IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY)

AT MWANZA

CONSOLIDATED CRIMINAL APPEAL No. 05 & 26 OF 2022

(Original Criminal Case No. 247 of 2020 of the District Court of Chato at Chato)

ELISHA MARIKO ---------- 1st **APPELLANT**

MUSSA MESHACK---------- 2nd **APPELLANT**

VERSUS

THE REPUBLIC---------- **RESPONDENT**

JUDGMENT

Last Order: 19/10/2022
Judgment: 28/10/2022

M. MNYUKWA, J.

In the District Court of Chato at Chato, the appellants were arraigned and convicted of armed robbery c/s 287A of the Penal Code of Cap 16. RE: 2019. Upon conviction, they were equally handed down with a sentence of 30 years imprisonment each. Aggrieved, the appellants appealed to this court for both the conviction and sentence. The first appellant Elisha Marko filed Appeal No. 05 of 2022 while Mussa Meshack filed Appeal No. 26 of 2022, which are now consolidated as Criminal Appeal No. 05 & 26 of 2022. The appellants presently seek to impugn the

decision of the District Court. The first appellant vide appeal No. 5 of 2022, petitioned with 6 grounds of appeal and the second appellant vide criminal appeal No. 26 of 2022 also advanced 6 grounds of appeal which I shall reproduce at a later stage of the judgment.

The case for the prosecution was built around the accusation of armed robbery as it was alleged that the accused MUSSA s/o MESHACK, SHUKRANI S/O MASABILA, ELISHA S/O MARIKO and AMOS S/O PETER M @MAJOGORO jointly, on 21st day of November 2020 at Mkungo village within Chato District in the region of Geita did steal one phone made Itel valued Tshs. 30,000/=, the property of FILBERT S/O COSMAS and immediately before such stealing did cut one FILBERT S/O COSSMAS with a machete in various parts of his body in order to obtain and retain the phone from him.

Upon arraignment, before the trial court and from the testimony of (13) prosecution witnesses, both accused were also afforded their defence before the trial court. The appellants refuted the prosecution's accusations and protested their innocence as they both entered a plea of not guilty. The trial court findings were that, the prosecution case was proved against MUSA S/O MESHACK and ELISHA S/O MARIKO who were convicted and squarely sentenced to serve 30 years imprisonment.

As I have, again, intimated, the 1st appellant appealed before this court vide Criminal Appeal No. 05 of 2022 and the 2nd appellant appealed vide Criminal Appeal No. 26 of 2022. Whether coincidently or by design, both have similar 6 grounds of appeal: -

1. *THAT the trial Court Magistrate erred in law and facts to accept weak evidence from the prosecution side which did not meet the credibility and weight of evidence which is contrary to law under section 110 of TEA 1967.*
2. *That the decision of the District Court to convict and sentence me was illegal because the charge against me was not proved beyond a reasonable doubt.*
3. *That all testimonies tendered before the court was not proved whether the appellant did commit the said offence but the case against me is hypothetical case.*
4. *That the trial District Court erred in law and facts because during the confession at the police station used force which resulting him pleading guilty without committing the said crime, the trial court was not taking into consideration that the confession must be voluntary.*
5. *That the trial Magistrate misdirected himself in law and facts as there was no cogent evidence adduced by prosecution witnesses to warrant conviction and sentence.*
6. *That the trial court erred in law and facts to convict and sentence me with poor evidence from the prosecution*

side due to poor identification of all witnesses from the prosecution side.

At the hearing, before this court, the appellants defended the appeal in person, unrepresented, whereas the respondent the Republic had the service of Ms. Sabina Choghoghwe for both appeals No. 05 & 26 of 2022.

Starting with Criminal Appeal No. 05 of 2022 the appellant Elisha Marko was the first to submit and he prayed this court to adopt his grounds of appeal to form part of his submissions. He further prayed this court to allow the appeal and set him free.

Responding to the appellant's grounds of appeal, Ms. Sabina Choghoghwe (SA) opposed the appeal and supported the conviction and sentence. He enlightens that on grounds 1, 2,3, 5 and 6 the appellant complained that the prosecution case was not proved beyond reasonable doubt and on the 4th ground the appellant complained of being convicted based on the caution statement which was not freely and voluntarily obtained.

On the first point, she avers that the appellant was convicted based on the evidence of identification and the caution statement exhibit P3. On the evidence of identification, she conceded that it was a piece of weak evidence for PW6 testified that, he did not know the appellant before and he did not state how he identified the 2nd appellant. Ms. Sabina maintained

that, the kind of evidence is not sufficient to enter conviction against the accused person. Referring this court to the case of **Waziri Amani vs Republic** [1980] TLR, 250, she maintained that, the 2nd appellant was not properly identified.

On the second point that, the appellant claims to be convicted based on the caution statement which was not freely and voluntarily taken, she insisted that the trial court rightly convicted the 2nd appellant based on the caution statement. She submitted that, though the accused person retracted the admissibility of the caution statement, the trial court conducted an inquiry and the caution statement was cleared for admission and admitted as exhibit P3. She referred to the case of **Mohamed Haruna @Mtupeni & Another vs R,** Criminal Appeal No. 259 of 2007 that, the best evidence in a criminal case is of the accused person who freely confessed to his guiltiness.

She went on to submit that, after the inquiry by the trial court, it was found that, the 2nd appellant's caution statement was freely obtained and the court warned itself before convicting, for the only evidence available was of the caution statement which was repudiated by the accused person. Insisting, she cited the case of **Godfrey Schizya vs DPP** Criminal Appeal No. 176 of 2007, which the Court of Appeal cited with approval in the case of **Hemed Abdallah vs Republic** [1996] TLR 172

where it was held that, courts in dealing with the retracted or repudiated confessions, needs to be corroborated unless the court after consideration of all circumstances it is satisfied that the confession is nothing but the truth to act on without corroboration. She went on to submit that, since the only evidence that convicted the accused was based on a caution statement, she argued that, since this court is the 1st appellate court it can evaluate the evidence and determine the appeal.

Re-joining, the accused person insisted that, he was not recording any statement rather he was given the same to sign and the police refuse him to call a relative or even sent him to the justice of peace.

In appeal No. 26 where the appellant was one Mussa Meshack who has similar grounds of appeal, at the hearing he prayed to add four grounds of appeal to wit: -

1. *That the trial court erred in law and in fact for failure to convict the appellant without proving the ownership of the property alleged to be stolen as there was no receipt tendered to prove ownership.*
2. *That the trial court erred in law and in fact since the PF3 which was used to convict the appellant failed to show which hand of the victim was injured.*
3. *That the trial court erred in law and in fact for relying on a search warrant while the witness who attested the search warrant were not called.*

4. *That the trial court erred in law and in fact to convict the appellant on the offence of armed robbery while there is no proof of the use of a weapon during the commission of the offences as the same was not tendered by the prosecution.*

The appellant's additional grounds were adopted and form part of his grounds of appeal. Submitting first, Ms. Sabina started by opposing the appeal and supports the conviction and sentence. Ms. Sabina chose to argue grounds 1,2,3,5 and 6 jointly as they both deal with the issue that the prosecution case was not proved and the 4th ground which deals with confession and argues separately the 1-4 additional grounds of appeal.

On the first point covered in grounds 1,2,3,5 and 6 that, the prosecution case was not proved, she submitted that the appellant was properly convicted based on the evidence of identification. She went on that, PW4 and PW6 properly identified the appellant as they claim that, the appellant was their fellow watchman with who they worked together for two months. PW4 testified to have identified the accused with the aid of the light generated from the electric bulb which shone the area they were working as watchmen. Ms. Sabina submitted further that, PW4 was able to identify the clothes worn by the appellant and recognises his voice for PW4 stood nearly 2 to 5 meters from the appellant. Referring to the

case of **Kenedy Ivan vs R,** Criminal Appeal No. 178 of 2007, she insisted that recognising a person known, all requirements of identification need not be met as stated in the case of **Waziri Amani vs R** [1980] TLR 250.

She further testified that, the appellant was also convicted based on the doctrine of recent possession whereas when arrested he was found with the mobile phone make Itel a property of PW6 which was shortly stolen and bears a special mark FC. Referring this court to the case of **Mustapha Maulidi Rashid vs Republic,** Criminal Appeal No. 241 of 2014, he insisted that the appellant was properly convicted for it was proved that the appellant was found with the mobile phone which was proved to be a property of PW6 which was stolen and was the basis of the complaint.

On the 4th ground of appeal that, the appellant was convicted based on a retracted caution statement, she submitted that, the statement was voluntarily made as there was an inquiry conducted by the trial court. Insisting, she cited the case of **Makungu Misalaba vs R,** Criminal Appeal No. 351 of 2013, that the confession can be relied upon by the court if satisfied that what is stated is true even when retracted. She maintained that the claim by the appellant that, the statement was not voluntarily made was an afterthought.

On the 1st additional ground, she submitted that, the offence of armed robbery, what was required to be proved was not a receipt because PW6 managed to show that the mobile phone belongs to him as against the appellant who failed to show how he came into possession of the mobile phone. She added that, the seizure receipt was tendered in court and PW1 and PW3 testified in court as independent witnesses. She insisted that the ground has no merit.

Submitting on the second added ground of appeal, she submitted that PF3 is not a requirement to prove the offence of armed robbery. She insisted that even in the absence of the PF3 in the record, the prosecution had managed to prove the case against the appellant.

Submitting on the 4th added ground of appeal, which I noted that, she termed it as ground No. 3, she avers that, the prosecution is not required to tender the weapon used if was not recovered. The PF3 suggest that PW6 was wounded by a sharp object which corroborates the evidence of PW6 that the accused person was in possession of the weapon. She retires and prays this court to dismiss the appeal for the case was proved by the prosecution to the standard required.

Responding to the submissions by the prosecution, the appellant prayed this court to adopt all of his grounds of appeal preferred. He went on to submit that, he was wrongly convicted by the trial court based on

the retracted confessional statement and he was not sent to the justice of peace for the court to ascertain if the confession was true or voluntary made.

He submitted further that, there was no proper identification at the time of the commission of the offence or soon after the commission and therefore identification was not in accordance with the law.

He further submitted that, the owner of the phone was not identified and no receipt was tendered to prove that he owns the phone and no any person from Vodacom was brought to make a clarification. He also submitted that, the PF3 tendered and admitted as exhibit P6 in the trial court failed to indicate which arm the victim was injured. He further submitted that, the search warrant did not show at what time the search was conducted and that he was found with the mobile phone in dispute.

He also claims that, the evidence does not show that, the victim was cut by a machete and the arresting officer did not state if he was found with a machete which also was not brought before the trial court as an exhibit. He insisted that, he was severally charged and the charge sheet was severally amended and the prosecution did not prove the case to the standard required. He, therefore, prays this court to allow the appeal.

Having heard the submission by the learned State Attorney and the appellants both in Criminal Appeals No. 5 and 26 of 2022 this appeal can

be disposed of by combining all grounds of appeal because they boil down to one issue, that is, *whether the prosecution proved its case against the appellants beyond a reasonable doubt*. In other words, is whether, based on the prosecution evidence adduced before the trial court, the appellants were properly convicted of the offence of armed robbery by the trial court.

As it stands in records, the appellants were both charged with an offence of Armed Robbery contrary to section 287A of the Penal Code, Cap. 16 RE: 2019 (now 2022) which reads as follows:

> *"...any person who **steals anything** and at or immediately after the time of stealing is armed with any **dangerous or offensive weapon** or robbery instrument; or is in the company of one or more persons, and at or immediately before or immediately after the time of the stealing **uses or threatens to use violence to any person**, commits an offence termed armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."*

From the above-cited section, the Court of Appeal in the case of **Shabani Said Ally vs Republic** (Criminal Appeal No. 270 of 2018) [2019] TZCA 382, held that, for the prosecution to establish an offence of armed robbery, it must be proved that, first, there was a proof of theft, the proof of the use of a dangerous or offensive weapon or robbery

instrument at the time of or immediately after the commission of the robbery and that use of a dangerous or offensive weapon or robbery instrument was directed to a person. (See**:- Kashima Mnadi vs. Republic,** Criminal Appeal No. 78 of 2011, See also the case of **Dickson Luvana vs. Republic**, Criminal Appeal No.1 of 2005).

At the trial, the prosecution evidence managed to establish the offence of armed robbery to the extent that there was a theft committed to PW6 who was also assaulted and injured at the time of theft, exhibit P6. What is left and challenged before this court for determination is whether it was the appellants who committed the offence of armed robbery as charged, tried, convicted and sentenced by the trial court.

On the appellant's 1,2,3,4 and 6 grounds of appeal as combined, both appellants claimed that, the prosecution evidence could not prove the case beyond doubt. First, it was the claim from both appellants that the evidence of identification was weak. As for the 1st appellant Elisha Marko the prosecution conceded that his identification could not meet the required standards but as for the 2nd appellant Mussa Meshack the prosecution claimed that he was properly identified. Ms. Sabina referred to the evidence of PW4 and PW6 who claim to have positively identified the 2nd appellant with the aid of the light generated from the electric bulb

which shone in the area. The 2nd appellant was their fellow watchman who they worked together for two months and also PW4 recognised the clothes and voice for PW4 stood nearly 2 to 5 meters from the appellant.

It is from this perspective that this court is obliged to analyse the evidence on the record as to whether the identification of the accused person by PW4 was proper. As stated in **Philip Rukaiza vs R,** Criminal Appeal No. 215 of 1994 at Mwanza (unreported), the Court of Appeal of Tanzania held that:"

> *The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonable possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness."*

As it stands, the guidelines to be followed by the courts were stated with sufficient lucidity by the court in **Waziri Amani v. R** [1980] TLR 250. The same principle applies even to cases of recognition evidence as in this case. Even recognizing witnesses often make mistakes or deliberately lie. The same guidelines were reiterated in the case of **Ausi Mzee Hassan**

vs Republic, Criminal Appeal No. 17 Of 2020 that for a positive identification, among others, the prosecution needs to show: -

1. *The time the witness had the accused under observation.*
2. *The distance at which he observed him.*
3. *The conditions in which such observation occurred.*
4. *Whether or not the witness knew or had seen the accused before.*

From the records, based on the evidence of PW4 and PW6, the trial magistrate noted that there was a bright light to enable the witnesses to identify the 2nd appellant who worked with PW4 as a co-watchman for two months prior to the occurrence of the robbery incident. The trial magistrate also observed that, both PW4 and PW6 had ample time to observe the 2nd appellant during the robbery as they stood near and they confronted. Relying on the case of **Ausi Mzee Hassan vs the Republic,** (supra), I agree with the trial magistrate that the conditions favouring correct identification of the 2nd appellant were met in this case but not for the 1st appellant. The evidence of PW4 who recognised the 2nd appellant was also corroborated with the evidence of PW5 that the 2nd appellant worked with PW4 prior to the incident of the robbery. It is my finding that as for the 1st appellant, the evidence did not prove the positive identification as rightly conceded by the prosecution, and I proceed to

fault the reasoning of the trial court. As to the 2nd appellant, it is my findings that he was positively identified as rightly held by the trial court.

On the 4th ground of appeal, both the appellants claimed that they were convicted based on the retracted and repudiated caution statement (exhibit P3 and P5). The prosecution opposed the appellant's claims holding that the trial court duly conducted an enquiry and found out that the appellants voluntarily made the statements. As I perused the trial court records, PW9 D 9861 Detective Sargent Kusiliye testified to have recorded the 1st appellant caution statement and tendered the same as exhibit P3. PW11 while E 4265 Detective Sargent Jishosha recorded the caution statement of the 2nd appellant which was tendered and admitted as exhibit P5. Before the same was admitted the accused raised objection. As to the 1st appellant's claim that the statement was not read to him, he was not given the right to call witnesses and he was forced to sign and was not sent to the justice of peace. Consequently, the 2nd appellant claimed that he was not given the right to call a witness and he was beaten and forced to sign. The trial court conducted an inquiry and the caution statements were cleared for admission and admitted as exhibits P3 and P5.

Starting with the 2nd appellant claim, I perused the records first on the inquiry conducted, and I find that the claims could not be proved. While the 2nd appellant claimed to be tortured, he did not exhibit before the trial court. secondly, I perused the detailed caution statement which detailed what happened. Taking into the line that the 2nd appellant was properly identified, I find this claim fails for the same was properly recorded and corroborates the evidence of PW4 and PW5. In fine I find this ground with no merit for the 2nd appellant.

Having in mind that the law is settled that not every confession, be it retracted, repudiated or otherwise, needs to be corroborated, as for the 1st appellant, after I find that he was not properly identified at the scene of crime, the only evidence that remains in records is his caution statement (exhibit P3). In the Eastern African Court of Appeal in the case of **Republic vs GAE s/o Maimba and Another** (1945) 12 EACA 82, it was held that: -

> *"There is no rule of law or practice making corroboration of a retracted confession essential. Corroboration of a retracted confession is desirable but if the court is fully satisfied that the confession cannot but be true, there is no reason in law why it should not act on it."*

This position was reiterated by the East Africa Court of Appeal in the case of **Tuwamoi vs Uganda** [1967] E. A. 84, the Court said:-

"... Corroboration is not necessary in law and the court may act on the confession alone when it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true"

(see also **Makungu Misalaba vs R,** Criminal Appeal No. 351 of 2013. **Kevin s/o Emmanueal Mahiga & Another vs The Republic**, Criminal Appeal No. 83 Of 2009*)*

Going to the records, specifically exhibit P5, it is a narration of the whole incidence of the case at hand from the time it was planned, how it was executed and the arrest of the accused. I do not think that, PW6 D9861 Detective Sagent Kusirie was in a position to invent 6 pages narrating the incident. The Court of Appeal in the case of **Twaha Alli & 5 others Versus Republic,** Criminal Appeal No. 78 of 2004 (unreported), put it clearly thus:-

"... it is a mundane truth that the very best of witnesses is an accused who confesses his guilt. This confession, however, should not be taken casually..."

(see also **Mohamed Haruna @Mtupeni & Another vs R,** Criminal Appeal No. 259 of 2007*)*

In line with the cited case of **Godfrey Schizya vs DPP** Criminal Appeal No. 176 of 2007 which the Court of Appeal cited with approval in the case of **Hemed Abdallah vs Republic** 1996 TLR 172, I hand with

the trial court findings that the confession by the accused person was nothing but the truth and was right to be relied upon in conviction of the 1st appellant. In fine, I find this ground wanting of merit for both the 1st and the 2nd appellants.

On the 1st added ground, for the 2nd appellant that the trial court erred in law and in fact for failure to convict the appellant without proving the ownership of the property alleged to be stolen as there was no receipt tendered to prove ownership, that did not detain me much for the evidence of PW6 before the trial court established that the mobile phone make Itel was his property of the victim (exhibit P6) and the accused persons did not dispute. However, evidence alone was enough to establish the offence of theft and in the absence of receipt is not a legal defect therefore this ground lacks merit.

On the 2nd added ground for the 2nd appellant, he claims that the trial court erred in law and in fact since the PF3 which was used to convict the appellant failed to show which hand the victim was injured. As it stands, the elements of the offence charged is armed robbery and as reiterated in **Shabani Said Ally vs Republic** (Criminal Appeal No.270 of 2018) [2019] TZCA 382 that proof of which part of the body a complainant

was injured is not among of the elements of the offence. Therefore, this ground lacks merit.

On the added 3rd ground of appeal for the 2nd appellant, that the trial court erred in law and in fact for relying on a search warrant while the witness who attested the search warrant were not called, the prosecution did not submit on this ground. As I perused the court records, I did not find the search warrant on record therefore, the 2nd appellant's claim is unfounded and consequently, this ground lacks merit.

On the 4th added ground of appeal for the 2nd appellant, that the trial court erred in law and in fact to convict the appellant on the offence of armed robbery while there is no proof of the use of a weapon during the commission of the offences as the same was not tendered by the prosecution. As discussed above in light of the case of **Shabani Said Ally vs Republic** (Criminal Appeal No.270 of 2018) [2019] TZCA 382, it is my finding that the prosecution was able to establish the ingredients of armed robbery and consequently, this ground fails.

Finally, like the trial court below, I am satisfied that the evidence of identification and recognition of the 2nd appellant at the scene of the crime as given by PW4 and PW6 had met the legal threshold which was set out in the case of **Waziri Amani** (supra) as all possibilities of mistaken identity were eliminated and consequently, the trial court was right to rely

on the caution statements of both the 1st and 2nd appellants to enter conviction. In my view, the evidence before the trial court, in this case, was indeed absolutely watertight. I find no room to fault the trial court findings except for the identification of the 1st appellant. In fine, the appeal is therefore without merit and is accordingly dismissed in its entirety.

It is so ordered.

M.MNYUKWA
JUDGE
28/10/2022

Right of appeal explained to the parties.

M.MNYUKWA
JUDGE
28/10/2022

Court: Judgement delivered today this 28th day of October, 2022, in presence of parties' counsel.

M.MNYUKWA
JUDGE
28/10/2022