that on the fateful day the Respondent was travelling from Dar es Salaam to Mwika and when he got there someone picked him up and they drove to a place called Msae where they stopped to wait for someone. While the driver who was also one of the Prosecution witnesses was packing the car, they were stopped by the Appellant who told them not to pack on that area. The driver decided to drive to the other side of the road so he could pack his car. Meanwhile the Respondent remained on the area and decided to ask the Appellant why they were not allowed to pack there. It was after being asked that question when the appellant decided to attack the respondent by pushing him and then holding him by his neck and then took one hundred and fifty thousand shillings from his pocket. As the respondent held the Appellant's hand and asked for help the appellant bit him on his chest and ran away. The respondent's testimony was supported by his witnesses who confirmed to have heard him calling for help and as they got to the place where the respondent was, they saw the Appellant running away. In his defence the Appellant denied to have been at the crime scene on that day and said that he was arrested at his home and that all the prosecution witnesses lied as they had grudge against him.

At the hearing of the appeal, the appellant was present in person and had no legal representation. The appeal was therefore heard in absence of the respondent.

Submitting orally with respect to the first ground of appeal the Appellant stated that the Magistrate at first appeal erred to dismiss his appeal as the trial magistrate shifted the burden of proof to the accused. That the court blamed him for failure to bring a witness who was with him during the acts. He said that he had informed the court that he had been framed due to conflicts he had with the complainants but the trial Magistrate said he ought to have informed the court of the conflicts. Submitting further the appellant stated that the magistrate also told him that he ought to have informed the court that he was not at the scene of crime and the person he was with at the time. The appellant further submitted that he is aware that the prosecution had a burden to prove the offence beyond reasonable doubt however he was convicted for failure to defend himself which was wrong.

With respect to the second ground of appeal the appellant submitted that the lower courts failed to note that visual identification was poor and that he was framed by the complainant. He further stated that the event was said to have happened at around 19:30 hours which he argued that the time was not friendly for an unmistaken identity. He added that the complainant failed to state the intensity of light at the scene of event and also that PW1 and PW2 were unable to describe the person who assailed the complainant. It was the appellant's view that the description of clothes

by colour (a red T-shirt) was not enough as the same could be worn by any person. Also, the appellant submitted that on the issue of the respondent knowing the appellant before the event, both courts failed to note that important elements for the evidence were missing. It was the appellant's view that it was important for the respondent to explain as for how long he had known him, the time when he last saw him and what made him recognize him. He submitted further that the reasons given by the complainant had no weight because he did not say how for how long they were arguing with the assailant. The appellant submitted that the evidence of visual identification was weak for those reasons.

With respect to the third ground of appeal the appellant submitted that the Hon. Magistrate failed to analyze the evidence which was tendered against him because if he did, he would have noticed that the evidence against him was false. His general view was that the evidence of PW1, PW2 and PW3 was hearsay as they never witnessed anything. Challenging their evidence, the appellant said that the witnesses alleged to have seen him running away while it was at night. He argued that if PW2 said he was at the distance of 20 paces how could he fail to reach at the place the complainant was robbed because to him 20 paces is close distance and that the witness would have gone at the scene and assisted the complainant. Referring to the case of **Jaribu Abdallah v. Republic** Criminal Appeal No. 110/2003 CAT, the appellant submitted that it is not enough to look at the factors of poor identification and an unmistaken identification also important is credibility of a witness.

Finally, the appellant submitted that both the lower courts were wrong in law for they failed to note there was conflict between the appellant and bodaboda that is why they laughed as explained under page 5 of the judgement but no reason was given as to why they were not brought to testify before the court. In the end the appellant submitted that the case was not proved in accordance to the law; he thus prayed for the appeal to be allowed.

I have carefully gone through the records and submission from the appellant. In determining whether this appeal has merit I will discuss the following two issues which I have gathered from the grounds of appeal raised. **One** is the issue of identification of the appellant whether he was properly identified. **Two** is regarding the totality of prosecution evidence whether it was sufficient to prove the offence charged without leaving any reasonable doubt.

Starting with the issue of identification, the appellant complained that he was framed as the time the crime is said to have been committed was not friendly for unmistaken identity. The appellant argued that visual identification was poor as the witness did not testify on the intensity of light. It is true that evidence of visual identification is the weakest kind and most unreliable and for that reason courts have been warned not to act on such evidence unless all possibilities of mistaken identity have been eliminated and the court is fully satisfied that the evidence before it is absolutely water tight. See the case of **Waziri Amani v. R** [1980] TLR 250. It is true that based on record the trial court relied on visual

identification evidence in convicting the appellant. Given the circumstance of this case, the possibilities of mistaken identity were eliminated by the fact that the circumstances of the commission of the offence allowed the witnesses to closely observe the appellant. The record show that the respondent spent a bit of time with the appellant which allowed him to have a close observation of him. First the appellant stopped them from parking in the area, then as PW1 and PW2 went to park the car on the other side of the road the Respondent remained behind so he could enquire from the appellant as to why he stopped them from parking in the area. As he did so they went into an argument which later resulted into him being attacked by the appellant who pushed him to the tree held him by the neck and stole money from his pocket and ran away. With these facts supported by the testimony of other witnesses PW1, PW2 and PW3 who also identified the appellant by the colour of the t-shirt he was wearing and PW3 who said he knew the appellant because he works in the same area as the appellant. With such evidence on record, it rules out any chance of mistaken identity, I thus agree with the trial court that there was no doubt that the appellant was properly identified. In addition, the fact that the appellant in his defence alleged that all the witnesses had grudges against him, he was in other way admitting that they knew each other. Although the appellant alleged that the witnesses had grudges against him, he failed to establish that fact that is why no doubt was introduced against prosecution evidence.

Moving on to the second issue as to whether the evidence on record was sufficient to prove the offence charged. The appellant was charged with the offence of robbery c/s 285 & 286 of the Penal Code Cap 11 R.E. 2002.

Section 285(1) of the Penal Code provides;

> *"Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of robbery."*

Based on the above quoted provision of the law for this offence to be proved the evidence on record must establish that the appellant stole something and immediately before or after stealing it he used or threatened to use actual violence to any person or property in order to obtain or retain the thing stolen. According to the evidence during trial the Respondent testified that the appellant stole from his pocket some money amounting Tshs. 150,000/=. Aside from his testimony there was no other evidence to prove the fact that he had such amount of money with him not only that but also there was no other proof that the appellant stole the same. None of the witnesses testified to have actually seen the appellant stealing from the Respondent. They all said what the respondent told them which is hearsay and therefore not admissible as evidence of fact. Consequently, it is my considered opinion that there being no other established proof that the respondent had the amount of money on him

which he alleged to have been stolen by the appellant when he attacked him, that fact remain to be a mere allegation that was not proved. This was never discussed during trial as the trial magistrate did not point it out as an important element of the charged offence. This oversight was caused by failure by the trial magistrate to analyze the important elements that established the charged offence. Looking at page 5 of the trial court's judgment on the first and second line where the issues for determination were raised, the first issue was whether the appellant was the one who stole from the respondent. This shows that the Honourable magistrate did not see the need for stealing to be proved as an independent element of the offence charged. She did not stop to check whether an act of stealing was actually proved or whether the thing alleged to have been stolen actually existed. She just proceeded by analysing as to who stole from the respondent as if the element of stealing was already established. Unfortunately, this oversight was also not discovered by the first appellate court as it upheld the trial court's finding.

The above cited short falls are sufficient to establish doubt in the prosecution evidence. It is therefore true that the offence against the appellant was not proved on the required standard of law that is beyond any reasonable doubt. This ground on its own is sufficient enough to allow the appeal.

For the foregoing reasons, I find the appeal meritorious and hence allow it by quashing the conviction by the trial court which was upheld by the district court. I also set aside the sentence imposed and order the release

of the appellant from custody forthwith unless lawfully held for other reasons. It is so ordered.

Dated and delivered at Moshi this 25th day of July, 2022

T. M. MWENEMPAZI

JUDGE

Judgement delivered at Moshi this 25th July, 2022 in the presence of the appellant, in person, and Ms. Mary Lukas, learned State Attorney for the Respondent.

T. M. MWENEMPAZI

JUDGE