IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO.51 OF 2022

(Appeal from the decision of the District Court of Kinondoni at Kinondoni dated 17th day of June, 2021 Hon. D.D. Mlashani - RM in Criminal Case No. 20 of 2020)

SAID ALLY@ JITU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 27/09/2022

Date of Judgment: 28/10/2022

POMO, J

The Appellant was arraigned before Kinondoni District Court (the trial court) facing a charge of armed robbery contrary to section 287A of the Penal Code CAP 16 R.E.2002 as amended by Act No.3 of 2011. It was the

particulars of the charge that, on 27th day of December, 2019 at Nyankoro Azania Bank Tegeta area within Kinondoni District in Dar es Salaam, did steal wallet and cash money Tshs 23,000/- the property of RAJABU IDIRISA and immediately before and after such stealing did threaten RAJABU IDIRISA with machete in order to obtain and retain the said stolen properties.

In proving the charge against the appellant, the respondent republic brought four witnesses to testify in court and for the defence side only one witness testified. In the end, the trial court was satisfied with the prosecution evidence to have proved the charge beyond reasonable doubt against the appellant henceforth convicted and sentenced him to serve thirty years jail sentence.

Aggrieved with the decision of the trial court, the appellant has appealed to this court with ten (10) grounds of appeal he lodged on 4th March, 2022. The said grounds of appeal are hereby reproduced in the manner they are presented: -

1. *The learned trial RM erred in law and fact by convicting the appellant when there was no scintilla of evidence to prove the prosecution*

allegation rather than a mere assertion which should never be relied on by the trial court

2. *That, the learned trial Magistrate misdirected himself by total misapprehending the nature and quality of the prosecution evidence which did not prove the charge against the appellant beyond reasonable doubt*

3. *That, the learned trial Magistrate erred in law and fact by convicting the appellant without making a critical evaluation, analysis, assessment and weighing the prosecution evidence in line to the defence evidence*

4. *That, the learned trial Magistrate erred in law and fact by convicting the appellant without considering the defence evidence sufficiently that raised a reasonable doubt on the prosecution case in regard to the reason of the appellant's apprehension*

5. *That, the learned trial Magistrate erred in law and fact by convicting the appellant when the prosecution failed to prove that PW2 (Victim) was injured and / or threatened with a machete by the Appellant as alleged by PW1; PW2 and PW4 by failing to tender any PF3 report or call a doctor to prove their allegation*

19.

6. *That, the learned trial Magistrate erred in law and fact by convicting the appellant for the offence of armed robbery when the appellant was not interrogated for the said offence as expounded by PW4 (G.5227 DC RASHID)*

7. *That, the learned trial magistrate erred in law and fact in convicting the appellant without considering and determining the variance of PW2 evidence adduced in court and his former statement recorded at Police Station i.e Exh.D1*

8. *That, the learned trial magistrate erred in law and fact by failing to observe and determine that the appellant was illegally arrested without any R/B or arresting warrant the omission which cast doubt on the prosecution case on whether or not this case was reported to Police Station and PF3 was issued as alleged by PW1; PW2 and PW3*

9. *That, the learned trail magistrate erred in law and fact in convicting the appellant when the evidence adduced in court was that PW1 and PW3 were told by one sister that there is quarrel near Azania place and not theft or Armed Robbery*

10. *That, the learned trial magistrate erred in law and fact in convicting the appellant when the prosecution has totally failed to prove its charge against the appellant beyond reasonable doubt as required by law*

When the appeal was called on for hearing on 27/09/2022 the Appellant appeared in person unrepresented while the respondent republic was represented by Ms Hellen Moshi, the learned Senior State Attorney. The Appellant allowed the Respondent republic to begin arguing the appeal while reserving his right to rejoin

In arguing the appeal, the learned state attorney, supported the trial court conviction and sentence and submitted on the grounds of appeal in manner below

Ms Hellen consolidated grounds of appeal No.1; 2; 3; 4; 5; 8; 9 and 10 while grounds No.6 and 7 she prayed to argue them separately

Ms Hellen argued that the consolidated grounds of appeal touch the evidence in that we did not prove the charge against the appellant beyond reasonable doubt. It was her submission that the respondent republic did prove the case against him beyond reasonable doubt. The learned senior state attorney argued that the appellant was identified at the scene of the crime and it was morning time, 6.00 AM, and was identified by PW1 Mohamed Ally (see p.11 in paragraph 2 of the typed trial proceedings). The said PW1 is a person who is familiar with him. Ms Hellen went on pointing

out that, looking at page 12 paragraph 3 of the said trial court proceedings, PW1 testified that he didn't know the victim rather the Appellant because they were living in the same area, Tegeta for that matter

Ms Hellen, further argued that when PW1 was being cross-examined testified to know the appellant and added that he once cautioned him on his bahaviour of stealing. Again, PW2 Rajabu Idirisa Athumani (the victim) testified to have known the appellant due to his physical appearance (see page 15 bullet No.6 of the typed proceedings) also stated to have met with the appellant at the scene of crime and lastly met him at his sister's home where he notified the militiamen who came and arrested the appellant. Supporting her submission, page 16 of the typed trial proceedings was referred. To her, that was an indication that the appellant was well identified by the victim (PW2) who led the appellant's arrest. The learned senior state attorney, in concluding, cited the case of **Waziri Amani Vs R [1980] TLR** where the Court of Appeal had this to state at page 4:

> *"We would, for example, expected to find on record questions such as the following posed and resolved by him, the time the witness had the accused under observation, the distance which he observed him, the condition in which*

such observation occurred, for instance, whether it was day or night, whether there was good or poor light at the scene, and further whether the witness knew or had seen the accused before or not." End of quote

It was Ms Hellen contention that under the circumstances of this appeal in line with the cited case law, the appellant was properly identified in morning time at 6 AM and those who were at the scene of crime were familiar with him and the appellant was mentioning their names. The learned state attorney again cited **section 287A of the Penal Code [Cap 16 R.E.2022]** arguing that the ingredients set for armed robbery were met in proving the charge against the appellant. She prayed the ground of appeal be dismissed for want of merit

As to ground No.6 of appeal which is on the allegations that the appellant was not interrogated when he was charged with the armed robbery offence count, Ms Hellen referred this court to the evidence of **PW4 G.5227 DC Rashid** who testified that the appellant didn't confess to the charge when PW4 wanted to record him. She argued this ground of appeal be dismissed too

On ground No.7 of appeal which alleges the appellant to have been convicted in disregard to the variance between the PW2 evidence and the

appellant's statement, Ms Hellen argued that since the appellant's statement was not tendered in court as evidence by the prosecution, thus the court was not availed with such statement hence had nothing to compare. This ground of appeal be dismissed too

Finally, the learned senior state attorney prayed the appeal be dismissed in its entirety for want of merit

When the Appellant was asked to respond, being a lay person, had nothing usefully to contribute. Only, he prayed to the court his appeal be allowed.

Having so heard the submissions for and against the appeal, I have given due consideration to the grounds of appeal raised by the appellant and find they are in two-fold. Those questioning the lack of proof of the offence the appellant was charged with, and two, those based on procedural irregularities. In the former the grounds are No. 1; 2; 4; 5; 9 and 10 while in the latter the grounds are 3; 6; 7; 8 and 9.

In determining the first limb of the grounds of appeal, the grounds which touches on evidence, as to whether the respondent republic proved the charge of armed robbery against the appellant beyond reasonable

187.

doubt or not, I will start looking into the charging section on what are the ingredients the respondent republic was mandated to prove for the offence of armed robbery. The ingredients of armed robbery which need to be prove are not farfetched. **S. 287(A) of the Penal Code, [Cap. 16 R.E. 2022]** provides thus: -

> ***287A***. *A person who steals anything,* ***and at or immediately before or after 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 person 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.*

From the above reproduced section, as submitted by the learned senior state attorney correctly so, in my view, for the offence of armed robbery to stand, the following must exist. **One,** proof that there was theft. Indeed, looking into the trial court proceedings, PW 2 Rajabu Idirisa (the victim) adduced unchallenged evidence that the appellant stole from him Tsh 23,000/- on the fateful incident (see p.15 bullet No.5 of the typed proceedings). **Two,** proof that dangerous or offensive weapon was used in

connection to the alleged theft. The victim, **PW2 Rajabu Idirisa Athumani**, testified unchallenged that the Appellant used dangerous weapon, the machete (see p.15 last paragraph of the typed proceedings). This evidence is corroborated by PW1 Mohamed Ally who met the appellant at the scene of crime holding panga (see p.11 paragraph 2 of the typed proceedings). **Thirdly,** proof of personal violence before or after the incident. The victim, **PW2 Rajabu Idirisa Athumani**, testified that he was beaten by the appellant by using the machete, which is a proof of use of force (see p. 15 bullet No.4 of the typed trial court proceedings).

The issue of mistaken identity of the Appellant does not arise here since the incident took place during the daylight time, the morning time of 27th December, 2019 at 6 AM and the Appellant is a person familiar to the persons who witnessed him committing the incident at the scene of crime. This is the obvious evidence from PW1 Mohamed Ally (P.11 last paragraph and p.12 last paragraph both of the typed trial court proceedings) and the evidence of PW3 Hamis Mohamed (see p. 17 of the trial court proceedings) the evidence the Appellant never challenged during cross – examination. Even in his defence the Appellant does not deny to be familiar with those witnesses. He does not say anything about the date of incident, the 27th

18.

December,2019. Under the circumstances, guided by the cited of **Waziri Amani Vs R [1980] TLR** where the Court of Appeal had this to state at page 4:

> *"We would, for example, expected to find on record questions such as the following posed and resolved by him, the time the witness had the accused under observation, the distance which he observed him, the condition in which such observation occurred, for instance,* ***whether it was day*** *or night,* ***whether there was good*** *or poor light at the scene, and further* ***whether the witness knew or had seen the accused before or not.***" End of quote

I therefore find that, the issue of mistaken identity as to the identification of the Appellant as a person who committed the crime against PW2 RAJABU IDIRISA does not arise as all the possibilities which could have led to the same were all, according to the evidence on record, eliminated in the manner I have heeinabove evaluated and assessed from the trial court evidence. In the event, the appellant's grounds No. 1; 2; 4; 5; 9 and 10 of appeal are without merit. I hereby dismiss them

Now I turn to the second limb of the grounds No. 3; 6; 7; 8 and 9 of appeal which are on allegations to procedural irregularities.

As the allegation that the learned trial magistrate failed to give critical evaluation, analysis, assessment and weighing the prosecution evidence in line to the defence evidence.

In the impugned decision, the trial court findings are found from paragraph 4 of page 5 to page 6. The judgment speaks to the contrary as the trial magistrate evaluated and analysed evidence from both side and critically weighed them before arriving to the decision that the appellant committed the crime he was charged with. To appreciate the findings, the analysis and evaluation part in the said judgment is hereby reproduced (see last paragraph of page 5 to 4th paragraph of page 6 of the typed impugned judgment):

> *"The accused raised doubts on the money stolen if it is 230,000/- as claimed by PW1 or 23,000/- as claimed by the victim and exhibit D1. I find the contradiction of PW1 and PW2 is immaterial and cannot go to the root of the case, PW2 is the person who know what amount of money stolen and he stated were 23,000/- as it appears in the charge sheet and PW4 who wrote the statement cleared that the money stolen was 23,000/-*
>
> *I have seen nothing special from the evidence by the accused. The fact that he was arrested for the offence of theft and later on charged with the offence of armed robbery does not hold water*

The accused was found in the scene of event, holding panga and threatening the victim, and PW1 and PW3

PW1, PW2 and PW3 both saw the accused with the panga, I am satisfied that the case has been proved and the accused is guilty with the offence of armed robbery as charged."

Basing on what I have alluded above, this ground of appeal is also found to be preferred without merit thus I hereby dismiss it

As to the remaining grounds of appeal, challenging that, the appellant was convicted on armed robbery charge the charge he was charged with without being interrogated, that he is being convicted in disregards of the existing variance in PW2's evidence and the Appellant statement.

In respect to the allegedly variance in evidence, as correctly found by the trial court, the victim is the one better placed to state the amount he was stolen. In that regard, he testified such amount to be 23,000/-. It is true in exhibit D3 the amount stated is 230,000/- while PW2 testimony stated the stolen amount to be 23,000/-. In exhibit D3 the said 230,000/- is only written in figures. Nowhere the amount stolen stand written in

words. Since PW2 the victim stated under oath the amount stolen to be 23,000/- and the Appellant never cross-examined on the same then such amount shall remain as the correct amount of money stolen on the fateful date. Be as it may, what is at stake is the stealing with violence by the appellant regardless of the amount stolen and the same is proved by the republic. This ground of appeal fails also.

As to the allegations regarding the appellant to be charged with the offence of armed robbery without being interrogated. The record speaks that he was interrogated with the theft offence and upon the case file being taken to the state attorney for framing the charge is when the Appellant was charged with that offence of armed robbery. This is per the evidence of PW4 G.5227 DC Paul (see pp.21 – 22 of the typed trial court proceedings). Under the circumstances, the issue of not being interrogated does not arise. Further, in my view, interrogation of an accused before the police upon being arrested is one thing and framing the charge is another thing.

As to his arrest, PW4 G.5227 DC Paul (see pp.21 – 22 of the typed trial court proceedings) gave evidence that the appellant was arrested on

18.

7/1/202 at 10:30 AM by the police in patrol (see page 22 of the trial proceedings)

In my final analysis, there is nothing to fault the trial court record in terms of procedural irregularities and or illegalities which can be seen to led into vitiating the trial court proceedings and judgment. Thus, I find the second limb of the above-mentioned grounds of appeal by the appellants to be preferred without merit. Therefore, the same are hereby dismiss for want of merit.

That said, the appeal is hereby dismissed in its entirety for want of merit. The trial court conviction and sentence metered to the Appellant is hereby upheld

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 28th day of October, 2022

Musa K. Pomo

Judge

This Judgment is delivered on this 28th October, 2022 in presence of the Appellant and Dorothy Massawe, the learned Principal State Attorney, for the Respondent

Musa K. Pomo

Judge

28/10/2022