IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 162 OF 2023

(Originating from the decision of the District Court of Kinondoni at Kinondoni before Hon. J.J. Rugemarila- PRM, dated 1st day of June 2023)

ADAM SAGO @ CHAPUMU.....1ST APPELLANT

MOHAMED KABANGA @ JOKELI .....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

13th Nov & 16th Nov, 2023

KIREKIANO, J.:

The appellants herein were charged and convicted with one count of Armed Robbery c/s 287A of the Penal Code Cap 16 R.E 2019. They were ultimately sentenced to a mandatory sentence of 30 years imprisonment.

The allegation was that on 27/12/2021 at Tandale B area within Ubungo District in Dar es Salaam Region, the appellants stole one Television Samsung 47 inches worth of Tshs. 820,000/= clothes and sandals worth 12,000/= valued at Tshs. 50,000/= cash Tshs. 180,000/=

clothes and sandals worth 12,000/= all valued at Tshs. 1,062,000/= the properties of Said Ramadhani, in the process it was alleged the appellants immediately before and after such stealing did threaten one Said Ramadhani with a knife to obtain and retain the said properties.

The brief facts leading to the appellant's conviction and sentence are as follows:

On 22.12.2021 the victim who testified as PW2 Said Ramadhan while at home found his door open, this was around 19:30hrs. When he wanted to get to his room, he met a man who he identified as the 1st appellant, the appellant threatened to stab him and run away. The victim raised the alarm and called for help. He then reported to the police at Tandale who on a later date arrested the appellant. It was PW2 version that the appellant was asked by police if he had stolen from him and admitted.

According to a police officer PW1 G 7227 D/CPL Nicolas who arrested the appellants, the appellants when arrested they were found in possession of the various appliances which were tendered by PW1. This was according to the certificate of seizure (Exhibit P1).

It appears the police did search the appellant's house after they were seen by PW3 Martin Mahungu on a motorcycle carrying a TV, who believed

them to be thieves! The second appellant was arrested by PW4 Robert Linus local security (*Ulinzi shirikishi)* on 25/02/2022. According to him, they had information that the 2nd appellant was wanted by police at Magomeni. Following the investigation conducted by PW5 F.8798 D/CPL David, the appellants were charged with mentioned offences.

The appellant's defence was complete denial, according to the 1st appellant, he was arrested on 30/12/2021 on a football ground. The police demanded Tshs. 50,000/= to release him on bail which he could not pay. He was then charged with the offence.

The 2nd appellant also denied the offence. He said when arrested by the police officers, they asked him about the whereabouts of the mobile phone and subwoofer, and he told them that he never purchased any mobile phone or subwoofer, then he was charged with the 1st appellant.

It was based on the above evidence the trial court found that the charge was well proved in the required standard and accordingly sentenced them to serve 30 years imprisonment.

The appellants were aggrieved by the decision of the District Court filed this appeal posing four grounds of appeal: -

1. *That, the learned trial magistrate grossly erred in law and fact by holding the appellant's conviction which was predicted upon incredible and unreliable visual identification evidence of PW2 and PW3.*
2. *That, the learned magistrate erred in law and fact by holding the appellant's conviction which was predicated upon incredible and unreliable visual identification evidence of PW2 and PW3.*
3. *That, the learned trial magistrate grossly erred in law by convicting the appellants relying on the seizure certificate (ex. P1) which resulted from a search that was conducted in violation of the law.*
4. *That, the learned trial Court grossly erred in law and fact by failing to observe that the prosecution case wasn't proved to the standard required in the criminal cases.*

At the hearing of the appeal, the appellants were unrepresented, while the respondent was represented by Miss Dorothy Massawe, learned Principal State Attorney. The appeal at the option of the appellant was argued by way of written submissions.

On the first ground, the appellants submitted that the prosecution case against the appellants rested on the purported visual identification evidence of PW2 and PW3. The crucial issue is whether or not the appellants were robbers. Did PW2 and PW3 unmistakably recognize the

robbers or were they dishonest or were they honest but mistaken? to whom did they mention the appellant's names, and did those witnesses mention the appellants in their first reports or statements to the police; if they truly knew who committed the offence to PW2?

The appellants submitted further that visual identification evidence of Pw2 was wanting in cogency. This is because the said offence having been committed at 19:30 hours the conditions at the scene of the crime were not favourable for the correct identification of the appellants. There was no direct evidence from PW2 on the type of light or source of light and its intensity which enabled them to identify the appellants.

It was submitted that Pw2 did not mention a single factor which had enabled him to identify the appellants as one of the robbers. They cited **Mengi Paul Samweli Luhanga and another Vs. Republic, Criminal Appeal No. 222 of 2006 (unreported), Waziri Amani Vs. Republic, (1980) TLR 250, Hassan Juma Kanenyera Vs. Republic (1992) TLR 100, Raymond Francis Vs. Republic (1991) TLR 100.**

As such the appellants cited the case of **Marwa Wangiti Mwita and another Vs. R, (2002) TLR 39**, where the court held that; -

"The ability of a witness to name a suspect at the earliest opportunity is important of his/her reliability, in the same way, an unexplained delay or complete failure to do so should put a prudent court to inquiry."

From the cited case, the appellants submitted that the claims of PW2 and is not supported by any evidence. The appellant wondered why it took three days to arrest the 1st appellant and 60 days to arrest the 2nd appellant who lived just nearby and was admittedly well known to them.

They submitted that the prosecution case was not proved beyond reasonable doubt.

On the second ground, they submitted that the evidence by the prosecution at the trial did not prove the case to the required standard.

The appellant complaint was that allegation that search in the 1st appellant's house resulted in the discovery of the alleged TV, mattress and clothes, the seizure of the said items was done in contravention of Section 38 (1) of the Criminal Procedure Act, Cap 20 R.E 2019.

They went on to submit that there was no search warrant which was issued in respect of the conducted search, and no receipt was issued to the appellant to acknowledge the seizure of the TV, mattress and clothes.

In support of this argument, they cited the case of **Ndungulile Mandago Vs. Republic, Criminal Appeal No. 58 of 2019, CAT at Mbeya (unreported)** at pg. 4-15 of the judgment where on Page 11 the Court held thus: -

> *"The search conducted without warrant was thus illegal and, to say the least, a blatant disregard of the law"*

He also referred to the case of **Joseph Charles Bundala Vs. Republic, Criminal Appeal No. 15 of 2020** (unreported) at Pg. 15 of judgment where search was conducted contrary to the dictates of the provisions of Section 38 of the CPA and PGO no. 226 it was held to be, *an* illegal search the trial court had no right to act on.

It was appellant argument that it was obvious that the search was not an emergency one and indeed it could not have been an emergency because PW1 knew about the incident. In this view the certificate of seizure cannot be acted upon. The appellants asked this Court to find that the charge was not proved beyond reasonable doubt and pray the appeal to be allowed.

On their part the respondent through Miss. Massawe supported the appeal.

Responding on the first ground of appeal, Miss Masawe submitted that in the case of visual identification evidence, being the weakest in character the same cannot be acted upon unless satisfied that all possibilities of mistaken identification are eliminated. The alleged robbery occurred at night, PW2 evidence was too weak in identifying the person he said is the 1st appellant. She referred this court in the case of **Waziri Amani Vs. Republic (1980) TLR 250** and Raymond **Francis Vs. Republic (1994) TLR 100**, whereby the Court emphasized that:

> *"It is elementary that a criminal case whose determination depends essentially on identification evidence all conditions favouring identification is of utmost importance."*

Referring to evidence on record she went on submitting that PW3 on pg. 14 of the court records testified that;

> *"When I was walking, I met with 3 people on the motorcycle. I identified them by their faces and names Adam Sago and Jokeli. They were carrying a Tv"*

She argued that this statement is not enough to say that the appellant committed the offence simply because there was no corresponding

evidence indicating that the said television was stolen from the complainant.

About the second ground of appeal, the respondent conceded with the appellants that some particulars which were in the charge sheet do not reflect what the prosecution proved during the trial. Miss Massawe cited the case of **Salum Rashid Chitende Vs. Republic, Criminal Appeal No. 204** (unreported) the Court of Appeal held that;

> *"When a specific date, time and place is mentioned in the charge sheet, the prosecution is obliged to prove that the offence was committed on that specific date, time and place."*

She submitted that in the case at hand, the evidence in the prosecution case differed from the charge on when the offence was committed

As regards the third ground of appeal about the admission of Certificate of Seizure, she submitted that it is true it was improperly adduced as evidence as stipulated at Pg. 8 of the lower court proceedings. The certificate of seizure tendered and admitted as ***exhibit P1*** was a result of an improper search done by PW1.

She cited the case of **Badiru Musa Hanogi Vs. Republic, Criminal Appeal No. 118 of 2020 and Mbaruku Hamisi and four others Vs.**

Republic, Consolidated Criminal Appeals No. 141, 143 and 145 of 2016 and 391 of 2018 (both unreported) stated that;

> *"In other words, in Badiru Musa Hanogi Case (supra) and Mbaruku Hamisi and four others (supra), exhibits impounded without a search warrant were treated as evidence illegally obtained and this court expunged the said exhibits from the record, we are afraid, in the circumstances obtaining in this appeal, it is beyond certainty that we will be constrained to the certainty that we will be constrained to follow suit"*

Since the search conducted without a warrant was illegal, the same cannot appellants, be acted upon.

On the fourth ground, she submitted that it is a trite principle of law that in all criminal matters, the standard of proof is beyond reasonable doubt and that the burden of proof lies on the prosecution as provided under Section 3(2) of the Law of Evidence Act, Cap 6 R.E 2022. She cited the case of **Christina Mbunda Vs. Republic (1983) TLR 340,** in which the Court held that

> *"It is an elementary rule of law that to prove the offence of theft the prosecution must prove the existence of actus-reus which is specifically termed as aspiration and mens rea or*

animus furandi with intent to deprive the person the use of it permanently"

She argued that the victim (PW2) failed to show how he was affected after being threatened by the alleged knife and how and when the alleged items were obtained from him. She concluded by praying this Hon. Court allow the appellants to appeal.

Having heard the concurring submissions by the parties I now wish to address the grounds of appeal but gathering from the parties submission the major complaint is that the prosecution failed to prove the case against the appellants beyond reasonable doubt.

Starting with issue of identification visual identification evidence of PW2 and PW3. It has, has been held in plenty of decisions as rightly submitted by the parties that court should caution, cautioned itself before relying on the evidence of visual identification as the basis of conviction.

According to the evidence adduced in the trial Court by PW2 (the victim) and PW3 it is on record that the offence was committed at 19:30 hours at night the conditions at the scene of the crime were not accounted. It was not explained what source of light the witness PW2 used to identify a person he said he saw coming from his room. This was a single witness

who said the first appellant threated to stab him before running away. When and how did he run away with all appliances named is not explained in the first place.

As such the evidence of PW3 that he arrested the second appellant because he knew he was a thief cannot fairly speaking be acted upon without evidence linking him with the charges at hand. Also, the evidence adduced by PW3, that he had just seen three people on the motorcycle carrying on TV, and he concluded that they were the ones who stole the TV of Pw2. Indeed, there is nowhere PW2 giving descriptions of the appliances allegedly robed from him

All said and done, I find merit in the first ground of appeal there was no tangible evidence of identification implicating the appellants with the offence. This ground is sufficient to dispose this appeal.

I allow this appeal in its entirety. The conviction of the appellants is hereby quashed and the sentence of thirty years imprisonment is set aside. The appellants are to be released from prison forthwith, unless otherwise lawfully held.

A. J. KIREKIANO

JUDGE

16/11/2023

COURT: Judgment delivered in the chamber in the presence of the appellant and Miss Dorothy Massawe, Principal State Attorney for Respondent.

Sgd: A. J. KIREKIANO

JUDGE

16/11/2023