IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 181 OF 2021

(Originating from *Criminal Case No. 467 of 2019 in the District Court of Kinondoni at Kinondoni).*

FLAVIAN GASPAL ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

29th September & 5th October, 2022.

MWANGA, J.

The appellant, **Flavian Gaspal** was charged and convicted of Armed Robbery Contrary to Section 287A of the Penal Code, Cap. 16 R.E 2002 now it is [R.E 2019]. He was then sentenced to 30 years imprisonment. Being dissatisfied with the decision, he appealed to this court on the following grounds: -

1. That, the learned trial grossly magistrate grossly erred both in law and fact when convicted the appellant based on Exhibit P2, a mobile phone which was not proved nor positively identified by PW1 in court by opening it and reading its serial numbers before everybody in court.
2. That, the learned trial Magistrate grossly erred in law and fact when convicted the appellant based on the evidence of PW2 despite it

being hearsay evidence and that there were no distinctive features which were mentioned or serial numbers.

3. That, the learned trial magistrate grossly erred in law and fact when convicted the appellant based on the evidence of PW3 and unprocedural admission of cautioned statement for identification purposes before inquiry was conducted as it could have influenced him after reading it and worse still no visible ruling was delivered after closure of the inquiry.
4. That, the learned trial grossly magistrate grossly erred in law and fact when convicted the appellant based on unprocedural conduct of ID parade contrary to PGO 232.
5. That, the learned trial grossly magistrate grossly erred in law and fact when convicted the appellant based on unreliable evidence of PW1 who failed to give distinctive or peculiar marks of his alleged stolen phone.
6. That, the learned trial grossly magistrate grossly erred in law and fact when convicted the appellant based on unreliable visual identification evidence of PW1 at the scene of crime despite of his failure to give distinctive features of his culprit to the police and worse still condition of proper identification at the scene of crime were not conclusive.

7. That, the learned trial grossly magistrate grossly erred in law and fact when convicted the appellant based on incredible evidence of the prosecution witness (PW1, PW2, PW4 and PW5).
8. That, the learned trial grossly magistrate grossly erred in law and fact that, the case was poorly investigated and prosecuted hence not proved to the standard required.

The story of the matter is that; on 4th August, 2019 one John Robert Ndikila (PW1) while at Mwenge "Bajaj" stand was communicating with his guest via his mobile phone. The appellant, Flavian Gaspal (DW1) approached him and attempted to grab or snatch his mobile phone. In an attempt to defend himself and retain the phone, John Robert Ndikila((PW1) thrown the phone near "Bajaj". During confrontation, the appellant quickly jumped the other side of Bajaj and took the phone and started running. PW1 tried to chase him but in return the appellant took out the knife which was in his trouser and threatened to stab PW1. PW1 re-treated from that action.

It follows that, PW1 went back to the Bajaj stand and complained to the Bajaj drivers about the incident and how it happened. Amongst other things, he described to them that the robber (appellant) was tall, black and that he was neither thin nor tall. One of the Bajaj drivers told PW1 that he knew the robber according to the given descriptions, hence

he advised PW1 to report the matter to the Bajaj chairman in that area and he did.

The following day in the morning i.e 5th August, 2019 the chairman of Bajaj reached at his working station, which is the Bajaj stand and he was told about the incident of robbery occurred last light. Upon being given descriptions of the appellant, he also stated that he knew the appellant. They looked after him in the nearby areas and manage to trace and arrested him. They took him to Mabatini Police Station. The Bajaj chairman informed PW1 over the phone about the arrest of the appellant Since it was dark times, PW1 revealed that at the scene of crime there were car and billboards lights which were just about three meters away from where the crime was committed.

In the first ground of appeal, the learned State Attorney submitted that exhibit P2 was the mobile phone which was the subject to this matter, and that the said exhibit was identified properly by PW1, who described its colours, type and the mode of commission of the crime. He referred this court at page 11 – 13 of the typed proceedings. At page 10, PW1 described that his phone was HUWAWEI, black and grey in colour and that the person who snatched/grabbed the phone was tall neither fat nor thin. Further descriptions by PW1 were shown at page 13 of the typed proceedings.

The argument by the appellant was that the said mobile phone was not opened before the court so that the PW1 could describe it by identifying the serial numbers. On the records at the trial court PW1 gave descriptions of his mobile phone while at the scene of crime. That's why PW2 managed to trace the appellant and arrested him with the robbed phone with similar descriptions as that of PW1 in the absence of the PW1.I therefore hold that. the descriptions of the mobile phone was sufficient and it was consistently right from the scene of crime, to the police and the court.

As to the second ground of appeal, that the evidence of PW2 was hearsay evidence because he was not in scene of crime. The leaned state Attorney submitted that PW2 was the chairperson of Bajaj and he is also a driver in that station. He was approached by his fellow driver and informed about the incidence of mobile phone being robbed. PW2 accompanied with his fellow drivers went to another location where the petty business traders were working('machinga'), they arrested the appellant while in possession of the robbed mobile phone of the PW.

PW2 called back PW1 about the information of on the arrest of the appellant. He then came and joined PW2 and took the appellant to Mabatini Police Station. He referred this court at page 15 of the typed proceedings where Pw2 and PW1 handed over the robbed phone to the

police, which was HUWAWEI type, silver grey and black in colour. He added that, all this features in the cross examination and examination in chief by PW2 who continued describing and identifying the appellant and the robbed mobile phone. The learned state attorney argued that the evidence of PW2 was direct and not hearsay.

From the submission above, one can see that PW2 was a trustworthy and reliable witness. Soon after he was informed about the descriptions of the appellant, he hastened to point finger and tell that it was the appellant who robbed the PW1.

In the third ground of appeal, the learned State Attorney supported this ground of appeal on the reason that though trial within trial was conducted and the ruling was issued as indicated in page 36 of the typed proceedings, that exhibit is nowhere indicated that it was tendered. She added that, this ground of appeal is valid as the law was not complied with and the same should be expunged from the record.

It appears from the original records that trial within trial was conducted to ascertain the time within which the cautioned statement was taken or recorded. However, the trial magistrate ruled against it and admitted for identification purposes, hence it was not admitted as exhibit. The appellant showed some hesitation for such admission that it might have influenced the trial court in making the decision. I have gone through

the record and I do not find argument of the appellant to be tenable because; the judgment of the trial court do not even reflect that there were such an exhibit and if at all it was accorded any weight in reaching the decision. This ground of appeal also is not meritorious.

In the fourth ground of appeal, on the conduct of the identification parade, the learned state attorney stated that the parade was conducted properly. He referred the evidence of PW4 at page 39,45 and 46 of the typed proceedings in relation to how identification parade was conducted. In expounding the point, he stated that the parade assembled 8 persons and PW1 was called to identify the appellant, hence it was conducted in accordance with S. 160 of CPA and (PG0 232).

I have perused the records at page 39, 45 and 46 and noted that the procedural requirements of conducting ID parade were complied with. PW5 explained in details on procedures and how it was conducted. There were 8 persons resembling the appellant, they were lined up, and finally PW1 identified the appellant as the person who robbed him.

With respect to fifth ground of appeal, the appellant submitted that PW1 failed to give descriptions of his mobile phone. This ground of appeal has been answered in the negative as discussed in the first and second grounds of appeal.

For the sixth ground of appeal, the appellant submitted that there was no proper identification at the scene of crime. The learned state attorney submitted at page 10 – 11 of the typed proceedings that PW1 identified the appellant as tall, black and he was neither fat nor thin. He explained on the source of lights from the billboards and car lights which were so intensive and close to about two meters away. At page 12, PW1 stated that in the course of confrontations, the act of robbing the phone by the appellant took like four minutes, so he had enough time to observe the appellant. PW2 while being cross examined by the appellant at page 13 he insisted that there was enough lights around that is why he managed to identify the appellant.

With such sources of lights and the distance between the appellant and PW1, I am inclined to hold that there were no issues regarding identification of the appellant at the scene of crime. In **Waziri Aman V. R, (1980) TLR 250,** the issues relating to intensity of lights, time for observation and physical description of the accused persons are key for identification purposes. That being the position, It is undoubtedly that there was proper identification of the appellant.

In the seventh ground of appeal, the appellant submitted that the conviction was relied on incredible evidence PW1, Pw2, PW4 and PW5 for being light. The leaned state attorney was of the view that evidence of

the mentioned witnesses were credible. He added that, PW1 described the appellant from the time of commission of the offence to the time the matter was reported to the police and even at the trial court. That it was the appellant who robbed the phone of PW1. At the police station, PW4 explained how he received the appellant and booked him with the exhibit P2. On the other hand, PW5 was the one who conducted identification parade. I t was further reiterated that the witnesses were reliable, and helped prove of the case beyond reasonable doubt.

I have also a similar view that, these witnesses were not discredited at any moment by the appellant at the trial court, hence reliable and credible once.

In the last eighth ground of appeal, that the case was poorly investigated and prosecuted, the learned state attorney argued to the contrary. Making reference at page 11 of the typed proceedings, PW1 told the court that when the appellant was robbing the mobile phone, he throws the same to Bajaj and the appellant then took knife to threaten PW1. At page 11 of the typed proceedings shows that the appellant had a knife in this trouser and it was PW3 who received the appellant at police station, investigated and collected evidence and that he even appeared in court to testify. Learned state attorney referred the court in page 25 – 26. The prosecution brought 5 witnesses who testified in court, and the

appellant had a case to answer, he was given the right to defend himself in court as per page 50 – 51. The reply of the appellant during Cross examination was a proof that the appellant was rightly convicted and sentenced according to the law.

In the circumstances, it is desirable to say that the Appeal is dismissed. Conviction and sentence of the trial court upheld.

It is so ordered

H. R. MWANGA

JUDGE

05/10/2022

ORDER:

Judgement delivered in Chambers this 5th day of October, 2022 in the presence of the appellant and absence of the Respondent.

H.R. MWANGA

JUDGE

05/10/2022