IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB REGISTRY OF KIGOMA)

AT KIGOMA

CRIMINAL APPEAL NO. 12 OF 2023

(Arising from DC Criminal Case No. 272 of 2022 at Kasulu District Court)

RABSON DONATUS ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of Last Order: 18.09.2023
Date of Judgement: 06.10.2023

JUDGEMENT

MAGOIGA, J.

The appellant, **RABSON DONATUS** was on 16th day of August, 2022 arraigned in the District Court of Kasulu (trial court) with one count of armed robbery contrary to section 278A of the Penal Code, [Cap 16 R.E 2022].

The particulars of the offence as per charge sheet were that, on 12th, day of May, 2022 at Shunga village within Kasulu District in Kigoma region, the appellant did steal moto cycle make KINGLION valued at Tshs.2,350,000/= the property of one Samwel Laurent and immediately before or after such stealing did use axe (shoka) to threaten, cut and injure one, Samwel Laurent in order to obtain the said properties.

After full trial, the appellant was found guilty of the offence charged as such convicted and sentenced to 30 years imprisonment.

Aggrieved by both conviction and sentence, the appellant preferred this appeal in this court armed with five grounds of appeal faulting the trial court findings, couched in the following language, namely:

1. *That the trial court erred in law and fact by convicting and sentencing the appellant by considering weak evidence adduced by prosecution witnesses which did not prove the case to the standard of proof in criminal cases;*
2. *That the trial magistrate erred in law and fact by convicting the appellant for the offence of armed robbery without any ingredients which constitute the offence he was charged and convicted to. Not only that but also there was no evidence at all from prosecution witness which associate the appellant with the alleged offence;*
3. *That the trial magistrate erred in law and fact by convicting the appellant based on PW1 virtual identification while he admitted himself that he was robbed by unknown person and he remembered his face but no identification parade was conducted to eliminate the possibility of mistaken identity;*
4. *That the trial magistrate erred in law and fact by convicting and sentencing the appellant without considering the law of virtual*

identification which is settled that before relying on it, the court should not act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely water tight;

5. *That the guilty of the appellant was not proved beyond reasonable doubt as required by law.*

On the strength of the above grounds, the appellant prayed this appeal be allowed, set aside conviction and sentence and set him free.

When this appeal was called on for hearing through video conference, the appellant was present and unrepresented, while the Republic was represented by Ms. Rehema Mpozemenya, learned State Attorney.

When the appellant was called on to argue his appeal, he preferred to hear the State Attorney first and then will reply thereafter.

Ms. Mpozemenya when rose to argue the appeal readily told the court that they strongly oppose this appeal for want of merits. The learned Attorney equally told the court that, she will argue together grounds Nos.1,2 and 5 together and 3 and 4 together.

Arguing the 1st, 2nd, and 5th grounds together, the learned Attorney told the court that all ingredients of armed robbery as stipulated under section 258A were proved. According to the learned Attorney, these are:- stealing and use of violence or threats with intent to steal the property. The

learned Attorney argued that PW1 explained what happened and the appellant used violence against him to steal the motor cycle. According to the learned Attorney, PW3 corroborated the story by the victim as he attended him and filled PF3 given by police which in their totality proved that the Republic proved the case beyond reasonable doubt. Further arguments by learned Attorney were that the appellant is connected with the offence because he confessed in his cautioned statement. However, the learned Attorney admitted that the proceedings are silent on how the accused was arrested but was quick to point out that, is curable under section 388 of the CPA. The learned Attorney referred this court to the case of **Angulile Jackson @ Kasonya Vs. DPP, Criminal Appeal No.162 of 2019 CAT (Mbeya) (unreported).** On the third and fourth grounds of appeal argued together, the learned Attorney argued that identification was done because PW1 told the court that he knew the appellant by face. Nevertheless, the learned Attorney argued that there was other evidence like cautioned statement, which was admitted without any objection. According to the learned Attorney, it was the appellant who was with the victim and eventually ended up injuring him and the best witness is the confession of the appellant. In support of that stance, the learned Attorney referred this court to the cases of **Jacob Asegelile Kakune Vs. DPP, Criminal Appeal No.178 of 2017 CAT**

(Mbeya) (Unreported) and **Emmanuel Stephano Vs. Republic, Criminal Appeal No.413 of 2018 CAT (DSM) (unreported)** in which the Court of Appeal insisted that once an accused person confess to the commission of the offence, is the best witness for the prosecution.

Guided by the above stance, the learned Attorney argued that in this case by his cautioned statement in which he admitted commission of the offence, then, it erodes the identification issue he is complaining now.

On that note, the learned Attorney urged this court to find that these two grounds are without any useful merits in this case and consequently dismiss them as well and the entire appeal which is wanting in merits.

In reply the appellant argued each ground separately and urged this court to consider his grounds of appeal along with the evidence on record. According to the appellant, the case was not proved beyond reasonable doubt as PW1 did not prove that it was the appellant who injured him. The appellant pointed out that, the two fellow drivers who were present when the two met, were not called to testify, no witness proved that it was the appellant and not someone else who injured the victim, the woman alleged to be at the scene of crime was not called to testify and the investigator did not tell the court how the appellant got into the prison and that he was forced to sign the cautioned statement. In the totality of

the above weaknesses the appellant argued that the case for Republic was not proved beyond reasonable doubt.

On the second ground, the appellant argued that no warrant of arrest, map of the crime, and weapon used were tendered to prove commission of the offence. Not only that but even the witnesses who were with the victim were not called, and according to the appellant, all these goes to the root of the matter that the case against him was framed.

On the 3rd ground on identification, no identification parade was done for correct identification of the accused who was not known to the victim. According to the appellant, what is on record is dock identification leading to his conviction.

On the 4th ground of appeal, the appellant replied that visual identification must be corroborated but is missing in this appeal. According to the appellant, no identification was done to the satisfaction of the law.

Lastly but not least on the 5th ground, the appellant replied that the case was not proved because no proof it was the appellant and not someone else who inflicted injuries to the accused victim. And that as to the cautioned statement, the appellant repeated that he was tortured to procure its contents.

On the totality of the above reasons, in strong terms, the appellant urged this court to allow the appeal and set him free.

This marked the end of hearing of this appeal.

The task of this court now is to determine the merits or otherwise of this appeal. I will deal with grounds as argued by the learned State Attorney because 1st, 2nd and 5th grounds all boils down to the issue of proof of the charge by the prosecution to the required standard in criminal cases, that is, beyond reasonable doubt, while 3rd and 4th grounds boils down to the identification of the appellant as the doer of the alleged illegal act.

The appellant's arguments relating to these three grounds was that much as PW1 failed to mentioned the appellant as his assailant, failure to call the two fellow drivers who were present when hiring the motor cycle and the woman who saw him doing the act, failure of the witness to testify that he saw him doing the act, failure of the investigator to tell know how got into prison, failure to tender warrant of arrest, failure to tender weapon used in the commission of the offence, and failure to observe that the cautioned statement was procure by force, then, concluded that the case for prosecution was not proved at all.

On the other hand, the learned State Attorney argued to the contrary that the offence of armed robbery was proved because the stealing was committed and was used violence against PW1, which was corroborated by PW3 and exhibit P3, and the cautioned statement of the appellant- which according to the learned Attorney was best evidence that the

offence was committed by the appellant and cited cases in support of her position.

Having heard and considered the competing arguments whether the offence was proved or not, I am with due respect to the appellant, find that in this appeal, the offence of robbery was proved because the Republic established that, on 12th day of May, 2022 stealing of the motor cycle make Kinglion with registration No.MC 498 CVV was done from PW1 and the thief use violence to by injuring PW1 on some parts of his body. The evidence of PW1 was corroborated by the evidence of PW3 a doctor who examined PW1. Not only that but also the cautioned statement of appellant which was admitted in evidence without objection and nor did the appellant cross examined PW4 on the way the cautioned statement was recorded. Therefore, the argument by the appellant that the cautioned statement was procured by torture is futile and afterthought exercise in vain on his part. No such point was raised during trial. Once an exhibition is admitted in evidence without any objection, then, it contents are considered true, unless proved otherwise by way of cross examination. See the case of

With the above reasons, the 1st, 2nd, and 5th grounds stand to fail and are dismissed for want of merits. In this appeal no such cross discredit the contents of exhibit P4.

This takes me to the 3rd and 4th grounds which boils down to the identification of the appellant. According to the appellant, identification if any was dock identification because the Republic failed to prove that it was the appellant and not someone else who stole the motor cycle and used violence to steal. Not only that but also that PW1 identification of the appellant was dock identification which cannot be basis of conviction. On the other hand of the Republic, the learned Attorney, admitted that there are flaws in the identification of the appellant by PW1 but was quick to point out that is curable under section 388 of the CPA because there are other evidence like cautioned statement which is the best evidence proving that it was the appellant and not someone else who committed the offence charged.

I have carefully considered the competing arguments on this point and revisited the record of appeal, with respect to the learned Attorney, I find that identification of the appellant in this appeal, was purely dock identification which cannot be basis of conviction. Going by the story of PW1, it was his first day to meet the appellant and started a journey to Shunga, but which journey le to the commission of the offence. However, I, as well agree with the learned Attorney that apart from identification which is problematic in this appeal, there are other evidence which irresistibly connects the appellant with offence charged. These according

to the learned Attorney, are the cautioned statement in which he admits the commission of the offence and investigations done by PW4. It is only for these two reason that, I am of the considered opinion that it was the appellant and not someone else who committed the crime in dispute.

That said and done, I find 3rd and 4th grounds of appeal as well devoid of any useful merits in this appeal and proceed to dismiss them as well.

In the fine, the whole appeal is found wanting in merits and is dismissed in its entirety. I find no reason to disturb the decision of the trial court which is hereby affirmed.

It is so ordered.

Dated at Kigoma, this 06th day of October, 2022.

S. M. MAGOIGA
JUDGE
06/10/2023