THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN HIGH THE COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPLICATION NO.67 OF 2021

(Originating from District Court of Tandahimba in Criminal Case No.01 of 2020 before Hon. J.J. Waruku, RM)

RICHARD SIMON CHILUMBA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Date of Last Order: 6/7/2022
Date of Judgement: 1/8/2022

LALTAIKA, J.:

RICHARD SIMON CHILUMBA "the appellant" was arraigned in the District Court of Tandahimba (the trial court) charged with an offence of armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2019] now the REVISED EDITION OF 2022. The particulars of the offence were that on 29/12/2020 at or about 12:00 hours at between Mnauke village and Mmwindi village within Tandahimba District in Mtwara Region the appellant while armed with a bush knife did steal two phones valued Tshs. 290,000/= and cash money Tshs. 50,000/= the property of one HABIBA D/O SALUMU and immediately before such stealing did use that

bus knife to threaten to injure one HABIBA D/O SALUMU and MARIA S/O HASSAN who were passing by.

At the trial court, the charge was read over to the appellant and the particulars of the counts explained as required by law. When he was invited to plead, the appellant denied having committed the offence. More importantly, a plea of not guilty was entered against the appellant.

At this juncture, a brief background of the matter can be gleaned from the trial court's records is of utmost important. It was one Habiba Salum Abdallah and Maria Hassan (who testified as PW1 and PW2, respectively) that on 29/12/2020 had a journey from Mmwindi village to Nanyanga village. They used a bicycle as a means of transportation. On the way back home, these two friends while riding their bicycle were stopped by the appellant who went around them and threatened them by using panga. Seeing that, PW1 abandoned the bicycle and run away.PW1 and PW2 managed to escape the appellant. According to PW1 and PW2, the appellant returned to the crime scene and took the handbag of PW1 which had two mobile phones make TECNO and NOKIA and cash money, Tshs.50,000/=. Thereafter PW1 and PW2 reported the incident at the Chairperson of Mmwindi village. Also, on the same day PW1 and PW2 were called at Mmwindi village to identify the culprit. Upon their arrival PW1 and PW2 identified their culprit as the appellant. PW1 told the trial

court that she managed to identify appellant because he was still wearing an orange vest and blue short. Whereas, PW2 managed the appellant as their culprit simply because he wore an orange t-shirt and short. Both testified that the event took half an hour hence had sufficient time to observe him properly.

The lower court's record informs further that on the same day PW3 (Salumu Lulaje) a resident of Mmwindi village heard that at the bush there was a culprit who committed rape and armed robbery. Thus, PW3 and other villagers went to the bush to trace the culprit. Later, they arrested the appellant who had a panga but with no phone.

PW4 testified that upon interrogating the appellant, he confessed to commit the offence of rape and armed robbery.PW4 told the trial court that in the course of arresting the appellant, the stolen phone was taken. Despite being objected he tendered exhibit P1(the cautioned statement of the appellant).

At his defence, the appellant distanced to have met the complainant either at the farm or on the way to the farm. He further denied to have stolen the phone of PW1.However, he testified that he was tortured for three days before he was brought to court.

Having been convinced that the prosecution had proved its case beyond reasonable doubt as required by the law, the learned trial

Magistrate J.J. WARUKU, RM convicted the appellant as charged and sentenced him to serve a jail term of thirty (30) years imprisonment term. Dissatisfied and aggrieved by both conviction and sentence hence this appeal. The appellant has filed this appeal vide a petition of appeal comprising of eight grounds which I take liberty to paraphrase them as follows: -

1. That, there is no watertight evidence of the appellant identification.
2. That, the prosecution side didn't prove its case beyond reasonable doubt.
3. That, the trial court having failed properly to examine, evaluate and analyse evidence on record.
4. That, the trial court erred in and fact by convicting and sentencing the appellant as it did, basing on unreliable evidence.
5. That, the manner in which the proceedings at the trial court were conducted, was irregular or/and improper.
6. That, the caution statement (exhibit P1) had no evidential value as it was extracted involuntary.
7. That, the appellant was not found in possession of any incriminating article.
8. That, the weapon alleged to have been used in the commission of the offence in this case was not tendered in court as evidence.

On 3/11/2021 the appellant filed the additional grounds of appeal which most of them detailed the eight grounds of appeal appearing in the petition of appeal. However, in those additional grounds of appeal I have

only seen one ground which is a new ground. In this new ground the appellant asserts that the learned trial Magistrate erred in law and fact by failing to comply with the requirements of section 235(1) and 312(1) of the Criminal Procedure Act [Cap. 20 R.E. 2019].

When this appeal was called for hearing on 6/7/2022 the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Enosh Kigoryo, learned State Attorney. Submitting in support of the appeal the appellant argued this court to take supplementary grounds and the petition of appeal as his detailed submission.

In response, Mr. Kigoryo supported the appeal. The learned State Attorney submitted that the appellant brought a total of 8 grounds of appeal. He stressed that looking at the additional grounds, they are merely an explanation of the main grounds. Mr. Kigoryo supported the appeal on two reasons. First, the learned State Attorney conceded on the first and sixth grounds of appeal which can dispose of the appeal. At to the first ground that deals with identification of the accused. The learned State Attorney submitted that the identification of the appellant was weak. Mr. Kigoryo referred to the evidence of PW1 and PW2 who testified that were invaded by the appellant who robed them their mobile phones and a total of 50,000/= shillings. He insisted that the robbery allegedly taken place during the day.

The learned State Attorney went further and contended that it was alleged that the appellant scared them with a panga and they run away. He also stressed that PW2 at page 6 of the proceedings had identified the appellant by the clothes had put on namely a yellow T-shirt and a pair of

shorts. Mr. Kigoryo further submitted that the PW1 on the other hand alleged that the appellant had worn a yellow vest and a blue pair of shorts and that after the act, the victims run away and reported the matter at the VEO office in Mwindi Village. The learned State Attorney further submitted that there was no any evidence to show that the victims had told the VEO how they identified the appellant. He also argued that even if the victims had told the VEO, what they told the court that they identified the appellant by his clothes only is not enough.

Mr. Kigoryo stressed that the records are to the effect that the appellant was arrested on the same day suspected to have committed rape.....The learned State Attorney submitted that this is as per the evidence of PW3.In that regard he argued that PW1 and PW2 were only called upon to identify the appellant whether he was the one who had robbed them on the same day. Mr. Kigryo strongly argued that unfortunately the appellant was taken to court and charged with armed robbery. He contended that the records show that the appellant was a stranger to the two persons. The learned State Attorney submitted that their identification should not have ended there but identification parade should have followed.

On top of that, Mr. Kigoryo submitted that the identification based on the colour of the clothes was insufficient. He thus referred this court to the case of **Godlisten Raymond and Another vs Republic**, Criminal Appeal No.363 of 2014 CAT, Dodoma(unreported). The learned State Attorney argued that the in cited case the Court of Appeal had indicated that the description given in the dying declaration had only touched on the complexion of the culprit as "mweupe was wastan". As to the instant case Mr. Kigoryo argued that many people put on the same clothes. He

went far and submitted that there is no record that such a description was given to the VEO in whose office the matter was reported for the first time. To this end, the learned State Attorney opined that identification was insufficient and therefore the offence was not proved.

Submitting on the sixth ground of appeal, the learned State Attorney argued that the cautioned statement was irregularly admitted as seen at page 12 of the trial court proceedings. Kigoryo insisted that was not read out after it was admitted. At last, the learned State Attorney submitted that based on those two grounds he opined that the case was not proven beyond reasonable doubt.

In rejoinder the appellant had nothing to add.

Having dispassionately but keenly considered the grounds of appeal, record of the trial court and rival submissions by both parties the main issue for my consideration is whether the appeal has merit. From the outset I subscribe the position taken by Mr. Kigoryo that the first and sixth grounds of appeal are capable of disposing this appeal in its entirety. However, it is not only those grounds but also the second and third ground are also important to dispose of the appeal. In the other way round, I would say whether the prosecution had proved the case against the appellant beyond reasonable doubt. This being a criminal case, the burden of proof is always on the prosecution side to prove their case beyond reasonable doubt which simply means that the prosecution is duty bound to lead strong evidence as to leave no doubt to criminal liability of the accused persons. See, **Godfrey Paulo,Frank Warioba, Nelson Mbwile v. Republic** [2018] TLR 491. Having said so, I am of the settled

position that the prosecution had not proved the case against the appellant as required by the law.

First, as correctly submitted by respondent that the identification of the appellant was very weak. It is very true that PW1 and PW2 did not provide sufficient facts as to the descriptions of the culprit (the appellant) before the village chairman who was the first person to be informed about the incident. Bad enough the incident took place during the day and PW1 and PW2 had half an hour observing the appellant when the incident was taking place at 1200 hours. In the instant case, the evidence shows that the appellant was identified by PW1 and PW2 at Mmwindi village office on the same day at 1400 hours. More so, PW1 testified that she managed to identify the appellant because the appellant was still in orange vest and blue short. Whereas, PW2 testified that she identified the appellant simply because he wore orange t-shirt and short.

Regarding the facts given by PW1 and PW2 I have noted that their facts on the type clothes worn by the appellant does not tally.PW1 testified that the appellant worn orange vest and blue short while PW2 testified that appellant had worn orange t-shirt and short. In fact, a vest and t-shirt are two different types of clothes. I may say this is minor discrepancy which does not go to the root of the case. However, my concern is whether the description of the type of cloth worn by the culprit is enough until to ground conviction against him? My answer is not enough since an orange vest/t-shirt and blue short may be worn by many people not necessarily the appellant. I expected that PW1 and PW2 could have provided the village chairman enough information about the person who had threatened them by using panga and stole her mobile phones and cash money at bush. Indeed, those facts on the description of the culprit

could have been used to compare with the appellant who was arrested and brought at the Mmwindi village office. The mere description of the type of clothes after seeing the appellant creates doubts that PW1 and PW2 did not know their real culprit or they maliciously mentioned the appellant as their culprit at their own purpose and will. As rightly submitted by the Mr. Kigoryo that identification based on colour of the clothes was insufficient as it was stated by the Court of Appeal of Tanzania in the case of **Godlisten Raymond and Another vs Republic** (supra). The Court of Appeal stated: -

> *"It is now settled that when a court of law relies on visual identification one of the important aspects to be considered is to give enough description of a culprit in terms of body build, complexion, size, attire, or any other peculiar body features to make the next person that comes across such a culprit to repeat those descriptions at his first report to the police on the crime. See the decision of this Court in the case of* ***Shabani Bakari v. Republic****, Criminal Appeal No.118 of 2015,* ***Omari Iddi Mbezi and Three Others v. Republic****, Criminal Appeal No.227 of 2009 (both unreported) to name a few."*

In the instant case, since PW1 and PW2 has failed to give such full description of appellant, I am of the settled view that it was unsafe to rely upon such description in finding that the appellant was correctly identified.

More ever, I have noted that the evidence of PW1 and PW2 is the to the effect that they were threatened by using a panga and eventually PW1's two mobile phones and Tshs.50,000/= were taken by the appellant who not properly identified. Furthermore, PW3 and PW4 in their evidence had introduced another offence of rape which PW1 and PW2 did not

testify and is not featured in the charge. With respect, regarding such introduction of new facts which the victims did not testify makes their credibility questionable and thus were not supposed to believed since they lacked coherent and consistency with PW1 and PW2.See the case of **Silas Sendaiyebuye Msagabago vs D.P.**P, Criminal Appeal No.184 of 2017 CAT,Mbeya.

Also, without wasting the previous time of this court I do subscribe to what the appellant had asserted and the learned State Attorney had submitted that exhibit P1 was improperly admitted since it read loudly in court before it was not being admitted. Therefore, I do expunge exhibit P1 from the record of the trial court. Being expunged the record of the trial court remain with the testimony of PW4 which as I have alluded earlier that is unqualified credible witness.

For those reasons, the appeal succeeds and is allowed, conviction is quashed and the sentence is set aside. The appellant is to be released forthwith from prison, unless otherwise lawfully held.

It so ordered.

E.I. LALTAIKA

JUDGE

1/8/2022