IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 48 OF 2023

(Originating from Criminal Case No. 183 of 2022 of Hai District Court)

ANOLD S/O EVARIST KILEO @ ANOO ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

06/11/2023 & 24/11/2023

SIMFUKWE, J.

The appellant, Anold s/o Evarist Kileo @ Anoo was arraigned before the district court of Hai charged with the offence of Armed Robbery contrary to **section 287A of the Penal Code, Cap 16 R.E 2022.**

It was alleged by the prosecution at the trial that on 11/11/2022 at Bomani area within Hai District in Kilimanjaro region, the appellant did steal cash Tshs 200,000/= and one mobile phone make Tecno valued at Tshs 150,000/, all total valued at Tshs 350,000/= the property of one Ramadhani s/o Mussa; immediately before or after such stealing, the appellant did use a knife to threaten the said Ramadhani Mussa in order to obtain and retain the said property.

The appellant pleaded not guilty to the offence.

Before the trial court, the prosecution called two witnesses who testified inter alia that; on the material day the victim who is an employee of TANESCO was on duty. At around 22:45 hrs he left his working place and went to Golden pub to buy a drink. He called his friend whom they stayed together, one Othman Wakaso (PW2) and required him to meet him at Golden pub so that they could find food. They met at Golden pub and bought energy drink and left the place. While seeking a place where they could buy chips, they passed at an alley (**uchochoro**) between Golden bar and Center bar where they heard someone calling them. They turned around and found that it was the accused person with his colleagues who were calling them. The accused asked them where they were heading to, they replied that they were going home. The accused asked them why at that particular time, they refused to reply.

It was testified further that; the accused had a knife and a stone which he used to threaten the victim and hit him on his head by using a stone. The victim felt dizziness and fell down. The accused person and his fellows searched the victim and stole his cash money Tshs 200,000/= and his mobile phone make Tecno worth Tshs 150,000/=.

PW2 the friend of the victim managed to escape from the scene and went to seek help. When he went back, he found the accused had boarded a motorcycle and escaped. He found PW1 bleeding on his head, he helped him and they went home. They narrated the tragedy to their neighbour one Jackson. They discussed and agreed that they should go back to the road and look for the accused person as they knew him as a boda boda driver who used to park at Panone station. They arrived at Panone station and found the accused person there. They asked him politely to return their properties which he had stolen from them or else, they could take him to the police station. The accused person begged them not to take him to the police station and promised to return their properties which at that time he alleged that were with another person.

While waiting for that other person, they witnessed a group of people who had sticks heading to them on motorcycles. They were afraid and run away to Bomang'ombe police station where they reported the matter. They were issued with RB number. Few days later, the accused was arrested and the victim was called to identify him.

In his defence, the appellant called one witness. He denied to had committed the offence and narrated how he was arrested.

After considering evidence of both parties, the trial court found that the case against the accused was proved beyond reasonable doubts. The appellant was then convicted and sentenced to thirty years imprisonment.

Dissatisfied the appellant filed the instant appeal on the following grounds of appeal:

1. *That, the learned trial court magistrate erred both in law and facts in finding and holding that, the appellant was positively recognized by PW1 and PW2 despite the conditions and circumstances at the scene of the alleged crime being not conducive for proper and correct identification/recognition.*
2. *That, the learned trial magistrate grossly erred both in law and fact to note that, PW1 and PW2 never described the appellant in terms of physical complexion, attire and what made them to recognize him at the scene of the alleged crime. Further, they never mentioned a clear source of light and its intensity which aided them to properly recognize their culprit at the scene of crime.*
3. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that PW1 did not disclose/report*

the alleged incident against him to the concerned authorities at the first earliest possible opportunity. Failure of which rendered his evidence to be highly suspicious and cast doubt on his credibility and reliability as a witness.

4. *That, the learned trial magistrate grossly erred both in law and fact in relying upon the evidence of PW2 to hold that he identified the appellant but failed to note that, this particular witness (PW2) made a dock identification of the appellant which is weak and worthless in law.*
5. *That, the learned trial magistrate grossly erred both in law and fact in failing to note that, there is variance between the charge sheet and the evidence on record from prosecution witnesses.*
6. *That, the learned trial magistrate grossly erred both in law and fact in using weak, tenuous, contradictory, inconsistent, uncorroborated, incredible and wholly unreliable prosecution evidence from prosecution witnesses (PW1 and PW2) as a basis of the appellant's conviction.*
7. *That, the learned trial magistrate grossly erred both in law and fact in not drawing an adverse inference against the*

prosecution for failure to summon the very crucial witnesses.

8. *That, the learned trial magistrate grossly erred both in law and fact by being adamant that the strong, unchallenged and well supported defence evidence did not raise reasonable doubt on the prosecution's case.*
9. *That, the learned trial magistrate grossly erred both in law and fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubt against the appellant and to the required standard by the law.*

When the matter was set for hearing, the appellant was unpresented while Mr. John Mgave learned State Attorney appeared for the respondent Republic. The appeal was heard by way of written submissions.

In support of the first, second and fourth grounds of appeal which concerns identification; the appellant submitted that the conditions and circumstances were not conducive for proper and correct visual identification. He said so because the alleged incident is said to have occurred at 22:45 hours (night hours). That, the victim (PW1) said that at the scene there was light of the electricity bulb. However, that particular

witness never mentioned the intensity of the alleged light. The appellant noted that it is now well settled that, when a witness claims to identify a person in an unfavourable conditions or circumstances, must mention a source of light and its intensity which aided him or her to identify or recognize an invader or culprit. The appellant cemented his assertion with the case of **Issa Mgara @ Shuka v. R, Criminal Appeal No. 37 of 2005** (unreported), in which the Court of Appeal when dealing with an akin situation, held that:

> *".... Definitely, light from a wick lamp cannot be compared with light from a pressure lamp or fluorescent tube. Hence, the overriding need to give in sufficient details the intensity of the light and the size of the area illuminated."*

The appellant averred that in this case, PW1 and Pw2 who were alleged to be at the scene of crime and who can be regarded as the only eye identifying witnesses, their evidence on how they identified the appellant is wanting. He made reference to page 11 of the proceedings of the trial court where PW1 testified that there was light of the electricity bulb illuminating on that alley. At page 15 to 17 of the proceedings, PW2 said that the light was normal at the scene. When cross examined, PW2

changed his story and said that the light was from the pub which he never knew its intensity.

It was the belief of the appellant that these two prosecution witnesses gave very highly conflicting evidence which is contradictory on the source of light and its intensity which aided them to identify their invader. Further reference was made to the case of **Jaribu Abdallah v. R [2003] T.L.R 271**, in which the Court of Appeal held that:

> *"It is not enough merely to look at factors favouring accurate identification equally important is the credibility of a witness. The conditions of identification might appear ideal but that is not guarantee against untruthful evidence."*

It was averred further that PW1 in his effort to convince the trial court that they knew the appellant before the alleged incident, he said that the appellant had a scar on his face and that he used to see him at Panone area. That, when the two witnesses went to the police station to report the said incident, they never mentioned nor described the appellant in a manner that could be ruled that nobody else was referred to by PW1 and PW2 other than the appellant herein. Moreover, the police officer to whom the said description was given was not summoned to testify.

On the fifth ground of appeal, the appellant submitted that the learned trial magistrate failed to note that, there were variance between the charge and the evidence on record. The charge against the appellant indicated that the incident occurred at Bomani area within the district of Hai, while PW1 and PW2 said in their evidence that the ordeal against them occurred at the alley (uchochoro). Both witnesses said that they were residents of Kibaoni street at Bomang'ombe area. From the noted variance, the appellant was of the view that it cannot be said with certainty that the prosecution proved the charge against the appellant beyond reasonable doubt. The argument was cemented with the Court of Appeal decision in **Salim Abdallah Maganga v. R, Criminal Appeal No. 285 of 2020** at page 6 where it was held that:

> *"Still on same point, the charge asserts that the offence was committed at a place known as Uwanja wa Ndege. Quite apart, in her evidence, PW1 told the trial court that the offence was committed at Kichochoroni. She was further clear in her evidence that, she could not establish where such Kichochoro was as she was a stranger in the town. In effect therefore, the piece of evidence proving an incident which occurred at Uwanja wa Ndege, could not be relevant in proving an incident which occurred at a place called*

"Kichochoro." The place of commission of offence being crucial in establishing the offence, we agree with the learned Principal State Attorney that, the variance in that respect between the charge and evidence renders the charge not proved beyond reasonable doubt."

Guided by the above cited case law, the appellant prayed this court to find and hold that the charge was not proved beyond reasonable doubt against him. Hence, allow the appeal, quash the conviction, set aside the sentence and set him at liberty.

In rebuttal of the first and second grounds of appeal, Mr. Mgave submitted that the appellant was properly identified at the scene of crime unlike his contention. That, it was the evidence of PW1 at page 11 of the typed proceedings that he saw the appellant with others but it was the appellant who had a knife and a stone; it was the appellant who hit him on the eye. That, the confrontation took almost half an hour which made PW1 see the appellant for a long and reasonable time and not mistaken him with another person. In addition, PW1 stated that there was a bulb light which was illuminating at that Uchochoro which aided him to see the accused properly.

Mr. Mgave cited the case of **Kisandu Mboje v. Republic (Criminal Appeal No. 363 of 2018) [2022] (Tanzlii) (14 July 2022)** at page 15 where the Court of Appeal held that:

> *"...in order to establish that the identification of the appellant was watertight there are several factors to be considered and they include time the witness had an occasion to observe the accused, the distance at which he observed him, the conditions in which the observation occurred whether it was a day or night time, whether there was a good or poor lighting at the scene of crime and whether the witness knew the accused or had seen the accused before."*

In the appeal at hand, Mr. Mgave contended that it is evident from the evidence of PW1 who stated that he saw the appellant at the scene of crime, it was the appellant who hit PW1 with a stone. It was also the evidence of PW1 that the confrontation took half an hour and he was able to identify the appellant without mistake. PW1 stated further that he knew the appellant long before the incident as he used to see him at Panone area. Therefore, the appellant was properly identified.

Responding to the fifth ground of appeal, Mr. Mgave asserted that there was no variance between the charge sheet and evidence presented by the prosecution. That, PW2 stated that he was called at Golden Pub which

is at Bomani area and that they passed through the alley which was just 10 steps from the Golden pub meaning that they were at the same area which the charge describes.

On the sixth ground of appeal, the learned State Attorney replied that evidence adduced by the prosecution witnesses PW1 and PW2 was not contradictory nor inconsistent as both witnesses were at the scene of crime and managed to see the perpetrator of the crime. Mr. Mgave insisted that evidence of PW1 and PW2 corroborated each other and was reliable.

The seventh ground of appeal was also contested as it was stated that the prosecution was under no obligation to summon all witnesses and that the summoned witnesses were enough to prove the case against the appellant. Reference was made to **section 143 of the Evidence Act, Cap 6 R.E 2022** which provides that there is no legal requirement for the prosecution to call a specific number of witnesses, what is required is quality of evidence and credibility of witnesses. Further reference was made to the case of **Skona Rolyani Munge and Others v. R (Criminal Appeal No. 51 of 2020)** TZCA 773 (Tanzlii) in which at page 14 and 15, the Court of Appeal cited the case of **Mwita Kigumbe Mwita and**

Another v. R, Criminal Appeal No. 53 of 2015 (unreported) in which it was held that:

> *"In each case, the court looks for quality and not the quantity of evidence placed before it. The best test for the quality of any evidence is its credibility. It was for the prosecution to determine the witnesses who should prove whatever fact it wanted."*

On the eighth ground of appeal, it was submitted that the trial magistrate evaluated evidence of the appellant and realised that the same was all about disassociating from the crime. The court did not believe it to be true.

In his final analysis, the learned State Attorney was of the opinion that the trial court did not err in convicting the appellant as the charge was proved against him beyond reasonable doubts. He subscribed to three elements which ought to be proved in an offence of Armed Robbery as outlined by the Court of Appeal in the case of **Kisandu Mboje v. Republic** (supra), that the prosecution is required to prove the act of stealing, that the assailant was armed with offensive or dangerous weapon and the said assailant used or threatened to use actual violence in order to obtain or retain the said property. He said that, in this case PW1 and PW2 testified that it was the appellant who attacked PW1. That,

the appellant was seen by PW1 and PW2 holding a knife and a stone. The stone was used to hit PW1 who fainted after being hit. It was testified further that the appellant and other bandits stole a mobile phone make Tecno and cash money Tshs 200,000/= the property of PW1. Thus, the charge was proved against the appellant beyond reasonable doubts.

Mr. Mgave prayed that the entire appeal be dismissed and conviction and sentence be upheld.

I have considered the grounds of appeal, evidence in the trial court's record and the submissions for and against the appeal. The issue for consideration is whether this appeal has merit.

According to the grounds of appeal and submissions of both parties, contentious issues are: identification of the appellant at the scene of crime; variance between the charge sheet and prosecution evidence; and contradiction of prosecution evidence. The appellant did not submit in respect of the third and eighth grounds of appeal. Therefore, I assume that he opted to drop the two grounds.

Starting with the issue of identification, it is trite law that where circumstances of identification are unfavourable, evidence should be watertight. See the case of **Pelo Moloimet Munga @ Pelo v. R,**

Criminal Appeal No. 43 of 2020 [2022) TZCA 790 (8 December 2022), at page 17 where it was concluded that:

> *"Without watertight evidence of identification, the case against the appellant crumbles."*

Also, where the witness knew or saw the accused before the incident, possibility of mistaken identification is minimized.

In the case of **Hassan Khatib Ali v. DPP, Criminal Appeal No. 86 of 2018,** (CAT at Zanzibar) at page 11 and 12 it was held that:

> *"In the cases of Kulwa Mwakapaje & 2 Others v. R, Criminal Appeal No 35 of 2005 and Issa s/o Mgara @ Shuka v. R, Criminal Appeal No. 37 of 2005 (both unreported) relied upon by the first appellate Judge, the Court underscored the principle that even where the identifying witness had prior knowledge of the suspect, as a pre-condition for acting on the evidence of identification, it must be established that there were favourable conditions for such identification."*

In the case of **Hassan Khatib Ali** (supra) at page 10 and 11, the Court of Appeal underscored factors which must be established so as to

eliminate the possibility of mistaken identity of a suspect which were stated in the case of **Waziri Amani v. R [1980] T.L.R 250**, that:

> *"We would for example, expect to find on record questions such as the following posed and resolved by him:* ***the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred for instance; whether it was day or night-time; whether there was good or poor lighting at the scene; and further whether the witnesses knew or had seen the accused before or not.****"* Emphasis added.

In the case at hand, at page 11, second paragraph of the typed proceedings of the trial court, the victim stated among other things that Anold (appellant) was in front of him holding a stone and a knife. At paragraph 3 of the same page, the victim stated that there was light of electricity bulb illuminating on that uchochoro (alley), thus it was easy to see clearly. PW1 (victim) stated further that:

> *"It took us almost half an hour on that confrontation. Anold had a scar on his face and mostly I used to see him at Panone area. He had a scar on his chick. I always saw him with a motorcycle, so I thought he is a bodaboda driver."*

When cross examined by the accused, PW1 explained that he had seen them dancing at Golden Bar prior to the incident and that one of them had asked him to buy him a cigarette and he bought for him. PW1 explained further that the appellant was the leader of the bandits as he was the one who was speaking to them and giving directives. PW2 elaborated how he managed to identify the appellant and type of light which enabled them to identify him. PW2 stated further that at the police they described the scar of the accused and one police officer said that the said person was Anold (appellant). PW1 said that the light which aided them to identify the appellant was from the pub. Although he did not know its size and watts, he explained that the same was bright enough to identify the accused. Apart from that, PW2 made it clear that he did not manage to identify the friends of the appellant as they were behind him. From that evidence, I am of the opinion that the appellant was properly identified by PW1 and PW2 on two reasons. First, they used to see the appellant at Panone area even before the incident. Second, PW1 saw the appellant and his fellows dancing at Golden Bar few minutes before the commission of the offence.

On the issue of variance between the charge sheet and prosecution evidence, the appellant submitted that the charge sheet indicated that the

offence was committed at Bomani area while adduced evidence was to the effect that the offence was committed at "**uchochoro**." The learned State Attorney was of the view that as seen at page 15 of the typed proceedings, Golden pub is at Bomani area and PW2 explained that they were invaded ten steps from Golden Pub meaning that they were at the same area. With respect to the appellant, an alley (**uchochoro**) is a vague term to describe the place as the same can be found anywhere. Thus, it was correct for the prosecution to describe the area where the offence was committed by stating the name of that particular place. The case of **Salim Abdallah Maganga** (supra) which was cited by the appellant is distinguishable to our case as in the cited case the witness did not specify where the said "**uchochoro**" was located as he was a stranger in that town. In this case, the said uchochoro was stated to be near Golden Pub at Bomani area. I therefore dismiss this ground for lack of merit.

In the last issue of contradictory evidence of PW1 and PW2 in respect of the source of light and its intensity, as already observed in the first issue of identification, both PW1 and PW2 explained clearly the source of light which aided them to identify the appellant. That is the electricity bulb which was illuminating from the pub. When re-examined, PW2 stated that the light at the scene was bright enough to identify the accused.

Considering the fact that PW1 disclosed that he used to see the appellant even before the incident, and that their confrontation took some time, it was easy to identify the appellant. Therefore, the charge against the appellant was proved beyond reasonable doubts.

In the circumstances, I hereby uphold the conviction meted against the appellant, confirm the sentence of thirty years as the mandatory prescribed statutory sentence for the offence of Armed Robbery which the appellant was convicted of and dismiss this appeal in its entirety. Order accordingly.

Dated and delivered at Moshi this 24th day of November 2023.

X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

24/11/2023