IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 183 OF 2021

(Appeal from the decision of the District Court of Kinondoni at Kinondoni dated 13th January, 2021 Hon. S.K. Jacob, RM in Criminal Case No. 30 of 2020)

SEIF S/O RAMADHAN.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 4/10/2022

Date of Judgment: 28/10/2022

POMO, J

The Appellant was arraigned before Kinondoni District Court (the trial court) charged with one count 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 18th day of September, 2019 at Manzese Midizini area within Kinondoni District in Dar es Salaam, did steal one mobile phone, Teckno spark 03 valued at 280,000/-, one mobile phone make Tecno spark 2 valued Tsh 180,000/- , one mobile phone make Itel valued at Tshs.24,000/- and cash money Tsh 9,000/- all total Tshs.493,000/- the property of ANGELA EDSON and immediately after such stealing did threatened one NICKSON STEVEN with machete in order to obtain and retain the said property

In proving the charge against the appellant, the respondent republic paraded four witnesses to testify in court (see pp.10 – 22 of the typed proceedings) while for defence side only one witness testified. The trial court was satisfied with the prosecution evidence to have proved the charge against the appellant beyond reasonable doubt 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 eleven (11) grounds of appeal he lodged on 30th August, 2021. The said grounds of appeal are hereby reproduced in the manner they are presented:

1. *That, the learned trial RM erred in law and fact by convicting the appellant who was not informed of the right to demand for a recall of PW1, PW2 and PW3 at page 19 of 28 line 16 – 26 who had already testified as per the requirement of section 234(2)(b) of the Criminal Procedure Act was an irregularity that rendered the proceedings before the trial court a nullity*

2. *That, the learned trial RM erred in law and fact by convicting the appellant while failure to assess, to analyse and to evaluate properly the evidence tendered by both parties before the trial court, lacked the points of fact and determination and failure to consider the defence evidence of DW1 which succinctly raises sufficient reasonable hypothesis irresistibly casting doubt about guilty of the appellant*

3. *That, the learned trial RM erred in law and fact by convicting the appellant relied on the discredited visual identification of PW3 at the locus in quo as he stated that, I identified them because it was already dawn also inside and outside the house there were lights, bulbs at page 17 of 28 line 22-23, my mother was asleep at that time, I identified you through the light of the bulb and because I know you even prior to the incident at page 18 of 28 line 2-9 while the trial court failed to determine that the circumstances and conditions set forth at the locus in quo criminis were not were not conducive and favourable for proper identification to implicate the appellant with the said offence*

4. *That, the learned trial RM erred in law and fact by convicting the appellant relying on the discredited visual identification of PW3 at the locus in quo as the status of light was silently undisclosed due to PW3 failure to state the number of bulbs or tube lights as he merely stated that, I identified them because it was already dawn also inside and outside the house there were lights, bulbs to implicate the appellant with the said offence*

5. *That, the learned trial RM erred in law and in fact by convicting the appellant relying on incredible and untenable evidence of PW1; PW2 and PW4 which generally is hearsay evidence while failing to determine that, the prosecution case lacked cogent and corroborative evidence which linked the appellant with the charged offence*

6. *That, the learned trial RM erred in law and fact by convicting the appellant by misdirecting himself when taking the evidence of PW3 [the victim] by complying with non – existed law section 210(3) of Civil Procedure Code instead of section 210(3) of the Criminal Procedure Act which require the court to prove the authenticity of the recorded evidence*

7. *That, the learned trial RM erred in law and fact by convicting the appellant while prosecution side failed to prove its charge beyond reasonable doubt speck of doubt as it failed to summon its crucial witness OMARY's MOTHER as it was barely stated by PW1 that, I went with the chairman to OMARY's MOTHER and*

told her that Omary said he was going to return the phone at page 11 of 28 line 20 – 22 before the trial court to be attested to prove the charge

8. *That, the learned trial RM erred in law and fact by convicting the appellant while erroneously failed to address the accused/appellant properly in terms of law in the ruling of a prima facie case c/s 231(1), (a) and (b) of the Criminal Procedure Act Cap .20 R.E.2019 to enable the appellant to prepare his defence after the prosecution case was marked closed at page 23 of 28 line 18-26 contrary to the procedure of law*

9. *That, the learned trial RM erred in law and fact by convicting the Appellant while he failed to conduct properly the preliminary hearing and to list down the memorandum of disputed facts and undisputed facts, list of witnesses and list of exhibits at page 3 of 28 – page 4 of 28 contrary to the procedure of law*

10. *That, the learned trial RM erred in law and fact by convicting the appellant by not reading over the charge to the accused /appellant to enter plea of not guilty when the defence case was marked opens at page 25 of 28 c/s 228 and 229 of the Criminal Procedure Act Cap.20 R.E.2019 contrary to the procedure of law*

11. *That, the learned trial RM erred in law and fact by convicting the appellant basing on prosecution evidence which was not proved beyond reasonable doubt*

Hearing of the appeal was on 20/10/2021 ordered to be by way of written submission. Whereas on 10/11/2021 the appellant filed his submission in support of the petition of appeal the Respondent republic didn't file reply submission. On 28/9/2022 when the appeal came for orders the respondent republic being represented by Hezron Mwasimba, learned senior state attorney notified the court to stand served with the appellant's written submission and are yet to file their reply submission. He further argued that since the schedule on their side to reply is out, prayed the appeal be determined on the basis of what is on the court record.

Upon going through the grounds of appeal raised and the submission of the appellant together with the trial court records, I have observed that the 8th ground of appeal raises a pertinent legal issue which need to be discussed first and should I find the ground to be meritorious, then there will be no need to discuss the other grounds. The said 8th ground of appeal is couched in the following words: -

> *"8. That, the learned trial RM erred in law and fact by convicting the appellant while erroneously failed to address the accused/appellant properly in terms of law in the ruling of a prima facie case c/s 231(1), (a) and (b) of the Criminal Procedure Act Cap .20 R.E.2019 to enable the appellant to prepare his defence*

after the prosecution case was marked closed at page 23 of 28 line 18-26 contrary to the procedure of law

According to the trial court records, the prima facie ruling under complaint was pronounced on 16/12/2020 and the same reads as follows (see page 22 of the typed proceedings):-

"16/12/2020

Coram: Hon. S.K. Jacob – RM

S/A: Mwaitenda and Mtafya

Accused: Present

Prosecution: For ruling, I am ready to proceed

Order: Ruling is delivered

Sgd: Jacob – RM

16/12/2020

RULING

"Having gone through the prosecution's evidence, ***whereby PW3 <u>has proved</u> that the person who stole her mother's phone is the accused****, I am satisfied that a prima facie case to answer has been established."* End of quote

Sgd: Jacob – RM

16/12/2020

Court:

Accused has been addressed in terms of section 231 Criminal Procedure Act Cap. 20 R.E.2019 and he replies;

Accused: *I will defend myself under oaths*

Sgd: Jacob – RM

16/12/2020

From the above ruling on case to answer as so pronounced by the trial court, the charge against the appellant stood found by it to be proved by PW3 the prosecution witness even before the appellant could be given his right to adduce his defence. This implies the hearing of the appellant's defence was just to accomplish the formalities. With such findings at the prima facie ruling stage the Appellant was condemned before being heard, which is against the cardinal principle of law on the right of fair trial.

Faced with akin situation the court of appeal in **BUNDALA MAYALA VS R, CRIMINAL APPEAL NO.148 OF 2015 CAT AT TABORA (UNREPORTED)** at page 6 had this to state: -

"..***such findings were expected to be found in a judgment, rather than in a ruling of no case to answer.*** *This is because* ***disputed findings of fact can only be legitimately established after a proper evaluation of both the prosecution and the defence cases.*** *(see HUSSEIN IDD AND ANOTHER V R (1986) TLR 166).* ***Since at that stage the trial court had only heard***

the prosecution case, it could not have established or made any findings of fact*. This is, a rule of thumber, which every presiding judge or magistrate ought to know. It has its root in the rules of natural justice, which is the back borne of any fair trial".*

The Court of Appeal went further by stating that:

"The trial judge ***purported to make and establish findings of facts at the close of the prosecution case and without hearing the defence case****, the appellant did not get a fair trial. Consequently, the trial was a nullity".* End of quote

Since the trial court found PW3 the prosecution witness to have proved the prosecution case at the ruling stage of prima facie case, then guided by the above court of appeal decision, in the like manner the court of appeal did in **Bundala Mayala** case **(supra)** I hereby quash the proceedings, conviction and set aside the sentence.

Further, I order for retrial of the case and that the appellant be retried as expeditiously as possible before another magistrate.

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 Prinicipal State Attorney, for the Respondent

Musa K. Pomo

Judge

28/10/2022