IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 142 OF 2022

(Originating from the decision of the District Court of Kinondoni in Criminal Case No. 421/2019)

SELEMANI DEMANGWE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

29th Nov 2022 & 27th January2023

MKWIZU J:

The appellant was arraigned at the District Court of Kinondoni at Kinondoni for armed robbery contrary to section 287A of the Penal code, (Cap 16 R.E. 2002) on the basis of which the prosecution sought to prove that on the 18th July 2019 at Tandale Shule area within Kinondoni District in the region of Dar es Salaam, using a knife, the appellant stole a mobile phone make ITEL A12 valued at 180,000/= the property of Mariam Hassan.

The incident is reported to have happened on the morning of 18/7/2019 at around 06.58 hours when Mariam Hassan (PW1) on her way to her working station heard a person not known to her calling her from behind. She stopped and the accused who was armed with a knife invaded her robbing her mobile phone make Itel, silver in colour, and ran away. She raised an alarm. PW5, Hamisi Ramadhani who was at his home nearby at Tandale opposite Salma Kikwete's school, heard the alarm and saw the accused who was being chased running from the scene towards him. According to his evidence, he managed to arrest the appellant with

a mobile phone make Itel silver in colour with a knife in his wrist and took him to the police station. At the police station, a seizure certificate (exhibit P4) was prepared and in an interrogation with the police, the appellant confessed commission of the offence and a cautioned statement (exhibit P3) was recorded.

In his defence, the appellant denied involvement in the alleged crime. He said he was arrested on 16/7/2019 on his way to Mabibo Mahakama ya Ndizi by militiamen who demanded money from him a request which he could not fulfill. He was then conveyed to Mabatini police station and later to Court. At the conclusion of the trial, the appellant was found guilty, convicted, and sentenced to thirty (30) years imprisonment.

Aggrieved, the appellant has approached this court with an initial eleven (11) points memorandum of appeal and other three supplementary grounds premised on the following paraphrased grievances:

i. *The conviction was based on a defective charge with facts different from the prosecution evidence, particularly on the place where he committed the armed robbery.*
ii. *That he was not properly identified in court blaming the prosecution for failure to lead PW1 to identify him in the dock.*
iii. *Failure by the prosecution to prove the armed robbery charge beyond a reasonable doubt.*
iv. *Exhibits P1, P2, P3, and P4; were improperly admitted in evidence.*
v. *Failure by the prosecution witnesses to describe the stolen property.*

vi. *Contradictory evidence by the prosecution.*

vii. *Failure by the trial court to consider defence evidence.*

viii. *Failure by the trial court to improperly evaluate evidence*

At the hearing, the appellant appeared in person, unrepresented. The respondent /Republic had the services of Mr. Clement Maswa, learned State Attorney. When called to address the court in support of his appeal, the appellant asked the court to let the learned State Attorney first address his appeal grounds.

Mr. Maswa outrightly opposed the appeal. Addressing the first point, the State Attorney said the charge is in all four angles competent as it is well supported by the evidence adduced by the prosecution witnesses. PW1's evidence shows that the incident was committed at Tandale, and PW2 and PW3 named the scene of the crime as Tandale Uzuri and so PW4 and PW5 who were categorical that the offence was committed at Tandale Uzuri at Mama Salma Kikwete's school. The Court was urged to find this ground untenable.

The learned State Attorney conceded to the second ground of appeal. He agreed that the prosecuting attorney did not, during the trial lead PW1 to properly identify the appellant in court. However, he added, PW1's evidence was clear that it left no doubt on the identity of the accused person. He found support from the decision of **Felix Majuga V R**, Criminal Appeal No 509 of 2020 CAT (Unreported) where the Court insisted that the arrest of the accused at the scene is sufficient evidence of his identity.

Mr. Maswa opted to argue grounds 3, 9, and 10 condemning the prosecution for failure to prove the offence together. He said, it is in the

prosecution evidence that the appellant robbed the victim and, in the process, a knife was used to retain the robbed property and again that the accused was arrested red-handed with the stolen items at the scene.

While admitting that chain of custody to exhibit P1 and P2 was not observed as complained by the appellant in his ground four, the leaned State Attorney contended that the oral evidence adduced by the prosecution witnesses sufficiently proves the offence even if the two exhibits are excluded from the records.

Regarding the complaint on the improper description of the alleged stolen mobile phones in ground five of the appeal, the learned State Attorney said, the mobile phone was properly described by its colour and reliance was made on the decision of **Jibril Okash Ahmed V R,** Criminal Appeal No. 331 of 2017(unreported). He categorically opposed grounds six and seven of the appeal on the reason that PW1 and PW5's evidence proves that the appellant ran with the mobile phone before he was arrested.

Admitting to the contradiction on the colour of the handle of the knife alleged to have been found at the scene, the learned State Attorney said, PW1 said it was red in colour while PW3, PW4, and PW5 said it was yellow and the trial courts analysis branded the same knife handle as orange in colour, but, he said, that contradiction is a minor one for many people are colour blind. He relied on the decision of **EX G 2434 PC George V Republic**, Criminal Appeal No. 8 of 2018 (unreported) and **Mohamed Said Matula V Republic,** 1995 TLR 3. He invited the court to centre its consideration on whether the knife was used in the commission of the offence or not.

Supporting the 8th grounds of appeal challenging admission of exhibit P3, the learned State Attorney said, the ruling after the inquiry directed that the statement would be considered in the judgment, but the trial court went ahead to admit the accused statement as an exhibit in court and used it to ground the appellant's conviction. He proposed the exclusion of the accused cautioned statement from the records with a view that the remaining direct evidence by PW1 and PW5 remains strong to support the appellant's conviction.

Regarding the issue of non-consideration of defence evidence by the trial court raised in the 11th ground of appeal, the learned State Attorney said the defence was considered. Trial court did evaluate both prosecution and defence evidence before entering the conviction.

The appellant had a very brief rejoinder, he only urged the court to consider his grounds of appeal and set him free.

I have considered the grounds of appeal, trial court records, and the parties' submissions. The first ground is on a defective charge for being at variance with the prosecution evidence. I think this should not detain the court. As correctly submitted by the learned State Attorney, the prosecution evidence is clear on the point of the scene of the crime. PW1 said the incident happened at Tandale, a fact which was confirmed by PW5 who said that the incident happened at Tandale primary school. This evidence corresponds squally with the details of the charge in which the appellant was accused of.

The second ground faults the trial court for convicting the appellant without a proper dock identification of the appellant to ascertain if he is the same person PW1 was referring to in court or not. The important issue

here, I think should be whether the appellant was properly identified at the scene of the crime. In her evidence, Pw1 did not mention if she identified the appellant or not. But she was specific that with the aid of other people, the appellant was arrested red-handed at the scene of the crime. PW5's evidence supported this version of the story. He testified that he apprehended the appellant who was running from the scene with the Mobile phone claimed to belong to PW1 and took him to the Kwa Ali Maua B police Post. I shall let part of PW4's evidence speaks for itself:

> *"…on 18/7/2019 I was at my home Tandale opposite Mama Salma Kikwete School. When I heard an alarm "wizi Mwizi" I saw people chasing the accused facing me. I catch him holding a phone make Itel silver in colour. One girl arrived demanding her phone. The other people came chasing the accused. The accused had knife hiding on his wrist. I took the accused to Ali Maua "B" police Post…"*

The appellant did not challenge PW5's testimony. A close examination of the trial court records reveals that PW5 did properly identify the appellant in court by pointing to him as the same person he arrested at the scene on the material date. I thus, find nothing to discredit PW5's credibility on the identity of the appellant. The issue of the identification of the appellant cannot under the explained circumstances arise. This position was held in the case of **Daffa Mbwana Kedi v. Republic**, Criminal Appeal No. 65 of 2017 (unreported), where the court said:

> *"The Court has on a number of times held that where an accused is arrested at the scene of crime his*

assertion that he was not sufficiently identified should be rejected. "

I thus find the appellant's complaint in the second ground of appeal without merit.

The third complaint is a failure by the prosecution to prove its case beyond a reasonable doubt. Being the first appellate court, this court will resort to the evaluation of the entire evidence to see whether the offence of armed robbery leveled against the appellant was proved as required. The law in place is clear on the essential ingredients of armed robbery. Section 287A of the Penal Code, provides:

> *"287A.-A* ***person who steals anything****, and at or* ***immediately before or after stealing is armed with any*** *dangerous or* ***offensive weapon*** *or* ***instrument*** *and at or* ***immediately before or after stealing uses or threatens to use violence to any person in order to obtain or retain the stolen property, commits an offence of armed robbery*** *and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment." [Emphasis added].*

To prove armed robbery, the prosecution must lead evidence to establish stealing committed by the use of actual or threat of violence by the perpetrator at or immediately thereafter using any dangerous or offensive weapon or instrument or by the use of or a threat to use actual violence to obtain or retain the stolen property.

PW1's evidence was to the effect that she was invaded by the appellant and her mobile phone- Itel AIZ, silver in colour was snatched from her. This evidence was supported by PW5 who said that in arresting the appellant, he found him with a mobile phone, make Itel silver in colour which PW1 claimed to be hers. I have curiously evaluated this piece of evidence. These two prosecution witnesses did not fail only to describe the phone properly to distinguish it from other similar phones in the street but also, ownership of the said phone was not established. PW1, for instance, did not give any special marks for the mobile phone allegedly belonging to her before being tendered in court. And no details were given by PW5 describing the items including the phone he personally found with the appellant on the arrest.

It is common knowledge that mobile phones are common items owned by any person in society, hence the need to prove that it belonged to the complainant who alleged to have owned it, by giving a description of specific marks. This was not done leaving the court undecided whether PW1 was a real owner or not the doubt which is resolved in the appellant's favour.

Worse enough, the rest of the evidence on the records that could clear the doubt is crippled by procedural irregularities. Accused's cautioned statement (Exhibit P3) for example was wrongly admitted by the trial court. My reading of the records reveals that the appellant had objected to the admissibility of the cautioned statement (exhibit P3) under section 169 of the Criminal Procedure Act contending that the statement was

recorded beyond the required time prescribed by the law. His objection was recorded thus:

> *"I object to the statement to be admitted as an exhibit because Pw2 removed me from the police cell on 19/7/2019 and is the date the statement was recorded"*

After the objection, the trial court went through an inquiry procedure which was terminated at the closure of the prosecution case on inquiry without affording the appellant chance to testify in defence followed by a ruling that the objection would be considered in the cause of analysing prosecution evidence. That however wasn't the case.PW2 was immediately thereafter allowed to tender the said statement which was admitted as exhibit P3.

The procedure here was faulted. Though not specifically mentioned, the contest to the admission of the cautioned statement by the appellant was premised on the provisions of section 50 of the CPA which requires a cautioned statement to be recorded in a period of four hours commencing at the time when the accused is taken under restraint in respect of the offence.

Essentially, the admission or otherwise of an exhibit of such a nature is a discretion of the court which must be exercised under section 169 of the CPA. As indicated above, the admission of the statement was without giving the prosecution right to respond to the objection, considering all relevant matters raised and no reason for that admission were assigned by the court. This is a fatal irregularity infecting exhibit P3, and the court has no option but to expunge the cautioned statement tendered and admitted as exhibit P3 from the records.

It is also evident from the records that the certificate of the seizure (exhibit P4) was admitted in evidence. This evidence would have supported direct evidence by PW1 and PW5 on the fact that the appellant was found with a mobile phone and a knife. However, admission to this exhibit was not error-free. It was admitted by the trial court pending the determination of the objection raised in the judgment. The trial court did not resolve the objection afterward. This exhibit is therefore inconsequential to the matter. It is as well expunged from the records.

Others exhibits admitted during the trial are the mobile phones allegedly stolen from PW1 and a knife found with the appellant, exhibits P1 and P2 respectively. According to the appellant, the chain of custody in respect of the two exhibits above was not established to the tilt. the learned State Attorney's submissions on this point were brief that the prosecution case was proved even without the two exhibits in court. This suggests that he was in a way supporting the appellant's ground censuring the chain of custody.

I have evaluated the records. PW1 told the court that the robbery involved the taking of her mobile phone make Itel AIZ, silver in color and PW5 informed the court that the appellant was, on arrest found with a mobile phone make Itel, silver in colour, and a knife on his wrist. The evidence on record does not show how these two items were handled to establish that the chain was not broken from the time the two items were found with the appellant, sent to the police station, their storage until how they were taken back to PW1 for them to be tendered in court as an exhibit on 16/12/2019. The whole process of the exhibit handling is doubtful creating

uncertainty on whether the tendered items are the same ones found with the appellant on 18/7/2019 or not. The appellant is given the benefit of the doubt by allowing the grounds.

Having disregarded the mobile phone, a knife, the appellant's cautioned statement, and the seizure certificate (exhibits P1, P2, P3, and P4) there is no other evidence that remains on record that links the 1st appellant to the offence of armed robbery. And the reason is the mere presence of the appellant at the scene on the material date could not by itself stand strong to ground the appellant's conviction without proof of stealing the alleged items as one of the essential ingredients of the armed robbery beyond reasonable doubts the duty that the prosecution has abrogated in this matter.

The complaints on failure by the trial magistrate to consider the defence is also justified. In its decision, apart from summarising the defence case, there is nothing done showing that the conclusion by the trial court was arrived at after examination of both prosecution and defence evidence as the learned State Attorney wanted this court to believe. It is a settled legal position that summary of evidence is not consideration of it. This was stated in the case **Leonard Mwanashoka v. Republic**, Criminal Appeal No. 226 of 2014 (unreported) where the Court observed:

> "*It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. It is one thing to consider evidence and then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."*

The summary of the defence evidence in the trial court's decision under scrutiny was followed by analysis of the prosecution evidence. No mention of the appellant's defence was made in the analysis contrary to the well-established rule of a judgement writing that calls for a critical analysis of both the prosecution and the defence. See for instance the reported decision of **Amiri Mohamed v. Republic** [1994] T.L.R. 138.

To say the least, the trial court failed to properly evaluate the evidence on the records. Had it so done, it would have realized that the prosecution case was not proven to the required standards.

As a result, the appeal against the appellant is allowed, the conviction is quashed, and the sentence is set aside with an order for his immediate release from prison custody unless otherwise lawfully held.

Right of Appeal explained.

DATED at **Dar es salaam this** 27th day of **January 2023**.

E.Y. MKWIZU
JUDGE
27/01/2023