IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 142 OF 2021

(Originating from Criminal case No. 92 of 2020, Resident Magistrates' Court of Arusha at Arusha)

TUMAINI S/O NOERY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

22.07.2022 & 25.08.2022

MWASEBA, J.

Tumaini S/O Noery (hereinafter referred to as the appellant), was tried in the Resident Magistrate's Court of Arusha on three separate counts of Armed Robbery Contrary to Section 287A of the Penal Code, Cap 16, R.E 2002 [Now R.E 2022]. After full trial he was convicted with the first and second counts and was sentenced to serve thirty (30) years imprisonment on each count. The custodial sentences were to run concurrently.

Aggrieved, the appellant appealed against the conviction and sentences and filed eleven grounds of appeal as depicted from the petition of appeal.

In a nutshell, the facts of the case that led to the arraignment and conviction of the appellant are as follows: it was alleged that the appellant on 2nd day of March, 2020 at Kikuletwa Village, District and Region of Arusha did steal one American passport worth 300 USD, Kenyan passport worth Tshs. 200,000/= Cash Money Tshs. 34,000/=, Two iPads make Apple worth 4,000,000/= and two rings worth 4,000,0000/=, the properties of one Helen D/o Wamatha. On the same date and the same area, he did steal One Phone Make Samsung worth Kshs. 18,000/= and one hand bag worth Tshs. 100,000/= the property of one Christina D/O Wamatha. And immediately before, during and after such stealing, did use machete to threaten them in order to obtain and retain the said properties. The appellant was charged accordingly before the Resident Magistrate's Court of Arusha.

In defence, the appellant denied to have committed the alleged offences and said he was not identified at the scene of crime. His evidence was to the effect that he was arrested at Kilombero Market and taken to

USA- River police station. At the end of trial, he was convicted and sentenced as above and hence, this appeal.

At the hearing of this appeal, Mr. Hamis Mkindi, learned counsel represented the appellant whilst, the respondent had the service of Ms Eunice Makala, learned State Attorney.

Supporting the appeal, Mr. Mkindi abandoned the 4th, 7th and 9th grounds of appeal and decided to proceed with the remaining grounds. On the 1st and 5th grounds of appeal, he submitted that the charge was not proved to the standard required by the law due to contradictions on the evidence of the prosecution side. The first contradiction is on the date the offence was alleged to have been committed. PW1 said the offence was committed on 2/03/2020 at 3:00 midnight, PW7 said the offence occurred on 1/03/2020 at night hours while PW8 said the offence was committed on 2/03/2020 at 2:00 midnight. Another contradiction is on the time of visitation, while PW1 said the visitors arrived on 1/03/2020, PW8 who is the victim said they arrived on 2/03/2020. Mr Mkindi asserted that it is not clear as to when specifically, the offence was committed. Another contradiction is on the stolen item. As per Exhibit P3 a stolen property was iPad make Apple, black in colour while PW5 when he was testifying said, he found a cell phone make iPad

Apple. It was his submission that this is a contradiction since there is a difference between iPad and a cell phone. Further to that when Exhibit P5 was shown which is an iPad, was Space Grey in Colour while Exhibit P3 (certificate of seizure) shows it was black in colour.

It was his further submission that the identification of the accused person was not absolute since the other witnesses said the appellant dressed in black jacket and brown cap and others said the bandits wore masks, had a machete and a hat and all of them covered their faces. And for the issue of money, PW7 said they forced him to send money to their phones which was Kshs. 4000 but PW8 said they failed to do so due to network problems. The last contradiction is on the time the kidnappers returned them after they were kidnapped. While others said they came back at the same time others said each one came on its own time.

He further pointed out that according to exhibit P3 the stolen iPad was found to Shaban Juma. However, he was never brought in court as a witness or an accused person.

On the 2nd ground of appeal, he is challenging the visual identification that it was not water tight. It was his further submission that PW1, PW7 and PW8 explained how they identified the appellant as he was tall,

black and designed his hair cut in punk style. And that he had a scar between his cheek and neck. To his opinion, that was not enough. He cited the case of **Waziri Amani vs Republic**, (1980) TLR 25 in which the court said the evidence on identification must be watertight.

Submitting on the 3rd ground he averred that the identification parade was wrongly conducted. He clarified that before conducting identification parade, prior statement to the witness as to how he identifies the accused must be done. To buttress his point, he referred this court to the case of **Rashid Othman Ramadhan and Others vs DPP**, Criminal Appeal No. 305 of 2017, Court of Appeal sitting at Zanzibar.

On the 6th and 10th grounds of appeal, Mr Mkindi submitted that the trial court unlawfully considered the exhibit P3 (certificate of seizure) while the property was found in possession of Shabani and not the appellant. Further, he alleged that there was a break up of a chain of custody of exhibit P3. He said if a document of chain of custody could have been tendered in court it could have cleared the doubt as to what exactly was found.

Submitting on the 8th ground of appeal, Mr Mkindi averred that the caution statement (exhibit P1) was not read over upon admission. To bolster his point, he cited the case of **Robinson Mwanjisi and 3**

Others vs Republic, (2003) TLR No. 218 and **Amour Mbaruck @Aljep vs Republic**, Criminal Appeal No. 226 of 2019 at page 6.

Lastly, on the 11th ground he submitted that the trial court did not consider the evidence of the appellant as he alleged that when the offence was committed, he was at Kilombero so he knows nothing about the case. So, they prayed for the court to quash and set aside the conviction and sentence imposed by the Rm's Court and set him at his liberty.

When the ball turned to Ms Makala learned State Attorney, she declared that she supports both conviction and the sentence imposed by the trial court. She submitted on the 1st, 5th and 6th grounds of appeal that in order to prove the offence of armed robbery three ingredients must be proved:

i. That theft was committed
ii. That dangerous or offensive weapon was used against a person and
iii. The said weapon must go direct to a person who was intended.

She said those ingredients are well stated in the case of **Shabani Said Ally vs Republic,** Criminal Appeal No 270 of 2018, CA sitting at Mtwara. She averred that all the ingredients were proved by the

witnesses at the trial court particularly the victims who are PW1, PW7 and PW8. They explained how they were invaded with weapons, took their iPad and how they identified the appellant due to his physical appearance. Regarding the issue of contradiction, she submitted that the same does not go to the root of the case, since it is normal to have contradictions due to the lapse of time. Thus, the court need to consider the main case as the raised contradictions cannot flop the case. See the case of **Emanuel Labonga vs Republic**, Criminal Appeal No. 257 of 2019, CA sitting at Iringa.

Responding to the second ground of appeal, Ms Makala argued that the identification was strong since the factors which were laid by the Court of Appeal in the case of **Waziri Amani** (supra) were met. All the witnesses (PW1, PW7 and PW8) identified the appellant as he was tall, black, his hair cut was in punk style and had a mark. The contradiction on where the mark (scar) was, does not go to the root of the case since the victims were shocked with the incident and the time had already lapsed.

Regarding the 3rd ground, she asserted that the identification parade was done legally. And the witness stated how he identified the appellant prior to the identification parade, thus, there is no merit on this ground.

Responding to the 8th ground, she admitted that exhibit P1 (caution statement) was not read out in court after its admission as exhibit and conceded for it to be expunged from the record.

In reply to what was submitted by Mr Mkindi on the 10th ground, Ms Makala stated that there is no merit on this ground since even an oral confession can prove this fact. However, the chain of custody was never broken as PW4 explained clearly its custody until the time it was tendered before the court.

As for the last ground of appeal, Ms Makala told the court that the trial court evaluated the evidence of both parties. The defence evidence was very weak and they raised a defence of Alibi without giving notice to such effect. Thus, she prayed for the court to uphold the conviction and the sentence.

In his rejoinder, the learned counsel for the appellant reiterated what he submitted in chief and insisted that the case was not proved beyond reasonable doubt.

Having considered the submissions made by both parties, and the record, the pertinent issue to be determined is whether the appeal has merit.

Looking at the judgment of the trial magistrate the conviction of the appellant is founded on visual identification. That the PW1, PW7 and PW8 managed to identify the appellant based on his appearance and a mark at his fore head and below his ear.

Both parties, Mr Mkindi and Ms Makala referred this court to the case of **Waziri Amani** (Supra) in which the court stated that on visual identification, the identification must be watertight and the court proceeded to set out the requirements for avoiding mistaken identification. The counsel for the appellant insisted that in the case at hand the identification was not water tight while the learned state attorney alleges that the identification is watertight.

The Court of Appeal in its various decision has insisted that when the court relies on visual identification a witness has to give enough description of a culprit. This was well stated in the case of **Godlisten Raymond and Another Vs Republic,** (2015) TLR No. 276 in which the Court of Appeal held that:

> *"It is now a settled law that when a court of law relies on visual identification one of the important aspects to be considered is to give enough description of a culprit in terms of body build, completion, size, attire, or any other peculiar body features to make the next person that comes*

across such a culprit to repeat those descriptions at his first report to the police on that crime."

Applying the settled law above to the case at hand I see a number of shortfalls. Those descriptions have been pointed out in court by the PW1, PW7 and PW8 who were present at the scene of crime. However, the record is silent as to how those descriptions led to the arrest of the appellant. The prosecution evidence with regard to the appellant's apprehension started by being interrogated and recording the caution statement by PW2. The same was tendered in court but was not read out loud. Both parties agreed that it was fatal and should be expunged from the record as I do.

It followed then that the appellant was taken for identification parade where PW1 identified him. The counsel for the appellant strongly challenged the visual identification and asserted that the procedure for conducting identification parade was not followed. I concur with the leaned counsel due to the fact that the record does not show whether the witness gave a detailed description of the suspect earlier. In the case of **Gwisu Nkonoli and 3 Others vs Republic**, (2015) TLR No. 292 the Court of Appeal stated that:

"It is settled law that for any identification parade to be of any value, the identifying witnesses must have earlier

given a detailed description of the suspects. For such non-compliance with such a vital prerequisite condition, we are constrained to find the identification parade was devoid of any value."

Being guided by the fore decision of the Court of Appeal, I am inclined to hold that the conducted identification parade was of no value as there was no connection as to how PW1 prior identified the appellant.

Further to that, it is on record that the appellant took PW5 to a place he sold a stolen iPad and that he sold it to Shaban Juma. Thereat they found it with the purported buyer. PW5 filled a certificate of seizure and Shaban signed it. However, the said Shaban was never brought in court neither as an accused person nor as a witness. Thus, I am inclined to agree with the learned counsel for the appellant that the case at hand was not proved beyond reasonable doubt.

In the end, this court is of the finding that the prosecution failed to prove their case beyond reasonable doubt. Accordingly, the appeal is allowed. The conviction and sentences passed by the trial court is hereby quashed and set aside. The appellant should be released from custody unless otherwise lawfully held.

Ordered Accordingly.

DATED at **ARUSHA** this 25th day of August, 2022.

N.R. MWASEBA

JUDGE

25.08.2022