IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 173 OF 2021

(*Originating from Kinondoni District Court at Kinondoni in Criminal Case No. 502 of 2018 before Hon. Jacob RM*)

FRANCIS NYANDINDI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 22nd August, 2022

Date of Judgment: 23rd September, 2022

E.E. KAKOLAKI J.

The appellant before this Court was convicted by the District Court of Kinondoni at Kinondoni of the offence of Armed Robbery Contrary to section 287A of the Penal Code, [Cap 16 R.E 2002] (now R.E 2022) as then amended by Act No. 3 of 2011, convicted and sentenced to serve 30 years imprisonment. The accusations against the appellant was to the effect that, on 3rd August 2018 at 20:00 hours at Kigogo Kati street, within Ubungo District in Dar es Salaam Region, the appellant stole a smart phone make Techno-Y3 worth Tsh.150,000 and cash money Tsh.82,000/= from one Beatrice Chelahani, and before and after such stealing threatened her with

a knife in order to obtain and retain the said stolen properties. As the appellant pleaded not guilty to the charge he stood trial, in which the prosecution had three (3) witnesses and relied on one exhibit, while the appellant did not enter his defence as he chose to remain silent. At the end of the hearing, the trial court was satisfied that, prosecution case was proved to the hilt hence proceeded to convict and sentence the appellant accordingly as noted herein above.

Unhappy, the appellant is before this Court by way of appeal trying to convince it that he is innocent, equipped with twelve grounds of appeal, which I see no reason to reproduce hereunder as during the trial he reduced them into three as I will soon pronounce them. It is on the said grounds of appeal, the appellant is praying this Court to quash the conviction and set aside the sentence meted on him. At the hearing of the appeal, appellant appeared in person unrepresented while the respondent enjoyed the services of Ms. Moshi, learned Senior State Attorney. The appeal was disposed by way of written submission.

As alluded to earlier on, appellant had twelve (12) grounds of appeal but in his submission, he prayed to consolidate argue together the 1st,2nd,3rd,4th,5th and 6th grounds of appeal on weakness of visual identification, the 7th,8th and

10th grounds on procedural irregularity in recording cautioned statement exhibit P1, relied on by the trial court to convict him and finally grounds No. 9, 11 and 12, on failure of the prosecution to prove the case beyond reasonable doubt. On the other hand, Ms. Moshi in rebuttal submission categorized the grounds into four (4) main complaints by the appellant referring them as complaints on weakness of visual identification, procedural irregularity on admission of caution statement, non-compliance with section 214 of CPA, and proof of prosecution case beyond reasonable doubt. In determining this appeal, I am prepared to determine the appeal in line with grounds and arguments proceeded with by the appellant.

Submitting on first complaint as summarised above, the appellant faulted the trial magistrate for convicting him basing on incredible and unreliable visual identification evidence of PW1. He noted that, it is now a settled law that, when a case is wholly depending on visual identification evidence of a person/ culprit, the court has to first of all make sure that all possibilities of mistaken identity are eliminated. He placed reliance in the cases of **Riziki Method@ Myumbo Vs. R**, Criminal Appeal No. 80 of 2008 and **Issa Magara @ Shuka vs Republic**, Criminal Appeal No 37 of 2005 (All CAT-unreported). The appellant contended that, PW1's evidence on his

identification was unreliable as he told the Court lies. He said, PW1 is in record that, she knew him prior to the alleged robbery incident as both were living in the same street, and that on the incident date she identified him with assistance of high voltage security light from both sides of the houses close to the narrow path she passed and further that, was threatened by a knife held on her neck before the matter was reported at police on 04/08/2018. The appellant argued, contrary to PW1's evidence that she reported the incident at police, there was no evidence adduced by PW2 and PW3, members of the police force to the effect that, the said crime was reported to police to either of them or his arrest was a result of the alleged report by PW1 or he ever named as perpetrator of robbery to PW1 at first instance. He questioned PW1's credibility saying, if the report was indeed made by her at police why no any effort was shown to have been made to arrest him until when he was arrested in another offence (case) and taken to police station sometimes in October, 2018, almost two months later, where PW1 surfaced with accusations of robbery against her. That aside he added, there was no evidence to suggest that appellant's home was searched after his arrest for recovery of the alleged stolen phone and money as they were living in the same neighbourhood. To him, all these unanswered

questions left a million-dollar doubts and also dented her credibility. In his view, the trial magistrate had to test the accuracy of PW1's evidence against the entire evidence on record basing conviction on it. To cement this point, he cited to the Court the case of **Maloda William and Another Vs. R**, criminal Appeal No. 256 of 2006 (Unreported).

With regard to the issue of light at the scene of crime, which the trial magistrate believed and held was sufficient hence based on his conviction the appellant contended, he erred in so believing and holding that it was enough light while PW1 did not state the colour of that bulbs, their positions and distance from which were illuminating from to the point of confrontation. In his view, it was unjudicial for trial magistrate to fill in the lacunas of evidence left by the prosecution. He thus prayed the Court to find the ground is meritorious hence allow the appeal.

In rebuttal, Ms. Moshi contended that, PW1 was credible since she was known to the appellant even before the incident as were living in the same street and the scene of crime was surrounded by sufficient electricity light from both sides of houses which aided her to properly identify the appellant. She fortified her argument with the case of **Geophrey Isidory Nyasio Vs. R**, Criminal Appeal No. 270 of 2017, (CAT-unreported), where the Court of

Appeal enumerated the factors to be taken into account for the Court to satisfy itself whether or not evidence of visual identification is watertight or not, and the case of **Flano Alphonce Masalu@ Singu Vs. R**, Criminal Appeal No 366 of 2018 (CAT-unreported), where the Court of Appeal insisted on magistrates and judges' duty to consider the time the witness had the accused under observation and the question of whether the witness knew or had seen the accused before or not. She argued that, the trial Court record precisely demonstrate how the appellant was properly identified by PW1. On the issue of the appellant's arrest, she said, PW2 addressed the same in his testimony that, when interrogating the appellant on another case, PW1 appeared and told him that the accused had robbed her a phone and money and threatened her with a knife. According to Ms. Moshi, that is when the appellant was re-arrested in respect of the offence of robbery of PW1. She pressed to the Court to dismiss the complaint for want of merit. In a short rejoinder, appellant had nothing useful to add rather than reiterating his submission in chief.

I have dispassionately considered the rival submission from both parties regarding this ground of appeal and accorded it with the weight it deserves. I have also extensively perused the available lower court records in a bid to

satisfy myself with the appellant's complaint. It is a settled principle that, the evidence of visual identification is of the weakest character and most unreliable thus caution should be exercised by Court before relying on it by satisfying itself that such evidence is watertight and that all possibilities of mistaken identity or even fabrication are eliminated. See the cases of **Waziri Amani V. Republic (1980) TLR** 250, **Magwisha Mzee & Another,** Criminal Appeal Nos. 465 and 467 of 2007 and **Hamisi Yazidi Vs. R**, Criminal Appeal No. 381 of 2015, (All CAT-unreported). In the case of **Hamisi Yazidi** (supra) the Court of Appeal on matters to be considered by the Court before placing reliance on evidence of visual identification to render conviction had this to say:

> *It is now settled that when a court relies on visual identification, among the important aspects to be considered is the time the witness had with the accused under observation, the distance at which the witness had the accused under observation, if there was any light, then the source and intensity of such light, and also whether the witness knew the accused before. (See Waziri Amani v. Republic (supra), Raymond Francis v. Republic, (supra),* ***Yohana Msigwa v. Republic*** *[1990] TLR 148 and* ***Idd Omari Mbezi and 3 others v. Republic,*** *Criminal Appeal No. 227 of 2009 (unreported)*

Further to the above factors, when the offence is committed at night, source of light must be properly established even when the identifier is known to the accused person. Court must therefore concentrate much to establish whether the aid of light, its source and intensity was clearly stated by witness purporting to recognize the accused. This position of the law is articulated in litany of cases some of which are the case of **Kulwa *slo* Makwajape & Two Others Vs. R,** Criminal Appeal No. 35 of 2005, **Saidi Chally Scania Vs. R,** Criminal Appeal No. 69 of 2005, and **Issa Mgara @ Shuka Vs. R,** Criminal Appeal No. 37 of 2005 (all unreported). In **Issa Mgara @ Shuka** (supra), the Court of Appeal said that:-

> *We wish to stress that even in recognition cases where such evidence may be more reliable than identification of a stranger, clear evidence* ***on sources of light and its intensity is of paramount importance.*** *This is because, as occasionally held, even when the witness is purporting to recognize someone whom he knows as was the case here, mistakes in recognition of close relatives and friends are often made. (Emphasis supplied)*

In the present case, to be straight and precise, PW1's evidence that there was electricity light (security lights) from both sides shining brightly at the scene and that, the appellant was well known to her in my considered view,

lessened the possibilities of mistaken identity of the appellant. However, as rightly submitted by the appellant, doubt is shaded on the rest of PW1's evidence as I will soon demonstrate. Firstly, while PW1 alleges to have reported the incident to the police station on 4/08/2018, neither PW2 nor PW3 testified in support of her evidence as whether she really reported the said incident at police and when, and if so whether she mentioned the appellant as her assailant so as to give assurance the Court of unmistaken identity of the appellant. It is the law that, mentioning the accused at the earliest possible time is an assurance to the Court of the undoubted identification of victim's assailant. See the case of **Marwa Wangiti Mwita and Another Vs. R**, Criminal Appeal No. 6 of 1995, (CAT-unreported) where Court of Appeal had this to say, on reliability of the witness who names the assailant at the earliest time:

> *"... 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 unexplained delay or complete failure to do so should put a prudent court to inquiry..."*

Secondly, PW1 alleged that she was living in one street with the appellant, however the record is barren on the reasons as to why she had to wait until 04/10/2018 when accused was arrested for another offence, to report that

she was robbed of by him. There is no evidence as to whether PW1 made any efforts to help or lead the police to arrest the appellant if at all is the one who robbed her on the fateful day. Further to that no evidence was led by her as to whether the appellant absconded from his home soon after commission of an offence hence unable to arrest him before reporting him on the date he was arrested with another matter. All these doubts in my humble view dented credibility of PW1's evidence on identification of the appellant as her assailant hence, I find this ground has merit.

Next for determination is the complaint on the appellant's caution statement exhibit P1 as tendered by PW3. It was the appellant's submission that, the same was unprocedurally recorded and admitted as exhibit for being recorded in front of other police officers hence he was not a free agent. Appellant relied on the case of **Kisonga Ahmed Issa & Another Vs. Republic,** Consolidated Criminal Appeal No. 17 of 2016 and 362 of 2017 (CAT-unreported) to cement the point of right to privacy to the suspect when recording a caution statement. Further to that, he attacked evidence of hand writing expert who came to testify during the inquiry as PW3, for not stating why he concluded the caution statement and sample taken from the appellant were the same without evidence showing writings had similar

character or letters and were collected from the same person. He pray the court to expunge this evidence in the record of the appeal.

Responding to this ground, Ms. Moshi though with different reason admitted that, the said caution statement exhibit P1 deserves to be expunged from the records as the same was not read aloud in court before admitted as required by law. She argued, failure to read out documentary evidence after its tendering is fatal as it denies an accused person opportunity of knowing or understanding the content of the exhibit. She relied on the case of **Frank John Libanga @ Lampard Vs. R,** Criminal Appeal No 55 of 2019 (CAT). According to her even if the court expunge the caution statement still the court could rely on the evidence of afore mentioned witness including PW3 who recorded the caution statement of the appellant to find that the appellant indeed committed an offence of robbery. In a short rejoinder appellant submitted that, after expunging exhibit P1, PW3's evidence cannot be used in its replacement since his evidence was only on how he was ordered to record appellant's caution statement and not its contents. He added that, PW2's evidence is not exceptional as it is on how appellant was arrested and not how the crime was committed, and worst of all the

appellant arrest emanated from a different case. Thus pressed to Court to find merit on this ground.

I have examined the contending submission by the parties in light of this ground as well as the lower Court records. It is not true as conceded by Ms. Moshi that, the said caution statement (exhibit P1) should be expunged on the reason that it was not read aloud in court. Glancing at page 53 of the typed proceedings, the proceedings tells it all that the same was read aloud. Thus, that reason does not constitute the ground for expunging the same. It is however noted by this Court as rightly submitted on by the appellant that, exhibit P1 was taken in contravention of law as it was recorded in front of other two police officers hence breached appellant's right to privacy when recording the statement. This fact is evidenced by PW1 and PW2 who during inquiry on the admission of exhibit P1 at page 16 and 21 respectively, undoubtedly explained that other police offices were present in the room when PW1 interrogated the appellant, hence the appellant was not only denied of his right to privacy but also was not a free agent when recording the said caution statement. My findings are fortified with the Court of Appeal decision in the case of **Kisonga Ahmad Issa and Another** (supra), where the Court of Appeal stated thus:

It is further noted that the cautioned statement of the first appellant was recorded by Pw1 in the presence of other police officers. That was yet another irregularity as the right of privacy to the first appellant was infringed.

With the above position of the law exhibit P1 which was recorded in violation of the law, I hold was rendered incompetent for admission as evidence in Court. I therefore find this ground meritorious too and proceed to expunge it from the record the appellant's cautioned statement (exhibit P1).

With the above findings, I now move to consider the third complaint by the appellant that his conviction based on prosecution case that was not proved to the required standard. It is a cardinal principle of criminal justice in Tanzania that the prosecution bears the burden of proving its case beyond reasonable doubt. See the case of **Daimu Daimu Rashid @ Double D Vs. R**, Criminal Appeal No. 5 of 2018 (CAT-unreported). It is also the settled law that for the one to establish the offence of armed robbery under section 287A of the Penal Code, the prosecution must prove the following elements: one, theft and two the use of dangerous or offensive weapon or robbery instrument against a person at or immediately after the commission of robbery. See the cases of **Shaban Said Ally Vs. R**, Criminal Appeal No. 270

of 2018 and **Charles Simon Vs. R**, Criminal Appeal No. 134 of 2019 (All CAT-unreported).

Arguing this ground the appellant submitted that, with incredible and unreliable evidence of PW1 and in absence of the cautioned statement (exhibit P1), prosecution's case is stem only on the evidence of PW2 and PW3, which evidence does not prove the charge against him on the offence of Armed Robbery, hence a conclusion that prosecution did not prove its case beyond reasonable doubt.

On the other hand, Ms. Moshi is of the view that, since in proving the offence of Armed Robbery a person has to prove that there was theft and use of dangerous or offensive weapon or robbery instrument against such person immediately after the commission of robbery, PW1 discharged that burden of proof when told the court on how appellant used a knife to rob her phone and money, thus the offence was proved beyond reasonable doubt.

Having considered the available evidence in line with the parties' submission, I am at one with the appellant's proposition that, the alleged offence of Armed Robbery was not proved against him beyond reasonable doubt. This is so as, apart from mentioning that her phone was stolen, there was no proof that PW1 owned the said phone, and that the same was stolen. PW1

did not tender either a receipt and or even police report book number commonly known as R.B to prove that robbery incident was reported at police. So, there is no tangible evidence to prove that PW1's properties were stolen, leave alone the fact that, her evidence on identify of the perpetrator of the alleged armed robbery is dented with doubts as found in the first ground above. All those deficiencies in evidence put together brings this court to the conclusion that, the offence of armed robbery was not proved against the appellant beyond reasonable doubt. Therefore, this ground also has merit too.

Having so found that, the prosecution case was not proved beyond reasonable doubt, I find no need to address the issue of non-compliance with section 214 of the CPA, as that will remain to be academic exercise in which this Court is not prepared to indulge into at the moment.

In the event, I allow the appeal, quash the conviction and set aside the sentence imposed on the appellant and order that, he should be released forthwith from prison unless lawful held for another cause.

It is so ordered.

Dated at Dar es Salaam this 23rd September, 2022.

E. E. KAKOLAKI

JUDGE

23/09/2022.

The judgment has been delivered at Dar es Salaam today 23rd day of September, 2022 in the presence of the appellant in person, and Ms. Monica Msuya, Court clerk and in the absence of the respondent.

E. E. KAKOLAKI

JUDGE

23/09/2022.