IN THE HIGH COURT OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

CRIMINAL APPEAL NO. 15 OF 2023

(Originating from the District Court of Mlele at Mlele in Criminal Case 123 of 2022)

KULWA MALEGI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

31st July & 11th September, 2023

MRISHA, J.

"...I am innocent. That is all."

The above were the last words uttered by the appellant, Kulwa Malegi herein when he was called upon to enter his defence in relation to a charge of Armed Robbery contrary to section 287A of the Penal Code, Cap 16 R.E. 2022 (the Penal Code) after the trial court which is the District Court of Mlele, found him with a prima facie case in respect of that count.

Initially, it was alleged before the trial court that on 11th day of October, 2022 at Kamalampaka Village within Mlele District in Katavi Region, the appellant did steal cash money Tshs. 780,000/= and different clothes valued at Tshs. 48,000/=, all valued at Tshs. 828,000/= the properties of one Lushibila S/o Wilson and immediately before stealing he did use a stick to injure him in order to obtain the said properties.

In order to prove their case, the prosecution marshalled five witnesses and tendered one exhibit which was a PF3, and on his side the appellant brought one witness to make a total two defence witnesses. After a full trial the trial court was satisfied that the prosecution side had made their case against the appellant. It therefore, proceeded to convict and sentence him to serve a sentence of thirty years in jail.

Being aggrieved by both the conviction and sentence passed against him, the appellant petitioned to this court against the decision, conviction and sentence passed against him by the trial court. His petition of appeal is predicated with three grounds of appeal which can be described as hereunder: -

1. *That, the trial court erred both at law and fact to convict the Appellant who (sic) not properly identified.*

2. *That, the trial court erred at law to disregard the water tight defence by the Appellant which raised reasonable doubt to his participation in committing the offence (sic) convicted with.*
3. *That, the trial court erred at law to convict the Appellant for an offence which the Prosecution failed to prove beyond reasonable doubt.*

When the instant appeal was called on for hearing the appellant appeared in person, unrepresented and submitted briefly that his petition of appeal contain three grounds of appeal which are self-explanatory. Hence, he prayed to this court to adopt them as his submission in chief and proceed to allow his appeal, quash the conviction, set aside the sentence he earned from the decision of the trial court, and set him free.

On the other side, the respondent Republic was represented by Mr. David Mwakibolwa learned State Attorney who opposed the present appeal and supported the decision of the trial court together with the conviction and sentence passed therein.

Submitting against the first ground of appeal Mr. Mwakibolwa contended that the evidence of the victim who PW1 Lushibila Wilson proves that the said victim properly identified the appellant due to the following

reasons. One, is a source of light. To support that reason, the counsel argued that in his testimony, at page 7 of the typed proceedings, PW1 testified that the appellant and his colleague had a torch at the scene of crime while they were looking for his items, he managed to identify one of them who is the appellant through the aid of a torch light who is the appellant.

Two, distance. The respondent counsel submitted that according to the evidence of PW1 as shown at page 7 of the trial court typed proceedings, the bandits were one pace from where he was; the appellant was ahead and his follow assailant was behind. He added that taking into account the distance the appellant and his fellow were and where PW1 was, together with the aid of a torch light, it was possible for PW1 to properly identify the appellant. The counsel cited the case of **Samson Samwel vs Republic**, Criminal Appeal No. 253 of 2021 CAT Shinyanga (unreported) to fortify his position.

Three, naming the appellant at the earlies opportunity. The respondent counsel submitted PW1 mentioned the appellant at the police. His evidence was corroborated by the one adduced by PW5. That, also PW1 testified to have known the appellant previously as he was with him on the 10th day of October, 2022 and that on that day the appellant sold to

him one sack of paddy and they went together to PW1's rented room to collect the sacks for keeping paddy.

In supporting his argument on that point, the respondent counsel referred the case of **Mussa Mustapha Kisa and Others vs Republic**, Criminal Appeal No. 51 of 2010(unreported) where it was stated that:

> *"Where a witness mentions the name of the offender at the earliest opportunity it is an assurance that the identification made by the witness is not a mistaken one."*

Having cited the above authority, the respondent counsel submitted that not only that PW1 mentioned the appellant at the Police Station, but also, he managed to describe the type of weapon the appellant and his fellow culprit used to assault him, as it is shown at page 7 paragraph 5 of the typed proceedings. With the above reasons, the respondent counsel prayed to this court to dismiss the appellant first ground of appeal for being unmerited.

Arguing against the second ground of appeal by the appellant, the respondent counsel submitted that the same lacks merit and deserves to be dismissed because first, despite raising a defence of alibi during defence hearing, the appellant did not file a notice of his intention to rely on that kind of defence as required under section 194(5) of the

Criminal Procedure Act, Cap 20 R.E. 2022 (the CPA), nor did he furnish the court and the prosecution with particulars of such defence, thus making his defence to be an afterthought.

A case of **Kibezya John vs Republic**, Criminal Appeal No. 488 of 2020 CAT at Tabora(unreported) was cited by the respondent counsel to reaffirm the principle that:

> *"Where no such notice is given the Court may in its discretion accord no weight of any kind to the defence."*

Secondly, the respondent counsel submitted that although the appellant managed to bring one witness (DW2) who was his wife, the same could not be used to corroborate the evidence of the appellant in absence of another independent evidence because being the appellant's spouse, DW2 was competent but not comparable witness meaning that her evidence alone could not hold water, unless corroborated by another evidence.

The respondent counsel also challenged the evidence of DW2 by submitting that the same was contradictory because while testifying before the trial court DW2 failed to stipulate the place she and the appellant were at the material date, but only stated the circumstances leading to the appellant's arrest. Basing on the above argumentation,

the respondent counsel implored this court to dismiss the second ground of appeal and upheld the decision of the trial magistrate.

As for the third and last appellant's ground of appeal, the respondent counsel had it that the same too has no merit due to several reasons. First, the prosecution side paraded five witnesses and their evidence corroborated to each other. For instance, the respondent counsel submitted that the evidence of PW1 shows that the said prosecution witness managed to identify the appellant based on the source of a torch light which was used by the bandit, as it appears at page 7 of the trial court typed proceedings.

Second, PW1 testified to have known the appellant before the incident by his single name of Kulwa and mentioned it while at the Police Station in front of a Police Officer one G. 9554 D/C Charles (PW3), as it is shown at page 14 of the trial court typed proceedings.

Third, the evidence of PW1 was corroborated by the one adduced by Songaleli Mikomangwa @Ng'witashinga (PW5) who at page 19 of the trial court typed proceedings stated that, *"At the Police Station Lushibila named Kulwa as one of the assailant...(sic)"*

In supporting the above proposition, the respondent counsel cited the case of **Samson Samwel**(supra) and the case of **Chacha Jeremia**

Murimi and 3 others vs Republic, Criminal Appeal No. 551 of 2015 Court of Appeal Tanzania Mwanza (Tanzli) whereby in the latter case it was stated that:

> *"it is important for witness to name the accused at earliest point and the witness to provide such information".*

The fourth reason according to the respondent counsel, is that the prosecution side proved that the appellant used a weapon to assault PW1 at the scene of crime as a result PW1 sustained a wound on his head. That evidence was corroborated by the evidence of Dr. Tausi Kabwe (PW4) who stated that PW1 complained before her to have severe pain and had a wound on his head. She filled the PF3 and that document was admitted by the trial court as exhibit P1 without objection from the appellant meaning that it was a genuine document, as it is shown at page 16 and 17 of the trial court typed proceedings.

In conclusion, the respondent counsel submitted that the prosecution side proved their case against the appellant beyond reasonable doubts in respect of the offence of Armed Robbery. He therefore, urged the court to dismiss the third ground of the appeal because it has no merit. He finally implored the court to uphold the decision of the trial Court and

confirm the conviction and sentence. The appellant had nothing to rejoin rather than reiterating his previous prayer to this court.

I have considered the grounds of appeal and the rival submissions for and against the said grounds. From the above, I think the nagging question for determination is whether the present appeal is meritorious. In answering that issue I will determine the grounds of appeal in a manner proposed by the parties herein.

In the first ground, the appellant has complained that the trial court erred both at law and fact to convict the appellant who was not properly identified. Both parties herein have not parted ways on the fact that the offence of Armed Robbery the appellant stood charged before the trial court took place at the midnight. This means the case against the appellant based solely on the evidence of identification.

It is elementary that in a criminal case where determination depends essentially on identification, evidence of conditions favouring identification is of the utmost importance. (See **Raymond Francis vs Republic** [1994] T.L.R. 100)

In the case at hand, the respondent counsel has argued that the prosecution proved their case against the appellant because the victim

of the charged offence who is PW1, managed to identify the appellant at the crime scene.

He has also pointed the means used by PW1 to identify the appellant as being the torch light used by the bandits, PW1's previous knowledge about the appellant, the use of a weapon which is a stick, the naming of the appellant at the police and physical description of the appellant at the scene of crime. Some of the above conditions were stated in the case of **Waziri Aman vs The Republic** [1980] T.L.R 250 CAT at pages 251-252.

On the other side, the appellant has submitted that he was not properly identified. It is glaring from the trial court typed records that at the scene of crime there was no other source of light than the one illuminated by the torch alleged to have been used by the appellant's fellow. In the circumstance, it was incumbent for PW1 to provide a concrete detailed description of the appellant and not just alleging to have known the appellant before or ending by describing his physical appearance.

The above court's position has its fortification from the decision of the Court of Appeal in the case of **Vitalis Benard vs Republic**, Criminal Appeal No. 263 of 2007(unreported) in which it was observed that:

"We do not think that knowing the appellant alone is sufficient. There should be more concrete detailed description of the appellant. The witness should have given a description of the appellant as he saw him at the time of the incident..."

In the present, case the trial court typed records reveal that apart from claiming to have identified the appellant at the scene of crime PW1 just ended by describing the appellant by physical appearance as being tall, black and having beards without going an extra mile to describe what the appellant had worn at the material time.

It is my settled opinion that had the testimony of PW1 been true that the appellant and his fellow were just one pace from where he was, PW1 could not fail to know the kind of clothes the appellant had worn at that material time. His failure to provide such concrete detailed description leaves a serious doubt whether the one he had seen at the scene of crime was exactly the appellant herein.

That apart, the respondent counsel has argued that PW1 managed to identify the appellant at the crime scene for he mentioned the appellant at the earliest opportunity. I agree with him that it is important for the witness to name the accused at earliest point and the witness to provide

such information, as it was stated in the case of **Chacha Jeremia Murimi** (supra).

However, with all due respect to the respondent counsel, I do not think if that principle of law applies in the circumstance of this case. I say so because the typed records of the trial court reveal that PW1 did not mention the name of the appellant at the earliest opportunity when he approached PW2 who was his neighbour.

He also did not mention the appellant before PW2 and other awaked neighbours even when they returned at the crime scene. It is until when he was taken to Inyonga Police Station when PW1 he decided to mention the appellant as the one who robbed him. That is shown at pages 8 to 9 of the said court proceedings. The above court observation is also fortified by the evidence of PW2 available at page 12 of the trial court proceedings in which the said prosecution witness was recorded to have said that:

> *"I asked Lushibila what happened, he informed me that he was attacked by robbers, he said he knew one of the robbers but he did not tell me who that robber was." [The underline is mine]*

From the above excerpt, it is crystal clear that PW1 was not sure if the one who robbed him was the appellant. Had he been sure he could not

hesitate to tell PW2 at the earlies opportunity, that it was the appellant who robbed him on the material time. In the circumstance, it can not be held, with certainty, that PW1 mentioned the appellant at the earliest opportunity. I therefore agree with the appellant that the victim (PW1) failed to mention the culprit at the first instance he was seeking help. Thus, due to the above reasons, I find the first ground of appeal to have merit.

Coming to the second ground of appeal, the appellant has complained that the trial court erred at law to disregard the water tight defence by the Appellant which raised reasonable doubt to his participation in commission the offence he was convicted with.

On his side, the respondent counsel has strongly argued that such ground is without merit because first, the appellant relied on defence of alibi without filing a notice of his intention to rely on that evidence and he also failed to furnish the prosecution and probably, the trial court with particulars of such notice.

Secondly, the respondent counsel has argued that the evidence of DW2 who testified in favour of the appellant requires corroboration due to the fact that being the appellant's wife, DW2 was competent but not

comparable witness hence her evidence could not hold water unless corroborated by another evidence.

On my side, I agree with the respondent counsel on the requirements of the law as he has rightly argued while addressing the court in respect of the second ground of appeal. However, with all due respect to the respondent counsel, I am unable to go along with his invitation that the second ground of appeal by the appellant lacks merit.

This is because being a layman one would not have expected the appellant to be familiar with the procedural requirements as stipulated under section 194(4) and (5) of the CPA which require the accused to file a notice of his intention to rely on defence of alibi and furnish the prosecution and the court with particulars of the same.

Further to the above, it has come to my attention that while arguing against the second issue, it is unfortunate that the learned counsel did not comment anything in relation to the appellant's complaint that the trial court disregarded the water tight defence by the Appellant which raised reasonable doubt to his participation in committing the offence he was charged and convicted with.

In my examination of the trial court proceedings as well as the impugned typed judgement, I have observed that what the appellant

has complained of is true. For example, at page 23 of the said court records the appellant was recorded to have narrated the following in his defence: -

> *"I was taken to (sic) an office; I was tortured by a baton. I was compelled to confess. I was asked my personal particulars, then I was asked to sign, but I refused. I was tortured to the extent I had to sign. I was then remanded without being informed of my offence. I was arraigned in court where I heard the offence which I was not involved. The victim in his testimony testified he was tortured when he was attacked at the material night. He claimed to have identified me by beard and heigh(sic), which can resemble to anyone. I pray this court to acquit me, and disregard the testimony of the victim. The victim did not name the culprit at first instance he was sleeping help. I am innocent. That is all."*

The allegation that the appellant was tortured was not only stated by him during defence hearing. His cross examination against PW4 reveals, by necessary implication, that he addressed it even at the hearing of the prosecution case. This can be inferred from page 14 of the trial court typed proceedings where in the course of responding to appellant's cross examination questions PW4 stated that:

"I interviewed you, while you were free and voluntary"

Again, at page 11 of the trial court typed judgement, the trial magistrate while dealing with the appellant's evidence just wrote the following words:-

> *"I had an endless opportunity to examine and consider the defence, will all due respect to the accused and his beloved wife, their testimony is nothing but a sham aimed at misleading the course of justice. I am aware that, though that is not my conclusion, DW2 as a wife to accused, she cannot be free and impartial to testify anything against her beloved husband. That being said, this court is satisfied with the prosecution side to have proved the charge laid against the accused person..."*

From the above excerpts, there is no doubt that nowhere in the impugned trial court judgment it is shown that the trial court considered that defence by the appellant which tells as correctly argued by the appellant, that the said trial court disregarded the appellant's defence which in my settled view raises serious doubts as to his involvement in the commission of offence he stood charged before the trial court.

Due to the foregoing reasons, I am of the view that had the trial magistrate properly directed his mind towards the appellant's defence,

he would have decided otherwise. This is because the said defence raises a serious doubt as to appellant's involvement in the commission of the alleged offence. I therefore find merit in the appellant's second ground of appeal.

As for the third ground, the appellant has submitted that the trial court erred at law to convict the appellant for an offence which the prosecution failed to prove beyond any reasonable doubt.

It is a cardinal principle of our criminal law that the burden to prove a criminal case is on the prosecution. No duty is cast on the accused person to prove his innocence. (See **John Makune vs The Republic** [1986] T.L.R 44. It is also provided under section 110 of the Evidence Act, Cap 6 R.E. 2022 that:

> *"When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."*

With the above principles of law, it can rightly be said that the prosecution in this case are the ones responsible to prove beyond any reasonable doubt that the appellant herein is the one who committed the offence of armed robbery contrary to section 287A of the Penal Code.

The determination of this court in respect of the two grounds of appeal above would suffice to dispose the instant appeal in favour of the appellant. However, I see it pertinent to add something crucial in dealing with this last ground of appeal.

I will start with the charge sheet. Looking at it one may find that the offence of Armed Robbery the subject of this appeal was committed on 11th day of October, 2022. However, although no time of the commission of the said offence was described therein as required under section 135 (f) of CPA, the evidence of PW1 shows that the offence took place at 0200 hour. It is also the evidence of PW1 that before the culprits robbed him, he heard a door being hit from outside, then a few minutes later the two culprits entered inside and began to exchange words with him.

A message that can be grasped from the above piece of evidence is that before committing the offence of armed robbery the said culprits broke PW1's dwelling house; and if that was the case, one would have expected the framers of the charge sheet to charge the appellant with two counts with the first count being Burglary contrary to section 294(2) of the CPA which provides categorically that:

"Any person who—

(b) having entered any building, tent or vessel used as a human dwelling with intent to commit an offence therein or having committed an offence in the building, tent or vessel, breaks out of it, is guilty of housebreaking and is liable to imprisonment for fourteen years.

(2) ***Where an offence under this section is committed in the night, it is burglary*** *and the offender is liable to imprisonment for twenty years." [Emphasis added]*

It is not stated anywhere why the charge sheet which was tabled before the trial Court does not include a count of burglary while the circumstance leading to the commission of the offence of armed robbery clearly indicates that the said offence was preceded by the offence of burglary. Due to such unanswered important question, the prosecution evidence leaves a reasonable doubt.

Again, I have gone through the evidence of PW3 who appears to be the interviewing police officer. His testimony shows that he was assigned by his superior to investigate the case and interview the appellant. At page 14 of the trial court typed proceedings, PW3 stated that: -

"I interviewed the accused, accused admitted that on 10/10/2022 he was together with Lushibila in course of crops business, and he

was able to visit the place of Lushibila, where he went to take empty bags/ sacks..."

During cross examination PW3 said that:-

"I interviewed you, while you were free and voluntary. You have the right to summon a lawyer or relative...You admitted that you were together with complainant"

By necessary implication, the above quoted parts of PW3's evidence indicates that the said prosecution witness interrogated the appellant and reduced his statement into writing. That observation is also fortified by the evidence of the appellant who at page 23 of the trial court typed proceedings stated that:-

"I was asked my personal particulars, then I was asked to sign, but I refused. I was tortured to the extent I had to sign..."

Surprisingly, no documentary evidence which is the appellant's caution statement was tendered by PW3 before the trial court to support his testimony that the appellant confessed to have been with PW1, nor did the trial magistrate commented anything in relation to the testimony of PW3. That again, leaves a lot to be desired on the prosecution evidence.

Thus, due to the above reasons, I am settled that the third ground too has merit.

Having found all the above grounds of appeal to have merit, I am now in a good position to answer the above issue positively that the present appeal is meritorious. Consequently, the present appeal is allowed. I quash the decision of the trial court as well as the conviction of the appellant, set aside the sentence meted out to the appellant and the compensation order. I order that the appellant should be released from the prison immediately unless held for some other lawful course.

Order accordingly.

A.A. MRISHA
JUDGE
11.09.2023

DATED at **SUMBAWANGA** this 11th September, 2023.

A.A. MRISHA
JUDGE
11.09.2023