IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 136 OF 2023

(Original Criminal Case No. 278/2021, District Court of Kinondoni (Hon. Lyamuya. A.M., PRM)

ABDALLAH ABDI@BODO.....1ST APPELLANT
ASHA HASSAN ALLY.....2ND APPELLANT

VERSUS

REPUBLIC..... ..... RESPONDENT

Date of Last Order: 01/11/2023

Date of Judgment: 17/11/2023

JUDGMENT OF THE COURT

KAFANABO, J.:

This is an appeal that emanates from the decision of the district court of Kinondoni at Kinondoni, (*Hon. A.M. Lyamuya, PRM*) dated 27th March, 2023. The appellants herein were charged with the offence of armed robbery contrary to section 287A of the Penal Code, Cap 16 [R.E. 2019]. It was stated in the particulars of the offence that the appellants on the 6th day of April 2021 in the Mwananyamala area within Kinondoni district, in Dar es Salaam Region, stole one motorcycle with registration number MC143CHG, make Bajaj Boxer, valued at Tanzania Shillings 2,600,000/= a property of Daudi Mwakatobe, and immediately before and after such stealing did threaten one

Juma Kombo, a rider, with a machete in order to obtain and retain the said property.The appellants were prosecuted, convicted as charged, and sentenced to serve imprisonment for a term of thirty years.

The appellants were aggrieved by the decision of the trial court and on 1st June, 2023 filed in this court a petition of appeal containing two grounds of appeal. Moreover, on 20th September 2023, the appellants filed five additional grounds of appeal the substance of which is reproduced as follows:

1. The learned trial magistrate erred in law and fact to convict the appellants relying on caution statements taken contrary to the Criminal Procedure Act, as they stayed in police remand for a long time and no reason was advanced by the prosecution, the process amounts to torture.
2. The learned trial Magistrate erred in law and fact to convict appellant using the PW2 evidence, who failed to give prior information to PW1 or PW2 on the physique or attire of the 1st and 2nd appellants.
3. The learned trial Magistrate erred in law and fact to convict the appellant using improper identification parade which was conducted in total contravention of PGO 232, hence exhibit P5 does not indicate who

was involved in that particular parade and parameter used to identify appellants.

4. That the learned trial magistrate erred in law and fact to convict 2nd appellant using PW2 incredible evidence while prosecution failed to summon any witness from hair dressing salon at Mwananyamala area to collaborate their evidence.
5. That the learned trial Magistrate erred in law and fact to convict appellants while no evidence established that motorcycle with registration number MC 143CHG, make boxer was the same with motor MC652CXR *Fabo Ones* with chassis number MD ZAZIBY3KWD86742 and MD ZAZIBY3KWD8672 respectively.

Ground one of the additional grounds of appeal is almost the same as that of the original grounds of appeal. The second ground of appeal of the original grounds of appeal is a general ground challenging that the offence was not proved beyond a reasonable doubt. Therefore, this court will consider the additional grounds of appeal as filed in the petition of appeal dated 29th September 2023 as they cover the original grounds of appeal.

As regards the first ground of appeal, the appellants are challenging their conviction as wrongful because it is based on the alleged custodial

investigation and caution statements taken contrary to the Criminal Procedure Act [Cap. 20 R.E. 2019]. According to their submissions, they were arrested on 1st September 2021 (1st accused) and 15th August 2021 (2nd accused), and both were arraigned in court on 15th September 2021.

They further submitted that, according to exhibits PE2 and PE4, the appellants' caution statements were recorded on the days they were arrested. However, they submitted that, according to the circumstances of the case the appellants overstayed in remand either before exhibits P2, P4, and P5 were taken. They also alleged torture and beatings when in police remand. The cases of Awadh Gaitani@ Mboma v. Republic, Criminal Appeal No. 288 of 2018, and Selemani Yahaya@ Zinga v. Republic, Criminal Appeal No. 533 of 2019 were cited in support of their submission.

The respondent submitted that the appellant's ground of appeal is baseless given that the appellants objected to the admission of exhibits PE2 and PE4, but the same were cleared by the trial court after conducting a trial within a trial. This court was referred to pages 18, 19, 24, 25, 36, and 37 of the trial court proceedings. Also, cases of **Nyerere Nyague vs Republic (Criminal Appeal Case 67 of 2010) [2012] TZCA 103 (21 May 2012), Sylvester s/o Fulgence & Another vs Republic (Criminal Appeal 507 of 2016)**

[2019] TZCA 476 (11 December 2019), Richard Lubilo and Another vs Republic (Criminal Appeal 10 of 1995) [2001] TZCA 29 (17 May 2001) were cited in support of the submission.

The Appellants, in-ground two of the appeal, submitted that PW2, Juma Kombo, did not give sufficient description of the assailants at the time of the incident. Further PW2 did not state the distance between him and the 2nd appellant, and the time spent in the commission of the offence. It was their submission that failure to give prior description to the police investigator, or any other person casts a doubt on the way he identified the appellants. The cases of **Bonifaces Sininga v. R, Criminal Appeal No. 274 of 2007 (unreported), and Jaribu Abdallah v. R [2003] TLR 271** were cited in support of their submission. It was their submission that the PW2's visual identification was insufficient to warrant conviction against the appellants.

Regarding ground three, it was submitted that the 1st appellant was convicted on reliance of an improper identification parade conducted in contravention of PGO 232 because exhibit P5 does not indicate who was involved in the said identification parade. The prosecution witness did not testify that PW2 gave them a description of the 1st appellant before the parade. The cases of **Yosiala Nicholaus Marwa and Two Others v. R.,**

Criminal Appeal No. 193 of 2016, and James Reginald MMbando v. R., Criminal Appeal No. 324 of 2017 were cited in support of the submission. It was further submitted that the purpose of the identification parade was not explained to the 1st appellant.

The respondent argued that a person can only be convicted on evidence of identification if the court is satisfied that such evidence is watertight and leaves no possibility of errors. The case of **Samson Samwel vs Republic (Criminal Appeal 253 of 2017) [2021] TZCA 422 (**27 August 2021) was referred to by the Respondent.

Nevertheless, it was the respondent's further submission that, the appellants' identification was proper. The reason being that the testimony of PW2 was very clear on what transpired until when he was robbed of a motorcycle in broad daylight, and that the robbery was done on a very close range. However, the respondent agreed with the appellants that no prior description of the 1st appellant was given by PW2 before the 1st appellant was identified, but was quick to point out that, the testimony of PW2 was corroborated by the caution statements of the appellants (exhibits PE2 and PE4).

Ground four was to the effect that the 2nd appellant was convicted using incredible evidence, and the respondent failed to call material witnesses from the hairdressing salon where the 2nd appellant was arrested. The appellants argued that the respondent should have paraded witnesses from a salon where a 2nd appellant was arrested. The appellants consider the witnesses from a salon to be material.

The respondent submitted that this appellants' ground of appeal is baseless, since no specific number of witnesses is needed to prove a fact, referring this court to section 143 of the Evidence Act, Cap. 6 [R.E. 2022].

As regards the 5th ground of appeal, the appellants submitted that the respondent failed to prove that the motorcycle with registration number MC143CHG was the same as the motorcycle with registration No. MC652CXR.

The appellants, also generally argued, on a sixth ground of appeal, that the respondent failed to prove the case beyond reasonable doubt.

Responding to grounds 5 and 6 of the appeal, the respondent submitted that the grounds of appeal are baseless since all the ingredients of the offence were proved and the ownership of the motorcycle was proved by PW1 by

tendering exhibit PE1. Further, the 2nd appellant's confession incriminated the 1st appellant.

After reviewing the parties' submissions, this court will consider the relevant grounds of appeal as expounded by the parties' submissions herein.

Commencing with the first ground of appeal, the appellants are challenging their conviction as wrongful as it is based on the alleged custodial investigation and caution statements taken contrary to the Criminal Procedure Act Cap. 20 R.E. 2019. However, it should, without hesitancy, be pointed out that there was no any evidence that was adduced in the trial court to prove their allegation of torture or overstaying in police remand before making the relevant confessions. They claimed that according to the circumstances of the case, the appellants overstayed in remand either before or after exhibits PE2, PE4, and PE5 were taken. They also alleged torture and being beaten when in police remand. But none of these were proven. It is unfortunate to the appellants that, the supposed circumstances and alleged torture, if any, were neither described nor proved.

This court inclines to accept the respondent's submission that exhibits PE2 and PE4 were cleared by the trial court after conducting a trial within a trial.

This is clearly indicated on pages 18, 19, 24, 25, and from pages 31 to 37 of the trial court proceedings. In the case of **Richard Lubilo and Another vs Republic (Criminal Appeal 10 of 1995) [2001] TZCA 29** (17 May 2001), The court of appeal held that:

> *'Ideally matters of voluntariness of confession are determined in a trial within a trial and it is at this stage the application of section 29 is considered.'*

Given that the voluntariness of the confessions made by both appellants was tested as per the requirements of the law in a trial within a trial, and the trial court found that they were made voluntarily by the appellants themselves, this court finds no fault in the decision of the trial court in admitting exhibits PE2 and PE4. Further, the contents of the said exhibits were corroborated by the evidence of PW2, PW3, and PW4. The cases of **Awadh Gaitani@ Mboma v. Republic, Criminal Appeal No. 288 of 2018,** and **Selemani Yahaya@ Zinga v. Republic, Criminal Appeal No. 533 of 2019** by the appellants are thus distinguishable. At this juncture, 1st ground of appeal is hopeless and thus crumbles.

Grounds two and three of the appeal will be determined together as they are all challenging the issue of identification. As regards the issue of visual identification it was the appellants' submission that PW2, Juma Kombo, did not give sufficient description of the assailants at the time of the incident, and did not state the distance between him the appellants and the time spent in the commission of the offence. It was their submission that visual identification was insufficient to warrant conviction against the appellants.

The respondent was of a different view that identification was proper. The basis is that the testimony of PW2 was very clear on what transpired until when he was robbed of a motorcycle in broad daylight, and that the robbery was done at a very close range. It is this court's view that the way PW2 identified the 1st appellant met all requirements of proper visual identification as stated in the case of Waziri Amani vs Republic (Criminal Appeal 55 of 1979) [1980] TZCA 23 (6 May 1980): the Court of Appeal observed:

> *"Evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely watertight".'*

In the present case, the robbery was done in daylight, at a very close range between the appellants and PW2. The 1st appellant and his colleague even slapped PW2 with a machete. Further, the 2nd appellant spent some time with PW2 as a passenger when at Kariakoo negotiating for the ride, during the ride, and at Mwananyamala Hospital. The closeness of the range between the 2nd Appellant and PW2 is unquestionable given the nature of the ride, and the 2nd appellant even managed to snatch an ignition key from PW2's motorcycle, when they reached Mwananyamala.

It is noted that the identification of 1st appellant through identification parade, is marred with an irregularity of absence of prior description which vitiated the said identification. (See: **Yosiala Nicholaus Marwa & Others vs Republic (Criminal Appeal 193 of 2016) [2019] TZCA 147** (9 April 2019).

However, the vitiated identification parade does not let the 1st appellant off the hook. This is due to other factors that connect the 1st appellant with the commission of the offence. The first one is that both appellants, through their caution statements (exhibits PE2 and PE4) admitted the commission of the offence. The narration of events in the said exhibits connects well and

undoubtedly, taking into account the fact that both appellants admitted to knowing each other very well.

Second, it is the 2nd appellant's arrest and confession that led to the discovery and arrest of the 1st appellant, without which the 1st appellant would have been at large. Third, the 1st appellant was caught red-handed, with the Motorcycle stolen from PW2 on 6th April 2021 with chassis number MD2A21BY3KWD86742, make boxer, whose original registration number is MC143CHG. The said factors point directly to the 1st appellant participating in the commission of the offence, the fact which was corroborated by the testimony of PW2, PW3, PW4, and PW5. Further corroboration is made by the seizure certificate exhibit PE3 and the motorcycle itself exhibit PE4 bearing a phony registration number as MC652CXR.

Therefore, the appellants' grounds two and three of the appeal also fail.

In respect of ground four of the appeal, the appellants are challenging the respondent's failure to call witnesses from the hairdressing salon where the 2nd appellant was arrested. The appellants did not explain why they think that the said witnesses are material to the respondent's case. It follows that section 143 of the Evidence Act, Cap.6 R.E. 2019 provides that no particular number of witnesses shall, in any case, be required for the proof of any fact.

An adverse inference may be inferred to the prosecution case only if it is proved that a particular witness who was not called by the prosecution was material in proving or disproving a particular fact. See **Simon Edson @ Makundi vs Republic (Criminal Appeal 5 of 2017) [2020] TZCA 1730** and **Allan Duller vs Republic (Criminal Appeal 367 of 2019) [2021] TZCA 689.** Therefore, this ground of appeal also lacks merit.

As regards ground five of the appeal, the appellants submitted that the respondent failed to prove that the motorcycle with registration number MC143CHG was the same as the motorcycle with registration No. MC652CXR. The respondent submitted that the ground of appeal is baseless since the ownership of the motorcycle was proved by PW1 by tendering exhibit PE1, which was a motorcycle registration card.

This court is also of the view that exhibit PE1 (motorcycle registration card), and exhibit PE4 (motorcycle itself) proved beyond doubt that that motorcycle with registration number MC143CHG was the same as the motorcycle with registration No. MC652CXR as it bears the same chassis number as appearing in the registration card of MC143CHG. The motorcycle in question was inspected and recognized by almost all respondent's witnesses from PW1 (owner of the motorcycle), PW2 (rider of the motor vehicle), PW3 (a

police officer who arrested the 1st appellant with a motorcycle), PW4 (a police officer custodian of exhibits) and PW5 (an independent witness). Therefore, in the light of the evidence adduced, ground five of the appeal also collapses.

The issue that the respondent failed to prove the case against the appellants beyond a reasonable doubt will not detain this court for long, given the determination of other grounds of appeal herein above. The starting point is the law creating the offence, section 287A of the Penal Code, Cap. 16 R.E. 2019 which provides that:

> *'A person who steals anything, and at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or immediately before or after stealing uses or threatens to use violence to any person in order to obtain or retain the stolen property, commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment.'*

The above-reproduced section makes it clear regarding the ingredients of the offence of armed robbery which, to a greater extent, were restated in the case of **Shabani Said Ally vs Republic (Criminal Appeal 270 of 2018) [2019] TZCA 382** (6 November 2019) where it was held that:

'It follows from the above provision of the law that in order to establish an offence of armed robbery, the prosecution must prove the following: -

1. There must be proof of theft; see the case of Dickson Luvana v. Republic, Criminal Appeal No.1 of 2005 (unreported);

2. There must be proof of the use of a dangerous or offensive weapon or robbery instrument against at or immediately after the commission of robbery.

3. That use of dangerous or offensive weapon or robbery instrument must be directed against a person. See:- Kashima Mnadi v. Republic, Criminal Appeal No. 78 of 2011 (unreported).

The relevant ingredients of the offence were meticulously considered by the trial court. Page 11 of the judgment stipulates the ingredients of the offence. Further, the trial court, on pages 11-14 of the judgment made an analysis of the facts and the law and decided that the respondent proved the charge of armed robbery against the appellants herein beyond reasonable doubt.

This court finds no reason to fault the trial court findings and thus confirms the decision of the trial court and thus upholds conviction of the accused persons for the offence of armed robbery. The sentence of thirty years' imprisonment for both accused is hereby confirmed.

The appeal is hereby dismissed.

It is so ordered.

K. I. KAFANABO

JUDGE

17/11/2023

Judgment delivered in the presence of the Appellants in person and in the presence of Salome Mafuru State Attorney, for the Respondent.

Right of appeal explained.

K. I. KAFANABO

JUDGE

17/11/2023