

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 15 OF 2023

(Original Criminal Case No. 432 of 2021 at Bagamoyo District Court)

RAMADHANI HUSSEIN DUNGA..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

26th September & 27th November, 2023

BWEGOGGE, J.

The appellant herein was arraigned in the District Court of Bagamoyo on a charge of armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E 2019] and convicted forthwith. The same was sentenced to suffer custodial sentence of 30 years.

It was the prosecution case in the trial court that on 19th December, 2021, at 09:30 pm, one Swedy Said (PW1), the victim herein, and his

colleague namely, Charles Fabian Tunda (PW2), who was the shopkeeper, were closing the shop intending to retire home. The victim was in possession of the cash sale to the tune of TZS 200,000/=, and mobile phone make Techno, the properties of his colleague (PW2). While the victim was waiting for his colleague who was locking the shop door, the appellant herein had grabbed him by the collar of his T-shirt and his accomplice threatened the same with a machete demanding to be given the properties under his possession. After a short-lived struggle, the victim yielded to the threat and released money and mobile phone which were in his possession. The victim identified his assailants and provided details to his brother, Juma Said Oda (PW3), who had pursued the appellant herein at his residence, but could not find him. The following day, a report was lodged at the police station. After several days, the appellant was arrested and prosecuted.

The trial court, having heard the case, found the prosecution case credible. The court was satisfied that the accused was identified at the crime scene by the victim who was well acquainted with him, and mentioned him at the earliest opportunity. Consequent to this finding, the appellant was condemned to languish in jail for thirty years.

The appellant being dissatisfied with the finding of the trial court and apprehending that his freedom was unjustifiably assailed, appealed to this court on seven grounds which in substance are summated in the 7th ground which avers that:

- 1. The trial court erred in law and fact in convicting the appellant whereas the prosecution failed to prove its case beyond reasonable doubt as required by law.*

The appellants fended for himself whereas the respondent Republic was represented by Mr. Emmanuel Maleko, the Senior State Attorney. The appeal herein was argued by way of written submissions following the prayer made by the appellant to that effect.

In substantiating his allegation that the prosecution case was below the standard set in criminal proceedings, the appellant argued that the conviction entered by the trial court was pegged on the evidence of visual identification/recognition by PW1 and PW2 which was weak to ground conviction. That the above-mentioned key witnesses didn't state the intensity of light upon which the purported identification was made and the time taken to observe the assailants. Likewise, the appellant argued that the witnesses above mentioned didn't describe the assailants' appearances, height, voice and attire. The appellant, in persuading this court, cited the cases: **Anael Sambo vs. Republic**, Criminal Appeal No.

274 of 2007, CA (unreported); **Republic vs. M.B. Allui** [1942] 9 EACA 72 and **Felician Joseph vs. Republic** (Criminal Appeal 152 of 2011) [2012] TZCA 93.

Further, the appellant argued that none of the prosecution witnesses gave particulars of the stolen mobile phone, such as IMEI, sim-card number and colour. Likewise, the victim failed to prove that he was injured during the alleged robbery, neither PW1 and, or PW2 testified in that the victim was injured. The appellant fortified his argument by citing the case of **Aloyce Maridadi vs. Republic** (Criminal Appeal 208 of 2016) [2017] TZCA 244, among others, whereas the Apex Court opined that:

"Good reasons for not believing a witness include the fact that the witness has given improbable or implausible evidence or the evidence has been materially contradicted by another witness or witnesses."

In the same vein, the appellant complained that prosecution failed to parade material witnesses such as his relatives who allegedly reported his absence from home for several days.

Lastly, the appellant argued that the trial court misdirected itself in convicting the appellant based on the weaknesses of defence case and,

or failure by the appellant to cross-examine the witness and failed to adhere to the principle that the accused may only be convicted on the strength of prosecution case.

On the above premises, the appellant prayed this court to allow the appeal, quash the decision of the trial court and set side aside the sentence imposed against him.

In reply, Mr. Maleko, from the outset, supported the conviction and sentence entered by the trial court and vehemently resisted the appeal herein. His stance was that the prosecution case at the trial court left no scintilla shadow of doubt in respect of the appellant's guilt.

In responding to the appellant's argument that the evidence visual identification relied on by the trial court to convict him was weak, Mr. Maleko contended that there is no possibility of mistaken identification in this case. That the appellant was familiar with the victim, the robbery encounter was within zero distance and the lights were blazing, illuminating the crime scene. The counsel asserted that the victim's ability to name the appellant at the earliest opportunity was an assurance of his reliability; hence, the trial court was correct to find his evidence credible.

The attorney referred the mind of this court to the case of **Ahmad Sekule**

vs. Republic, Criminal Appeal No. 131 of 2009, CA (unreported) to reinforce his point. In the relevant case, it was held:

"In our considered view, we agree with Ms. Lilian Itemba that it is not in every case that evidence of description is necessary. In a case such as this one where the witness knew the appellants by names, we think it was not necessary to give descriptive evidence."

Further, the counsel referred the case of **Abdul Ally Chande vs. Republic** (Criminal Appeal 529 of 2019) [2021] TZCA 597 whereas the court aptly held:

"The fact that PW1 named the appellant at the earliest, lends credibility to her testimony."

Pertaining to the complaint that the victim didn't describe/identify the mobile phone allegedly robbed, the attorney responded that the appellant didn't raise this issue at the trial court. That the appellant never cross-examined the victim to challenge ownership of the stolen property. Therefore, his failure to cross-examine, amounted to admission.

And, in response to the allegation that the prosecution failed to call material witnesses, the attorney contended in terms of the provisions of

section 143 of the evidence Act, no particular number of witnesses is required to prove the fact. That the procured witnesses were sufficient to establish the prosecution case.

Lastly, with regard to the complaint that the trial court's conviction was based on the weakness of defence, the attorney contended that the conviction entered by the trial court was pegged on the credibility of the prosecution case not the weakness of defence. That expressly, the trial court considered the defence martialled and reached a conclusion that the defence case has not raised any shadows of doubt on the prosecution case. On the above premises, the attorney opined that the appeal herein is bereft of merit; hence, should be dismissed in its entirety.

The question for determination is whether the prosecution had proved its case in the trial court sufficiently to ground conviction on the charge of armed robbery levelled against the appellant herein.

It is the appellant's stance that the evidence of visual identification upon which the conviction entered by the trial court was pegged on is patently weak to sustain conviction. Undeniably, it is a rule of law that;

"Where a conviction is wholly dependent upon identification of the accused by one witness, it is the duty of the court to satisfy itself in all circumstances that it is

safe to act on such identification." **Daniel Odongo & Another vs. Republic** [1978] LRT 62.

In **Republic vs. M.B. Allui** (supra) the court held:

"In every case in which there is a question as to the identity of the accused, the fact that there having been a description given and the terms of that description, are the matters of the highest importance of which evidence ought to have been given first of all, of course by the person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom description was given."

And, in **Felician Joseph vs Republic** (supra), the court stated:

".....visual and aural identification evidence be that of a stranger or a previously known person, particularly one done under unfavourable conditions such as at night, is of the weakest kind and unreliable. Such evidence should be approached with utmost circumspection. No court should act on such evidence unless all possibility of mistaken identity are eliminated and the court is fully satisfied that the evidence is absolutely watertight."

Now, the pertinent question arising herein is whether the prosecution case met the scales of justice above mentioned. This question, I attempt to answer hereunder.

Upon scrutiny of the prosecution case at the trial court, the following observations ensues: **First**, the alleged robbery was perpetrated against

the victim who manifestly knew the appellant. The victim told the court that while he was outside the shop, awaiting his colleague (PW2) to close the shop, one Ramadhani, the appellant herein appeared in company of a stranger, held him tightly whereas his accomplice threatened to cut him with a machete, forcing him to yield money and mobile phone to them. PW3 deponed in the trial court that when he was called to intervene, he found the victim on the ground crying, having sustained a cut wound on his ear. Upon inquiry, the victim mentioned Ramadhani Hussein and his accomplice as the perpetrator of the alleged robbery. As rightly asserted by the respondent's counsel, mentioning the perpetrator at the earliest opportunity gives assurance of the reliability of the victim's evidence. See the case of **Abdul Ally Chande vs. Republic** (supra), among others.

Secondly; the victim told the court that the shop front was illuminated by blazing electric light which enabled him to identify the appellant properly. I need not mention the fact that the alleged robbery was executed at a close distance.

Thirdly, having identified the appellant, the victim, and his brother, PW3 had reported the incident to the appellant's relative (guardian). The appellants relatives cooperated by promising to follow up on the matter. However, it was deponed that the appellant had absented from home for

several days before he was arrested. This piece of evidence which was not controverted neither cross-examined, further implicates the appellant.

Fourthly; the fact that the appellant made defence in that he was at loggerheads with PW3 over the woman they were competing for, further ascertains that the appellant was familiar to the victim.

Based on the above grounds, I am on all fours with the respondent's counsel in that the evidence of identification had been watertight to be relied upon to ground conviction against the appellant herein.

It was alleged by the appellant that he was convicted on the weakness of defence. I am of the opinion that his allegation is an afterthought. The record entails that the trial court had weighed the appellant's defence in that he was at loggerheads with PW3 over the woman, which prompted the PW3 to concoct the case herein against him. However, the trial court reasoned that the appellant never raised this matter when PW3 was testifying in court. Hence, the trial court considered the accused defence an afterthought. As rightly opined by Mr. Maleko, the trial court had convicted the appellant on the credibility of prosecution case, not his weak defence.

Likewise, the appellant alleged that the victim failed to describe his stolen property. The record of the trial court entails that the victim enlightened

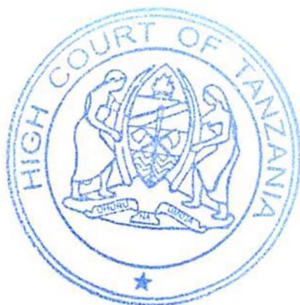
the court that his stolen property was the mobile phone make Techno. In the circumstances of this case, this description was sufficient. Be that as it may, the wanting description was not fatal to the prosecution case in the circumstances of the case.

And, with respect to the allegation that the accused relatives were not summoned to testify in court, I am of the view that such witnesses were not crucial for proof of the case. Their testimony was not material for proof of the case; hence, no effects was occasioned to the prosecution case. Otherwise, the appellant would have procured their attendance if he considered them material witnesses to the case.

That said, I find the appeal herein devoid of merit. I hereby dismiss the appeal in its entirety. The conviction and sentence entered by the trial court are hereby upheld.

So ordered.

DATED at DAR ES SALAAM this 27th November, 2023.




O. F. BWEGOGGE
JUDGE