IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 85 OF 2023

(Originating from Criminal Case No. 456 of 2021, Ilala District Court)

JOSEPH EMMANUEL SAMWELI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

29/08/2023 to 01/09/2023

E.B. LUVANDA, J

In this appeal, the Appellant above mention is appealing against both conviction and sentence of thirty years for committing armed robbery contrary to section 287A of Penal Code, Cap 16 R.E. 2019. In the petition of appeal the Appellant raised the following grounds:-

1. That, the learned trial court grossly erred in law and fact by holding the Appellant's conviction basis (sic, based) on the visual identification evidence of the said identifying prosecution witnesses (PW1 and PW3) which was on material aspect, unsatisfactory incredible, unrealible and not watertight.
2. That the learned trial court erred in holding on the evidence of PW1 who failed to give description of the Appellant before an identification parade was conducted.
3. That the learned trial court erred in law and fact by failing to realize that the particulars of the offence stated in the charge sheet varies

with the evidence on record regarding the alleged properties stolen hence rendering the charge unproved.

4. That, the learned trial court erred in law and fact by holding the Appellant's conviction without considering that the search and seizure of the said properties was improperly conducted since during the trial, search warrant/search order was not tendered thus rendered a certificate of seizure (exhibit P1) a nullity.
5. That the learned trial court erred in holding the Appellant's conviction basis (sic, based) on the cautioned statement (exhibit P4) without considering that the witness (PW4) who said to have recorded the same was an arresting officer and also an investigator officer while in law that is not allowed.
6. That, the learned trial court erred in law and fact by convicting the Appellant for the offence of armed robbery whereas there was no sufficient evidence neither given by PW1 nor PW3 to establish the said commission against him.
7. That the learned trial court grossly erred in law and fact by failure to observe that the case for the prosecution was not proved to the standard required in the criminal case.

The Appellant argued ground number one and two jointly where he submitted that the visual identification of the identifying witnesses PW1 and PW3 was unsatisfactory, incredible and unreliable because the period under which the Appellant was under observation by PW1 and PW3 was not disclosed. Two, a distance was not disclosed. Three, PW1 and PW3 failed to name the Appellant at the earliest opportunity. He cited the case of **Marwa**

Wangiti Mwita & Another vs. Republic, [2002] TLR 39. On reply, the learned State Attorney submitted that the offence took place during broadly day light, the Appellant was known by the complainant even before the incident and the complainant used to work with the Appellant for six months, argued that the identification parade was unnecessary. On rejoinder, the Appellant submitted that the evidence of visual identification is the weakest, argued that before it is taken as a basis of conviction must be water tight, citing **Waziri Amani vs. Republic,** (1980) TLR. He submitted that PW1 could not mention the name and description of the Appellant at the earliest opportune time.

I have failed to comprehend the complaint by the Appellant. The incedent took place on broad day light between 11:00 hours and 12:00 hours. PW1 identified the Appellant as among family member of PW1's principal that is PW3. PW3 stated that he lived with the Appellant for six years. Both PW1 and PW3 mentioned the Appellant by his name Joseph. To my view, the identification by PW1 and PW3 was proper to the extent that it leave no room for saying it was tainted by any mistaken identification. Even the identification parade conducted at the Central Police for PW1 to identify the Appellant was superfluous. Therefore ground number one and two are dismissed.

Ground three, the Appellant submitted that tin the particulars of offence it shows the Appellant steal cash Tshs 440,000/=, mobile phones make Samsung, Techno Smart Phones, one laptop make Toshiba, one bag, three cheques books and motor vehicle Toyota Rav 4 properties of PW3, while the testimony of PW3 mentioned cheque books, USD and EURO and other documents which does not feature in the charge sheet. He cited the case of **Issa Mwanjiku @ White Vs. Republic** Criminal Appeal No. 175/2018. In reply, the learned State Attorney submitted that the stolen properties as indicated in the charge sheet have been well articulated by PW3 during examination in chief and re examination, to include cheque books, cash Tshs 440,000/=, motor vehicle Toyota Rav 4, at pages 18 and 19 of typed proceedings. To my view, this complaint is without substance, PW3 mentioned lost item to include a bag, cheque, two mobile phone make Samsung worth 290 and Techno worth 200,000/= and on re examination he mentioned cash 440,000/= as among item which were stolen. PW1's testimony was to the effect that he was bundled by the bandits into a motor vehicle Toyota Rav 4 belonging to PW1's principal, and taken away, thrownout by the kidnappers. In the circumstances a mere fact that PW3 did not mention a car in support of a charge sheet, is immaterial.

Ground number four, the Appellant submitted that the search was conducted by PW3 who was not an officer in charge, neither given a written authority to execute search nor search warrant. He cited the case of **Joseph Charles Bundala vs. Republic,** Criminal Appeal No. 15 of 2020. In reply the learned State Attorney submitted that when a certificate of seizure was tendered, the Appellant did not object and the Appellant did not cross examine on the same. On rejoinder, the Appellant insisted that a certificate of seizure (Exhibit P2, sic, P1) was from the search which was illegal.

It is true that PW2 who purport to conduct search into the room of the Appellant at Kigogo on 08/06/2021, did it without a search warrant. In the case of **Joseph Bundala** (supra) at page 15, the Court of Appeal ruled I quote,

> *"Without much repeating ourselves we wish to state that, as quietly submitted by Ms. Makundi, PW5 searched the house of the Appellant without a search order or warrant. Since the search was conducted contrary to the dictate of section 38 of the CPA and PGO 226, we have no doubt that it was an illegal search and the trial court did not comply with section 169 of the CPA, it had no right to act on it. Consequently, we proceed to expunge it from the record of appeal.*

Therefore certificate of seizure exhibit P1 is expunged from the records as it emanate from illegal search. The fourth ground is meritous.

Ground number five, the Appellant submitted that it was improper for PW4 who is the investigator to record a caution statement exhibit P4. In reply the learned State Attorney submitted that section 158 (4) of the Criminal Procedure Act, amended by Act No. 3/2011 empower the recording officer to arrest and investigate, argued that what was done by PW4 was his duty provided by law.

It is true that PW4 was an investigator and arresting officer in this case. In the case of **Njuguna s/o Kimani & Three Others vs. Regnam** [1954] EACA 316 (cited by the Appellant) the court ruled. I quote,

> *"It is advisable if not improper for the police officer who is conducting the investigation of a case to charge and record the caution statement"*

The same position was taken by the Court of Appeal of Tanzania in **Idd Muhidin Kibatamo v. Republic** Criminal Appeal No. 101/2008.

However according to Act No. 3/2011 (supra), mention the investigating officer to be among persons who can record accused caution statement. The test here will therefore, be whether the accused (Appellant herein) was prejudiced any how by PW4 recording his caution statement, regard be made

to the proceedings where the Appellant did not object admissibility of exhibit P4. To my view in absence of explanation as to how the Appellant was prejudiced, the position in **Nguguna** (supra) cannot be taken on a whole sale basis. In the case of **Republic vs. Marceline Koivogui,** Criminal Session No. 151/2015 HC Dar es Salaam, this court speaking through Matogola J (as he then was), had this to say, I quote,

> *"There is nothing wrong therefore for the investigating police officer to record the accused person caution statement provided that he comply with the law relating to recording of accused caution statement"*

For brevity, Act No. 3/2011 which amended section 58 of Cap 20 (supra) by inserting subsection (4) after subsection (3), provide, I quote,

> *"(4) subject to the provision of paragraph (c) of section 58, a* ***police officer investigating an offence*** *for the purposes of ascertaining whether the person under restraint has committed an offence* ***may record a statement of that person*** *and shall*
>
> *(a) show the statement to the person and ask him to read it, or*
>
> *(b) read the statement to him and ask whether he would like to add or correct anything from the statement"*

Therefore ground number five is unmerited.

Ground number six, the Appellant submitted that there is no evidence given by PW1 and PW3 to prove that the said offence took place on the material date, arguing it is doubtful whether the said car was stolen and the ropes and plasters were not tendered in evidence. The learned State Attorney in reply, submitted that the trial court accorded weight to the credible prosecution witnesses, citing **Goodluck Kyando vs. Republic,** Criminal Appeal No. 118/2003 CAT.

Arguably the evidence of PW1 and PW3 was cogent, plausible and credible. The Appellant did not adduced tenable reasons and grounds for misbelieving PW1 and PW3. Cross examination marshalled by the Appellant and co-accused at the trial, did not manage to shake their credibility. Above all it is not the law that each and every fact should be physically brought and tendered in court proceedings, to my view the oral account given by PW1 and PW3 on how they were tied hand with rope and covered with or plastered on their month, including on how they managed to unrope and unplaster themselves, suffices to prove a fact that indeed ropes and plaster were there. Section 61 of the Evidence Act, Cap 6 R. E. 2019, provides,

> *"All facts, except the contents of documents, may be proved by oral evidence.*

Therefore this ground is unmerited.

Ground number seven is taken into board by adumbration in ground number one, two and six. Therefore ground six too is dismissed.

Save ground number four with eventuality of expunging a certificate if seizure exhibit P1, the rest grounds are unmerited, accordingly dismissed.

As such exhibit P1 cannot render the whole prosecution case to flop. The verdict and sentence of the trial court is upheld.

Appeal is dismissed.

THE HIGH COURT OF TANZANIA

E.B. LUVANDA
JUDGE
01/09/2023

Judgment delivered in the presence of Ms. Agness Mtunguja learned State Attorney and the Appellant in person.

THE HIGH COURT OF TANZANIA

E.B. LUVANDA
JUDGE
01/09/2023