IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DODOMA DISTRICT REGISTRY)

AT DODOMA

CRIMINAL APPEAL NO. 18 OF 2023

(Appeal from the conviction and sentence of the District Court of Bahi in Criminal Case No. 27 of 2022)

AMOS MLABU.....1ST APPELLANT

JEREMIA MAKOPE MDUMLA.....2ND APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 29/8/2023
Date of judgment: 29/11/2023

KHALFAN, J.

Amos Mlabu and Jeremia Mkope Mdumla hereinafter referred as the 1st and 2nd appellants respectively were arraigned before the District Court of Bahi (hereinafter referred to as the trial court), charged with one count of causing grievous harm contrary to section 225 of the Penal Code [CAP 16 R.E 2019] now [CAP 16 R.E 2022].

It was alleged by the prosecution that, on 1/5/2022 at about 2200 hours at Mayamaya village within Bahi District in Dodoma region, the

appellants caused grievous harm to one Damas Lameck Kalinga by cutting him with a sharp object namely a knife on the head, left hand and left leg thus causing him to suffer severe injuries.

The appellants pleaded not guilty, hence full trial ensued. In attempt to prove their case, the prosecution called a total of three witnesses and tendered one exhibit. The appellants were the sole witnesses for the defence, they did not tender any exhibit. After hearing the parties, the trial court was convinced that the case against the appellants was proved to the hilt hence it convicted and sentenced them to serve 7 years imprisonment.

The appellants were aggrieved with the conviction and sentence meted out against them hence they jointly preferred the instant appeal with 10 grounds of appeal which can be conveniently reduced into four grounds as follows:

1. *That the appellants were convicted basing on the evidence of visual identification which was not water tight.*
2. *The trial court erred in law and fact for grounding conviction basing on the evidence adduced by family members without corroboration from the investigator of the case as well as the medical doctor.*
3. *That the case against the appellants was fabricated.*

4. The appellants' defence was not considered.

Before going to merits or otherwise of the appeal, a brief factual background leading to the prosecution of the appellants before the trial court is as follows: on 30/4/2022 at around 2100 hours PW1 was on his way coming from the club where he met two people whom he identified to be the appellants herein. He claimed that, he suddenly saw a person cutting him on his head using a machete and he later fell down. He tried to get up and he was able to see Amos Chilewa telling his fellow that he was delaying him. Hence he was cut again at the back of his head. He claimed that the second appellant pulled him towards the millet farm. He maintained that he was assaulted by using a stick and he lost conscious till morning.

PW1 was taken to the hospital where he was attended by PW3. He contended that PW1 had cut wound on his head hence he was to be operated. He tendered the PF3 as exhibit P1.

In their defence, the appellants denied to have committed the offence. Having heard the parties, the trial court convicted the appellants and sentenced them as I have indicated above.

When the appeal was called on for hearing, the appellants appeared in person unrepresented, while the respondent was represented by Mr. Gothard Mwingira and Ms. Jacqline Manyala learned state attorneys.

When given chance to expound the grounds of appeal above, the appellants simply adopted the grounds of appeal to form part of their submissions. They hand nothing further to elaborate.

The respondent opposed the appeal. Arguing the first ground of appeal, Mr. Gothard contended that the appellants were properly identified at the scene of the crime as there was enough light. He argued that in order for the evidence on visual identification to ground conviction, there must be enough light as it was expounded in the case of **Wazir Amani v Republic** [1980] TLR 250 in which it was succinctly pointed out that the court should not act on evidence of visual identification unless such evidence is water tight.

The learned state attorney pointed out that PW1 was able to explain the type of weapon used as well as clothes worn by the assailants. He argued that PW1 promptly named the appellants to be his assailants in which he was able to mention both their names. He argued that the appellants did not

cross examine PW1 regarding the issue of identification hence presuppose that they accepted PW1's evidence.

In a brief rejoinder, the appellants simply stated that they did not commit the offence.

Having gone through the parties' rival submissions in respect of the first ground of appeal, the issue for my determination is whether there was proper identification of the appellants.

This court sitting on the first appeal is tasked with the duty to reappraise the evidence on record, and where possible, to come up with its own findings.

The appellants' complaint on the first ground of appeal is that there was no proper identification. It is not in dispute that the offence was committed in the night while PW1 was on the way coming from the club. It follows therefore that, the prosecution was tasked to lead evidence to prove that it was the appellants who attacked PW1.

The law is well settled on the import of visual identification and conditions for relying upon it and for a court to find conviction. There is a plethora of decisions to the effect that such evidence should not be relied

upon unless the court is satisfied that the evidence is watertight and all possibilities of mistaken identity are eliminated. To mention but few **Waziri Amani v Republic** (supra), **Emmanuel Luka and Others v Republic**, Criminal Appeal No. 325 of 2010 and **Omari Iddi Mbezi and 3 Others v Republic**, Criminal Appeal No. 227 of 2009 and **Taiko Lengei v Republic**, Criminal Appeal No. 131 of 2014 (both unreported).

In the case of **Waziri Amani v Republic** (supra), the Court of Appeal laid down some guidelines for consideration in establishing whether the evidence of identification is impeccable. These include:

i. The time the culprit was under the witness observation,

ii. Witness's proximity to the culprit when the observation was made, the duration the offence was committed,

iii. If the offence was committed in the night time, sufficiency of the lighting to facilitate positive identification,

iv. Whether the witness knew or had seen the culprit before the incident and description of the culprit.

v. Furthermore, mention of the culprit's peculiar features to the next person the witness comes across after the incident further solidifies the evidence on identification of the culprit, especially when repeated at his first report to the police officer who interrogates him.

Guided by the above factors, PW1 claimed that he knew well the appellants even before the commission of the offence at hand. However, familiarity alone is not enough. This was underscored in the decisions of **Boniface Siwingwa v Republic**, Criminal Appeal No. 421 of 2007 and **Mabula Makoye and Another v Republic**, Criminal Appeal No. 227 of 2017 (both of which are unreported);

> *"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown that the conditions for identification were not conducive, then familiarity alone is not enough to rely on to ground a conviction. The witness must give details as to how he identified the assailant at the scene of the crime as the witness might be honest but mistaken."*

PW1 claimed that, he was able to identify the appellants through moonlight which was lighting as sunlight. In the case of **Said Chally Scania v Republic**, Criminal Appeal No. 69 of 2005 (unreported) underscored the following:

> *"We think that where a witness is testifying about another in unfavourable circumstances like during the night, he must give dear evidence which leaves no doubt that the identification is*

*correct and reliable. To do so> he will need to mention all aids to unmistaken identification like proximity to the person being identified, the **source of light**, **its intensity**, the length of time the person being identified was within view and also whether the person is familiar or a stranger."*

In the case of **Pontian Joseph v The Republic** Criminal Appeal No. 200 of 2015 (unreported), the Court of Appeal had this to say regarding identification with the aid of moonlight:

"Though under certain circumstances identification by moonlight may be possible, it was imperative in the circumstances to explain the intensity of the moonlight. Whereas PW2 merely said there was moonlight, the complainant said there was " enough moon light: It is our considered view that it does not suffice to say there was moonlight or enough moonlight. Its brightness had to be explained."

Back to the instant matter, PW1 just stated that, there was moonlight which was lighting like sunlight. There was no further explanation regarding the intensity of the moonlight. It is inconceivable however strong it can be, moonlight cannot be equated with sunlight. There was also no further

explanation as to length of time the incident took place. Moreover PW1's evidence was silent as to whether the prevailing circumstances at the material night could aid correct identification. This is evidenced by PW1's evidence as he told the trial court that:

> *"...I met two people, the first one was Jeremiah Makope. Suddenly I saw a person cutting me with a machete on my head. I fallen [sic] down. I tried to get up and saw Amos Chilewa."*

The above piece of evidence leaves a lot to be desired. The person who cut PW1 using a machete was not disclosed. Taking into account that PW1 was drunk and the manner in which PW1 was attacked, the prevailing conditions could not aid positive identification.

I have also noted that PW2 told the trial court that when she asked PW1 as to who attacked him, PW2 is recalled to have said this:

> *"I asked him as to who injured him and said at the beginning, he identified Bonge @ Mosi and 2nd one was Msongaa. We thought that it was due to beer."*

The names of people mentioned by PW1 to PW2 to be the assailants are different from those mentioned by PW1. PW2 thought such confusion was due to the fact that PW1 had taken some beer. It is apparent that,

going by the evidence of PW2, PW1 at the very beginning, failed to mention the real suspects. Hence, his evidence should have been approached cautiously. Apart from the PW1's evidence, there is no any other evidence linking the appellants with the offence at hand.

Hence I find the first ground of appeal with merits and the same is accordingly allowed. Determination of the first ground of appeal sufficiently disposes of the appeal before me, there is no need of determining the remaining grounds of appeal.

Consequently, the appeal is allowed, the conviction and sentence meted out against the appellants are quashed and set aside. I further order the appellants be forthwith set to liberty unless lawfully held.

It is so ordered.

Dated at **Dodoma** this 29th day of November 2023

F. R. KHALFAN,

JUDGE