THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MOROGORO)

AT MOROGORO

CRIMINAL APPEAL NO. 73 OF 2022

(Arising from Criminal Case no. 402 of 2009, District Court of Morogoro at Morogoro)

MIRAJI SHABANI @ MILLO ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

Date of last order: 25/04/2023

Date of Judgement: 12/05/2023

MALATA, J

The appellant MIRAJI SHABANI @ MILLO and three others were charged at the District Court of Morogoro for the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 now R.E of 2022.

The facts giving rise to the appeal may be briefly stated as follows;

That on 9th June, 2009 at about 2.00a.m of night at Kigurunyembe Morogoro District within Morogoro Region, the appellant together with other were jointly charged for stealing one short gun make browning pump action with registration number 46220 PN 162 CAR NO. 6500, DVD Machine make Sony, IBP of dish receiver make Gulf Star, 1 PN of amplifier make different, four bags with different clothes, different electrical instruments, cash money TZS 150,000/=, two boxes of cigarettes, different kind of vouchers and different domestic all valued at TZS 3,200,000/= the properties of one Samwel Shendolwa. That immediately after stealing the appellant jointly threatened Francis Simon with bush knives so as to retain the said properties.

The prosecution called a total of five witnesses to testify and tendered one exhibit to prove the offence against the appellant and

PW1, Samweli Kindolwa testified that he is the owner of the premises where armed robbery occurred, he stated that he was phoned by a neighbour who informed him of the incident of armed robbery at his house premises and also informed of his stolen properties. PW1 identified the shot gun which was shown at the trial court.

PW2, Francis Simon testified that, he was asked by PW1 to help him take care of his house while he was away, and that on 9th June 2009 at about

2:00am while at PW1's house three robbers broke into the house through the front door, the robbers had weapons including bush knives. The robbers ordered him to sleep on the floor while beating him and threatening him to show them PW1's room. PW2 further stated that since the light at the corridor was on he managed to identify one of the robbers who is the appellant herein. Thereafter they searched all the rooms and took the properties as mentioned in the charge sheet. On 8th July 2009 PW2 managed to identify the appellant in the identification parade.

PW3 ASP Isidori Sedoyeka testified that on 8th July 2009 in daytime, he was appointed to conduct the identification parade, where on the first day the appellant was identified by PW2 and one Sikitu Abdallah, and on 14th July 2009 the same people identified Moshi Muhelezi (DW1).

PW4 Dsgt Joseph testified that with the assistance of two police officers namely Dotto and Cpl Iddy they investigated the offence of armed robbery and they managed to arrest the appellant who was later identified in the identification parade by PW2 and Sikitu Abdallah.

However, Sikitu Abdallah was not available to testify before the court and the prosecution prayed his statement of evidence to be tendered in court under section 34 B (2) of the Evidence Act to form part of the court proceedings. The prayer which was rejected by the trial court.

PW5, DCpl Magoti testified that on 26th June 2009 at 21.00 hours during the night he was with Inspector Ibrahim at Buguruni Police Station, he received a phone from his secret informer who informed him that at the Central Bar in Vingunguti there are people who are suspected to be culprits. PW5 together with other two police officers namely Inspector Ibrahimu and Coplo Kombono and two more police officers went to Central bar and found the suspects and arrest them. Upon search they found one shotgun with registration number 4632 PN 162 together with two bush knives. PW5 further testified that because they had information that there was robbery incident in Morogoro and among the property stolen was the shotgun.

Among the culprits arrested on that day was the first and second accused. They were taken to Buguruni Police station for interrogation, after recognised that the stolen gun is the one which was stolen in Morogoro they sent the accused to Morogoro to answer their accusation.

After the prosecution case the court found out that prima facie case has been established against the 1st, 2nd and 4th accused (the appellant herein) and the 3rd accused was acquitted.

DW1, testified that he was caught by police officers on 25th July 2005 on his way to return home. The police officers sent him to Buguruni Police

Station where he was locked up to 11th July 2009. On 26th July 2009 he was interrogated for on the criminal acts and he replied that he knows nothing. On 11th July 2009 he was sent to Morogoro Police Station. The identification parade was conducted on 14th July 2009 and one of the witnesses identified him to be among the people who commuted the offence. On 3rd December, 2009 he was charged with armed robbery.

DW2, Yusuph Hassan Chituhuma testified that on 26th June 2009 about 2:00 a.m he was arrested by the police officers at Buguruni who claimed that he resembles one Abdul Bonge a criminal who stays at Tabata. On 11th July 2009 he was brought to Morogoro, the identification parade was conducted and no one identified him. on 22nd July 2009 he was pinned with other accused in this case and charged with armed robbery.

DW4, (the appellant) refused to cross examine the witnesses and later to appear in court, upon defending his case he refused to enter his defence as he rejected to enter appearance in court and thus lost his fundamental rights to be heard and defend his case.

The case was heard ex-parte against him. first and second accused were acquitted while the appellant was convicted and sentenced to serve thirty years imprisonment.

Being aggrieved by conviction and sentence the appellant knocked the doors of this court with nine grounds of appeal as follows;

1. That, your lordship, the learned trial RM erred in law and fact by convicting the appellant while failure to determine that there was a variance between the particulars of the offence indicated in the charge sheet and prosecution witnesses PW1, PW4 and PW5 are different from those indicated in the particulars of the offence, the charge was not proved beyond to the required standard contrary to the procedure of law.
2. That, your lordship, the kerned trial RM erred in law and fact by convicting the appellant relied on exhibit PE1 (The identification parade form 186) which was procedural tendered by PW3 ASP ISIDORISEDOYEKA in compliance with the applicable procedure as set out by the police General orders No. 232 (the P.G.O)
    i. The identification parade from 186 exhibit PE1 which was conducted on 8/7/2009 at page 19 line 12 - 13 while the trial court failure to read over aloud the contents to determine its credibility, before relied upon as a basis of conviction. '

ii. ii. PW3 did not explain the purpose of the parade and ask the suspect if the has any objection and noted in the identification parade Register

iii. iii. PW3 did note carefully in his identification or degree of identification made and any material circumstances. Connect therewith including any wrong identification and any remark or objection made by the suspect he shall ask the witness who made the identification in what connection do you identify this person? And shall similarly record precises details of the witnesses reply.

3. That, your lordship the learned trial RM erred in law and fact by convicting the appellant relied on the discredited visual identification of PW2 (the victim) at the locus in quo as the incident was nocturnally occurred around 2:00 hours at night as the status of light was silently undisclosed as PW2 stated that they ordered me to sleep down, while the trial court failed to determine that the circumstances and the conditions set forth at the locus in quo creminis were not conclusive and favorable for proper identification to implicate the appellant with the said offence .

4. That, your lordship, the learned trial RM erred in law and fact by convicting the appellant relied on the discredited visual identification

of PW2 (the victim) at the locus in quo it is clear that he did not explain on the intensity of the tube light which assisted his visual identification of the appellant and the distance at which the witness had the accused under observation. i. The issue of the description of the intensity of the source of light has been emphasized in various decisions that it should be clearly stated so as avoid mistaken identity of a suspect.

5. That, your lordship, the learned trial RM erred in law and fact by convicting the appellant relied on the discredited visual identification of PW2 (the victim) who failed to give any proper descriptions of the suspected accused person including his physique, body structure, height, complexion, attire, physical feature and appearance.
6. That your your lordship the learned trial RM erred in law and fact by convicting the appellant while the prosecution side failed to prove the charge beyond reasonable speck of doubt as it failed to trace the alleged offensive weapons, i.e short gun make browing wing pump action Reg. No. 46220 P.N 162 CAR No. 6500 with other mentioned properties to have been found in the possession of 1st and 2nd accused persons (acquitted) and neither in the witness

evidence that anybody from the said bar (Central Bar Park) was brought to this court as a witness.

7. That, your lordship, the learned trial RM erred in law and fact by convicting the appellant relied on the unprocedural and discredited testimonies of PW1, PW2 and PW4, while the prosecution side failure to tender any purported document including an emergency search order and certificate of seizure to prove that the untendered shot gun make browning pump action alleged to be found in possession of the 1st and 2nd accused (acquitted) while PW1 failure to tender the licence of the fire arm to establish its owner ship of untendered shot gun contrary to the procedure of the law.
8. That, your lordship, the learned trial RM erred in law and fact by convicting the appellant while the judgment termed on 31/08/2010 at page 8 line 9-11 it does not show the sentence which imposed to the appellant contrary to the procedure of law.
9. That your lordship, the learned trial RM erred in law and fact by convicting the appellant while the prosecution has failed to prove its case beyond any reasonable doubt.

The appellant prayed for this Honourable Court to allow the appeal on merits, quash conviction and set aside the sentence and set him free.

When the appellant invited to submit in support of his appeal, he stated that he is contesting the conviction and sentence imposed on him by the trial court through the grounds of appeal, he prayed to the court to consider his grounds of appeal and set aside conviction and sentence.

In reply thereto Mr. Emmanuel Kahigi, learned State Attorney supported the appeal due to the following reasons; ***one,*** the identification of the appellant was not water tight for the court rely on and enter conviction and sentence against the appellant. It is on record that, the incidence occurred at night at around 2.00 a.m. as such the most reliable evidence was the identification evidence. Mr. Kahigi submitted that before the court can rely on such evidence, it must warn itself on the no possibility of mistaken identity. He referred to the case of **Raymond Francis vs. Republic [1994] TLR 100**, where the court held that, there must be no mistaken of identity of the accused. PW2 failed to elucidate how he managed to identify the appellant, at page 14 of the typed proceedings 4th line from the bottom for want of description as required by the afore stated principle of law. The trial court was expected to get description of; ***one***, the intensity of light, ***two***, distance, ***three***, time used to observe, ***four***, familiarity with the appellant and ***five*** witness being able to mention the appellant at the earliest stage. All these were not stated save just for

mentioning the light. The mentioned factors were also considered in the case of **Waziri Amani vs. Republic [1980] TLR 250.** The reliance of trial court in such evidence which did fall short to the requirement of the law made the decision to be vulnerable for interference by this court for want of sufficient evidence to prove such vital fact in incidence of this case. This concludes that, the court relied on weak evidence to prove the fact.

Second, on the identification parade of the appellant was not mentioned at the earliest possible time. In the identification parade the appellant was identified by PW1 but there is no explanation as to how he identified the appellant at the scene of the crime and equally at the identification parade. In the absence of prior description of the appellant, it is unknown as how PW2 pointed the appellant at the identification parade.

To bolster the position, he cited the case of **Yosiala Nicholaus Marwa and two others vs. Republic**, Criminal Appeal no 193 of 2016 where the court quoted the case of **Republic vs. Mohamed** [1942] EACA No. 72, where the court held that there must be prior description of the suspect before conducting identification parade.

Mr. Kahigi was of the view that, the aforementioned reasons are cogent to find that the offence was not proven beyond reasonable doubt as

required by law. As such the appellant has to benefit to the shortfalls pointed.

The appellant had nothing to re-join but prayed to the court to quash conviction and set aside conviction.

At the trial court, the appellant didn't enter his defence as he rejected to enter appearance in court and thus lost his fundamental rights to be heard and defend his case.

Having heard the submission this court is now in the position to raise issues for determination of this appeal. These are;

1. Whether the identification evidence was watertight to warrant conviction and sentence
2. Whether there was sufficient evidence to prove armed robbery against the appellant
3. Whether the prosecution case proved the case to the standard required by the law.

In disposing this appeal, this court took into account issues of identification and consideration of other evidence on record if it sufficed to warrant conviction. Upon determination of those issues this court will

be in a position to decide on whether the prosecution has proved the case beyond reasonable doubt, thence arriving at the conviction and sentence.

It is the duty of the trial court to analyse and evaluate the evidence adduced before it, and where there is an appeal, it is the duty of the first appellate court to re-evaluate the same.

In the case of **Registered Trustees of Joy in the Harvest vs. Hamza K. Sungura,** Civil Appeal No. 149 of 2017 CAT (unreported) where it was held, among other things that, the first appellate court is required to re-evaluate the entire evidence adduced at the trial and subject it to critical scrutiny and arrive at its independent decision.

It is therefore the duty of this court exercising first appellate power to do what the trial court failed to do, if satisfied otherwise interfere with it.

Based on the evidence adduced during trial and the grounds of appeal presented before the court, I find it pertinent to start with the issue of visual identification which covers the 3rd, 4th and 5th grounds.

The law in relation to evidence of visual identification is now settled in Tanzania. There is plethora of authorities where the courts have principled on how to approach and apply the evidence of visual identification. **Waziri Amani vs. Republic** [1980], TLR 250, **Selemani Rashid @ Daha Vs Republic,** Criminal Appeal No. 190 of 2010, and **Chacha Mwita and 2**

Others Vs Republic, Criminal Appeal No. 302 of 2013 and **Philipo Rukaiza @ Kicheche Mbogo Vs Republic**, Criminal Appeal No. 25 of 1994 (All unreported).

Without exception, the evidence of visual identification especially if incidence occurred at night hours requires, a careful approach as it has been considered to be of the weakest evidence, and since in this case the incident happened at night, the trial court ought to be satisfied itself of the credibility of evidence of visual identification. In the case of **Waziri Amani (supra)** the Court of Appeal observed thus;

> *"The first point we wish to make is an elementary one and this Is that evidence of visual Identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual Identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight."*

In view of thereof, before the trial court acting on the evidence of visual identification, it should, as a matter of principle, warn itself as to the possibilities of mistaken identity and water tightness of such evidence.

Short of that, the trial court it may find itself convicting innocent person based on mistakenly identity of the culprits. In the case of **Said Chaly Scania vs. Republic**, Criminal Appeal No. 65 of 2015 (Unreported), the Court of Appeal observed as follows:

> *"We think that where a witness is testifying identifying another person in unfavourable circumstances like during the night, he must give dear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or stranger".*

In the case at hand, it is not in disputed that, the incident occurred at night hours. PW2 testified that, he managed to identify the appellant because there was some light at the corridor. Starting with the light at the scene of crime, the victim did not tell the trial court the source of that light; whether it came from electricity, solar energy or lamp. He did not also state the position of the light, the area of coverage and the distance from where it illuminated to where he had been with the appellant and whether he knew the appellant before the incident. In the circumstances,

I agree with the appellant that there was no any source of light established at the scene upon which PW2 could have identified him taking into consideration that PW2 was on the floor. Further, as correctly submitted by Mr. Kahigi that, requirement for admissibility of the identification evidence were not really fulfilled as guided by the afore stated plethora of authorities on identification. I need not to fault anything stated by Mr. Kahigi learned State Attorney. This ground is therefore meritorious and is allowed.

On the second ground the appellant grievance is on the identification parade, first complaint is that the the identification parade register was not read out after being cleared for admission. The requirement of reading over the document after it has been cleared for admission was reiterated in the case of **Robinson Mwanjisi and 3 Others V. Republic**, [2003] TLR. 218 as follows:

> *"Whenever it is intended to introduce any document in evidence, it should be cleared for admission and be actually admitted, before it can be read out"*

Also, in the case of **Anania Clavery Betale v. Republic**, Criminal Appeal No. 355 of 2017 (unreported) it was observed that failure to read out

exhibits admitted in court after being cleared is not proper as it becomes prejudicial.

In this case, as the identification parade register was not read over after being admitted before the court, we find that it was prejudicial to the appellant as he could not have been in a position to understand its content, this was a fatal omission which cannot be cured under section 388 of the Criminal Procedure Act (CPA). In the circumstances, it was expunged from the record of appeal.

That being the case, there is no necessity of discussing other grievances arising from the identification parade as the evidence which is to be relied upon is no longer part of the court's proceedings. This ground therefore has merit and it is also allowed. **This resolves issues No. 1 herein above in negative that, the identification evidence was so weak to warrant conviction.**

On the seventh ground the issue is whether it was proper in law to convict and sentence the appellant for armed robbery in the absence of the certificate of seizure of the items alleged to be seized during search. It is common ground that no certificate of seizure was filled and issued after the seizure of the bag.

In the case of **Badiru Mussa Manogi vs Republic**, Criminal Appeal No. 118 of 2020 (unreported), the Court of Appeal discussed at length on the applicability of section 38 of the CPA in which it was explicitly stated that where search is a planned one, a police officer conducting the search must carry with him a search warrant issued by Police Officer In-charge of a police station authorizing him to conduct the search and must fill a seizure certificate which should be signed by those present during the search and also receipt acknowledging seizure of the thing retrieved must be issued.

That has to be done in terms of section 38(1) and (3) of the CPA.

In the present case the prosecution did not prepare a certificate of seizure to prove that the 1st and 2nd accused was found in possession of shot gun stolen and two bush knives. The law requires a certificate of seizure to be prepared immediately after any property connected to a crime is seized.

Furthermore, the Court of Appeal of Tanzania in the case of **Julius Matama @ Babu @ Mzee Mzima v Republic**, Criminal Appeal No. 137 of 2015 (unreported), emphasized the necessity of preparing a certificate of seizure where the arresting officer seizes any property. In that case, the Court referred the provision of section 38 (3) of the Criminal Procedure Act, and held that;

"...Ipso jure, this section is couched in mandatory terms, entailing that they must be complied with. It intends to achieve the point that where physical evidence is used in a criminal trial, there must be evidence establishing an adequate foundation on where and how the object being offered in evidence is indeed the object that it is claimed to be."

In my considered opinion, the evidence in the instant case, was not strong enough to prove the case since, ***first,*** of all, the appellant has denied the fact that he has committed the said offence, therefore prosecution has to provide more evidence which would connect the appellant with the offence, ***second***, the alleged short gun being among the properties seized was not tendered at the trial court as evidence, the gun was tendered in court for identification in the words of Prosecutor he testified that;

P.P: I am praying the PW1 to identified the said gun which is present before this court it is the one belonged to him and was stolen during the incident of armed robbery and make clarification on if how know it.

PW1: I identify the said shotgun is mine which stolen during the incident that happened to my house on 9/06/2009 as the following, the number of that gun was 46220 PN 162 this gun

looking different as the robber removed its Kitako together with its Mtutu so I am praying the said gun to be stay after police custody so that late on be tendered as exhibit before this court.

The gun was tendered in court for identification purposes it did not form part of the prosecution exhibit. This would mean that there was no tangible evidence to connect the appellant with the incidence of robbery, as there was no evidence of the item seized to mean the certificate of seizure, further the alleged gun was not tendered in court to form part of evidence at the trial court. The prosecution therefore failed to lay a strong foundation to connect the appellant with the offence of armed robbery. **This resolve issue no. 2 herein above in negative, as such I find the ground thereto meritorious.**

For the foregoing reasons, I am satisfied that the prosecution evidence was weak to prove the case against the appellant. I find there is no need to discuss other grounds of appeal as crystal clear that, the prosecution failed to prove the case beyond reasonable doubt based on the advanced reasons herein above of which I shall not go into details as they are clearly stated. **This resolves issue no. 3 herein above in negative, that the prosecution case failed to prove the case to the standard required by law.**

In the upshot, I hereby allow the appeal, quash conviction and set aside sentence entered against the appellant. I order for immediate release of the appellant from prison unless he is lawfully held for other lawful purposes.

IT IS SO ORDERED

DATED at **MOROGORO** this 12th May, 2023

G. P. MALATA

JUDGE

12/05/2023