IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL CASE NO. 56 OF 2023

(Original Criminal case No. 286 of 2021)

BETWEEN

ENOS ROBERT..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

JUDGMENT

5th & 26th July 2023

MWANGA, J.

In the District Court of Kinondoni at Kinondoni, the above appellant was charged with two counts of Armed Robbery, contrary to Section 287 A of the Penal Code, Cap 16 R.E 2019. The incident occurred on 19th December 2020, whereby the appellant is accused of stealing Mobile Phones to wit, Techno Spark 5 valued at 450,000/= cash Tshs. 960,000,000/=the

properties of Ester Donald. He was convicted and subsequently sentenced to 30 years imprisonment.

On the stated date and time, the appellant did steal a mobile phone, making Nokia valued at 65,000/=, cash Tshs. 300,000/=, and one handbag valued at 15,000/=, the properties of Witness Steven. It was alleged that he threatened the victims with "panga" and knife to obtain and retain the stolen properties immediately before and after such stealing.

After a full trial, the appellant was convicted and sentenced to 30 years imprisonment. Being aggrieved with the decision, he appealed to this court on six grounds, namely: -

1. That the learned trial court magistrate grossly erred in law and fact by convicting the appellant for the 1st and 2nd counts of armed robbery. In contrast, there is neither relevant information given by PW2 and PW3 to the Oysterbay Police Station nor before the court to establish the commission of any of those offenses against the appellant.
2. The learned trial court magistrate erred in law and fact by failing to realize that the particulars of the offense stated in the charge sheet vary with the evidence on record regarding the date of the incident

and the properties stolen, rendering the charge incurable and defective.

3. That the learned trial court magistrate erred in holding the appellant's conviction based on the discredited and concocted cautioned statement (Exhibit. P1) tendered and admitted in evidence.

1. The learned trial court magistrate grossly misdirected herself and consequently erred in law and fact in holding that the appellant was positively identified at the crime scene based on the weak, tenuous, incredible, and wholly unreliable evidence of PW2 and PW3.
2. That the learned trial court magistrate grossly erred in law and fact by not contemplating and analyzing the evidence of PW2, PW3, and PW4, which is why she arrived at a wrong conclusion.
3. That the learned trial magistrate erred in law and fact to warrant a conviction without considering that the case for the prosecution was not proved beyond the reasonable court.

The Appeal was argued by way of written submission. Ms. Nura Manja learned that the State Attorney represented the Respondent. On the other hand, the Appellant appeared in person.

The grounds of the appeal lie in the allegations that the offense within which the appellant was charged was not proved to the required standard. The main areas of weakness shown by the appellant were that: **one,** there was variation between the chargesheet and evidence adduced. **Two,** the conviction was based on proof of weak identification. **Three,** evidence of the cautioned statement was unreliable.

In reply, Ms. Nura Manja supported the Appeal. The learned State Attorney contended that the charges reflected that the incident occurred on 19th December 2020. However, testimony from PW2 (pages 23–26 of the proceedings) and testimony from PE3 (pages 27–30 of the proceedings) indicate that the incident occurred on 21st December 2020. Ms. Nura added that it is trite law that the prosecution has a duty to prove its case beyond reasonable doubt and it is required that the evidence must tally with the particulars of the charge sheet. The State Attorney cited the case of **GODFREY ELISALIA & OTHERS Versus REPUBLIC,** Criminal Appeal No.39 of 2022) Court of Appeal at Kigoma (unreported), where the court referred to the case of **ANANIA TURIAN V REPUBLIC**, Criminal Appeal No. 19 of 2009 (unreported) on page 18- 19 where it was stated that:-

"*When a specific date of commission of the offence is mentioned in the charge sheet, the defense case is prepared and built based on that specific date. The defense invariably includes the defense of alibi. If there is a variation in the dates, the charge must be amended immediately, and the accused explained his right to require the witnesses who have already testified to be recalled.* ***If it is not done, the preferred charge will remain unproved, and the accused shall be entitled to an acquittal as a matter of right. Short of that, a failure of justice will occur."***

The learned State Attorney confirmed a similar view in another decision of the court in **METHOD KULUWA CHENGULA vs REPUBLIC**, Criminal Appeal No. 92 of 2021 (unreported), where it was observed that:-

"It is trite law where there is variance between charge and the evidence, and in the absence of any amendments of the charge, it is tantamount to the prosecution having failed to prove its case on the required standard in a criminal case."

While referring to the present case, Ms. Nura noted that there is a variance between the dates of the incident on the charge sheet and evidence of PW2 and PW3, and no amendment was made to the charge sheet. According to her, such variance is fatal because the case has not been proved beyond a reasonable doubt.

Regarding the 3rd ground of appeal, the leaned State Attorney submitted that PW1- F8858 D/CPL on page 19 of the proceedings tendered the appellant's cautioned statement. The same was admitted as exhibit P1, not objected to without objection. It was argued further that, the appellant, for his own volition, failed to cross-examine PW1 concerning the said cautioned statement and further failed to ask any question to raise doubt on how the cautioned statement was. Ms. Nura added that such failure implies that exhibit P1 was recorded and tendered lawfully. The State Attorney supported her contention with the case of **GOODLUCK KYANDO V REPUBLIC (2006) TLR 363** where on page 366, the court held that *"failure to cross-examine a witness on an important matter leaves the evidence to stand unchallenged".*

On the 4th ground, the learned State Attorney referred to the evidence of PW2 and PW3 on their testimonies found on pages 23 – 26 and 27 – 30,

where both stated that on 19th December 2020 at around 20:00 hrs while they were drinking beer at Leo Tena place, the appellant ordered them drinks. He also moved to where they were sitting and started charting with him. On 21st December 2020, they met him again at Bantu pub, and jointly, they went to Uhuru Peak to meet. According to the State Attorney, these two times witnesses had a chance to see the appellant and identify him correctly. It was also referred that PW2 identified the appellant with the aid of light and that the appellant had a tattoo on his arm and was wearing glasses. That on the date of the incident of arrest, the appellant was wearing the same glasses. The learned State Attorney asserts that even though PW2 and PW3 stated they spent enough time observing the appellant, they never described his physical features or appearance to prove that they identified him. It was her view that the fact that they never mentioned the source of light, its intensity, or the physical features of the appellant it raises doubt as to whether the appellant was identified. Hence, there may be the possibility of mistaken identity. In essence, the learned State Attorney supported this appeal, stating that the test for identification enumerated in the case of **Waziri Amani v R**, TLR was not satisfied.

Regarding grounds 1, 5, and 6, the appellant complains that the prosecution side has failed to prove its case beyond a reasonable doubt. These assertions were supported by the learned State Attorney, Ms. Nura. The State Attorney analyzed to confirm the offense of armed robbery; it is imperative to prove that there was a threat to victims and that there was the use of weapons to threaten the victims to steal from them. It is also imperative to prove that the appellant threatened the victim. PW3 was unconscious when the incident happened and she has no idea who stole from her except what PW2 told her. PW2 narrated to the court that on the date of the incident, when her sister was unconscious, the appellant took their handbags and escorted them to his car and stated he would take them home; however, on the way, two men entered the vehicle and threatened PW2 with machete and knives and stole PW2 and PW3 properties and then left them at Kinondoni graveyard. According to Ms. Nura, there is a high possibility that the man who took them to the car is the one who committed armed robbery. Still, since the man's identification was not correctly done, chances are that the man may not be the appellant. It was submitted that it is vital to identify the person who commits an offence at night due to the

chances of mistaken identity. And since the identification was improper, It is better to acquit the appellant.

I have seriously reviewed the trial court proceedings and the parties' submissions, including the authorities cited regarding the subject matter. The incident occurred during the night, and PW2 and PW4 were drunken. They described the appellant as a bit tall with the glasses he wore that day and his tattoo. PW1 was a police officer who recorded the statement of the appellant. PW6 was an investigator of the case. Prosecution witnesses, particularly PW2 and PW4, did not describe the appellant well before his arrest. More or so, PW 6 as an investigator did not provide details of the appellant's description, which were given earlier at the police station.

In that printed evidence, it is clear that there was the possibility of mistaken identification, which ought to be eliminated by victim PW2 and PW4 providing detailed descriptions of the suspects/appellants before their arrest. Therefore, I second the State Attorney's argument that the appellant's identification was not done according to law.

Likewise, the law is settled. Where there is variation between the charges and evidence adduced, the same is taken that the charges were not

proved. The court in **ANANIA TURIAN V REPUBLIC** (supra) stated that If there is a variation in the dates, the charge must be amended immediately, and the accused explained his right to require the witnesses who have already testified to recall. Otherwise, it would jeopardy the defense of the accused, and if no amendment were done, the case would not be proved to the standard required. See also the case of **METHOD KULUWA CHENGULA Versus REPUBLIC** (supra).

Throughout the entire proceedings of the trial court, no such amendment was effected to the chargesheet. In pursuance of the decision thereof, the case is not proved to the required standard, which is beyond a reasonable doubt.

As contended by Ms. Nura, it is the law that where the accused does not cross-examine a critical matter, it is taken as if the facts or evidence were admitted. However, the court should warn itself about receiving such evidence. This is because there was no proper identification as per the decision in **Waziri Aman's case,** and there was a variation of charges and the evidence adduced.

In the upshot, the appeal is allowed. The conviction and sentence of the trial court is quashed and set aside. The appellant shall be released from prison unless lawfully held.

Order accordingly.

H. R. MWANGA

JUDGE

26/07/2023

COURT: Judgment delivered in Chambers this 26th day of July 2023 in the presence of Ms. Nura Manja, learned State Attorney for the respondent and the Appellant in person.

H. R. MWANGA

JUDGE

26/07/202