IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL No 46 of 2021

(Arising from District Court of Musoma at Musoma in Criminal Case No 12 of 2020)

WAKALA JOSEPH.....APPELLANT

Versus

REPUBLIC..... RESPONDENT

JUDGMENT

12th Dec. 2021 & 28th February, 2022

Kahyoza, J.:

Wakala Joseph, the appellant, was arraigned before the District Court of Musoma at Musoma with the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E 2019]. The trial court found him guilty, convicted and sentenced him to serve an imprisonment sentence of 30 years. Aggrieved the appellant appealed to this Court.

The appellant's raised five grounds of appeal, which I paraphrased as follows: -

1) That, the magistrate erred in law and fact to convict the appellant in the want of sufficient evidence.
2) That, the trial magistrate wrongly applied the doctrine of recent possession to convict the appellant.
3) That, the trial magistrate erred in law to hold that Pw1 properly identified Exhibit PE1 without producing a receipt.
4) That the trial magistrate erred to hold that the appellant was properly identified.

5) That the trial magistrate failed to consider the defence evidence.

The appellant appeared unrepresented and Mr. Temba, the State Attorney represented the respondent. At the hearing, the appellant sought to adopt the grounds of appeal.

The state attorney submitted seriatim, commencing with the first ground of appeal. I will consider the issues raised by grounds appeal and refer to the submission as and when answering the issues.

Was the appellant properly identified?

The appellant complained in the first ground of appeal that there was no evidence that he was identified and described by the victim when she reported the incident.

The State Attorney argued that Suzana (**Pw1**) properly identified the appellant. She knew him before and there was light. He added that the victim named the appellant to police.

This is the first appeal. I have a duty to consider the grounds of appeal and review the evidence. The trial court found that the appellant was property identified. It also found the victim a credible witness. The trial court was of the firm view that the victim identified the appellant as she knew him before and named him as the culprit at the earliest opportunity to Daniel (**Pw2**) and police.

Undeniably only one witness, Suzana (**Pw1**) identified the appellant at night. It is a settled position of the law that when a Court is considering the evidence of a single witness has to exercise great care. See **Ahmad Omari V R,** Criminal Appeal No 154 OF 2005 (CAT unreported), where the Court stated that **there is a need to take greatest care when dealing with the evidence of a single witness**. There is yet another position of the law that when the court is dealing with the identification evidence of a single witness it must find

out if that witness is a credible. This position was taken in **Chacha Jeremiah Murimi and 3 Others v R** Cr. App. No. 551/2015 where the Court of Appeal stated that-

> *"**In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness**. The conditions for identification might appear ideal but that is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor". (**Emphasis provided**)*

In the present case, the trial magistrate found Suzana (**Pw1**) a reliable witness. I am alive of the principle regarding credibility of witness, that ***credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned.*** See the case of **Shabani Daudi v. Republic,** Criminal Appeal No.28 of 2000 (unreported), where the Court of Appeal held that-

> *"Maybe we start by **acknowledging that credibility of a witness is the monopoly of the trial court but only in so far as demeanour is concerned.** The credibility of a witness can also be determined in two other ways; **one, when assessing the coherence of the testimony of that witness. Two,** when the testimony of that witness is considered in relation with the evidence of other witnesses, including that of the accused person. In those ways the credibility of the witness can be determined even by a second appellate court when examining the findings of the first appellate court.*

I have no doubt that Suzana (Pw1) was a credible witness. She was coherent in her evidence. She explained how she communicated with her younger brother Daniel (**Pw2)** and told him that they had been invaded. She mentioned a person who invaded them as Wakara, the appellant. The appellant challenged the evidence of Suzana (**Pw1**) and Daniel (**Pw2)** that they related witnesses. The appellant complained that there was no any other person knew the incident. He doubted the evidence. It is on record during cross-examination that Suzana (**Pw1**) did not shout for help as the appellant was holding a knife threatened to take her life if she shouted. The appellant lamented that both Suzana (**Pw1**) and Daniel (**Pw2)** were family members. They may have conspired against him.

It is settled that when determining credibility of witnesses, what matters and is not whether they are related or otherwise but is their credibility. A case would not be any less proved merely because those who testify on it happen to be family members. The Court of Appeal took the above position in **Robert Andondile Komba V. D.P.P.** Criminal Appeal No. 465/2017 [CAT unreported]. I did not find any reason not to trust the prosecution witnesses. It is trite law that witnesses must be trusted unless, there is a reason to question their credibility. The Court of Appeal in **Goodluck Kyando v. R.,** [2006] TLR 363 and in **Edison Simon Mwombeki v. R.,** Cr. Appeal. No. 94/2016, stated that-

> *"Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness."*

I further considered the evidence on record, Suzana (**Pw1**) deposed that after the invaders left she awoke Daniel (**Pw2**) and told him what happened. Daniel (**Pw2**) corroborated Suzana (**Pw1**)'s evidence. As held by the trial court the ability of the witness to name the offender at the earliest possible moment is an assurance that the witness is telling the truth. There are overabundance authorities to cement that position. See the **Chacha Jeremiah Murimi and 3 Others v R, cited above, Godfrey Yahe and Another v R** Criminal Appeal No. 227/2010 and **Marwa Wangiri Mwita and Another V. R**, Criminal Appeal No. 6/1995. The Court of Appeal stated that-

> *"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry."*

Like the trial court, I do not find any evidence to discredit the victim and Daniel (**Pw2**). The appellant's evidence was that he had love affairs with Suzana (**Pw1**) which arose hostility with Boniface. He deposed that Boniface was a person who led No. G 5254 Dc Rashid (**Pw3**) to arrest him.

Much as Suzana (**Pw1**), the only identifying witness was credible she had a duty to give explanation on how she recognized the appellant. I am not satisfied with her evidence that he wore a trouser and T-shirt that night. She ought to have given description of the appellant's attire like the colour of his clothes or something akin to that and tendered the evidence to proof that Wakala was her mother's customer. It is clear and settled as to what factors should be considered by trial court to

determine whether single witness clearly identified the accused at night. There are several authorities providing the guidelines a few among them are the following; **Waziri Amani V.R.** (1980) T.L.R. 250); **Igola Iguna and Noni@Dindai Mabina V.R.**, Criminal Appeal No. 34 of 2001 (CAT, unreported)) **Chacha Jeremiah Murimi and 3 Others v R, cited above**, **Joseph Melkiory Shirima @ Temba Vs. Republic**, Criminal Appeal No. 261 of 2014 CAT(unreported), Charles Sichaine @ Isaroche v. R Criminal Appeal No. 549/2015. The guidelines were stated in **Waziri Amani as follows:**

> *"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of the surrounding circumstances of the crime being tried We would, for example, expect to find in the record questions such as the following posed and resolved by him: The time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night time; whether there was good or poor light at the scene; and further whether the witness knew or had seen the accused before or not".*

Suzana (**Pw1**) did not depose regarding the time she spent with the appellant in the room. She did not explain how and where the appellant robbed money. The Court of Appeal warns trial courts to carefully consider evidence of visual identification in **Joseph Melkiory Shirima @ Temba** cited above it stated

"...evidence of visual identification is of the weakest kind and most unreliable. As such, no court should act on such kind of evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that it is absolutely watertight."

Suzana (**Pw1**) deposed that she woke up at night and found the appellant in her room and that the light was on. The light was from a bulb, with sufficient intensity to identify a person. I agree that she so threatened that she could not shout in the presence of the appellant. Why did she not shout after they had left? Why did she not make a report to the immediate leader? I am of the view that such identification evidence required corroboration. The third ground is partly upheld on the ground that the identification evidence of Suzana (**Pw1**) was not watertight, it required corroboration.

The prosecution's further evidence was that the appellant was found with stolen mobile handset, make Huawei black in colour. No. G 5254 Dc Rashid (**Pw3**) deposed that he got information that the appellant was selling a mobile handset. He arrested and found him in possession of one mobile handset, make Huawei black in colour. No. G 5254 Dc Rashid (**Pw3**) tender the mobile handset and a certificate of seizure. Unfortunately, the appellant did not sign the certificate. A person who witnessed the appellant being searched did not testify. The prosecution left a reasonable doubt whether the appellant was found in possession of stolen mobile handset. Worse still, Suzana (**Pw1**) did not specify how she identified the mobile handset nor did she have a chance

to identify the mobile handset. The mobile handset was tendered by No. G 5254 Dc Rashid (**Pw3**) after Suzana (**Pw1**) had testified.

Like the appellant and the state attorney, I find the doctrine of recent possession of stolen was not properly applicable. In **Joseph Mkumbwa & Another v.R** Criminal Appeal No. 94 OF 2007 CAT (Unreported) the Court of Appeal had the following to say regarding the doctrine of recent possession of stolen property:-

> *"The position of the law on recent possession can be stated thus: Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis of conviction it must be proved that,* ***first****, that the property was found with the suspect;* ***second****, that the property is positively the property of the complainant;* ***third****, that the property was recently stolen from the complaint; and* ***lastly****, that the stolen thing in possession of the accused constitutes the subject of the charge against the accused. It must be the one that was stolen or obtained during the commission of the offence charged. The fact that the accused does not claim to be the owner of the property does not relieve the prosecution of their obligation to prove the above elements."*

It is undisputable that the prosecution did not prove two of the four factors, which form the basis of invoking the doctrine of recent possession of stolen property. **One**, the prosecution did not that *the property is positively the property of the complainant,* Suzana (**Pw1**). **Two**, the prosecution did not prove beyond reasonable doubt *that the*

property was found with the suspect, the appellant. As shown above the appellant did not sign certificate of seizure, exhibit P. 1 nor did the prosecution summoned any person who witnessed No. G 5254 Dc Rashid (**Pw3**) searching the appellant. For that reason, I uphold the second ground of appeal that the trial court did not properly invoke the doctrine of recent possession.

Given what I have point out above, I uphold the first ground that the magistrate erred in law and fact to convict the appellant in the want of sufficient evidence.

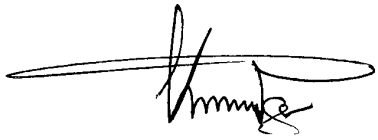
Lastly, the appellant complained that the trial magistrate failed to consider the defence evidence. The State Attorney refuted the allegation that the appellant's defence was not considered.

I examined the trial court judgment. I agree with the state attorney that the trail court considered the appellant's defence and formed an opinion that it did not punch holes. The trial court discarded the appellant's defence that that he was not identified. It did so after it observed that Suzana (**Pw1**) knew him before the incident. Further, the trial court casted-off the appellant's defence that he was not found with the mobile phone handset. It stated that "*the fact the accused said, was in the barber shop where it is alleged he was found with mobile phone (exhibit P2), the shop that had so many people around, now, could have summoned even one person to create doubt over the allegation by the prosecution".* I do not find any merit in the fifth round of appeal. I dismiss it.

All in all, I find that the prosecution did not prove beyond doubts as shown above, that the appellant committed the offence of armed robbery under section 287A of the Penal Code, [Cap. 16 R.E. 2019]. I therefore, uphold the appeal, I quash the conviction and set aside and

sentence. Consequently, I order the appellant's immediate release from prison unless his continued incarceration is related to some other lawful cause.

It is ordered accordingly.

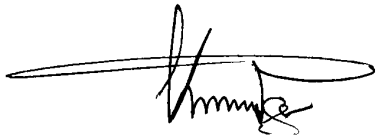


J. R. Kahyoza

JUDGE

28/2/2022

Court: Judgment delivered in the presence Mr. Temba, the state attorney virtually and in the absence of the appellant who could not connect to the virtual court from the prison.



J. R. Kahyoza

JUDGE

28/2/2022