IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 129 OF 2022

(Arising from Criminal Case No.273 of 2018 at Resident Magistrates Court of Arusha at Arusha.)

HALFAN ALLY @ SANGWA.....APPELLANT

Vs

THE D.P.P .....RESPONDENT

JUDGMENT

Date of last order: 18-5-2023

Date of judgment: 8-6-2023

B.K.PHILLIP,J

The appellant herein was arraigned at the Resident Magistrates' Court of Arusha at Arusha on the offence of Armed Robbery contrary to section 287A of the Penal Code (Cap 16 R.E 2002) as amended by section 10A of the Written Laws (Miscellaneous Amendments) Act. The trial Court found him guilty of the offence and sentenced him to thirty years imprisonment .

Aggrieved by the aforesaid conviction and sentence the appellant lodged this appeal on the following grounds;

i) *That, the trial magistrate grossly erred both in law and in fact in failing to note and held that the evidence adduced by PW1 was not compatible with the particulars in the charge sheet. Hence the charge was fatally defective.*

ii) *That, trial magistrate grossly erred both in failing to note that the circumstances at the scene of the crime was not conducive*

to furnish the proper visual identification purported to be made by the victim as the victim failed to explain the physical appearance of the accused and his attire.

iii) *That, the trial magistrate grossly erred both in law and in fact in wrongly applying the doctrine of recent possession since the alleged stolen phone (exhibit P5) was not found in the possession of the appellant hence violated the rule of recent possession which requires that the item must be proved that it has been found in possession of the accused.*

iv) *That, the trial magistrate erred in law and in fact in failing to note that there was no cogent proof that the one found with the phone got the same from the appellant.Furthermore, the alleged stolen mobile phone was not switched on before the trial court in order to ensure the phone IMEI number tally with those from the receipt.*

v) *That, the trial magistrate erred in law and in fact in being adamant that the appellant'sdefence did not raise any reasonable doubt to the prosecution case.*

vi) *That, the prosecution side failed to prove their case against the appellant beyond reasonable doubt.*

vii) *That, the trial magistrate erred both in law and fact in finding that the offence of armed robbery was proved beyond reasonable doubt against the appellant while at the same time confessing that the identification evidence was not watertight.*

viii) *That, the trial magistrate erred in holding that the evidence of PW1 was corroborated by that of PW2 hence failed to consider the fact that the phone was allegedly sold by Ally Sango and not Halfan Ally @ Sangwa.*

ix) *That, the trial magistrate erred in wrongly applying the doctrine of recent possession for the lack of cyber-crime report.*

x) *That, the trial magistrate grossly erred procedurally on fact neither was the alleged stolen phone tendered nor identified by PW1 during the trial which led conviction to become a grave miscarriage of justice.*

xi) *That, the trial magistrate intentionally erred in overlooking the reasonable doubt on the prosecution evidence consequently shifted the burden of proof to the appellant.*

At the trial court the prosecution's case was as follows; That on the 9th day of July at Nalopa Njiro area within Arusha Region the appellant together with 2nd accused who at the closure of the prosecution case the trial Magistrate found him with no case to answer thus, not a party to this appeal, did steal two mobile phones make iPhone, Sumsung J5 and Tshs. 100/000/= the properties of one Peter s/o Mushi and immediately before, during and after such act did use knives to threaten him in order to obtain and retain the same. In proving its case, the prosecution paraded six witnesses, namely, Peter Sabaya (PW1), Erick Makundi (PW2), Hason Elivai (PW3), Mathayo Mbise (PW4), Elibariki Kirua (PW5) and E.8086 DET.CPL. Yuda (PW6).The appellant was the sole witness for the defence case.

PW1's testimony was to the effect that on the fatefully day about mid night he was invaded by group of four people whom he did not knew them by that time. They stabbed him on forehead by a knife then they took his belonging, to wit; iPhone7, Samsung J5, Tshs. 100,000/=, remote control for the gate and spectacles .He managed to identify them through spotlight which was shining intensively. Moreover, he testified that he was able to identify his assailant (the appellant) because he dropped the remote control for the gate and came back to pick it. The incident took about 30 to 54 minutes. His neighbor (PW3) came to assist him and took him to Engutoto Police Station where he obtained a PF3 and then took him to hospital. His condition was not good. He was treated as an emergency patient. On 26 July 2018 after his recovery, he went to the Police Station with the receipt for his stolen cell phone. The police conducted investigation and found out that the stolen cell phone was in the possession of a teacher of Naura secondary School. Through the assistance of the police he went to Naura Secondary School together with the police officer. They managed to find the teacher who was in possession of the stolen cell phone (PW2) who was arrested by the police officer and he told them that he bought cell phone from the appellant. He took them to the appellant and upon arrival at that place they appellant was they met two people.PW1 managed to identify the appellant immediately. The appellant and the other person who was with him were both arrested. Upon being interrogated at the Police Station, the second person knew nothing about the incident.PW1 tendered in court the receipt for buying the cellphone and the cellphone which were admitted in evidence as exhibit P2 collectively.

On the other side PW2 testified that on 18th July 2018 about 04:00pm the appellant approached him and informed him that he had a cell phone for sale. He was selling it for Tshs. 120,000/= but they bargained and he agreed to sell it for Tshs. 60,000/=. He further testified that on 3rd August 2018 he was arrested by the police for being in possession of a stolen cell phone. He was told by the police that the said cell phone was the property of Mr. Mushi (PW1). He informed the police officer who were together with PW1 that he bought that cell phone from the appellant.He took them where appellant was. Before pointing at the appellant Mr. Mushi to identified him (appellant). When appellant saw him (PW2), he wanted to escape but they managed to arrest him.

PW3 was PW1's neighbour. He testified that on 9th July 2018 at around mid-night he heard a person shouting for help from his home. Thereafter he went to assist him , only to find that it was his neighbor (PW1) who told him that he had been invaded by thieves. He was in pain since he was injured. He took him to the Police Station and hospital. PW4 was a watchman at the house of one Mr. Ben which is nearby PW1's house. His testimony was to the effect that on 9th July 2018 around midnight when he opened his gate he found Mr. Mushi (PW1) nearby PW3's house. PW1 told him that he was invaded by thieves .PW5 was a doctor who testified to received PW1 on the fatefully day and attended him. As per his history PW1 was invaded by bandits. He was in a serious condition as he had multiple wounds on his head. He was treated him as an emergency patient. Moreover, PW5 told the trial court that he filled the PF3 and tendered it court as exhibit. The same was admitted as Exhibit P2. PW6 is a police officer who testified that they tracked the stolen cell phone through IMEI number

and the cell phone was in possession of PW2 who told them that he bought it from appellant. PW2 took them where appellant was and they arrested him.

In his defence the appellant testified that he was arrested with his co-accused persons on unjustifiably reasons. They were taken to the Police Station. His co- accused persons were released on bail. He stayed at the Police Station for two days thereafter he was charged of the offence of Armed Robbery.

In her judgment the trial court pointed out that the testimony of PW1 and PW2 proved beyond the reasonable doubt that the offence charged against appellant. With regard to the appellant's defence she was of the view that the same did not raise any doubts against the prosecution case.

In this appeal the appellant appeared in person, unrepresented whereas the learned state attorney Yunis Makala appeared for the respondent.

The appellant's submission in support of appeal was as follows; With regard to the 1st ground of appeal he submitted that the trial Magistrate erred in law for failure to note that the testimony of PW1 was not compatible with the charge sheet. He referred this court to page 13 of the trial court proceedings.He contended that the charge sheet mentions different items from the one alleged to have been stolen by PW1. He further argued that the prosecution was supposed to amend the charge sheet to correct the aforesaid mistake but they did not do so. He insisted that this omission is fatal. To support his argument, he cited the case of **Mohamed Kamiyo Vs Rebuplic (1980) TLR 279.** In addition, referring this court to page 22 of the proceedings the

appellant pointed out that PW3 testified that the properties which were stolen were remote control for the gate and cell phone, make Samsung. His testimony is different from the testimony of PW5.

With regard to the 2nd ground of appeal, the appellant submitted that the circumstances of the scene of crime were not good enough for PW1 to identify his assailants. He contended that the victim (PW1) failed to explain his (appellant) physical appearance and attire as required by the law. To cement his argument, he cited the case of **Republic Vs Mohamed Bin Allic (1942) EA 72, Raymond Francis Vs R (1994) TLR 100.**

On the 3rd ground of appeal the appellant submitted that the doctrine of recent possession was not properly applied because the stolen cell phone was not found in his possession. To buttress his argument, he cited the case of **All Bakari and Pili Bakari Vs Republic (1992) TLR 10.**

Coming to the 4th ground of appeal , the appellant submitted that there was no proof that the cell phone that was brought in court was stolen by him. He was emphatic that the prosecution was required to prove beyond reasonable doubts that the cell phone that was tendered in court is the one which was stolen but did not do so.

On the 5th ground of appeal the appellant submitted that trial Magistrate erred in law and fact for failure to believe his defence and held that it did not raise any reasonable doubts without giving any reason for disbelieving it . To cement his argument, he cited the case of **Amiri Mohamed Vs Republic (1994) TLR 231.**

With regard to the 6th and 7th grounds of appeal, the appellant submitted that the prosecution did not prove the offence of armed robbery to the standard required by the law.The trial court erred to rely on the evidence of PW1 whose testimony contravened section 198 (1) of the Criminal Procedure Act ("CPA") which requires an adult person to give his/her testimony under oath. He further submitted that PW1 gave his testimony without being sworn. To support his position, he cited the case of **Jonath Nkize Vs Republic, (1992)TLR 213.**

On the 8th ground of appeal appellant submitted that trial Magistrate's findings that the testimony of PW1 was corroborated with the testimony of PW2 was not correct since he failed take into consideration the fact that the cell phone was allegedly sold to PW2 by Ally Sango. He referred this Court to page 14 to 17 of the trial court's proceedings. Also, he contended that the testimonies of the witnesses were contradictory. He added that the contradictions on the names of the one who sold the cellphone is fatal.

With regard to the 9thground of appeal the appellant submitted that the doctrine of recent possession was wrongly used without any report from cybercrime. He referred this court to page 29 of the proceedings. He further testified that PW5 alleged that he tracked the cell phone and realized that it was bought by a secondary school teacher of Njiro but did not substantiate his statement with any expert evidence.

On the 10th ground of appeal the appellant submitted that the trial court did not analyze the evidence adduced by prosecution properly and shifted the burden of proof to the appellant. The prosecution case is full

of doubts. To cement his argument, he cited the case of **Robson Mwanjisti and 3 Others vs R (2003) TRL 218.**

In opposing the appeal, with regard to the 1st ground of appeal, Ms. Makala submitted that PW1's testimony shows that the stolen properties were as follows; cellphones, remote control for the gate, Tshs.100,000/= and spectacles.She further argued that it is true that the charge sheet shows fewer items, but such omission can be cured under section 388 of the CPA.

With regard to the 2nd and 7th grounds of appeal, Ms Makala submitted that PW1 testified that he identified the appellant because there was sufficient light from spotlight.PW1 explained that the appellant spent about 30 to 54 minutes in the process of grabbing PW1's properties thus, he had ample time to identify the appellant. She further submitted that PW1 told the trial court that the appellant came back to take a remote control for the gate. She insisted that PW1 identified the appellant properly and there was no need or necessity to state his attires. To support his argument, he cited the case **of KisanduMboje vs Republic, Criminal Appeal No.351 2018 (unreported)**

On the 3rd and 9th grounds of appeal, Ms. Makala submitted that these grounds of appeal have no merits since PW2 testified that he bought the stolen cellphone from the appellant and appellant failed to give any explanation on where did he get that cellphone. She referred this court to pages 18 and 19 of the lower court's proceedings, to bolster his arguments. She added that there was no need to bring in court the report on cyber-crime on how the cellphone was tracked because PW2

appeared in court and testified how he received the cellphone from the appellant.

With regard to the 4th ground of appeal, Ms. Makala submitted that PW2 testified that he bought the cellphone from the appellant and took the police officer and PW1 to the place where the appellant was. It was Ms. Makala's contention that PW1 also identified the cell phone as the one that was stolen on the fateful day.

On the 5th ground of appeal, Ms. Makala submitted that the impugned judgment shows that the trial Magistrate considered the appellant's defence and explained why she did not believe it.

On the 6th and 11th grounds, Ms. Makala submitted that the charge against the appellant was proved beyond reasonable doubts. To support her argument, she cited the case of **Kisandu Mboje** (supra). She further argued that the victim explained in court that the appellant together with other people attacked him by using a knife and stole from him a number of items including the cellphone. (exhibit P1).The PW1's testimony was corroborated by the testimony of PW2. She referred this court to pages 18 and 19 of the proceedings. She insisted that PW1 identified the appellant.

With regard to the 8th ground of appeal, Ms. Makala submitted that PW1's testimony was to the effect that he identified the one who stole his properties as one Halfan Ally Sangwa. She referred this Court to page 15 of the proceedings. She further added that PW2 also testified that he bought the cell phone from Halfan who was before the court. That there was no confusion of the names of the appellant in the

proceedings and even if there was a confusion of names the appellant never raised that issue before the trial court.

On the 11th ground of appeal Ms. Makala submitted that the same has no merit because PW1 identified the stolen cellphone, he explained the mark which he used to identify the same. She referred this court to page 14 of the proceedings. In conclusion of her submission, she prayed this appeal to be dismissed.

In rejoinder, the appellant reiterated his submission in chief and added that PW2 did not prove that he bought the cellphone from him. He told the trial court that his name is Halfan Ally @ Sangwa. He referred this court to page 37 of the proceedings.

Having analyzed the rival arguments made by the parties herein, let me embark on the determination of the grounds of appeal. With regard to the 1st ground of appeal, the court's record reveal that in the charge sheet the properties alleged to have been stolen are; two mobile phones - iPhone 7, Samsung J5 and Tshs.100,000/=. In his testimony PW1 stated that the properties which were stolen are; two cell phones, remote control for the gate and Tshs 100,000/=. PW5 testified that the properties which were stolen were cell phone make Samsung, cash money, documents and keys for the gate. Thus, it is true that some of the stolen properties mentioned by PW5 are not mentioned in the charge sheet. Now, the pertinent question here is; Is the omission to state some of the allegedly stolen properties in the charge sheet fatal?.My answer to this question is "No". I am inclined to agree with Ms. Makala that under the circumstances of this case the omission explained herein above is not fatal.It is a minor one and can be cured

under the provision of section 388 of the Penal Code since the same does not rebut the fact that PW1 was invaded by bandits and some of his properties were stolen. Whether the bandits stole few or many items the offence of armed robbery stands if there is proof that there was robbery.It is the finding of this court this ground of appeal has not merit.

Coming to the 2nd and 8th ground of appeal which is on the appellant's identification. It is not in dispute that the offence was committed at night. It is also not in dispute that appellant was arrested after being implicated by PW2 who was found with the cell phone alleged to have been stolen. PW1 stated that on the scene of crime there was a spotlight shining intensively which enabled him to identify the appellant and that the appellant spent about 30-54 minutes at the scene of the crime. And had more time to see the appellant when he went to pick the remote control for the gate . The evidence adduced by PW1 as far as the identification of the appellant is concern, leaves no doubt and the conditions stipulated in the case of **Waziri Amani Vs Republic (1980) TLR** have been met. In addition, PW1 testified that he was able to identify the appellant immediately when he saw him before he was pointed by PW2 at the time of his arrest. In connection to what I have stated herein above it is also noteworthy that the appellant was arrested after being implicated by PW2 who informed that police that he is the one who sold the stolen cell phone to him. In considered view the identification of the appellant was water tight.

I have taken into consideration the appellant's argument that the one who stole the cell phone was mentioned by PW2 as Halfan Sango not him because his name is Halfan Ally @Sangwa. The court's records

reveal that at the hearing PW2 testified that he bought the cell phone from Halfan Ally @ Sangwa (appellant). (see Page 15 of the proceedings).According to the Court's records, the names Halfan Sango and Halfan Ally Sangwa have been used interchangeably to refer to the appellant.I have also noted that during the hearing the appellant did not cross examine PW2 on the alleged difference in the appellant's names. Thus, in my considered opinion the appellant's argument regarding his names has been raised as an afterthought and has no merit because the appellant was also identified by PW1.Physical identification of the appellant is more important than the names because some people use different names interchangeably. In addition, I find the testimony of PW2 credible and there is no doubt that the appellant is the one who sold the stolen cell phone to him.

I will deal with the 3rd, 9th 4th and 10th grounds of appeal conjointly as they are intertwined. They all concerned with the misapplication of the doctrine of recent possession and identification of the stolen cell phone. First of all, the court's records show that the cell phone and the receipt for buying it were tendered in court as exhibit P1 collectively (See page 15 of the typed proceedings).PW1 described before the court the features of the stolen cell phone that it had top cover, but at after being stolen that the cover was removed and was black in colour. His testimony was corroborated with the testimony of PW2 who testified that when he bought the cell phone it had a cover but he removed it. PW2 identified the cell phone in court.(see page 18 of the typed proceedings).The appellant's contention that the cell phone was not properly identified on ground that the cell phone was not switched on in order to ensure that the phone IMEI number tally with those in the

receipt is unfounded and raised as an afterthought because during the hearing the appellant did not cross examined any of the prosecution witnesses on the IMEI number. In my opinion if at all he was doubtful on whether that cell phone was really the one stolen from PW1 he would have raised that question during cross examination but did not do so, thus he is now stopped from question on whether the cell phone tendered in court was really the one stolen.[See the case of **Nyerere Nyague Vs Republic, Criminal Appeal No.67 of 2010].** It is true that the stolen cell phone was not found in possession of the appellant. It was found in possession of PW2 who implicated the appellant and assisted the police to apprehend him (appellant).As I have pointed out earlier in this judgment, PW1 managed to identify him immediately when he saw him before he was arrested. In his judgment the trial Magistrate invoked the doctrine of recent possession on the ground that before the stolen cell phone was sold to PW2 it was in the possession of the appellant. With due respect to him the doctrine of recent possession cannot be extended in a manner he did.The same is applicable when the stolen property is found in possession of the accused person. However, despite the fact that the doctrine of recent possession is not applicable in the circumstances of this case, the testimony of PW2 corroborates PW1's testimony that the appellant is the one who invaded him and stole his properties including the cell phone in question since he identified him and he is the one who sold the cell phone to PW2.I find PW2's testimony credible.

Coming to the 5th ground of appeal , upon perusing the court's record I hasten to say this allegation is baseless since at page 7 of the judgment it shows that the trial Magistrate did consider the appellant's defence

and she gave her reasons why she did not accord it any weight, which I entirely subscribe to. As correctly argued by trial Magistrate the appellant's defence was sham and it did not cast any doubts to the prosecution case.

In his arguments in respect of 6th,7th and 11th the appellant endeavored to show that the prosecution did not prove its case beyond reasonable doubts and in addition he contended that PW1 testified without taking oath as required by the law. I have already explained in this judgment how the victim (PW1) identified the appellant and his testimony was corroborated with the testimony of PW2.The evidence adduced by the prosecution side met all the conditions for proving an offence of armed robbery; to wit; One, that there was an act of stealing .Two, that immediately after stealing the assailant was armed with dangerous or offensive weapon or robbery instrument and three , that the said assailant used or threatened to use actual violence in order to obtain or retain the stolen property. [See the case of **Kisandu Mboje** (supra)].The testimonies of PW1, PW3 and PW4 and PW5 prove that there was an act of stealing and one of the stolen item was a cell phone which tracked by the Police and obtained, and led to the arrest of the appellant. PW1 was injured by his assailants who had offensive weapon. He had several wounds. The assailant used actual violence in order to obtain the stolen items including the cell phone.This is proved by the testimony of PW1, PW3, PW4 and PW6. I am of a settled opinion that the prosecution proved its case beyond reasonable doubts.

The appellant's contention that PW1 testified without being sworn is unfounded because it is in record that PW1 took oath befoe giving his testimony.However, I have noted that in the typed proceeding there are

typing errors because the part indicating that the PW1 took oath before being giving his testimony was skipped whereas the handwritten proceedings show clearly that the PW1 took oath. The record which is supposed to be relied upon in case of any variance between the typed proceedings and the hand written proceedings it is the hand written proceedings for a very obvious reason that the typed proceedings is obtained from the handwritten one.

In the upshot, this appeal is dismissed in its entirety.

Dated this 8th day of June 2023

B.K.PHILLIP

JUDGE