IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF MWANZA)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 256 OF 2021

(Appeal from the Criminal Case No. 275 of 2020 in the District Court of Bagamoyo at Bagamoyo (Mbafu, RM) dated 11th of August, 2022.)

ABDUL HASSAN MDERE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

7th February, & 11th February, 2022

ISMAIL, J.

The District Court of Bagamoyo at Bagamoyo, in which the appellant was arraigned on the charge of armed robbery, found him guilty and convicted him of robbery. The charge was brought under the provisions of section 287A of the Penal Code, Cap.16 R.E. 2019. Consequent thereto, the trial court sentenced him to imprisonment for thirty years.

The record of the trial proceedings inform that a robbery incident occurred at Dunda area in Bagamoyo township, and it involved a motorcycle with registration No. MC 472 CPR, make Haojue, belonging to a certain Mr.

Luxford Mbawala who featured as PW3 in the trial proceedings. The stolen motorcycle was entrusted to Livinus Archard Mwabesa, PW1 who, on the day, was hired by a person who required that he be taken to Ukuni Primary School. Along the way, they met a motor vehicle, make IST that blocked their way. As that was happening, the passenger he carried stabbed him with a sharp object and they both fell down. PW1 alleged that passengers who were in the vehicle alighted, armed with a machete, knives and a rope. One of the assailants was allegedly the appellant who took the motor cycle and sped off. PW1 was tied with a rope and thrown at Kichemichemi locality where he subsequently enlisted an assistance that set him free.

The matter was reported to PW2, the victim's brother, who then informed PW3, the owner. The trio lodged a complaint to the police and the search for the stolen motor cycle began in earnest. Things were made easier by the fact that the said motorcycle was fitted with a GPS device that took them to Mbezi Kisiwani where the appellant was putting up. Unable to find the appellant and the motor cycle, the search team returned to Bagamoyo until about a fortnight, when they were informed that the assailant had been arrested and held in custody at Mbagala police station, on a different incident. On interrogation, the appellant allegedly confessed to the involvement, stating that the motorcycle was brought to him by a Mr. Said

who is alleged to have been involved in the robbery. The appellant allegedly confessed that the said motor cycle was sold to Kelvin Mtende of Dakawa Morogoro.

Trial proceedings involved five witnesses who testified for the prosecution, against the appellant's own defence testimony which denied any involvement in the robbery incident. Attributing his tribulations to misunderstanding with his landlord, who vowed to teach him a lesson, the appellant argued that nothing was recovered from him, and that the GPS only indicated that the motorcycle was in a shared compound but that did not necessarily mean that it was stashed in his room.

The trial court was unfazed by the appellant's defence. It found him guilty and convicted him of robbery. He was sentenced to a maximum prison term of thirty years. The conviction and sentence enraged the appellant, hence his decision to challenge them through an appeal to this Court. The petition of appeal that founded the instant appeal has seven grounds of appeal, paraphrased as hereunder:

1. *That the trial erred in law when it convicted the appellant based on the evidence of PW1 without considering that PW1 gave no description of the assailant when he lodged his complaint to the police.*

2. *That the trial court erred in law when it convicted and sentenced the appellant based on a visual identification when PW1 admitted that he*

was robbed by an unknown assailant but alleged to have remembered the face of the assailant when he met him at the police station where no identification parade was done.

3. *That the trial magistrate erred in law when it convicted and sentenced the appellant without considering that the appellant was not arrested with the motorcycle allegedly stolen in the theft incident.*

4. *That the trial magistrate erred in law when it convicted the appellant based on the testimony of PW5, to the effect that the appellant confessed to the commission of the robbery incident, while no trial within a trial was conducted following the appellant's objection to the admissibility of the cautioned statement on the allegation of involuntariness in its procurement.*

5. *That the trial magistrate erred in law when it convicted the appellant in the absence of evidence of a ten-cell leader, hamlet chairperson or any civilian who saw the appellant arrested with the said motorcycle.*

6. *That the trial magistrate erred in law by convicting the appellant based on the cautioned statement whose recording did not comply with the law.*

7. *That the trial magistrate erred in law when he disregarded the appellant's defence and while the case against the appellant had not been proved at the required standard.*

Hearing of the appeal saw the appellant fend for himself, unrepresented, as the respondent enjoyed the able services of Ms. Laura Kimario, learned State Attorney. Noting that the appellant is lay and unrepresented, he prayed that the respondent's counsel be accorded the privilege of addressing the Court first while he, the applicant, would come last. This prayer was acceded to by Ms. Kimario and sanctioned by the Court.

Ms. Kimario informed the Court that she supported the appeal, adding that the conviction and sentence imposed by the trial court were unjustified. Making no particular reference to the grounds of appeal, Ms. Kimario began by taking a swipe at the treatment of the cautioned statement (Exhibit P2) which was allegedly recorded from the appellant. She argued that when PW5 prayed to tender it in court, the applicant raised an objection which touched on the voluntariness of the confession. Learned counsel argued that, once the objection was raised, the trial court's duty was to put the trial on hold and conduct an inquiry into the admissibility of the statement. This is consistent with the Court of Appeal's decision in ***Nyerere Nyague v. Republic***, CAT-Criminal Appeal No. 67 of 2010 (unreported). She argued that, since the procedure was not followed, the effect is to have the said testimony expunged from the record. This, she contended, would leave the evidence of visual identification as the basis for conviction.

With regards to the visual identification, Ms. Kimaro submitted that page 9 of the proceedings is to the effect that PW1 identified the appellant when he hired him. This contrasts what is stated at page 10 wherein the same witness stated that he identified the appellant when he alighted from the IST vehicle that blocked the way, and that he was aided by the vehicle's lamp light. She read a contradiction in this testimony because the said passenger would not be the same person that came from the vehicle and attacked him. Punching further holes in the evidence of visual identification, Ms. Kimario argued that, in this case, the prosecution did not conform to the requirements set out in the case of ***Waziri Amani v. Republic*** [1980] TLR 250 in that: intensity of the light was not described; no mention of time within which the assailant was under the identifier's observation; whether the victim knew the assailant before; and the distance between the victim and the assailant. Learned attorney took the view that, even after the appellant had been arrested, no identification parade was conducted to see if PW1 had been positively identified. He concluded that absence of all these had the effect of rendering the visual identification a mere charade which would not be used as the basis for grounding a conviction against the appellant.

Still on the testimony, the respondent's attorney took the view that the contention that the motorcycle was fitted with GPS is not proven as no witness appeared in court to testify on that contention. This left some doubts as to whether the said GPS was fitted in the motor cycle.

She concluded by reiterating her support to the appeal and prayed that the trial court's decision be set aside and that the appellant should be set free.

The appellant had nothing to say except supporting what the respondent's counsel submitted.

I will start my analysis by casting an eye on the cautioned statement (Exhibit P2) which contains a confession by the appellant. As correctly submitted, admission of this exhibit was objected to by the appellant, and one of the grounds raised was that the same was procured involuntarily. The trial magistrate was not convinced by the appellant's contention. She ruled that the said statement was admissible and admitted it. This was utterly flawed for, as learned attorney submitted, the law is settled in respect, and the decision in ***Nyerere Nyague v. Republic*** (supra) offers invaluable procedural steps that should be followed by courts, whenever a question of voluntariness of a confession arises. It was held:

"As we understand it, the law regarding admission of accused's confession under this head is this:

First, a confession or statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground, either that it was not voluntarily made or not made at all (See also ***Selemani Hassani v R*** *Cr. Appeal No. 364/2008 (unreported);*

Secondly, if an accused intends to object to the admissibility of a statement or confession, he must do so before it is admitted, and not during cross examination or during defence See: ***Shihoze Seni v. R****, (1992) TLR 330);* ***Juma Kaulule v R****, Cr. Appeal No. 281/2006 (unreported)*

Thirdly, In the absence of any objection into the admission of the statement when the prosecution sought it to have admitted, the trial court cannot hold a trial within a trial or inquiry suo motu to test its voluntariness. (See also ***Stephen Jason & Another v. R****, Cr. Appeal No. 79/1999 (unreported))*

Fourthly, ***if objection is made at a right time, the trial court must stop everything and proceed to conduct a trial within a trial (in a Trial with assessors) or inquiry, into the voluntariness or otherwise of the alleged confession before the confession is admitted in evidence****. See also* ***Twaha Ally & 5 Others v R*** *Cr. Appeal No. 78/2004 (unreported)."*[Emphasis is added]

The quoted excerpt guides that what the trial court ought to have done, in this case, was to put the trial proceedings on hold, as the question of voluntariness or otherwise of Exhibit P2 was going to be determined. This would only be done through an inquiry or a trial within a trial. It would determine the voluntariness or otherwise of the confession of the confession. Sadly, this was not done, and the net effect is to render the said evidence worthless, liable to being expunged. I take this to be a genuine call and I uphold it. I expunge exhibit P2 from the record.

After getting exhibit P2 out of the way, the residual testimony includes the testimony of visual identification. A number of issues have been raised, casting aspersions on the reliability of the visual identification allegedly carried out by PW1. As I subscribe to the position expressed by Ms. Kimario, it behooves me to restate that, while visual identification constitutes evidence on which conviction may be premised, reliance on such testimony is fraught with a serious danger. This is mainly due to the known fact that such evidence is one of the weakest forms of evidence. The danger of relying on this evidence has been restated time and again by authors of no mean repute, and through countless judicial pronouncements. ***Elizabeth F. Loftus***, a legal luminary and author of the Eyewitness Testimony 19 (1979) posted a very exhilarating observation. She said:

"The reasons as to why this kind of evidence has to be given great caution when the court intends to rely on, is that the basic foundation for eyewitness is a person's memory. And we often do not see things accurately in the first place, but even if we take in a reasonably accurate picture of some experience, does not necessarily stay perfectly intact in memory, sometimes the memory traces can actually undergo distortion with the passage of time, proper motivation interfering facts*. The memory traces seem sometimes to change or become transformed. These distortions can cause a human being to have memories of things that never happened. In* ***State of Utah v. Deon Lomax Clopten****, 223 P 3d 1103 (2009) 2009 UT 84:*

The vagaries of eyewitness identification are well known; the annals of criminal law are rife with in instances of mistaken identification." [Emphasis supplied]

The foregoing subscription has been given a thumbs up by courts across jurisdictions, including our very own. The emphasis is that visual identification should be foolproof, and that can only be ensured if conditions favouring positive visual identification are conformed to. In ***Demeritus John @ Kajuli & Others v. Republic***, CAT-Criminal Appeal No. 155 of 2013 (unreported), the Court of Appeal of Tanzania held as follows:

"In a string of decisions, the Court has stated that evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a Court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely water-tight (See, ***Waziri Amani v. R.*** *(1980) TLR 250;* ***Raymond Francis v. R.*** *(1994) T.L.R. 100;* ***R.V. Eria Sebatwo*** *(1960) EA 174;* ***Igola Iguna and Noni @ Dindai Mabina v. R.,*** *Criminal Appeal No. 34 of 2001, (CAT, unreported). Eye witness identification, even when wholly honest, may lead to the conviction of the innocent (****R. v. Forbes****, (2001) 1 ALL ER 686).* ***It is most essential for the court to examine closely whether or not the conditions of identification are favourable and to exclude all possibilities of mistaken identification."*** [Emphasis is added]

See also: ***Raymond Francis v. Republic*** [1994] TLR 100 (CA)

Stringency has been added to the rules, especially where such identification is said to have been done at night. This is particularly so since conditions for identification become more challenging. Thus, in ***Ally Mohamed Mkupa v. Republic***, CAT-Criminal Appeal No. 2 of 2008 (unreported), it was held that: *"where one claims to have identified a person at night there must be evidence not only that there was light,* ***but also the source and intensity of that light. This is so even if the witness***

purports to recognize the suspect" (see ***Kulwa s/o Mwakajape & 2 Others v. Republic***, CAT-Criminal Appeal No. 35 of 2005 (unreported)) [Emphasis is supplied].

To gauge the reliability of the visual identification evidence, the Court of Appeal came up with pertinent questions that should guide courts in arriving at a conclusion and a finding on the reliability of otherwise of the visual identification testimony. This was done in the case of ***Chacha Jeremiah Murimi v. Republic***, Criminal Appeal No. 551 of 2015 (unreported), in which was held as follows:

> *"...To guard against the possibility the Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: how long did the witness have the accused under observation? At what distance?* ***What was the source and intensity of the light if it was at night?*** *Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original 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 in his actual appearance?* ***Did the witness name or describe the***

accused to the next person he saw? Did that/those other person/s give evidence to confirm it?' [Emphasis supplied]

The cited authorities serve to embolden my resolve and conclusion that, as rightly contended by Ms. Kimario, conditions in which the identification was allegedly done were marred by challenges that hampered proper and unmistakable identification. They were far less than conducive, falling short of the required standard, and it baffles me that the trial court cast a blind eye on all these glaring shortfalls, and gave PW1's identification a 'clean bill of health'. The testimony of PW1 is that, with the help of headlights that shone from the vehicle (IST), he was able to identify the appellant. Nothing was told about the direction that the lights pointed, the intensity of such lights, and the distance between him and where the vehicle was. If the lights flashed against PW1 and, in the absence of any evidence that the lights were, at any point in time, flashed in the assailants' direction, it is inconceivable and humanly impossible that such light would be of any assistance to PW1 in identifying any of the assailants, including the appellant. My finding is fortified by the decision of the Court of Appeal of Tanzania in a couple of decisions on the subject. In ***Michael Godwin & Another v. Republic***, CAT-Criminal Appeal No. 66 of 2002 (unreported), it was held:

> ***"It is common knowledge that it is easier for the one holding or flushing the torch to identify the person against whom the torch is flushed.*** *In this case, it seems to us that with the torch light flushed at them, (PW1 and PW2), they were more likely dazzled by the light. They could therefore not identify the bandits properly. In that case, as Mr. Mbago, correctly conceded, the possibility of mistaken identity could not be ruled out."* [Emphasis added].

The foregoing stance was emphasized in the subsequent decision of the upper Bench in ***Bariki Kinyaiya, Jacob Hubert & Elioani Kinyaiya v. Republic***, CAT-Criminal Appeal No. 220 of 2007 (unreported), in which the following observation was made:

> ***"Ordinary human experience is that a person uses a torch, otherwise known as flashlight in American English to enable them to see an object or a person in front of the user but without the user being clearly seen by the person shone at because of the blinding effect of such light on that other person. It may be possible, however, for a person in front of the user of the torch who is not directly shone at to see and identify the person using the torch if the light from the torch is reflected by a shiny wall or object.*** *Otherwise, usually, it is not easy to identify reliably the user of the torch who directs the light from the torch to objects*

in front of or around them. In the case under discussion there was no evidence that the light from the torches was reflected by the walls of the room or by shiny objects in the room". [Emphasis supplied].

See: ***Isaya Mato @ Issa v. Republic***, HC-Criminal Appeal No. 173 of 2020 (MZA-unreported).

The foregoing view settles the matter. It simply that identification in the circumstances described by PW1 was a near impossibility that was incapable of supporting the conviction.

There is yet another disquieting observation. This relates to the fitting of the GPS device into the stolen motorcycle. The contention by Ms. Kimario is that no evidence was tendered to substantiate that the said system was fitted in the motorcycle. No expert opinion or testimony was led to prove that, if true, such installation is capable of giving a lead to where the motor cycle was stashed. I couldn't agree more with this splendid thinking. I would also add that, while it may be assumed that the GPS led the recovery team to the appellant's home, there was no evidence that provided an assurance that the stolen motorcycle was in the appellant's room and not in any of several other rooms that the house had. Such evidence would be crucial where no recovery of the said motorcycle was done during the swoop. Is

agree with Ms. Kimario that this was yet another grey area which needed some serious convincing by the prosecution.

In consequence of all this, I take the view that the appellant's conviction was based on an acutely deficient evidence. I, accordingly, allow the appeal. I quash the proceedings, set aside the conviction and sentence, and order that the appellant be set free unless he is held for some other lawful reasons.

It is so ordered.

DATED at **DAR ES SALAAM** this 11th day of February, 2022.

M.K. ISMAIL

JUDGE