IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

(APPELLATE JURISDICTION)

CRIMINAL APPEAL No. 107 OF 2021

(Arising from the decision of the District Court of Temeke at Temeke by Hon. Mwankenja, RM) dated 1st day of October, 2021, in Criminal Case No. 362 of 2020)

JOSEPH SAID HALIYE .... APPELLANT

VERSUS

THE REPUBLIC... RESPONDENT

JUDGMENT

3rd & 10th October, 2022

ISMAIL, J;

The District Court of Temeke at Temeke, before which the appellant was arraigned, convicted him of armed robbery, contrary to the provisions of section 287A of the Penal Code, Cap. 16 R.E. 2022. In consequence of the conviction, the trial court handed the appellant a custodial sentence of 30 years.

The brief facts constituting the appellant's blemishes are straight forward. At around 9.00 pm on 3rd October, 2021, the victim, PW1 had finished bathing in a bathroom that is outside her house. As she was walking

back to her room, she was invaded by two bandits at knife point. They made away with her mobile phone handset Infinix HD7, valued at TZS. 250,000/- and cash sum amounting TZS. 53,000/-, leaving the victim with a score of injuries. After the incident that lasted for about seven minutes, the assailants ran away. Her call for help yielded no fruits as the said bandits found their way out of the scene of the crime. With the assistance of a fluorescent (tube) light, PW1 identified one of the assailants. He happened to be the appellant in this matter.

The matter was reported to the Police from which PW1 was given a PF3 which enabled her to access medical services for the injury sustained in the incident. A police swoop succeeded in the apprehension of the appellant and eventual arraignment in court. His alleged partner in crime became illusive.

Trial proceedings saw the prosecution marshal attendance of four witnesses against two for the defence. The appellant's defence was that on the day and time of the alleged commission of the offence, he was in Mbagala, Dar es Salaam, helping DW2 shifting to her new house. This process took him until around midnight of the same night. This effectively meant that she could not be at the scene of the crime at the time when he was elsewhere, many kilometres away.

The trial magistrate was convinced that a case had been made out to warrant making a finding of guilty against the appellant. Consequently, he was convicted and sentenced to the maximum prison term. Displeased with the conviction and sentence, the appellant has preferred the instant appeal. Seven grounds of appeal have been preferred. These grounds state as follows:

1. *That the trial magistrate erred in law to name the appellant in the judgment as Joseph Said Haliye @ Joseph Tufe which the said name was disputed during the preliminary hearing and no evidence was tendered by the prosecution to prove that the appellant is also known as Joseph Tufe;*

2. *That the trial magistrate erred in law and in fact to convict the appellant relying on visual identification evidence of PW1 and PW2 which was not watertight for want of positive identification;*

3. *That the trial magistrate erred in law and in fact to convict the appellant basing on evidence of PW1 which is highly suspicious and improbable, since it is incomprehensible that she would go to the bathroom while holding a phone and money;*

4. *That the trial magistrate erred in law and in fact to convict the appellant based on evidence of PW1 and PW2 which is contradictory with respect to who assisted PW1 when she cried for help;*

5. *That the trial magistrate erred in law and in fact to convict the appellant based on an invalid PF3 (Exhibit P1) which was tendered but its contents were not read out;*

6. *That the trial magistrate erred in law in fact for not drawing an adverse inference on the testimony of E. 5029 Detective Corporal Jackson (PW4) who testified that the appellant made a confession while the confessional statement was not tendered in court; and*

7. *That the trial magistrate erred in law and in fact to convict the appellant based on the prosecution's case which was not proved beyond reasonable doubt.*

When the matter was called on for hearing, the appellant appeared in person, unrepresented, whilst the usual Ms. Nura Manja, learned State Attorney, held the fort for the respondent.

Noting the decisive importance that ground two carries, Ms. Manja chose to argue the said ground alone, opting to abandon other grounds of appeal.

Submitting in respect of the said ground, Ms. Manja began by supporting the appeal. She took the view that essential elements that would render the conviction credible were not observed, thereby rendering the decision a complete nullity.

With respect to ground two, the argument is that, whereas the offence was allegedly committed at night (9.00 pm), nothing was testified on how PW1 managed to identify her assailants. Nothing was stated on the intensity of the light and the spell of time during which PW1 was with the assailants, including the appellant.

Reverting to the testimony of PW2, Ms. Manja contended that his testimony was that he heard an alarm but when he tried to respond to it, he found that the door of his room was closed. He eventually got out and saw the appellant running. Learned counsel argued that the obvious fact is that PW2 could not see as the appellant while the door was closed and could not have identified the appellant he wasn't facing at the time.

Ms. Manja further argued that PW1 did not say if the person who robbed her is the same person PW2 saw running from the scene of the crime. She concluded that, since the identification did not meet the test set in the case of ***Waziri Amani v. Republic*** [1980] TLR 250, the same could not constitute the basis for conviction. It is simply that the identification was weak.

The appellant had nothing substantive to submit on. He only prayed that his appeal be allowed.

As submitted by Ms. Manja, conviction of the appellant and the eventual meting out of the sentence was based on the testimony of visual identification. It is the identification which was carried out, severally, by PW1 and PW2. While the law is settled, to the effect that the testimony of visual identification may found a conviction, the question is whether the testimony of visual identification in the instant case met the threshold requisite for grounding a conviction against the appellant. The view held by Ms. Manja is that the same wasn't, and I fully subscribe to this view.

The reason for this conclusion is that neither PW1 nor PW2's testimony came anywhere close to meeting the preconditions set in the ***Waziri Amani's case*** and a plethora of others that came after it. These include the case of ***Demeritus John @ Kajuli & Others v. Republic***, CAT-Criminal Appeal No. 155 of 2013 (unreported), in which the Court of Appeal of Tanzania held:

> *"In a string of decisions, the Court has stated that evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a Court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely water-tight (See,* ***Waziri Amani v. R.*** *(1980) TLR 250;* ***Raymond Francis v. R.*** *(1994) T.L.R. 100;* ***R.V. Eria Sebatwo*** *(1960) EA 174;* ***Igola Iguna and Noni @ Dindai Mabina v. R.,***

*Criminal Appeal No. 34 of 2001, (CAT, unreported). Eye witness identification, even when wholly honest, may lead to the conviction of the innocent (**R. v. Forbes**, (2001) 1 ALL ER 686). **It is most essential for the court to examine closely whether or not the conditions of identification are favourable and to exclude all possibilities of mistaken identification."*** [Emphasis is added]

The testimony on which the trial court relied to ground a conviction had all the hallmarks of an unreliable and weak testimony. It is settled that the alleged incident occurred at 9.00 pm, and the prosecution's contention is that the witnesses were helped in the identification by a tube light which illuminated the place. Nothing on the intensity of the light was stated in the entirety of the testimony, the distance between the witnesses and the assailants. In the case of PW2, the fact is that he saw the appellant running, meaning that he did not take time to observe him. PW1 has contended that she knew the appellant before the incident, imputing that that her identification is unmistakable. With respect, this position defies the established position of the law which was illustrated in the decision of the upper Bench in ***Ally Mohamed Mkupa v. Republic***, CAT-Criminal Appeal No. 2 of 2008 (unreported), wherein it was guided as follows:

*"Where one claims to have identified a person at night there must be evidence not only that there was light, **but also***

the source and intensity of that light. This is so even if the witness purports to recognize the suspect" [Emphasis added].

These speaking doubts lead me to an irresistible conclusion that the prosecution's testimony failed the test of a credible, reliable and sufficient testimony on which to base a finding of guilty against the appellant. It brings me to a conviction that the appellant's conviction and eventual sentence were predicated on evidence which is not worth its name.

In consequence, this appeal is allowed and, accordingly, I quash and set aside the conviction and sentence, and order that the appellant be immediately released, unless he is held on some other lawful grounds.

Order accordingly.

Rights of the parties have been explained.

M.K. ISMAIL,

JUDGE

10/10/2022

DATED at **DAR ES SALAAM** this 10th day of October, 2022

M.K. ISMAIL,

JUDGE

10/10/2022