IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

CRIMINAL APPEAL NO. 79 OF 2022

BETWEEN

SAID OMARY SAID @ VISIKIO ..... 1ST APPELLANT

ABDUL KASSIM MTUPA

@ MASQWENDO KIRIKUU ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the District Court of Temeke at Temeke before A. NDOSSY, RM in Criminal Case No. 7 of 2021)

JUDGMENT

Date of Last order 03/10/2022
Date of Judgment 26/10/2022

A. Z. BADE, J

The appellants, **SAID OMARY SAID @ VISIKIO** and **ABDUL KASSIM MTUPA @ MASQWENDO KIRIKUU** were charged and convicted of Armed Robbery contrary to section 287A of the Penal Code (Cap 16 R.E 2002) by the District Court of Temeke at Temeke and sentenced to serve 30 years imprisonment. Aggrieved, they now appeal to this court and their appeal comprises of seven (7) grounds.

The grounds of Appeal were enumerated viz

1. That learned trial magistrate erred in law and fact in convicting the appellants whilst essential ingredients necessary to constitute the offence of armed robbery were not proved to the hilt such as theft.
2. That learned trial magistrate erred in law and fact in convicting the appellants relied (sic) on the improper visual identification evidence of PW1 (victim), and PW2 who did not explain the parameters used to identify the assailants in the said group of twenty (20) people in commotion i.e. the clothes they wore and the time they used to observe the assailants.
3. That learned trial magistrate erred in law and fact in in convicting the appellants when PW1 did not prove the ownership of the said phone tecno spark valued TZS 275,000/- and treatment she got at the hospital by tendering the purchasing receipt and PF3 report as exhibit in court in order to prove her allegations.
4. That learned trial magistrate erred in law and fact in in convicting the appellants while the trial court failed to draw an inference adverse to the prosecutor by failing to call one Nassoro Dilunga to testify in court so as to prove the veracity of PW1 and PW.
5. That learned trial magistrate erred in law and fact in in convicting the appellants when the appellants apprehension was not proved to the hilt such as when and how the appellants were arrested in connection to this crime.
6. That learned trial magistrate erred in law and fact in in convicting the appellants when shifted the burden of proof on the defense case hence

improperly disregarded the defense which raised a reasonable doubt on the prosecution case.

7. That learned trial magistrate erred in law and fact in in convicting the appellants when the prosecution case was not proved beyond reasonable doubt against the appellants.

The appellants are self representing themselves and thus they prayed and were granted to argue this case by way of written submission, to which the learned state attorney who represents the republic did not oppose. Each party complied to the scheduling order.

The facts of this case as explained are that on 13th day of June 2020 at Mbagala Kiburugwa, Magenge 20 Area within Temeke district in Dar es Salaam, Said Omary Said @ Visikio and Abdul Kassim Mtupa @Maskwendo@ Kirikuu are said to have stolen two mobile phones make TECNO SPARK which are valued at 275,000/- each and cash amounting to 117,000. All properties are said to be valued at TZS 392,000. The properties are said to belong to Zawadi Heneriko. It is also alleged, before stealing, the appellants beat up Zawadi Heneriko with a bush knife to obtain the said properties.

On the fateful day, at around 2 pm, after the complainant received a call from one Nassoro, a fellow "Polisi Jamii" loosely translated to mean Community Police officer to attend to his home, she hired a bodaboda to reach to Nassoro's place of abode. As she was approaching the designated area, she found men with machetes and bush knives charged and ready to attack and as soon as they saw her approaching, they ordered the motorbike rider to drop off the lady while shouting "mwingine huyu.... mshushe" loosely

meaning here is another one, let him drop her off. In fact, they allegedly addressed the motorbike rider specifically by name saying "mgosi... mshushe huyo." The complainant fearing for her life she decided to jump off the motorbike and make a run for her life looking for a place to hide. They charged right after her, and started to beat her up with the other side of the machetes and bush knives, and even bare hands. Soon enough she found herself without her two phones and the money that she had on herself which amounted to TZS 117,000. As she received the beating she peed on herself as she was fearful they were going to kill her, and soon enough they dispersed and disappeared. It is alleged that since she is a community officer, she were able to recognized two of the persons on the mob as the appellants herein.

They were arraigned before Temeke District Court, and they both denied the charges. The Court entered a plea of not guilty, where the prosecution had to prove its case. They paraded 3 witnesses including the complainant Zawadi Heneriko, Jaffari Athumani, the motorbike cyclist who parks at Kiburugwa Magenge 20 and Sergent Jumanne E1568 who is the police officer in charge of the Kiburugwa area.

On the close of the prosecution case, they were found to have a case to answer. In their defense while the 1st appellant maintained not knowing of the crime or the incident leading to his arrest, the 2nd appellant says he found himself being invaded by this big mob at his place of business which is in front of his house, and he was beaten up. As he cried for help, and as the mob dispersed and disappeared, he was apprehended by the police on disturbing peace and

causing disturbance and chaos at the station, and sent to Maturubai Police station. He complains that the other people at his place of abode where this chaos ensued were not arrested. They were both found to be guilty of the offence as charged and convicted to 30 years imprisonment.

On arguing the appeal, the 1st ground and 2nd ground the appellant is aggrieved that the trial magistrate erred in law and fact in convicting them whilst the offence of armed robbery was not proved nor was there any proof of the items lost or stolen. It is essential requirement in proving armed robbery that theft must be proved. Section 287A of the Penal Code reads as follows.

> "Any person who steals anything and at or immediately before such 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 persons 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".

The record has it that Pw1 on her statement found on pp 11-12 of proceedings she was chased by the appellants and once they caught her, the 1st appellant beat her with his bare hands while the 2nd appellant beat her with the back of the machete. She called for help and the two suspects left her. Pw1 did not state at what time the appellants stole her phones make Tecno Spark and Tecno with buttons worth Tshs. 275,000/= and cash Tshs. 117,000/=, it is not clear whether the said phones and money dropped while

she was running or were stolen by suspects because Pw1 only stated that once the appellant left her, she discovered the said items missing.

Pw2 who was present at scene of crime but managed to escape, stated that he did not see Pw1 with any phone. This raises doubt on whether she had the said items in the first place, but more importantly, whether the same were stolen by the appellants.

In my quest the issues are twofold. First, did the appellants commit armed robbery against the complainant in the eyes of the law; and secondly, how did the complainant identified the two amongst the group of 20 as her assailants? The evidence as presented in court should be able to provide the answer.

The evidence of PW1 is not exactly supporting the ingredients of the offence of armed robbery offence; i.e. theft which is stealing with the use of force. The variances against the dictates of section 287A of the Penal Code (Supra) and the statement of the offence placed in the charge sheet, are clearly demonstrated by the PW1 who testified as recorded at p 11 of the typed proceedings that:

> "..... they bet (sic) me with sticks, bapa za panga at the ribs, things and all over my body, they slapped my face, I peed on myself I cried for help calling wezi and they left, people came I told them there are people who have attacked me one of them is Maskwendu, Saadi Dula. I stood up searched myself and found my phone and money missing, I was wearing a peddle with pockets. My phones were Tecno spark and Tecno with buttons worth Tshs 275,000/= and Tshs 117,000/=

was stolen from me I left to the police station Maturubai to report; I was given PF3 and went to Mbagala Rangi tatu Hospital for treatment (X- Ray and Ultrasound)"

So from the extract of the evidence above: how did she know they were twenty people on this mob, and how many persons amongst the twenty (20) she saw attacked her at the said incident? Secondly, how many persons were there and how many were beating her? Thirdly, were she actually searched by her assailants and which ones are they? Fourthly, how did she recognize her assailants? Fifthly, who specifically took her phones and money?

Also I have checked the records to see if there were any proof by PW1 in her evidence that she owned the said items. I have to agree with the appellants that on charge sheet, even the particulars of the stolen phones are inconsistently described as Tecno; and then Tecno spark; or tecno with buttons as testified by PW1. The fact that there is difference between charge sheet description and the adduced evidence creates doubt.

It is requirement of the law that the charged offence should be proven by evidence of witnesses that indeed the incident happened and the stolen properties should reflect what is in charge sheet. In this incident, there are variations that have not been explained.

Furthermore, what are the specifics of the allegedly stolen phones - the Colour and/ or special marks of her phones, the existence of the said phones at the place where the incidence occurred. In my mind the questions are probably endless, and the doubts are many... is it possible the complainants did not have the two phones with her at the crime scene, or could the phones

and money have fallen off her as she was running as she explained her ordeal, or is it possible that amongst the 20 people in the mob, any of the others could have been the ones who took off with the phones, and if it's the duo who took the phones and money, which is also doubtful, did they do it in unison, did each one had one, did they conspire to actually take the phones with culpable minds? I find this evidence is short of the needed probative value to stand as the basis of the conviction against the charge of armed robbery against the appellants.

See in the case of **Donald Joseph Nzweka and 3 Others vs R, Criminal Appeal No. 464 Of 2019** (unreported).

I have no doubt in my mind that the prosecution was not able to prove that there was culpability, neither did they managed to prove theft which is an essential ingredient in Armed Robbery.

This is as per the provisions of section 3 (2) (a) of the Evidence Act, (Cap. 6 R.E 2019) as it provides,

"A fact is said to be proved when:

(a) In Criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the prosecution beyond reasonable doubt that the fact exists.

On the other hand, there is a litany of the Courts decision emphasizing the statutory duty of the prosecution to prove its case against the accused persons beyond reasonable doubt. See for instance in the case of **Joseph John Makune vs R (1986) T.L.R 44** at page where the Court held thus:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case, no duty is cast on the accused persons to prove his innocence"

Likewise, in the case of **Jonas Nkize vs R (1992) T.L.R 213** where it was articulated that:

"The general rule in Criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part law and forgetting or ignoring it, is unforgivable and is a peril, not worth taking"

On the basis of the foregoing authorities and analysis, I will allow these two grounds of appeal.

On another ground, the appellants complain that identification was not proper, in the evidence on file it is evident that the incident happened during afternoon and PW1 explained to the court how she and PW2 were invaded by a group of 20 people holding machetes, knives and sticks and she started running away and was caught by them in a small hut wherein she hid herself. She identified the appellants amongst the group. That the two assaulted her using machete and hands.

PW1 stated that she knows the two men as they live together on same street. It is striking that she did not mention how she identified the two on the date of the incident bearing in mind that she was in a state of fear whilst the two amongst many attacked her. She failed to state if there was light in the said hut and if there was, then its intensity, she did not state how long she had

the two people under her observation and how far she was from the two to ensure proper identification took place.

In the case of **Waziri Amani vs Republic, (1980) TLR 250**, the court held that:

> "The evidence of visual identification is the weakest and most unreliable. It follows 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.

The court went on to establish circumstances to be considered in such evidence to include:-

i. The amount of time the witness has had the accused person under observation.
ii. The distance at which he observed the accused person.
iii. The conditions in which such observation occurred ... was it day or night.
iv. Whether there was good or poor lighting at the scene...."

I must agree with the appellants on this issue as well. The law is well settled on the import of visual identification and conditions for relying upon it for a court to find a conviction. Decisions of the Court of Appeal have held that such evidence should not be relied upon unless the court is satisfied that the evidence is watertight and all possibilities of mistaken identity are eliminated Cf with **Waziri Amani vs Republic** (supra), and many other authorities including **Emmanuel Luka and Others vs Republic,**

Criminal Appeal No. 325 of 2010 and Omari Iddi Mbezi and 3 Others vs Republic, Criminal Appeal No. 227 of 2009 and Taiko Lengei vs Republic, Criminal Appeal No. 131 of 2014 (unreported)

In the case of **Philimon Jumanne Agala @ 34 others vs Republic,** Criminal Appeal No. 187 of 2015, which is quoted with approval in **Sadick S/O Hamis @ Rushikana and 2 others vs R, Criminal Appeal no 381 of 2017** that:-

> *"Admittedly, identification in cases of this nature, ... is a very tricky issue. There is no gainsaying that evidence in identification cases can bring about miscarriage of justice. In our judgment, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the courts should warn themselves of the special need for caution before convicting the accused in reliance on the correctness. This is because it often happens that there is always a possibility that a mistaken witness can be a convincing one. Even a number of such witnesses can all be mistaken.*
>
> *It is now trite law that the courts should closely examine the circumstances in which the identification by each witness was made. The Court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows: How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally,*

had he any special reason for remembering the observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance? ... Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of dose relatives and friends are sometimes made."

So it is obvious basing on the guidelines from the case above the prosecution and the trial court in consequence did not dispense of its duty. It is unclear how PW1 identified the two appellants as to remove any such doubts to the standard required by the criminal law. PW1 failed to properly identify the accused appellants which creates doubts as to whether the two appellants are the ones who invaded, assaulted her and stole from her. The trial court on the other, did not direct itself properly to ensure the appellants were identified amongst the group of many, which can occasion miscarriage of justice.

As I allow this ground of appeal, which also in my opinion carry all the other grounds on proving beyond reasonable doubt; to the hilt the prosecution case.

On the final analysis, I allow the appeal, quash the conviction and set aside the sentence on both the appellants. The appellants **SAID OMARY SAID @ VISIKIO** and **ABDUL KASSIM MTUPA @ MASQWENDO KIRIKUU** are set free unless they are otherwise lawfully held. It is so ordered.

Dated at Dar es Salaam this 26th day of October 2022

A. Z. Bade
Judge
26/10/22

Court: Judgment delivered by Hon Nyombele DR in the presence of the Appellant, and the learned State Attorney. Right of Appeal explained to parties.

Signed

DR
26/10/22.

DR
26/10/22