IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 27 OF 2017

(Being an Appeal from the decision of the District Court of Bagamoyo at Bagamoyo in Criminal Case No. 13 of 2019)

BETWEEN

MASHAKA MKAKA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

MRUMA,J.

The appellant was charged in Bagamoyo District Court Criminal Case No. 13 of 2019 with the offence of Armed Robbery contrary to section 287A of the Penal Code. The particular of the offence were that on the 29th day of October 2019 at about 00.00 hours at Visakazi Village in Bagamoyo District within Coast Region the appellant did steal cash money T. shs 300,000/= and one laptop make Dell valued Tshs 400,000/= all valued Tsh 700,000/= and that immediately before and after such stealing

he did threaten one Nditenye s/o Papaa by using a bush knife and club in order to obtain the said properties.

The appellant was tried first before Makube RM and then before Mwaria RM. In the judgment dated 18th June 2019, the trial court found the appellant guilty of the offence of Armed Robbery as charged. After considering the Appellant's mitigation, the court proceeded to sentence him to Minimum sentence of thirty years (30) as stipulated under section 281A of the Penal Code.

Aggrieved by both conviction and sentence, the Appellant filed the present appeal. The Petition of Appeal was filed before this court on 28th July, 2021. It sets out 11 grounds of appeal, which can be summarized into nine grounds as follows;

1. That the Magistrate convicted the appellant based on a defective charge sheet which didn't disclose names of the person against whom the violence was committed;
2. That the Magistrate erred in law and in fact in that he convicted the Appellant without properly evaluating the evidence of both parties;
3. That the learned trial magistrate erred in law and in fact by convicting the Appellant while relying on the discredited evidence of PW3, a child of tender age

(12 years old) which didn't comply with the requirement of Section 127(2) of the Evidence Act;

4. That the trial court erred in law and in fact in relying on the untenable evidence of PW1,PW2,PW3 and PW4;

5. That the Appellant was not properly identified by way of recognition;

6. That the trial of the Appellant was improper in that there was change of trial magistrate but the Appellant was not addressed in terms of Section 190 and 192 of the CPA;

7. That the Appellant was not addressed in terms of section 231(1) (a) and (b) of the Criminal Procedure Act;

8. That the learned trial magistrate erred in law and in fact in not reading over the charge to the accused to enter a plea of guilty when the defence case marked opens contrary to section 228 and 229 of the Criminal Procedure Code.

9. That the court admitted hearsay evidence of PW4 thereby shifting the burden of proof to the appellant.

This being the first appeal, I am required to re- evaluate the evidence and reach my own conclusion. In doing so, I bear in mind that I have neither seen nor heard the witnesses, which the trial court had the advantage of doing – **see Okeno Vs R (1972) EA 32.**

The prosecution called 4 witnesses. PW1 was Mwanaidi Rashid the Appellant's ex- girlfriend. It was her evidence that during the material day and time she was staying with the Appellant as her boyfriend. She recalls that invaded on the date the house of PW2(i.e the complainant), was her ex- boyfriend had disclosed to her that he was one of the perpetrators in that robbery incident and that one of the suspect was killed by the mob. She told the court that after the incident the Appellant destroyed his mobile phone and disappeared from home for two months. On his return he threatened her and that is when she decided to disclose the incident.

On cross examination she stated that on the date of the incident, the appellant had left home at the time she was cooking and returned and remained indoor for about two days and then disappeared for two months.

Nditenye Papaa (PW2), the complainant was the second witness. He told the court that on 29.10.2018 at 00:00 hours, he was sleeping at his home when he heard a bang in his front door. A group of thugs entered

and went straight to his bed room and demanded money. They asked him to show where were his father's money. They then went to his father's bedroom where they took. Tshs 300,000/= and a laptop. He said that he saw the Appellant and was able to identify and recognize him easily as there were light from five bulbs of solar light and that because he knew him before the incident.

Joyana Papaa a 12 years child testified as PW3. She said that when the bandit came to her bedroom they demanded money and she gave them Tshs 10,000/= but they demanded more money. They tried to raise alarm by shouting and neighbours came to their rescue. It was her evidence that there were electric lights from solar lights which were on and she could therefore see everything. She said that she was able to see and identify the Appellant because she knew him before.

When placed on his defence, the Appellant elected to give his defence on oath. He told the court that he was indifference with his wife (PW1) and that is why PW1 gave evidence against him.

In its judgment, the Court analysed the prosecution evidence and after considering the totality of the evidence adduced, it was of the view that the accused had offered no plausible defence. The court concluded

that the prosecution had proved the case against the Appellant beyond reasonable doubt and proceeded to convict him.

The Appellant was aggrieved and he contended that the judgment of the trial court was based on a defective charge sheet, and that the particulars of the charge in the charge sheet did not state the names of the person who was threatened before and after the alleged stealing and that the charge sheet was never amended. The Appellant submitted further that in view of the defective charge sheet, the trial court proceeded to make an analysis of the ingredients of the offence of Armed Robbery which was based on the wrong legal reasoning and that if the charge sheet was defective, the analysis was based on the wrong evidence, and therefore the conviction is based on wrong conclusion.

The second argument advanced for the appellant was that the prosecution evidence was contradictory. The Appellant referred to the evidence of PW1, PW2 and PW3 which he said was contradictory. He contended that the contradiction complained of was not resolve by the trial court. It was Appellant's submission further that the circumstances under which the incident occurred are a mystery. That the Appellant was not identified and recognized by PW2 and PW3 and that PW1,PW2 and

PW3 only said they knew the appellant too well but did not day how they knew him.

The Respondent/ Republic opposed the appeal. In her submissions, Ms. Rose, learned State Attorney, submitted that the charge sheet was proper, and that it was in accordance with the requirements of section 287A of the Penal Code with respect to what a charge sheet should contain. She said that in any event, the issue of a defective charge sheet ought to have been raised very at stages early in trial a thing which was not done in this case.

Having heard the submissions of the parties, I have now to consider if there was sufficient evidence to warrant conviction in this case to stand. As the alleged robbery incident occurred at 00:00hrs midnight and since some witnesses recounted that there was electricity from solar power, it is imperative to determine if the appellant was properly identified at the scene of crime. Both PW1 and PW2 told the court that there were light from solar bulbs and that they knew the Appellant even before the incident so it was easy for them to be able to identify and recognize him. However neither PW2 nor PW3 explained the intensity of the solar light or the distance from where they were to where the Appellant was. In the case of **CHOKERA MWITA VS REPUBLIC, Criminal Appeal No. 17**

of 2010(Unreported) the Court of Appeal was confronted with a similar issue concerning light (though of lantern lamp) and it held thus;

> *"In so far as the lanten lamp is concerned neither PW1 nor pw3 spoke of the intensity of its light, thus leaving unattended the issue of likelihood of mistaken identity"*

That Court further held that:

> *" In short, the law on visual identification is well settled. Before relying on it the Court should not act on such evidence unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is absolutely water tight....."*

In my view it is not sufficient for the witnesses to make bare assertions that there was light. In Chokera's case (supra), for instance the Court of Appeal went on to hold that;

> *"It is common knowledge that lamps be they electric bulbs, fluorescent tube, hurricane lamps, wick lamps, wick lamps lanterns etc give out light with varying intensities. Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube.*

Hence the overriding need to give in sufficient details on the intensity of the light and the size of the area illuminated."

In the present case PW2 and PW3 were at the scene of the crime. However, their evidence did not state the distance they were from the Appellant which could enabled them to have proper identification of him and as stated hereinabove PW2 and PW3, who al stated that there was solar light, fell short of stating the intensity of such light.

In the light of what the Court of Appeal said in **CHOKERA MWITA Vs REPUBLIC** (supra) like in the case at hand, since the intensity of solar light and the distance from the Appellant were not explained, the possibilities of mistaken identity and recognition were not eliminated. It was not enough in my view for the witnesses to merely say that they knew the appellant because he used to work in the village, without stating as to how they managed to identify recognize him at the scene of the crime during the material might. This is because it is trite law, even in recognition cases, mistaken identity is possible. In a nutshell, the evidence of PW1, PW2 and PW4 on visual identification of the appellant does not rule out the possibilities of mistaken identity which is unsafe to base a conviction.

Regarding the testimony of PW1, who claimed to be the Appellant's ex- girlfriend, her evidence is tainted with hatred. She stated that the Appellant had informed her of his involvement in the robbery incident at the house of PW4, on the same date the incident occurred, if that in the case the question would be why did it take her over two months before she could disclose those information to the authority?

In view of the deficient in prosecution's evidence discussed above, I do find that the prosecution didn't prove its case beyond reasonable doubt. I allow the appeal not because the accused didn't commit the alleged offence but because the evidence adduced was insufficient to sustain conviction. Accordingly I quash the convictions and set aside the sentence and order the immediate release of the appellant from prison unless he is otherwise lawfully held.

A. R. Mruma

Judge

Dated at Dar Es Salaam this 15th Day of March, 2022.