IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 42 OF 2021

(Arising from Criminal Case No. 15 of 2021 in the Resident Magistrate's Court of Kagera at Bukoba)

SPERIUS MULOKOZI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

DATE OF LAST ORDER: 09-03-2022

DATE OF JUDGMENT: 18-03-2022

A.E. MWIPOPO, J.

Sperius Mulokozi filed the present appeal against the decision of the Bukoba Resident Magistrate's Court in Criminal Case No. 42 of 2021. The appellant was convicted and sentenced to serve 30 years imprisonment by the Resident Magistrate's Court after he was found guilty of the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap. 16, R.E. 2019. The appellant filed in this Court petition of appeal containing 6 grounds of appeal as follows hereunder:-

1. *That, the said visual identification by prosecution witnesses was not properly confirmed to identify the appellant as the person who committed the robbery in terms of light that existed and its intensity.*
2. *That, the visual identification relied by the trial Court in convicting the appellant does not meet the description details of the appellant by witness under observation.*
3. *That, exhibit P1 (certificate of seizure) which was tendered by prosecution was not read out loudly to appellant contrary to the law.*
4. *That, the stolen properties allegedly found with PW2 were not positively proved by complainant (PW3) that they were indeed had been owned and possessed by him. No receipt or any mark was directed upon the properties to constitute the subject of the charge against the appellant.*
5. *That, the said PF3 (Exhibit P3) was not read over loudly appellant hence it was bad in law.*
6. *That, the said conviction against the appellant was improper while the defence evidence was not considered, therefore, the conviction was biased to the prosecution case during scrutiny of the evidence contrary to the law.*

The appellant filed additional petition of appeal in March, 2021, which contains six grounds of appeal as follows:

1. *That, the Hon. trial Magistrate erred in law and facts to convict the appellant on the wrong evidence given by the victim without mentioning the source of light used to identify the appellant at the scene of crime.*
2. *That, the trial Court erred in law and facts to convict and sentence the appellant without any eye witness who testified or proved to have seen the appellant committing the alleged offence.*

3. *That, the trial Court erred in law and facts to convict and sentence the appellant while he was not found in the possession of the properties allegedly to be stolen from the victim.*
4. *That, the victim did not raise alarm or yelled during the time of committing an alleged offence.*
5. *That, the identification parade was not conducted so as to identify the appellant which is contrary to the law.*
6. *That, the prosecution side failed to prove the case against the appellant to the required standards of law which is beyond reasonable doubt.*

Looking at the evidence available in record, it shows that the prosecution called five witnesses to prove their case and the appellant defended himself by testifying on oath without calling any other witness. In summary, Investigator of the case - PW1 testified that on 04.01.2021 he was assigned the file by OCS Bwanyai police post to investigate it. PW1 arrested the appellant following information that the appellant is responsible for the offence of house breaking and stealing a cellphone a property of Christina Felician. On 27.01.2021 the appellant admitted to commit the offence and told PW1 that he sold the phone to Stelda Sylvester of Igabiro village. The appellant led him to Igabilo Village where they retrieved the said phone Techno Phantom 6 – Exhibit P2 from Stelda and certificate seizure – Exhibit P1 was filled and signed.

The second prosecution witness Stelda Sylvester – PW2 testified that in January, 2021 she bought a mobile phone from the appellant. The appellant was

selling mobile phone for shillings 150,000/=. PW2 paid shillings 130,000/= in two instalment and the phone was left in her possession. She said that on 27.01.2021 PW1 came together with the appellant and asked about the phone she bought from the appellant. PW2 admitted to buy it and handled the phone to PW1. She said that she signed certificate of seizure – Exhibit P2 prepared by PW1. PW2 identified the phone which was sold to her by the appellant as Exhibit P1.

PW3 – Christian Felician testified that on 31.12.2020 at night hours the appellant and another person robbed her and did steal her cellphone Techno make worth shillings 600,000/= and a hand bag containing Tshs 250,000/=. The appellant and that other person strangled her neck and mugged her by using a piece of wood which had nails in order to obtain and retain the said properties. PW3 said that she was able to identify the appellant only during the incident as she know him prior to the incident for the past five years and that there was moonlight and electric light in the area. The incident took about ten minutes. PW3 screamed for help and the assailant did run away. Some people in response to her screaming came for her rescue including George Kataya. She was taken to Bwanyai Police Station where she narrated the whole story of the robbery. She gave the description of her cell phone that it was Techno phantom 6 which has two line with a cracked screen and the last number she communicated with is 0716158833. She was given PF3 – Exhibit P3 at the police and she went for treatment. She said

that after sometime she was called to the police where she was able to identify the phone - Exhibit P1 which was stolen during the incident.

George Mugaya – PW4 testified that on 31.12.2020 he was at Lusinga Day celebration and among the people present at the ceremony was the appellant. PW4 said that while at the said ceremonies, he heard someone calling for help. He went to the place where the voice was coming from and saw PW3 crying while lying on ground. He said that PW3 was bleeding in her hand, arms and was complaining for neck pain. PW3 told him that the appellant and another unknown person where responsible for the incident and that they have stolen her money and cellphone. PW4 said that they informed local authority leaders about the incident.

PW5 – Aniseth Fransis @ Kyaruzi testified that the appellant came to him on 01.01.2021 with two cellphones which he was selling. Appellant told him that he do not know how to fix a chip number and PW5 received the phone from appellant and fixed them. He said that one of the phone is Techno phantom 6 which has two camera and cracked screen. He identified the phone to be Exhibit P1.

The trial Court found the appellant with the case to answer and in his defence he denied to commit the offence and said that he was not found with anything which was stolen. He said he attended the ceremony but he did not

commit any offence and that he know PW3 since their childhood. This was the evidence available in this case.

When the appeal came for hearing, the appellant being a lay person he prayed for the Court to consider his grounds of appeal and release him from prison.

In response, Mr. Amani Kirua, State Attorney appearing for the respondent was against the appeal. He submitted jointly on the first and second grounds of appeal as found in the Petition of appeal and ground no 1 and 2 in the additional petition of appeal. It was submitted that PW3 was able to identify the appellant as there was sufficient lights, the incident took place for about 10 minutes, the witness knew the appellant prior to the incident and there was no distance or something which impede PW3 from identifying the appellant. This is found in page 10 of the proceedings of the trial court.

On the 3rd ground of appeal in the Petition of appeal, the counsel submitted that the typed proceedings shows in page No. 6 that the certificate of seizure – Exhibit P1 was read over to the appellant after it was admitted. Thus, the ground has no merits.

The counsel submitted on the 4th ground of the appeal in the petition of the appeal that the witness – PW3 who is victim told the police all the descriptions of his stolen phone and she identified it. The said phone was found in the possession of PW2 who bought it for shilling 130,000/= from the appellant. This evidence

proved the offence without doubt. He said that on the fifth ground of appeal in the petition of appeal, the Exhibit P3 was read over to the appellant after it was admitted.

The counsel turned to the sixth ground in the petition where he said that the trial court considered the appellant defence and the court was satisfied that the defence evidence has not shaken the prosecution evidence and there is no doubt which was raised.

On the 3rd ground in the additional petition of appeal, the counsel said that the PW2 testified to buy the phone from the appellant after she paid shilling 130,000/=. PW2 said that the appellant came with the police to take the phone. Thus, the allegation that the phone was not found to him has no merits as appellant sold the phone to PW2.

Regarding the ground No. 4 in the additional petition, he said that PW4 testified to hear someone calling for help, and he went to where the cry was coming from and find the victim – PW3 lying on ground injured. Also, PW3 testified that she raised alarm after the incident.

On the last ground of appeal, the counsel said that the evidence adduced by prosecution witnesses proved the offence without doubt. PW3 soon after the incident told people who came to help her that the incident was committed by the appellant. There was no doubt that it was the appellant who committed the offence

as the identification was watertight and the doctrine of recent possession also support the identification. The Appellant failed to give explanation as to how he obtained the phone which he sold to PW2. All of this proved beyond doubt that it was the appellant who committed the offence. To support his submission, the counsel cited the case **of Seleman Mussa @ Vitus and Another v. Republic,** Criminal Appeal No. 07 of 2019, CAT at Mbeya, at page 10 second paragraph.

From the submissions, the issue for determination is whether the appeal has merits.

In determination of this appeal, I will go through grounds of appeal as they are found in the petition of appeal and additional petition of appeal. On the issue of visual identification, the appellant stated that the identification at the scene was not watertight as the identifying witnesses did not explain source of right, intensity, no eye witness who saw the incident and that identification parade was not conducted to identify him. The respondent counsel said that the evidence on visual identification was water tight.

It is a settled law that the person can only be convicted on evidence of identification if the Court is satisfied that such evidence is watertight and leaves no possibility of error. This position was stated in the case of **Waziri Amani V. Republic [1980] T.L.R. 280,** where it was held that:

"The evidence of visual identification is of the weakest kind and most unreliable. As such, courts must not act on visual identification unless and until all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence is watertight."

It is very important to scrutinize the evidence on the conditions favoring a correct identification before the court determine the case depending on visual identification as it was held by Court of Appeal in the case of **Raymond Francis V. Republic [1994] T.L.R. 100.**

There are number of factors to be considered by the Court to ensure that the evidence is watertight and there is no possibility of mistaken identity. In **Samson Samwel v. Republic,** Criminal Appeal No. 253 of 2021, Court of Appeal of Tanzania at Shinyanga, (unreported), the Court of Appeal held that factors to be considered before the Court convict the suspect on the evidence of visual identification includes the time the witness had the suspect under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance whether it was day or night time, whether there was good or poor lighting at the scene and whether the witness knew or had seen the suspect before. The similar factors were stated in **Sostenes Myazagiro @ Nyarushasi V. Republic,** Criminal Appeal No. 276 of 2014, Court of Appeal of Tanzania, at Tabora, (Unreported).

In the case of **Chacha Jeremiah Murimi and 3 Others V. The Republic,** Criminal Appeal No. 551 of 2015, Court of Appeal of Tanzania, at Mwanza, (Unreported), held that even in cases where witnesses have claimed to have recognised the accused, mistakes are sometimes made, although by any degree, evidence of recognition may be more reliable that identification of a stranger.

Also ability of a witness to name a suspect at the earliest opportunity possible is another important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry. However, the same is not as decisive factor as it was held in the case of **Jaribu Abdallah v. Republic [2003] TLR 27.**

In this matter, there is no dispute that the incident took place at night. As result, the factors favouring accurate identification at night are important to be established by PW3 who is the only identifying witness in this case. It is true as it was alleged by the appellant that PW3 did not explained the intensity of the light at the scene of crime. She said that there was moonlight and electricity light in the area of incident but she said nothing about the intensity of the light. Despite of that shortfall, PW3 evidence proved that the incident took ten minutes and she knew the appellant very well prior to the incident. The evidence of the PW3 is that of recognition which is more reliable than the identification of the stranger. This was also supported by appellant in his testimony where he said that he know the

victim since their childhood as they are residents of the same village. PW3 told PW4 soon after he came to provide help following hearing PW3 screaming for help that it was the appellant who robbed her. She did the same to the police after she reported the incident. In addition, the evidence of identification is supported by the fact that the appellant was found with phone stolen during the incident soon after the incident.

The appellant alleged that there was no identification parade which was conducted but identification parade is not conducted in every identification situation. It is a settled law that where suspect is known to the identifying witness there is no need to conduct identification parade as the same is superfluous. This position was stated in **Charles Nanati v. Republic**, Criminal Appeal No. 286 of 2017, Court of Appeal of Tanzania at Dar Es Salaam, (unreported). In the case of **Doriki Kagusa v. Republic**, Criminal Appeal No. 174 of 2004, Court of Appeal of Tanzania at Mwanza, (unreported), the Court held that:

> *"The identification parade was absolutely unnecessary where the identifying witnesses or witness knew the suspect before the incident, it is superfluous and waste of resources to conduct such a parade. We have asked ourselves this question; the identification parade is held to achieve what purpose when the suspect is well known to the identifying witnesses? Our answer has already been indirectly given above. It is unnecessary and a waste of time."*

Thus, in the present case where the victim and appellant knew each other very well there was no need to conduct identification parade.

Regarding appellant's allegation that it was wrong to convict him for the offence while he was not found with any of the stolen property, the Counsel for the respondent submitted that the doctrine of recent possession is applicable in this case as the stolen phone in the robbery incident was found in appellant's possession soon after the incident.

In order for the doctrine to apply it has to be proved by the prosecution that the property was found in the possession of the suspect and it was positively identified to be the property of the complainants which was recently stolen from complainant during the commission of the offence charged. Also, the said stolen property must constitutes the subject of a charge against the accused person. This was stated in the case **Samwel Marwa @ Ogonga v. Republic,** Criminal Appeal No. 74 of 2013, Court of Appeal of Tanzania at Mwanza, (Unreported).

The evidence available in record revealed that soon after the incident PW3 named the appellant and his companion as the one who injured her and robbed her a bag with Tshs. 250,000/= and a mobile phone Techno Phantom 6 on 31.12.2020. PW5 evidence proved that the appellant brought the alleged stolen phone on 01.01.2021 to fix its sim card at the same time the appellant was looking for a buyer of the said phone. The evidence of PW2 proved that in January, 2021

she bought a mobile phone from the appellant where she paid shillings 130,000/= and on 27.01.2021 the police led by the appellant seized the said phone as it was stolen. This evidence proved that soon after the incident the said stolen phone was seen in appellant's hand before he sold it to PW2. It was the appellant who led PW1 to PW2 where the phone was recovered. The victim who is the owner of the said phone provided description of the phone including its special marks to the police and she was able identify it after the phone was recovered.

The appellant said nothing concerning his possession of the said phone. This Court observed that appellant's question to PW3 during cross examination suggested that PW3 gave her the phone. All of this proved that despite the fact that the said stolen phone was not found in appellant's possession at the time it was recovered, the said phone was in his possession soon after the incident as it was stated by PW5 and later on he sold the phone to PW2. Later, appellant led the police to recover it from PW2. I find that this is a fit case for applying the doctrine of recent possession to prove the offence of armed robbery against the appellant as it was rightly held by the trial Court.

The appellant alleged that certificate of seizure - Exhibit P1 and PF3 – Exhibit P3 were not read loudly after its admission, but the typed proceedings in page 6 and 11 respectively show that the said documents were read over to the appellant. Thus, there is no evidence to support the allegation.

The testimony from prosecution proved without any doubt that PW3 was robbed with a bag containing Tshs. 250,000/= and a mobile phone Techno phantom 6 make on 31.12.2020. PW3 identified the appellant as among the robber and that they strangled her neck and assaulted her by using a piece of wood which has nails in order to obtain and retain the said property. PW3 informed the police and the appellant was arrested. The appellant led the police to PW2 whom he sold the phone and the same was seized and PW3 identified it.

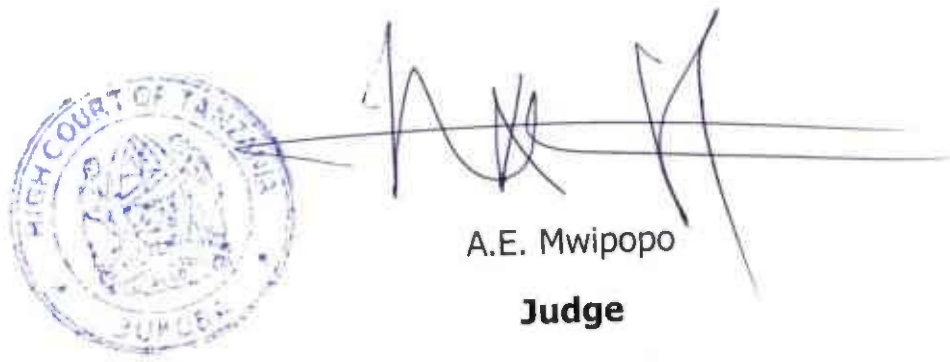
The appellant alleged that his defence was not considered by the trial Court in its decision. It is settled principle that failure to consider the evidence of the defence is fatal to the trial or proceedings. This was stated by Court of appeal in **James Bulow & Others v. Republic, [1981] T.L.R. 283.** The trial Magistrate had duty to evaluate the entire evidence from the prosecution and the appellant as a whole before reaching at a verdict. In this case, the learned trial Magistrate did not do so. After the Magistrate found the prosecution proved the offence against the appellant proceeded to find appellant guilty of the offence and convicted him for the offence charged. I'm aware that this being the first appellate court it has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary. As the trial Court did not consider the defence evidence, I find it necessary for this Court to evaluate the evidence and to reach to its own findings of the fact.

The issue to be resolved is whether the trial Magistrate would have arrived at the same conclusion had he considered the appellant's defence. The Court of Appeal took similar stance in the case of **Jonas Burai v. Republic**, Criminal Appeal No. 49 of 2006, Court of Appeal of Tanzania at Dar Es Salaam, (Unreported). In his sworn evidence, the appellant denied to commit the offence and told the court that he was not found with the stolen property from the incident. He said that his rights were prejudiced during the trial and that he was tortured and he tendered PF3 as exhibit. He said that the evidence of PW3 has a lot of mistaken identity possibilities and that he was framed.

Looking at this appellant defence it is very clear that it does not raise any doubt to the prosecution case. The evidence of prosecution witnesses has shown the connection between the phone stolen during the robbery incident and the appellant. The same prove that soon after the incident the appellant was in the possession of the phone and he sold it to PW2. It was the appellant who led the police to seize the said phone to PW2. Also, the testimony of PW3 proved that she recognized the appellant during the incident and she told the first person to come to assist her and the police that it was the appellant who committed the offence. This evidence is corroborated by evidence on the recent possession of the phone stolen during the incident to be in appellant's hands soon after the incident and fact that the appellant sold the phone to PW2. It is for these reasons I conclude

that had the learned trial Magistrate considered the appellant's evidence and evaluated the evidence still he would have reached the same decision of convicting the appellant.

Therefore, I find that the appeal has no merits and I dismiss it.

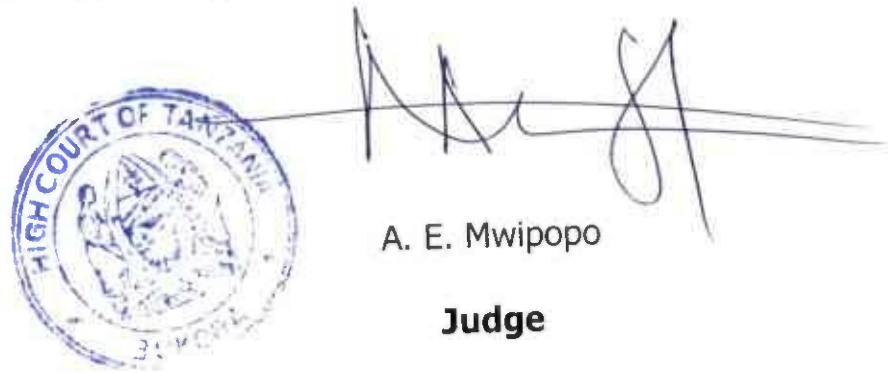


A.E. Mwipopo

Judge

18/03/2022

The Judgment was delivered today, this 18.03.2022 in chamber under the seal of this court in the presence of the Appellant and in the absence of the Respondent. Right of appeal explained.



A. E. Mwipopo

Judge

18/03/2022