IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 50 OF 2023

(Originating from Criminal Case No. 116 of 2021 in the Resident Magistrates Court of Ilala at Kinyerezi)

MOHAMED SALUM NDAMBWA.....1st APPELLANT

TWAHA ISMAIL..... 2nd APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 10/11/2023

Date of Ruling: 14/11/2023

MWAKAPEJE, J.:

The appellants were charged, convicted and sentenced to 30 years imprisonment by the Resident Magistrates Court of Ilala at Kinyerezi in Criminal Case No. 116 of 2021 for the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap. 16 [R.E. 2029]. Aggrieved by the decision of the said trial court, appeal to this Court.

The grounds of their appeal are:

(1) *The trial magistrate erred in law and fact to convict and sentence the appellants relying on improper evidence of identification of PW1 and PW2 while the evidence is silent in the intensity of light used to identify the appellants when the matter was reported to police*

(2) *The trial magistrate erred in law and fact to convict and sentence the appellants without cautioning himself whether it was possible for a person covered by a net to identify culprits with the aid of solar light in the time of shock.*

(3) *The trial magistrate erred in law and fact to convict and sentence the appellants for the cautioned statement which was taken contrary to the Criminal procedure Code as the appellants were not free agents*

(4) *The trial magistrate grossly erred in law and fact to convict and sentence the appellants by disbelieving defence evidence that they were tortured;*

(5) *The trial magistrate grossly erred in law to convict and sentence the appellants while reasons for arrest, prosecution and sentence were concocted as the*

offence was unbailable hence were kept in custody at Kijitonyama Police Station and Ukonga Central Prison for remandees and convicts who is contrary to PW3 evidence; and

(6) *The trial magistrate erred in law and fact to convict and sentence the appellants for the case in which its ingredients were not proved to the required standard.*

The brief facts of this appeal are thus; on 07 September 2020 at night hours, the appellants committed the offence of Armed Robbery. On the material date while at Msongola Yange Yange area with the District of Ilala in Dar es Salaam Region they invaded the house of one Ramadhan Omary (PW1) and stole **TZS 400,000/=** cash, flat Screen television make mobisol 22 inches valued at **TZS 1,500,000/=** and 2 GB flash make Sony valued at **TZS 20,000/=.**

It is stated that immediately before and after such stealing they threatened the said Ramadhani Omary with machetes in obtaining the said properties. The matter was reported to police who later arrested the appellants. To prove the said offence, prosecutions paraded four (4) witnesses namely: Ramadhan Omary Mbonde (**PW1**); Dotto Pangalas Kindon (**PW2**); F.1123 P/C Hamad (**PW3**); and E.3863 SGT Lucas (**PW4**).

PW1 and **PW2** husband and wife respectively testified that on 07 September 2020 at night when they were asleep they were invaded by the appellants. They covered them with a net and thereafter took money and other valuable properties. They both stated that he managed to identify the appellants by solar light which was/were in their bedroom. The matter was reported to the Police who on 24 October 2024 arrested the appellants. **PW3** interrogated the 1st appellant and recorded his cautioned statement in which he admitted to having committed the said offence. He also named other accused persons. **PW4** on the other hand arrested the 2nd appellant who denied any involvement.

On the other hand, the appellants denied having committed such an offence. However, it is from the evidence of PW1, PW2, PW3 and PW4 that the court convicted and sentenced the appellants. Aggrieved by the said conviction and sentence, they therefore appealed to this Court.

This appeal was argued by way of written submissions according to the scheduling order of the Court. In their submission, the Appellants reduced their grounds of appeal into four, to wit:

(a) Poor identification;

(b) Illegal cautioned statement as PW3 before his evidence in chief did not take an oath which qualifies all her activities therein as a nullity;

(c) Defence evidence was not given weight/consideration; and

(d) The prosecution did not prove their case beyond reasonable doubt.

On their submission in chief in their first ground of appeal, the appellants contended that the trial court decided to convict them while the parameters set for identification were not met as outlined in the case of **Waziri Amani vs Republic [1980] T.L.R 250**. They asserted that **PW1** and **PW2** did not identify their assailants. This contention was based on the fact that the said witnesses differed as to the number of solar lights used to identify those who committed the crime. PW1 stated that had one light in their bedroom while PW2 stated that in their bedroom they had four solar lights which assisted them in identifying the appellants. They further referred to the caser **Jaribu Abdallah v. Republic [2003] T.L.R 271** and **Michael Aishi Vs Republic [1992] 92;** and **Lucas Kapinga and 2 Others Vs Republic [2006]. T.L.R 374.**

The appellants on the second ground of appeal contended that **PW3**, the investigator and recorder of the cautioned statement gave unsworn testimony in her evidence in Chief. In addition, they were of the contention that the same revealed himself to be an untruth witness when contradicted himself as he testified as to the time he has been working with the police force and the time he received the appellants for recording their statements.

On the third ground of appeal, the appellants' cry was that the trial magistrate never gave weight to their testimony. They contend that what was done Was to summarize what was stated in Court by the appellants without analysing the contents of what they stated to cement their argument they referred to the case of **Leonard Mwanashika Vs R. Crim. Appeal No.226 of 2014** where it was stated that it is one thing to summarize the evidence and another to subject the entire evidence to an objective evaluation to separate the chaff from the grain.

The Appellants on the fourth ground of appeal were of the view that the case against them was not proved on the standard required in criminal law, that is beyond reasonable doubt. The same was not proved beyond reasonable doubt since the prosecution failed to prove the two elements in the offence of armed robbery which are theft and the use of force another referred to the Case of **Christian Mbundu vs Republic**

[1983] T.L.R 340. Also, they further stated that **PW1** and **PW2** the victim of the crime did not identify the culprits according to the standard in the case of **Marwa Wangiti Mwita VS Republic [2002] T.L.R 39**. The appellants noted that in the testimony of the two victims, there is nowhere they were named apart from the testimony of **PW3** who stated that **PW1** informed him that he saw the 1st Appellant who was thereafter arrested.

In reply to the submission of the appellants, the Respondent Republic supported both the Conviction and sentence of the appellants. On the first ground of appeal, they contended that the appellants were well identified by **PW1** and **PW2**. According to them managed to identify the appellants since the distance was only one space from them and the tube light had strong light. Also, PW1 stated that he managed to identify the appellants since they live on the same street i.e. Yange Yange. Since this was not disputed by the appellants and they did not cross-examine simply implied that they conceded. To cement this argument, the respondent relied on the case of **Nyerere N Yague VS Republic Criminal Appeal No. 67 of 2010 CAT.**

On the issue of contradiction of the number of lights used to identify the appellants, the Respondent was of the view that it was a slip of the tongue that PW 1 testified his house to have one solar light one

being in his bedroom, and on the other hand PW2 testified their bedroom to have four lights. The Respondent was of the opinion that the contradiction was only on the number of solar lights which meant the same thing. He further stated that the said contradiction did not go to the root of the case. He referred to the case of **Mohamed said Matulis vs. Republic [1995] TLR 3**. He was therefore of the opinion that identification was properly done as the incident took place at night when there was enough light to identify the appellants

The Respondent concerning the second ground of appeal admitted the fact that the trial magistrate erred in law by admitting the unsworn or affirmed evidence by **PW3** F. 1123 DC Hamad and the same vitiated proceedings. He referred to the cases of **Jaffar Ramadhan vs. Republic, Criminal Appeal No. 311 of 2017; Bundala Makoye VS Republic Criminal Appeal No. 137 of 2018** and **Fatehali Manji VS Republic 1966**. He was of the opinion that if the evidence of **PW 3** is expunged there remains the evidence of **PW2** and **PW3** which is enough to prove the case beyond reasonable doubts as the same fits in section 62 (1) (a) and (b) of the Evidence Act, Cap.6 R.E 2022

On the weight given to defence evidence, the Respondent was of the View that the whole process of the trial was fair and the appellants were availed the opportunity to cross-examine all prosecution witnesses

and to defend their case. He was of the view that since the victims managed to identity the appellants and because they were living in the same street and since that was not disputed fact by the appellants at cross-examination which was considered as they conceded to the testimony of the prosecution witnesses, then a case was proved against them beyond reasonable doubts.

In their rejoinder, the appellants insisted on what they submitted in their submission in chief. They therefore prayed for their appeal to be allowed, their conviction quashed, their sentence set aside and be set free.

From the foregoing I proceed to determine the issues raised and the very question that I will answer in the end is whether the case was proved beyond reasonable doubt that it was the appellants herein who committed the offence of armed robbery.

It is on this premises I would wish to attend the present appeal whose conviction was based solely on visual identification of the appellants. As we all know, the question of visual identification of accused persons has been a topical issue many in criminal trials for quite some time now. The Court of Appeal has on many occasions laid and reiterated the guidelines and tests on matters about visual identification.

In the eminent case of **Waziri Amani VS Republic** (*supra*), it was stated on visual identification, that-

> *".....such evidence, as this Court is fully aware, is notorious subject to error and has often led to a miscarriage of justice"*

It was therefore concluded to eliminate the possibility of mistaken identity the court has to

> *".....warn itself of the special need for caution before convicting in reliance of identification of an accused".*

With this preamble, I will combine the 1st and 2nd grounds of Appeal as I dispose of the same hereunder. On the appeal hand, PW1 and PW2 are key witnesses and were the victims of the incident. The said witnesses testified that on the material day when they were bugled, they managed to identify the appellants because of the intensity of the solar light in their bedroom and the fact that they know them as they live in the same street.

In this testimony, there are two limbs. One was that identification was through solar light and two that they knew the appellants beforehand. About solar light, PW1 testified that in his bedroom there was one light which assisted him in identifying the appellants while on the other hand, PW2 testified that in the room where they slept, there

were four tube lights powered by solar which she managed to identify the appellants. In the case of **Waziri Amani** as highlighted in cases that followed, when one claims to have identified a culprit they must not only provide for the source of light, but also the intensity of the same. See the case of **Issa Mgara @ Shuka vs Republic, Criminal Appeal No. 37 of 2005 (unreported)** where it was stated that:-

> *"Even in recognition cases where such evidence may be more reliable than the identification of a stranger,* ***clear evidence on the source of light*** *and* ***its intensity is of paramount importance.*** *This is because even in recognition cases mistakes are often made"* [Emphasis supplied]

In the appeal at hand, yes we are told that the appellants were identified through solar light. Was the same clear evidence? Was the intensity described? The answer to this is simple, one PW1 states that there was one light, PW2 say four. These are husband and wife who live in the same room which is their house, how come they confuse of the number of lights in their bedroom? I do not agree with the Respondent who contends that it was a slip of the tongue.

Joseph @ Sengerema vs Republic (Criminal Appeal No. 378 of 2015) [2016] TZCA 216 it was noted that:

> *"PW1 described the intensity of the light in the room which according to her,* ***had bright walls****. She said that* ***the light was enough to enable her to recognize the appellant****. She explained that* ***as they went to bed, they left****, as had been their habit,* ***the lamp lighted****"* [emphasis supplied]

Apart from the fact that there was solar light in the appeal at hand, we find no description as to its intensity. In **Frank Joseph @ Sengerema's Case (supra),** the Court of Appeal appreciated the testimony of a witness by stating that:

> *"On the conditions under which she identified the appellant, we are of the settled minds that, as described by PW1,* ***the same favoured proper recognition of the appellant.*** *PW1 described the intensity of the light in the room which according to her, had bright walls. She said that the light was enough to enable her to recognize the appellant. She explained that as they went to bed, they left, as had been their habit, the lamp lighted."* [Emphasis supplied].

The guide in **Waziri Amani's case** and the case of **Sostenes Myagaziro @ Nyarushashi vs Republic (Criminal Appeal 276 of 2014) [2015] TZCA 408** is that the witness has to state explicitly:

> *"(a) How long the witness had the accused under observation.*
>
> *(b) What was the estimated distance between the two?*
>
> *(c) If the offence occurred at night which kind of light existed and what was its intensity?*
>
> *(d) Whether the accused was known to the witness before the incident.*
>
> *(e) Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like which may have interrupted the latter's concentration*

PW1 and PW2 stated that they had been with the appellant for five minutes. The same had machetes and the appellants covered PW1 and PW2 with a net. In such circumstances and terrifying conditions, without a description of the incident including there being no information on how were they covered with a net, how was the shape and holes of the said net, how they managed to identify the appellants,

were the witnesses standing or they were down, were they facing each other or not. All these questions are not answered.

PW2 also testified that she managed to identify them because they were close to her and the distance was "one spaces". To me, this breeds many questions and may mean many things and I wish not to go there. Enough to say this is in no way a proper identification.

Further to the foregoing, PW1 and PW2 testified that they with the appellants live in the same street which is why it was easy to identify them, to me this is not enough. They had to state and describe the way the appellants looked on the day of the incident rather than giving general statements. This is the position in the case of **Anael Sambo vs Republic, Criminal Appeal No. 274 of 2007 (unreported)** where it was stated that:

> *"The fact that a witness knew the suspect before that date is not enough.* ***The witness must go further and state exactly how he identified the appellant at the time of the incident, say, his distinctive clothing, height, voice and the like"*** [Emphasis supplied]

Moreover, on prior knowledge of the appellants by the prosecution witness, in the case of **Frank Sengerema (Supra),** it was observed as follows:

> *"PW1 explained how she came to know the appellant. She said that apart from the fact that the appellant, who was until the material time of the incident a* ***taxi driver, used to park his taxi near the premises where the deceased was working,*** *the fact which he admitted in his defence,* ***he also used to visit her and the deceased at their residence.*** *Furthermore,* ***when she went to report the incident to PW4, she was unhesitant in naming the appellant as the person who stabbed the deceased. She maintained that when she went with the deceased to the police"*** [Emphasis supplied]

In the appeal at hand, it is stated on record that PW1 and PW2 were living on the same street with the appellants, hence they knew them. Why then, didn't they tell their neighbours, Mtaa leaders or police about the people who invaded their home immediately after the incident? It was stated in the case of **Sadick s/o Hamis @ Rushikana & Others vs Republic (Criminal Appeal 381 of 2017; Criminal Appeal 382 of 2017** that:

> *"failure on the part of a* ***witness to name a known suspect at the earliest available and appropriate***

opportunity renders the evidence of that witness highly suspect and unreliable."

Furthermore, in **Shamir John v The Republic, Criminal Appeal No. 166 of 2004 (unreported)** the Court of Appeal observed that:-

"...recognition may be more reliable than identification of a stranger, but even when the witness is purporting to ***recognize someone whom he knows, the Court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."***

[Emphasis supplied]

To me, PW1 and PW2 are not consistent in their knowledge of the appellants. Now in the application of the guidelines that were provided in the **Waziri Amani case** as pointed out above, and since identification evidence has to be watertight, I do not find PW1 and PW2 truthful since there is neither coherence nor cohesion in their testimony, they are not reliable.

Now I turn to the second ground of appeal. In the proceedings of the trial court and as observed by both the Appellants and the Respondent, there is nowhere the said witness who is a police officer took oath. Section 198(1) of the CPA is very clear on this aspect:

*"198.-(1) every witness **in a criminal cause or matter shall**, subject to the provisions of any other written law to the contrary, **be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declarations Act**"* [Emphasis supplied].

The Oaths and Statutory Declarations Act, Cap. 34 [R.E. 2019] makes it mandatory for the witnesses giving evidence in court to do so under oath. It provides under section 4 that:

"(4) Subject to any provision to the contrary contained in any written law, an oath shall be made by

*(a) **any person who may lawfully be examined upon oath or give or be required to give evidence upon oath by or before a court**."* [Emphasis Supplied]

Since it is mandatory for the witnesses to take oath before giving evidence, its omission vitiates the proceedings. This is the position in the case of **Joseph Elisha vs Tanzania Postal Bank (Civil Appeal 157 of 2019) [2021] TZCA 518**. In addition, it is trite law that failure to comply with such mandatory provisions prejudices the accused person (see **Maduhu Sayi @ Nigho vs Republic (Criminal Appeal 560 of**

2016) [2020] TZCA 1723; and **Mabula Julius & Another vs Republic (Criminal Appeal 562 of 2016) [2020] TZCA 1739.**

In the premises above, I treat the testimony of PW3 and exhibits **"ID 1"** (i.e. cautioned statement of the 1st Appellant) tendered and received as evidence in the trial court as no evidence at all. I, therefore, expunge them from the record.

From what has been stipulated herein above, and since there are so many unanswered questions in this appeal, I am satisfied that the two grounds are adequate to dispose of this appeal even without pondering on the one remaining that of defence evidence was not given enough weight. Since the prosecution must discharge its obligation to prove the charged offence beyond a reasonable doubt, in this case, the same was not well discharged.

In the upshot, I find merit in the appeal and I hereby allow it. I quash the conviction and set aside the sentence meted out against the appellants. I furthermore order the immediate release of the appellants herein from prison unless they are held for some other lawful cause.

THE HIGH COURT OF TANZANIA

G.V. MWAKAPEJE
JUDGE
14/11/2023

Judgment is delivered in Court this 14 day of November 2023 in the presence of Ms. Amina Macha, learned State Attorney for the Republic and the Appellants in person.

G.V. MWAKAPEJE
JUDGE
14/11/2023