IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

DC. CRIMINAL APPEAL NO. 24 OF 2022

(Originating from Nzega District Court Criminal Case No. 22 of 2021)

MACHIBYA S/O NHWANI @ KATENDELE.....1ST APPELLANT

JUMA S/O DOTTO.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date: 20/3/2023 & 21/4/2023

BAHATI SALEMA,J.:

In this first appeal, the two appellants herein **MACHIYA NHWANI @ KATENDELE and JUMA S/O DOTTO** (hereinafter called the first and second appellant respectively or appellants collectively) were jointly charged with 3 counts, the first charge was conspiracy contrary to section 384, attempt robbery contrary to section 288 and assault with intent to steal contrary to section 287B of the Penal Code, Cap.16.

The particulars of the offence are that the duo accused persons in December 2020 at Nzega town within Nzega District in Tabora region jointly and together conspired to commit an offence, to wit Robbery.

On the second count of attempt armed robbery contrary to section 287B of the Penal Code, Cap.16, that the duo on 12 February,2021 at Uzunguni area, Nzega Magharibi Ward in Nzega township within Nzega District in Tabora region jointly and together with the intent to steal a motorcycle with registration number MC 506 CHR, make Sunlg being driven by Abdul s/o Fumbuka were armed with offensive weapons, to wit; bush knife "Panga and Knife" and in the course thereof, used actual violence to Abdul Fumbuka in an attempt to rob a motorcycle with registration number MC 506 CHR make Sunlg.

As to the third count assault with intent to steal contrary to section 288 of the Penal Code, Cap 16, on 12 February,2021 at Uzunguni area, Nzega Magharibi Ward in Nzega township within Nzega District in Tabora region jointly and together assaulted one, Abdul Fumbuka using a bush knife and a knife on various parts of his body with intent to steal a motorcycle with registration number MC. 506 CHR make, Sunlg.

The said first accused Machiya Nhwani Katendele was alleged to have mentioned the second accused Juma Dotto, the person who was together. Based on those reasons the accused person was arraigned.

They appeared before the court, the accused pleaded not guilty to the counts, and the prosecution paraded witnesses. After the full trial, the trial court found the two appellants guilty for the second offence 14 years and the third offence 15 years imprisonment.

Unperturbed, the appellant dissatisfied with the trial court decision appealed to this court fronting a total of eight grounds of appeal. This appeal is against the conviction and sentence, on the grounds namely:-

1. *That, the case for the prosecution was not proved against the appellants beyond reasonable doubt as required by the law.*
2. *That PW1 did not name the culprits at the earliest opportunity to the person he first met in the aftermath of the attempted robbery and assault, despite the allegations of being familiar to them.*
3. *That PW1 did not describe the culprits in terms of appearance and/or attire they put on at the time of the commission of the offence.*
4. *That, the allegation of the first appellant's injury on his lip was not established by the medical doctor who would have informed the trial court on whether the same was the result of a later.*
5. *That, the trial court was not told when, how, and why the second appellant was arrested to establish whether his arrest had any connection with the commission of the offence charged.*

6. *That, the motorcycle subject of the charge namely SAN LG with registration number MC 506 CHR is at variance with the one testified by PW1 to be the one he was riding namely MC 506 CRK.*
7. *That, the cautioned statements allegedly made by the appellants before police officers (exhibits P2 & P3), were obtained under torture.*
8. *That, exhibit P3, the cautioned statement of the second appellant was made after the expiry of the time prescribed by sections 50 & 61 of the Criminal Procedure Act, Cap. 20 [R.E 2019].*

For these grounds, the appellants urged this court to allow the appeal, quash the conviction and set aside the sentence.

In the course of the hearing of the appeal, the appellants were unrepresented, whereas the respondent Republic had the services of Mr.Joseph Mwambwalulu, learned State Attorney.

The appellants being laymen adopted the grounds of appeal to form part of their submissions.

On the part of the respondent, Mr. Joseph Mwambwalulu objected to the appeal and supported the conviction and sentence meted against the appellants. He submitted his response on the first and third grounds. According to the proceedings PW1, Abdul Fumbuka explained in detail how he identified the accused persons when he was

stopped since there was sufficient light and also there was light from the motorbike. Amplifying his stance he referred this court to the case of **Amani Waziri V Republic [1980]** on identification. He stated that the appellants were well-identified.

On the fourth ground of appeal that the allegation of the first appellant's injury on his lip was not established by the medical doctor who would have informed the trial court on whether the same result from a later. On this ground, the State Attorney contended exhibit "P1 and P2" collectively that the appellants admitted in the cautioned statement that they were the ones who attacked him, the evidence from the doctor was only to confirm that PW1, the victim was injured.

On the fifth ground of appeal, the trial court was not told when, how, and why the second appellant was arrested to establish whether his arrest had any connection with the commission of the offence charged the connection. Mr. Mwambwalulu, learned State Attorney contended that it is true that Juma Dotto, the second accused was convicted after being identified. Also in his caution statement, he confessed.

On the sixth ground of appeal, he conceded that the motorcycle subject of the charge namely SAN LG with registration number MC 506 CHR is at variance with the one testified by PW1 to be the one he was

riding namely MC 506 CRK. In this aspect, the learned state attorney admitted to the court that the difference in the numbers of M 596 CRR or MC 596 CRK was a slip of the tongue since there is no dispute that the cycle which was attempted to be stolen was CRK.

On the seventh ground of appeal, the cautioned statements allegedly made by the appellants before police officers exhibit "P2 and P3" were obtained under torture. He submitted that the caution statement was properly done since a trial within a trial was conducted and the court upon satisfied admitted them.

On the eighth ground of appeal that exhibit P3, the cautioned statement of the second appellant was made after the expiry of the time prescribed by sections 50 and 51 of the Criminal Procedure Act, Cap.20 [R.E.2019] which was against the law.

The learned State Attorney submitted that PW6, G.4473 testified that the accused was arrested on 23/02/2021 at Puge, and on the same day he was interviewed and his statement was completed at 18 hours which was within the time. Thence, the prosecution proved their case beyond reasonable doubt. He prayed to this court to dismiss the appeal.

In his short rejoinder, the first appellant reiterated his submission in chief that he was arrested at 9 hours. In respect of the scar, he was injured while riding a motorcycle.

For the second appellant, he submitted that he was not taken to the justice of the peace and no one identified him. PW1, Fumbuka in his evidence said that he knew Shaban Dotto but his name is Juma Dotto and he lives in the village. For these grounds, the appellants urged this court to allow the appeal, quash the conviction and set aside the sentence.

Having considered the foregoing submissions from both sides, the issue is whether the appeal is meritorious.

It is a cardinal principle of the criminal justice system in Tanzania that, the prosecution bears the burden of proving its case beyond reasonable doubt. In **Daimu Daimu Rashid @ Double D Vs. R,** Criminal Appeal No. 5 of 2018 (CAT-unreported), and **Samson Matinga Vs. R,** Criminal Appeal No. 205 of 2007 (CAT-unreported).

Addressing the first ground of appeal is to re-assess the evidence in line with the ingredients that form the offence of attempted robbery. There is no dispute that the appellant was charged with armed robbery. Section 287B of the Penal Code, Cap. 16[R.E 2022] defines, attempted robbery to mean;

"Any person who with intent to steal anything from another person, is armed with any dangerous or offensive weapon or

instrument, or is in company of one or more persons, and in the course thereof threatens, or attempts to threaten to use actual violence to any person, commits an offence termed "attempted armed robbery" and on conviction is liable to imprisonment for a minimum period of fifteen years with or without corporal punishment.

Similarly, they were charged with Assault under section 288 of the same Act, *"Any other person with the intent to steal anything is guilty of an offence and is liable to imprisonment for a term of not less than five years but not more than fourteen years, with corporal punishment."*

In examining appropriately, the first issue, I will combine the evidence adduced before the trial court against the ingredients of the offence of attempted robbery to establish the offence, according to the evidence of PW1, the ingredients of the offence of attempted robbery under section 288B of the Penal Code, Cap. 16 were cogently established in terms of the type of weapon employed in the commissioning of the offence namely "*a knife and a machete*". The testimony of PW1 revealed that the two accused bordered his motorcycle and assaulted him in different parts of the body and this was corroborated by Dr. Arnold Majaliwa France who tendered a PF3 as an exhibit "P1" and Nelson Stanslaus, a border who met Fumbuka dragging his motorbike and he

saw him oozing blood. This was also corroborated by PW3, H 8525 PC James while patrolling he saw a border Abdul who had injuries. Therefore from this evidence, the ingredients of offences were proved beyond reasonable doubt as required by the law.

Now coming to the second and third grounds of appeal which are interconnected that PW1, did not name the culprits at the earliest opportunity to the person he first met despite the allegation of being familiar to them and that PW1 did not describe the culprits in terms of appearance and attire they put on.

As rightly submitted by the appellants, on the issue of identification, admittedly, this incident took place at night hours around 23hrs when under normal circumstances darkness had set in. It is a settled law that courts should closely examine the circumstances in which an identification of any witness was made.

As traversed through the court records I noted that PW1 in his testimony in court stated that he identified the first culprit Machibya and he was familiar with him and recognizes him from "vijiwe vya bodaboda" and he used to station at Uchama, he then stated that there was the light of bulb from Jesmark hotel and the light was intense about 100 watts, and the bulbs were lighting to 10 to 15 meters. He further identified him

wearing a black coat and an Adidas cap while his friend wore a black coat and black cap. He was also familiar with Shaban Doto for two weeks.

Even though in this matter, the evidence of PW1 was believed by the trial court and was relied upon to convict the appellants, however, in this matter, I am of the different view that; generally the courts are required to be cautious to ground their conviction based on visual identification unless it is satisfied that all possibilities of mistaken identity have been eliminated and that the evidence before it is watertight. I am aware of the cardinal principle laid in **Waziri Amani Versus Republic [1980] TLR 250** regarding the evidence of visual identification. The principle laid down in these cases is that in a case involving evidence of visual identification, no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is watertight.

Looking at the case at hand, it is on record that while PW1, Abdul Fumbuka was towing his Motorcycle he met his colleague Nelson Stanslaus and upon hearing the incident he went to call other borders that used to park with PW1.

Although it is not a must, the courts in various decisions have set guidelines concerning this. Undeniably, it is trite law that the ability of a

witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry. This was also emphasized in the cases of **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39 and **Minani Evarist v R, Criminal Appeal No 124 of 2007 CAT (unreported)**.

As observed from this court, the testimony from the prosecution witnesses on which the trial court based its finding that the appellants were positively identified at the scene of the crime could not be that much relied upon because PW1 had not disclosed to anyone prior to the arrest of the appellants that he managed to identify the appellants.

In this matter at hand, had the identification has been accurate, PW1 would have mentioned the peculiar feature of the appellants first. The witnesses did not describe the appellant either his physical appearance or the clothes he had worn to any other witness prior to the arrest of the appellants. Ideally, this was to be done by PW1. The requirement of describing the peculiar features or marks is an imperative prerequisite and it has been emphasized in many judicial pronouncements. In the case of **Mustapha Darajani v. Republic**, CAT-Criminal Appeal No. 242 of 2005 (unreported).

Similarly in the case of **Ayubu s/o Zahra v Republic**, Criminal Appeal No. 177 of 2004 (Unreported) among other things it was held that,

> *"Where it is the question of evidence of identifying a stranger the law demands that the witness should describe the appellant to the police in their first report."*

Therefore I am of the considered view that the identification must be watertight to sustain a conviction. In this matter PW1, Abdul Fumbuka did not name any accused during all the time. This court also agrees with the appellants that had the victim identified them at the scene he would have reported them to the one immediately since he said he was familiar with the appellants.

As to the fourth ground that at, the allegation of the first appellant's injury on his lip was not established by the medical doctor who would have informed the trial court on whether the same was the result of a later.

In criminal trials, the general rule is that it is the prosecution and not the accused, except for exceptional cases, who has the burden of proving the case against an accused person. The case of **Joseph John Makune v Republic** [1986] T.L.R. at page 49, and **Mohamed Saidi Mtula v Republic** [1995] T.L.R. 3 support this instance that where there is doubt, it is always resolved in favour of the accused person.

The evidence of PW5, G2267 DC Saidi who arrested the first appellant reveals that upon receiving information from the informer they conducted a survey and found the place the accused lived with his parents since they had known the name of the offender they arrested him, and found that he was stitched on his lower lip. This was also validated by PW3 H88525 James who during cross-examination stated that the appellant had an injury on his mouth.

On the contrary, in his defence the first appellant stated that in 2017 while riding a motorcycle the chain of the motorcycle dropped and injured him in several parts of his body head, face and lower lip and he went to Eden for treatment.

As noted from the evidence the prosecution had not contradicted this dispute to verify the truth, since during cross-examination DW1 stated that he was injured at the lower lip in 2017 and at the time he was arrested and he had no bandage. It is my conviction that, since the police arrested the accused at his place of residence, they were in a better position to bring any witness to disprove the appellant's claim or else the prosecution would give him a PF3 for treatment but none was said. In this instance where there is doubt, it is always resolved in favour of the accused person.

As to the fifth ground of appeal, the trial court was not told when, how and why the second appellant was arrested to establish whether his arrest had any connection with the commission of the offence charged.

From the evidence of PW6, G.4473 DC Dickson it is noted that on the 23/02/2021 evening hours, he received a phone from OC CID Boniface Mayala informing him of the arrest of another suspect at Puge connected with the case and the second accused was brought by militia from Puge. They wanted to know the connection between Juma Dotto and Machibya Nhwani who earlier mentioned him.

Although section 147 of the Evidence Act, Cap.6 [R.E. 2022] provides that no particular number of witnesses is required for proof of any fact. It is my conviction that the prosecution ought to bring the militia from Puge to give evidence of how he managed to arrest the second accused in connection to the case. I am therefore of the considered view that the prosecution failed to lead investigatory evidence as to how they arrested the appellant to ascertain whether his apprehension emanated from the crime at hand. In the prosecution case, the procedure for arrest was not exposed and there was no record connected to the offence apart from being mentioned by the first appellant. In the case of **Ibrahim Shabani Ally Kalulu V. R**; Criminal Appeal No. 110 of 2002 (unreported), the court made the following pertinent observation:-

"It is our opinion that the slackness in arresting the appellants was not due to inefficiency, but to lack information as to whom they were to arrest."

Following that it is my view, the evidence of all the witnesses PW6, G4473 DC Dickson did not explain how the accused was arrested and how he was connected to the offence of attempted robbery and assault. It is clear from what is set out above that there were some shortcomings in the witnesses' evidence, which diminished their credibility as witnesses thus their convictions were not on merit.

On the sixth ground of appeal, the motorcycle subject of the charge namely SAN LG with registration number MC 506 CHR is at variance with the one testified by PW1 to be the one he was riding namely MC 506 CRK.As conceded by the State Attorney, there was a variance in respect of the numbers. This does not prejudice the appellants since it was a minor inconsistency that did not affect the parties.

For the convenience of the seventh and eighth grounds of appeal since they are related that the cautioned statements allegedly made by the appellants before police officers (exhibits P2 and P3), were obtained under torture and after the expiry of time.

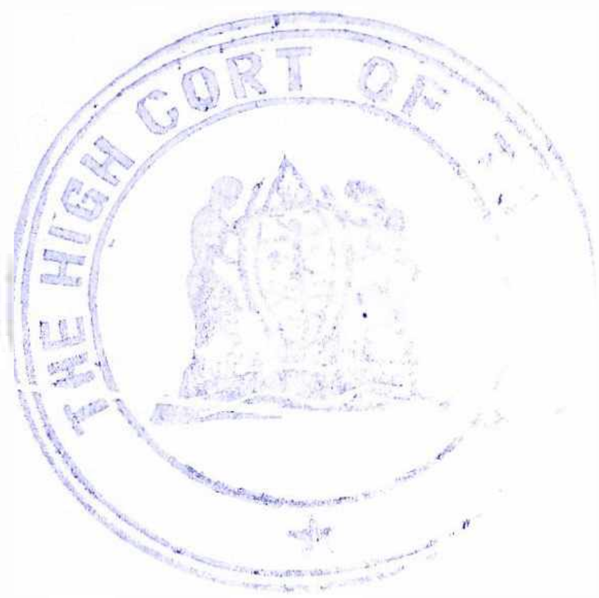
The records show that the caution statements of both accused persons were recorded timely however upon my perusal of the proceedings I have noted on page 44 that before conducting anything OCID directed G.4473 Dickson to call the first accused. After bringing him into the office, they interviewed them and they both admitted to committing the offence. This undoubtedly reveals that the caution statements of both accused persons were not properly procured.

In light of the above considerations, I find substance in the appeal preferred by the appellants which I accordingly allow. The conviction entered is quashed and the sentence is set aside. The appellants are to be released from prison forthwith unless otherwise held for some lawful cause.

Bahati

A. BAHATI SALEMA
JUDGE
21/4/2023

Court: Judgment delivered in presence of both parties.



Bahati

A. BAHATI SALEMA
JUDGE
21/4/2023

Right of Appeal fully explained.

A. BAHATI SALEMA
JUDGE
21/4/2023