IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MUSOMA

AT MUSOMA

CRIMINAL APPEAL NO. 61 OF 2021

(Arising from Serengeti District Court at Mugumu in CC No. 213 of 2020)

JUMA MARWA @ MWITA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

4th and 21st February, 2022

F.H. MAHIMBALI, J.:

Juma s/o Marwa @ Mwita , the appellant was arraigned before Serengeti District court at Mugumu charged with the offence of armed robbery contrary to section 287 A of the Penal Code, Cap. 16 RE 2019. He denied the charges levelled against him. The trial court heard the parties and at the end, the appellant was convicted and sentenced to serve thirty years imprisonment.

The material facts leading to this appeal are as follows; On the 28/ 5/2020 Consolatha Mwita (PW1) herein referred as the "victim" was on her way home from an auction market, she was attacked by the appellant who hit her with an iron bar on her head. She fell down and the appellant strangled her and stole her handbag that had tshs. 360,000/=

She raised an alarm and Ghati Mugita (PW2) came to her rescue. PW2 took her to the police station and she was given a PF3. She then went to the hospital where she was stitched and given some medications. She also testified in court that she knew the appellant before and electricity aided her in identifying him on the date of the incident.

PW1's evidence was corroborated by the evidence of PW2 who stated that on 28/5/2020 around 9:00 pm while she was at her home, she heard an alarm and when she went to the scene, she found the victim and the appellant and the appellant fled when he saw her. He ran with the handbag of the victim. She tried to run after him but she could not catch him. She stated further that the victim was crying and she had injuries on her head. The victim told her that the appellant had hit her on the head and taken her handbag that contained tshs. 360,000/=.She then took the victim to the police station where she was given a PF3 . She went further to submit in court that she was able to identify the appellant using the aid of electricity lights.

At Nyerere DDH (Hospital), PW3 who is a clinical officer attended to the victim and gave her medications and filled the PF3 (PE1). He stated that the victim's clothes were covered in blood, she was in pain and had injuries on her head.

On the next day (29/5/2020) PW4 a police officer was assigned this case and after his investigation he discovered that the appellant was charged with the offence of armed robbery. The appellant was arrested on 31/5/2020 and, he admitted to committing the offence levelled against him. PW4 recorded his caution statement which was admitted and marked as exhibit PE2. The appellant did not object to its admission.

The court eventually found the appellant with a case to answer and he was given a right to defend himself. He fended for himself and under oath. The appellant's defense was to the effect that on 28/5/2020 he was not at Mugumu town but he was at Masangura. He had gone to his farm and he returned to Mugumu on 31/5/2020. While at his work place (Mugumu bus stand) he was arrested and later taken to court.
After hearing both parties the court ruled that the prosecution had proved its case beyond reasonable doubt and hence convicted and sentenced the appellant as stated above.

The trial court's decision did not amuse the appellant hence he has come to this court through his petition of appeal armed with five grounds of appeal. The five grounds of appeal can be rephrased as follows for purposes of understanding them well;

(a) That, the trial magistrate erred in convicting and sentencing the

appellant because the trial court did not give the appellant the right to be heard during his case at the trial court.

(b) That, the trial magistrate erred in convicting and sentencing the appellant without being properly identified by any witness (either PW1 or PW2).

(c) That, the trial Magistrate erred in convicting and sentencing the appellant on weak prosecution evidence.

(d) That, the trial magistrate erred in relying on the testimony of ARBERT S/O KISANGA(PW3) who is a clinical officer who was not credible witness for failure to state the exact time he had received the patient for medication on that day of 28/05/2020.

(e) That Arbert s/o Kissanga (PW3) didn't state what was his working station.

When this matter came up for hearing, the appellant was present in person and unrepresented while the respondent enjoyed the legal services of Mr. Frank Nchanilla , State Attorney. The appellant prayed his grounds of appeal be adopted to form part of his appeal's submission.

Before responding to the appellant's grounds of appeal,Mr. Nchanilla stated that the appellant has mixed up issues of facts and law in grounds 1-4 and that contravenes section 362(2) of the Criminal

Procedure Act. He prayed those grounds of appeal be struck out. That notwithstanding, he submitted in his reply as follows:

On the first ground of appeal, he submitted that the appellant's ground is lacking support as it is evident on page 27 of the typed proceedings, the appellant was well heard as he was given a right to plead, responded to the facts, complied with section 231 of the CPA and he testified. It was his view that the appellant's ground is bankrupt of merits.

On the second ground of appeal, the appellant is challenging the relevance of PW2's testimony. The respondent contested this ground and stated that the incident occurred at night (page 11 of the typed proceedings) and the appellant was well identified. PW2 saw him at the scene before he fled. He was thus properly identified before he fled

Responding to the third ground, Mr. Nchanilla submitted that this ground is bankrupt of merits as in law the number of witnesses is immaterial but what is material is the relevance of the evidence of the witness. It was his view that PW1 was a credible witness and this is evident from his testimony on how she described the appellant.

The appellant's fourth ground is that the testimony of PW3 is unreliable because he did not mention the exact time. While responding to this ground, Mr. Nchanilla found this ground to be a trivial issue. It was his

submission that stating it to be night time is sufficient and the law does not require to specify the exact time. Also, PW3 conducted medical examination on the victim and him stating whether it was in the morning, or noon or in the evening is sufficient.

Responding to the last ground of appeal, Mr. Nchanilla stated that the ground lacks merits as it evident on page 14 of the typed proceedings that the clinical officer was working at Serengeti DDH. He prayed this appeal to be dismissed.

Rejoining, the appellant prayed to be acquitted on the reasons he stated in his grounds of appeal.

Having heard the submissions of the parties and gone through the court's record, this court will now determine if this appeal has merits. The appellant's first ground of appeal is that he was denied the right to be heard.The respondent objected to this ground. Having gone through the court's record it is evident from the typed proceedings that as he was given a chance to plead to the charge levelled against him, he also cross examined all the prosecution witnesses and gave his defence evidence under oath and called one witness as informed by the trial court. That said, this court finds this ground is bankrupt of merits.

Moving to the second ground of appeal, the appellant's grief is on the relevance of PW2's evidence. I have gone through PW2's evidence

and I am going to summarize it herein; PW2 testified to the effect that she knows the accused person and on the date of the incident while she was at her home, she heard an alarm. She went to the scene where she saw the victim and the appellant. When the appellant saw her, he fled with the victim's handbag. Then the victim told him about what had transpired. During cross examination she stated that she was able to identify the appellant due to the aid of electricity lights. It was Mr. Nchanilla's submission that the light was sufficient to identify the appellant before he fled. The law is settled that evidence of visual identification should only be relied upon when all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight. This principle is enunciated from the case of **Waziri Amani v Republic** (1980) TLR at page 252.

It is settled law that the prosecution has to prove its case beyond all reasonable doubt. In the case at hand, PW2 said he knew the appellant before and he was able to identify him with the aid of electricity. However, she did not tell the court the intensity of the electricity as it was at night time. Her evidence in my scrutiny did not give any description of the appellant, how well did she know the appellant, his physique and what he was wearing. This applies to PW1.She did not tell the court for how long the appellant was under her

observation and how well did she know him. In the case of **Raymond Francis v R** [1994] TLR 100 at page 103 it was held that ;

> " *... it is elementary that in criminal case where the determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance."*

Taking into consideration of the settled law, it is safe to state that the evidence of identification as given by PW1 and PW2 can not be said to have met the legal requirement. Therefore, this ground has merit and it is allowed.

Regarding the appellant's third grief that only one witness gave evidence in court, this court is at one with Mr. Nchanilla that there is no legal requirement on the number of witnesses in proving a particular fact or fact in issue. The law is settled and in terms of section 143 of the Evidence Act, Cap 6 R.E. 2002, that there is no specific number of witnesses which is required for the prosecution to prove any fact. See **Yohanes Msigwa v R** (1990) TLR 148. What is important is the quality of the evidence. That said this ground is baseless.

On the fourth grief of the appellant that that testimony of PW3 is not reliable, it is this court's finding that it is also baseless and a very trivial complaint. As PW3 is a clinical officer and his testimony is mainly on the result of the medical examination, stating the exact time he had

received the victim is irrelevant. It suffices to say whether it was morning, day, evening or night time. In law that is sufficient. Further to that, he already stated that the incident occurred during night time.

The appellant also complained in his last ground of appeal that the doctor did not state his working station. This ground will not detain us. It is evident at page 18 of the typed proceedings that he works at Nyerere DDH at Mugumu. This ground is also bankrupt of merits as there is only one District Designated Hospital at Mugumu by name of Nyerere.

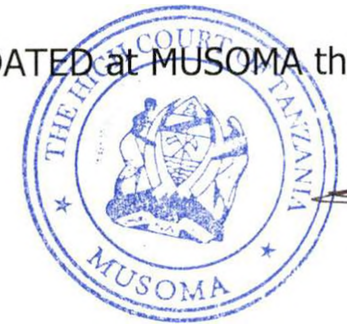
As regards the argument raised by Mr. Nchanila, state attorney that the appeal is incompetent for mixing up both points of law and fact, I consider it as a sound legal point that ought to have been raised by way of preliminary objection before hearing the appeal. It was thus misplaced arguing it now.

In fine, the appeal is allowed to the extent explained in ground number three on the issue of visual identification of the appellant by PW1 and PW2. There were no visual aids described favoring identification conditions which the PW1 and PW2 described against the appellant at the scene. That said, the appeal has merits. Conviction is quashed and sentence of 30 years is set aside. The appellant is hereby ordered to be released immediately unless otherwise lawfully held by

other cause.

It is so ordered.

DATED at MUSOMA this 21st day of February, 2022.



F. H. Mahimbali

Judge

21/02/2022

Court: Judgment delivered this 21st day of February, 2022 in the absence of both parties.

F. H. Mahimbali

Judge

21/02/2022