

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 04 OF 2022

(Appeal from a Judgment of the District Court of Tarime at Tarime in Criminal Case No 73 of 2021)

JUMA SHABAN MOHAMED APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGEMENT

4th August & 23rd September, 2022

F. H. Mahimbali, J.

The appellant in this case was charged with the offence of Armed Robbery contrary to section 287A of the Penal Code Cap 16. R.E 2019. It was alleged that on 20th August 2020 at Mjini Kati village within Tarime District in Mara region the accused person did steal cash money Tshs 1,500,000/=the property of Mwita Chacha Magige and immediately before stealing used machete to assault on the victim. The appellant pleaded not guilty to the charged offence. The prosecution side brought seven witnesses and tendered three exhibits whereas the appellant defended himself and tendered two exhibits (charge sheets).

In her testimony, PW1 testified that on 20th August, 2020 around 20:00hrs, her husband had arrived home while heavily breathing claiming that he was being chased by certain people. After that, he started talking over his phone. As she was going to take food for her husband, she suddenly, saw the appellant and Wegama @ Mnyalu over the fence wall jumping inside. That both culprits entered inside armed with machetes. Seeing this, she was astonished and called her husband (PW2) for rescue. Her husband while astonished, he started running into the house, but the culprits who had already got in, managed to catch her husband and wounded the victim husband (PW2) on his head by the use of machet and then managed to remove the wallet from the pocket of her husband and disappeared with it which had money. She then raised alarm for help where one neighbour (called Julias Marwa Wambura) and helped her to take her husband to Sungusungu hospital as he was in very bad condition. In the said saga which had lasted for about five minutes, she managed to identify the appellant and his fellow on the aid of the bright electricity lights illuminating the said area and that the duo are familiar to her. The appellant Juma Shaban a.k.a Chizi was their neighbour and knows him even before her marriage with the victim – husband. With Mnyalu, she described her as the husband of her

friend. So, she was familiar with both of them. Considering further she was closer with them and they were unmasked, she had been able to identify them thoroughly.

PW2, testified that on 20/08/2020 around 20:00 on his way back to his home from work he met with four people with two motorcycles at Makaranga street. He managed to identify them as they stopped him and demanded money from him. He refused and escaped by running to his home and all four were holding machetes. He had managed to reach home and knocked the gate and his child opened and got in where he found his family eating at the compound (inside the fence). He greeted his family and reported to his wife what transpired on his way back. Thereafter, his wife took her way to bring him food. That no sooner had he finished reporting to his wife about the chasing incidence, than when culprits got in by jumping over through the said wall, invaded him and wounded him with the said machetes on his head. By that time, his wife was on her way to collect food, where then she first saw thugs called him for help arresting the situation, but Waigama Johaness (the first accused) caught his clothes and pulled him back outside and started assaulting him on his head and then the second accused cut him at the head using the machete and he lost his consciousness and he

woke-up at Bugando Hospital in ICU after 14 days. That as there was sufficient electric lights illuminating outside were on, he had managed to identify the accused persons clearly and he knew them before and after recovery of his conscious he asked for his wallet which had 1,500,000/= and the PW1 told that the first accused person had taken his wallet from his pocket. That he got the said money from his brother-in-law for business (PW4). That following the injuries, he is now is incapacitated and he cannot do anything

PW3 testified that PW2 is his neighbour next to his home. That on 20/8/2020 around 20:00 hrs he heard alarm (cry) for help from PW2's home. He went and saw PW1, helpless. Pw1 told him that the Pw2 had been brutally invaded by bandits and they had cut wounds on his head. In assistance with Pw1, they managed to take pw2 to hospital where he was referred to Tarime Hospital for further medication. He saw the pw2 being in very critical condition as he was heavily bleeding and he was unconscious. He was told by pw1 that her husband was invaded by the appellant and his fellow (accused persons).

PW4, on his testimony stated that he is brother -in- law to PW2 (the victim) and that they are in business partnership. That on 19/8/2020 he had given the pw2 Tshs 1,500,000/= for gold business.

On that day, PW2 didn't collect the gold minerals and on 20/8/2020 around 20:00hrs he was informed by PW1 (his sister) that PW2 was robbed and he went to sungusungu health centre and also went to police where he collected PF3 where then the victim was referred to Tarime District Hospital and further referred to Bugando Hospital.

PW5 on his testimony testified that he is a surgery doctor working at Bugando Hospital. That on 21/8/2020, he had received PW2 as patient being in critical condition at emergence department. He had a cut wound on his head and he was unconscious. In his careful examination after CT scan, he realized that his skull was fractured and the solution was to conduct operation. In the said neuro surgery operation, the broken bones were removed from the brain. The said PW2 after some medical examinations, then got recovery and was recommended to be undergoing physiotherapy exercises. He tendered the medical report of his medication which was admitted as exhibit P1.

On his part, PW6 testified that on 20/08/2020 at night shift at Nyangoto health centre he had received the pw2 who had the cut wound on his head and he was bleeding heavily and the skull was broken and the brain part was seen. He attended him with first aid and

referred him to Tarime District Hospital. It was him who filled the PF3 of the victim which was admitted as exhibit P2.

PW7, testified that on 21/08/2020 he was assigned a police case file from the OC-CID for grievous harm in order to investigate. He first went to the crime scene at Mjini kati village and found PW1 who assisted them in drawing a sketch map, also the pw1 told them where the accused had climbed the wall to enter inside, the place where the pw2 stood speaking with the phone and before he was wounded. He testified that the first accused was arrested at Double G Bar and two months later the appellant was arrested. He tendered sketch map plan which was admitted as P3 exhibit.

On his part, the appellant had testified as DW2 whereas his fellow had testified as DW1.

Testifying as DW2, the appellant stated that on 14/02/2021 he was arrested by police officer when he was at work in mining activities in connection with this offence. He denied to have committed the said offence as charged. He complained that at police station he was so much tortured and lost conscious. He tendered pf3 for the medication he attended which was admitted as exhibit D3.

He denied to have committed the alleged armed robbery. He also challenged the testimony of PW1 and PW2 as establishing nothing against him in connection with the charged offence classifying their testimony as not credible evidence.

The first accused person had testified as DW1. He too denied involvement in the commission of the said offence. He tendered the two charge sheets in connection with this offence.

Upon hearing of the case, the trial court convicted the appellant and his fellow accused person and sentenced each to 30 years imprisonment. Dissatisfied by both conviction and sentence, the appellant preferred this appeal armed up with a total of four grounds in his petition of appeal as follows:

- 1. That the trial court erred both in law and fact by convicting the appellant while the evidence led by the prosecution did not measure up to the required threshold of proving the case beyond reasonable doubt*
- 2. That the trial court erred both in law and in fact for failure to consider that there was un procedural technicality irregularity and improperly on arrest interrogation and identification against the appellant*
- 3. That the trial court erred both in law and fact by wrongly convicting the appellant whereas there was contradictory suspicious evidence between the PW1 and pw2*

4. That the trial court erred in both law and in fact by convicting the appellant in absence of sufficient evidence of proper recognition upon which to base a conviction against the appellant

During the hearing of the appeal, Mr. Juma David Mwita represented the appellant whereas Ms Monica Hokororo represented the respondent.

However, in arguing the said appeal, the second ground of appeal was abandoned and the remaining three grounds of appeal were argued jointly which are grounds 1, 3, and 4.

In support of his appeal, Mr. Juma argued that, it is always the Republic's duty to prove their case beyond reasonable doubt. In the current case, it has not been the case. The only evidence availed by the prosecution is identification of the appellant at the scene. The trial court did not warn itself with the evidence of PW2 in convicting the appellant. As per page 9 of the typed proceedings, PW1 testified to have known the accused persons for a long time as family friends. That the incident happened at night. She had been able to identify the culprits by aid of electricity power. He challenged the evidence as PW1 didn't tell how intensity the said lamp/light was. There was no mention of time and distance for her to make clear identification. How those culprits dressed

themselves, is not clear. All these not said make a lot of doubts. Making reliance to the case of **Waziri Amani vs Republic** (1980) TLR 250, he submitted that the circumstances of this case, make it weaker to mount conviction as done. That the case of **Waziri Amani** set down the guidelines on the identification of accused person at night.

Also in the case of **Maulid Doto @ Mau Mchina and 2 others vs Republic**, Criminal Appeal no 493 of 2019, the CAT at page 7 the offence was committed at night and two identifying witnesses did not explain the intensity of light supposedly illuminated from the energy server, the time under which the two witnesses had the culprits under observation and the attire of the culprits were not fully elaborated by the two identifying witnesses.

With this, he submitted that the PW1 and PW2's evidence has left numerous doubts. The testimony of PW1 is so doubtful if her husband (PW2) was being chased by the culprits. PW2 (at page 13 of the typed proceedings) didn't describe the episode well if he was stopped by the four people. His conduct at home after the said chase is unbelievable and unconvincing. On this, he prayed that this honourable court to consider the prosecution's evidence as doubtful. In the case of **Abdul**

Ally Chande vs Republic, Criminal Appeal No 529 of 2019, CAT at Dar es Salaam, it was ruled that:

"In a case involving evidence of visual identification, no court should 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."

Cumulatively, he prayed that this Honourable court to allow this appeal, quash conviction and set aside the sentence meted out as per this submission.

In resisting the appeal, Ms Monica Hokororo learned state attorney, argued that as per court record, the available evidence for prosecution has fully established that the appellant was fully identified by the PW1 and PW2. She said so not only basing on the power of identification but also on the fact of familiarity. She submitted that, the duo culprits and the victim family (PW1 and PW2) were not strangers. PW1 testified how she had been able to identify the culprit (see at page 6 of the typed proceedings). That there was bright illuminating lights at the scene. Also that appellant is her neighbour in living and that she had been knowing her even before her marriage. That the incident lasted for five minutes (page 10 of the typed proceedings). The evidence of PW1 is collaborated by the testimony of PW2 (her husband) (See at page 13

of the typed proceedings). All the culprits were in plain (unmasked of their faces). That the appellant is familiar with PW2 (at page 14 of the typed proceedings). With her, she considered the testimony of PW2 had met the threshold of the case of Waziri Amani as quoted by Mr. Juma David Mwitwa counsel for the appellant.

That the conduct of PW1 after reaching home is doubtful, is not supported. The proceedings had narrated how he was being chased. However, not naming them instantly is just a minor discrepancy. It has not affected the root of the case. In the case of **Charles Mnanti vs Republic**, Criminal Appeal No 286 of 2017, CAT, Dar es Salaam, at page 16. It considered as a mere shock.

Lastly, she tried to convince the Court that the evidence of their witnesses be considered as credible. Their testimonies corroborate each other. There was no any contradiction in their testimonies. In essence, there is nothing to make their evidence as incredible for this court's consideration. In the case of **Goodluck Kyando vs Republic**, (2006) TLR 363 the CAT laid foundation that there must be credence to every witness unless there are good reasons for not doing so. In the circumstances of this case, she found none suggesting suspicion on the credence of the prosecution's witnesses.

She concluded that, the trial court was justified to reach that conclusion in convicting the appellant and his fellow culprits. She then prayed that this appeal be dismissed. Conviction and sentence meted out by the trial court be upheld.

In his rejoinder submission, Mr. Juma David Mwita reiterated his submission in chief. He kept on challenging that with colour bulb in which it is not told what colour was it, it is hardly convicting that it was capable of illuminating. There was no distance mentioned between the two. Furthermore, the time spent there was not elaborated that by that five mounted time, what was happening.

Lastly, not mentioning names of the said culprits at the heat of time as per circumstances of this case vitiated the testimony of PW2. He maintained his position that the conviction and sentence be quashed and set aside for being wrongly reached. He is of the view that with the authorities supplied, his appeal be allowed.

Having heard the serious submissions from both sides and having digested the evidence in record, the question now to ask is whether the appeal is meritorious. In essence, there is no doubt that on the evil date, the PW2 was invaded by thugs, wounded and left helpless. The

controversy is who actually were the said thugs? The appellant and his fellow or?

According to the charged offence, the appellant and his fellow accused (not party to this appeal), are charged that on 20th August 2020 at Mjini Kati Village within Tarime District in Mara Region, stole cash money TZS: 1,500,000/= the property of Mwita Chacha Magige and immediately before the said stealing used machete to assault one Mwita Chacha Magige in order to obtain the said money.

The charging section in which this offence has been preferred is coached in the following terms:

*287A. A person who **steals anything**, and at or immediately before or after stealing is **armed with any dangerous or offensive weapon or instrument** and at or immediately before or after stealing **uses or threatens to use violence** to any person in order to obtain or retain the stolen property, commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment. [emphasis added].*

In the current case, the testimony of PW1 and PW2 is identical to the effect that the appellant and his fellow, had invaded into the home of the PW2 by jumping over the fence wall. The thugs were armed with

machetes. PW2 had identified them very well. PW1 says they were very ones who had stopped him before (on his way back home). They cut him with the said machetes on his head. They had identified the thugs by use of bright illuminating electricity lights at the scene. That there was a crash of fight between the thugs and the PW2. Pw1 had been closer watching and crying for help. PW2 says they were the very ones who had earlier stopped him before and they were chasing him after he had denied giving them money. Since the episode was continuous from the previous, the PW2 had identified the culprits sufficiently in my view eliminating all chances of mistaken identity. I say so basing on the testimony of PW1 and PW2 conjunctively. Considering further that there had been a fight between PW1 and the thugs for about five minutes.

In digest to the testimony of PW1, PW2, PW3, PW4, PW5 and PW6, the fact that PW2 was dangerously attacked is undisputed. As who attacked them, PW1 firmly points fingers at the appellant and his fellow Waigama Mnyalu. As to why she points fingers at them, because she first saw them jumping over the house fence wall, dropped down, invaded her husband, attacked him, took his wallet from the trouser pocket. All this had been witnessing while closer and under the illumination of bright electricity lights. The incidence lasted for about five

minutes. As it was outside, no any impediment preventing the visual identification, I agree with Monica Hokororo, learned senior state attorney that the appellant was properly identified at the scene by the PW1 and PW2.

I equally agree with Mr. Juma David Mwita learned advocate for the appellant rightly submitting that in a case involving evidence of visual identification, 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 as stated in the case of **Abdul Ally Chande vs Republic** (Supra). However, in the circumstances of this case, the chances of mistaken identity are almost negative. The appellant and his fellow were properly identified in my considered view.

The argument that there was no prompt mentioning of the chasing thugs to PW2, PW1 testified well. By the way assuming that one was in such a situation, could even be in a shock (as per case of **Charles Mnanti vs Republic**, Criminal appeal No 286 of 2017, CAT at Dar es Salaam.

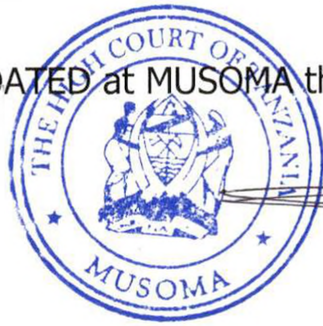
Since, I have no good reasons to fault the evidence of the prosecution witnesses, credence on them is high. I am guided so by the position in the case of **Goodluck Kyando vs Republic**, (supra) that there must be credence to every witness unless there are good reasons for not doing so. In the circumstances of this case, I find none suggesting suspicion on the credence of the prosecution's witnesses.

In fact I am aware that for an offence of armed robbery to stand as per the charging section, amongst the important ingredients to be established are whether there is stealing and use of weapon or violence in retaining possession of the said stolen property. In the current case, PW1 says she had seen the thugs taking the wallet from the pocket of PW2 which had money. PW2 says in the said wallet had been 1,500,000/=. There is no real evidence in record that in the PW2's wallet had such an amount of money as claimed by PW2. However, there is evidence that there was taken of his wallet which had money. The taking of someone's wallet by itself suffices stealing as it is a thing capable of being stolen.

That said and considered, I am of the firm view that as per tests set in the case of Waziri Amani, the appellant was sufficiently identified committing the charged offence at the crime scene. The appeal is thus

dismissed. Conviction and sentence meted out are hereby confirmed and upheld.

DATED at MUSOMA this 23rd day of September, 2022.



F. H. Mahimbali

JUDGE

Court: Judgment delivered 23rd day of September, 2022 in the presence of the Mr. Juma David Mwita, Advocate for the appellant, Ms. Monica Hokororo, Senior State Attorney, for the respondent and Mr. Gidion Mugoa – RMA.

Right of appeal is explained.

F. H. Mahimbali

JUDGE