IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO.175 OF 2020

(Originating from Criminal Case No. 230 of 2015 in the District Court of Kinondoni at Kinondoni)

EDWIN BAGUMA KAJERELO..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 21/09/2022

Date of Judgment: 26/09/2022

Kamana, J:

The Appellant, **Edwin Baguma Kajerelo** was arraigned before the District Court of Kinondoni charged with an offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 [RE.2002]. It was alleged by the Prosecution that on 20th May, 2014 at Mbezi Beach area within Kinondoni District in Dar es Salaam Region, the Appellant did steal a mobile phone valued at Tshs. 150,000/=, Tshs. 255,000/= in cash, Tshs.147,000/= in Tigo Pesa and passport size photograph valued at Tshs, 6,000/= the property of one **Joyce John Mwangange (PW1)**. It was further alleged that immediately before and after such stealing, the Appellant threatened PW1 with a knife with a view to obtaining and retaining such stolen properties.

The accused person pleaded not guilty and a full trial was held. At the conclusion of the trial, the Appellant was convicted of armed robbery and consequently sentenced to serve thirty years in prison.

Aggrieved with the findings of the trial Court in respect of his conviction and sentence, the Appellant preferred this appeal in his quest for justice. In his Petition of Appeal, the Appellant advanced three grounds of appeal which are hereunder reproduced as follows:

1. That, the learned Magistrate erred in law and fact to convict the Appellant basing on the evidence of visual identification without considering that the incident took place at night and PW1 allegedly to have identified an Appellant did not state exactly how she identified the Appellant at the time of incident.

2. That, the learned Magistrate erred in law and fact to convict the Appellant without considering tremendous contradiction in the testimonies of PW1, PW2 and PW3 as to whether the victim of robbery (PW1) was robbed by the gang of robbers or by a one robber.

3. That, the learned Magistrate erred in law and fact for failure to consider the defence of alibi which was raised by an Appellant during the time of his defence in Court while the Prosecution did not cross examine the Appellant to challenge his defence.

When the appeal was called on for hearing, the Appellant appeared in person fending for himself. The respondent was represented by Ms. Dhamiri Masinde, the learned State Attorney. The Appellant adopted his three grounds of appeal and opted not to elaborate them. He further requested the Respondent to firstly address the Court on the grounds of appeal.

At the outset, Ms. Masinde, the learned State Attorney supported the appeal. She was of the view that the Prosecution case was marred with incongruities which principally did not warrant a conviction against the Appellant. In that case, she requested this Court to allow the appeal.

In the interest of justice, I think it is pertinent, before discussing the reasons advanced by the learned State Attorney, to have a look at the evidence adduced before the trial Court. Succinctly, it was as follows.

Around 22:30 hours of 20th May, 2020 at Mbezi Beach area, the complainant, one PW1 was strolling to her home when she met a boy who shoved her down. Immediately thereafter, the boy started to forcibly snatch her hand bag. In the course of struggling with a view to protecting her belongings, PW1 felt pain and realized that she has been stabbed with a sharp object in her hand. Being scared, PW1 relented and the boy fled with her hand bag.

PW1 aggrieved with what she underwent, she ran after the boy in the company of one Samli Hamosi Mdandige (PW2). Their efforts to catch the boy proved futile as the boy was much a speeder compared to them. Basing on their accounts of that event, the boy sought refuge in a place they could not locate him.

In her bid to pursue her assailant, PW1 relates the incident to a group of youths residing in her street. The young men told her that they know the boy and promised to leave no stone unturned until they arrest him.

On his part, PW2's story is to the effect that on the material day was at his home preparing to go to his work place when he saw one lady (PW1) walking and such lady met a boy. It was like they were greeting each

other when suddenly, according to PW2, both of them fell down. Since he could not comprehend what was going on, he decided to go where the lady and the boy were so as to ascertain what was happening.

When he was approaching at the scene, the boy saw him and he stood up and took flight. Meanwhile PW1 was crying while narrating that the boy has attacked him and ran off with her hand bag in which there was a cellphone and title deed. PW2 joined PW1 in pursuing the boy to their dismay since they could not be able to apprehend him. When they reached at the place called TMK, PW1 and PW2 asked some people on whether they saw the boy running. Those people agreed to have seen the boy entering in an area known as Mafletini. In view of that, PW2 advised PW1 to report the incident to the Police Station and PW1 reported as such.

According to PW1, two days later she received a call from one of the youths he related the incident to that the boy has been arrested and he was at the local government office. The caller urged her to go there and identify the boy. When she arrived at the office, she found the boy who beseeched for mercy and promised to show where her stolen properties were. From there, the boy was taken to Kawe Police Post and later to the hospital since he was beaten.

Following that event, the boy who is now the Appellant was arraigned before the District Court of Kinondoni charged with an offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 [RE.2002].

A third witness for the Prosecution was ID6523 S/SGT Hamza (PW3). This witness narrated that on 20th May, 2015 he was at Kawe Police Station when he received a case file for investigation with regard to

armed robbery. He interviewed the complainant (PW1) who told him that he was attacked by a gang of thieves at about 20.00 hrs and during that attack her different items were stolen including money, ATM cards and phone. It was his evidence that the complainant identified the Appellant as one of those thieves. When he interviewed the Appellant, he denied to have committed the alleged offence. He proceeded to testify that he recorded statements of other witnesses who agreed to have seen the Appellant at the scene of crime.

In his sworn evidence, the Appellant stated that he knows nothing about the case. He in effect pleaded a defence of alibi by stating that during those days in which he is alleged to have committed the alleged offence he was in Bukoba.

Coming back to the appeal, the learned State Attorney argued that the trial Court erred in relying on the evidence of visual identification to convict the Appellant. To her, the trial Court misdirected itself by not considering essential factors for the evidence of visual identification to be considered credible. It was her contention that since the incident took place at night hours, the trial Court was placed under the duty to satisfy itself as to a time spent by PW1 in observing the Appellant; and whether PW1 stated how the Appellant looks like when she reported the incident to the persons she met immediately after the incident. She submitted that such factors are of utmost importance in establishing the authenticity of the evidence of visual identification. In augmenting his position, she cited the case of **Waziri Amani v. Republic** [1980] T.L.R 250.

It was further submitted by the learned State Attorney that PW1 in her evidence did not mention whether she was threatened by any weapon. According to the evidence, PW1 felt pain which she realized was caused by being stabbed by a sharp object. However, in the Judgment of the trial Court, it is alleged that a knife was used to attack PW1. To the learned State Attorney, the issue of knife was extraneous in that case as the victim (PW1) did not mention when adducing her evidence.

Lastly, the learned State Attorney was of the view that the trial Court failed to consider the evidence of alibi as advanced by the Appellant. She observed that such failure occasioned injustice to the Appellant.

In summing up, the learned State Attorney requested this Court to allow the appeal on the ground that there was insufficient evidence to warrant conviction against the Appellant.

On his part, the Appellant was in agreement with what the learned State Attorney submitted. He pleaded for his release from prison.

Upon perusing the records of the trial Court, it is crystal clear in my mind that the conviction and sentence meted out against the Appellant exclusively revolves around the evidence of visual identification of the Appellant by PW1. That being the case, the main issue for determination is whether the trial Court was correct to find that the Appellant was properly identified at the scene of crime.

The law in relation to evidence of visual identification is well settled in Tanzania. The Court of Appeal has in multitudinous cases decided on how to approach and apply the evidence of visual identification. Without exception, the evidence of visual identification especially in night times

requires a careful approach and application as it is considered to be the weakest evidence of all. In the case of **Waziri Amani (Supra)**, the Court of Appeal observed thus:

> *'The first point we wish to make is an elementary one and this is that evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.'*

In view of that, the trial Court before acting on the evidence of visual identification, it should, as a matter of principle, warn itself as to the possibilities of mistaken identity and watertightness of such evidence. Short of that, the trial Court may find itself convicting innocent persons who are mistakenly identified to be culprits.

In the case of **Said Chaly Scania Versus the Republic**, Criminal Appeal No. 65 of 2005 (Unreported), the Court of Appeal observed as follows:

> *'We think that where a witness is testifying identifying another person in unfavourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken*

> *dentification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger.'*

From the records, it is clear that PW1 testified that she managed to identify the Appellant since there was an electricity light. However, in her testimony, PW1 did not state the intensity of that light, the time spent in observing the Appellant and whether the Appellant was familiar or stranger to her. These elements are vital in eradicating possibilities of mistaken identity. In the absence of those elements, I am inclined to hold that the evidence of visual identification was wrongly relied by the trial Court.

It is clear from the records that PW1 identified the Appellant for the first time at the local government office. Before that, PW1 did not describe how the Appellant looks to any one she encounters immediately after the incident. Even PW2 did not account anywhere in respect of who the Appellant was and how he looks. This failure is another aspect which defeats the credibility of the evidence of visual identification.

In the case of **Marwa Wangiti v. Republic** [1992] T.LR. 39, the Court of Appeal emphasized the importance of a witness to name a suspect at an earliest time. It observed the following:

> *'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.'

Inspired by that decision of the Court of Appeal, I hold that failure of the PW1 and PW2 to name the Appellant before his arrest puts their reliability in question.

From the above reasons, I do not see any need to discuss other grounds of appeal as this one is sufficient enough to dispose of this appeal.

Accordingly, this appeal is allowed in its entirety. I consequently quash the conviction of the Appellant and set aside the prison sentence meted out by the trial Court. The Appellant is to be released forthwith from the prison unless he is otherwise lawfully held.

It is so ordered.

Right to appeal explained.

KS Kamana

JUDGE

26/09/2022

Court: Judgment delivered in the presence of both parties.