IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 84 OF 2021

(Arising from Hai District Court in Criminal Case No. 111 of 2020.)

RAMADHAN IDD SWAI @NYANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

19th January & 16th February, 2023

A. P. KILIMI, J.:

The appellant one RAMADHAN IDD SWAI@NYANI was arraigned before the District Court of Hai, jointly with one KELVIN ULIRIKI MTEI for an offence of Armed Robbery contrary to Section 287A of the Penal Code Cap. 16 R.E. 2002 read together with Miscellaneous Amendment Act No. 3 of 2011. At the trial court, hearing started with both accused persons but later Kelvin Uliriki Mtei who was the first accused at the trial court escaped. The trial further continued in his absence. In the end both were convicted and sentenced thirty years imprisonment each.

Aggrieved with the conviction and sentence, the appellant hereinabove preferred this appeal basing on the following grounds: -

1. That the learned trial Magistrate grossly erred in both law and fact in failing to note that there are variances between the charge and evidence on records, particularly the scene of the alleged crime, the owner of the alleged stolen and recovered bajaji and the type of weapon allegedly used in commission of the said offence. The above variance rendered the charge to be fatally and incurable defective as it was not at all supported by the evidence on records.
2. That, the learned trial Magistrate grossly erred both in law and fact in holding that the appellant was positively recognized by the victim of the alleged offence (PW2) at the Scene of crime despite the conditions and circumstances being not conducive for proper identification.
3. That the learned trial magistrate grossly erred both in law and fact in failing to note that, once the conditions and circumstance at the scene of crime are not conducive for proper and correct identification, the question of familiarity does not arise at all.
4. That, the learned trial Magistrate grossly erred both in law and fact in failing to note that, the victim (PW2) never mentioned the name of the 2nd accused (now the appellant) neither to PW1 (the investigator), The PW3 (his employer) nor to the police station when he went to report on the alleged incidence. Therefore, unexplained delay of failure to name the suspect at

the earliest possible opportunity cannot attract the confidence of the witness before the court of law.

5. That the learned trial magistrate grossly erred both in law and fact in using speculative ideas which influenced his judgment. As he used the evidence which were not apparent on face of record to convict the appellant.
6. That the learned trial magistrate grossly erred both in law and fact in failing to note that the victim (PW2) never mentioned the source of lights and its intensity which aided him to recognize the appellant at the scene of crime.
7. That the learned trial magistrate grossly erred in law and fact in failing to note that PW2 never recognized the appellant at the scene as his invader/culprits, as when testifying, he mentioned the appellant as Ramadhani Nyari while in the charge sheet the appellant has been named as Ramadhani Nyani. Further in his evidence in chief he never mentioned the appellant's attire nor the physique.
8. That the learned trial magistrate grossly erred in both law and fact in convicting and sentencing the appellant basing on contradictory, incredible, weak, tenuous, and wholly unreliable prosecution evidence from the prosecution witnesses.
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 against the appellant beyond reasonable doubt and to the required standard by the law.

Before I proceed with the grounds above, let me recap the background facts giving rise to this appeal, these may be briefly stated as follows: On 05/06/2020

at about 19:00 hours the victim (PW2) who work as a rider of Bajaji, was at Boma stand, he got two passengers, they agreed he should ride them to a place known as Urassa Mashine for a fare of 1,500/= Tshs. Then the journey started but when they reached at Sangoma Area, one of his passenger who the victim named as Ramadhani Nyari hit him on his back with a sharp object. Then he was pushed out of the bajaji. The other one hit him on his head with a stone and started to bleed. While he was on the ground bleeding, the two took the bajaji and did ride away. After a few minutes he gained energy, and went to police Boma to report the incident, thereat he was given PF3 and went to Hai District hospital for treatment. Later he got information they said Bajaji has been apprehended at Tanga Korogwe.

Before this court the appellant appeared in person while Ms. Mary Lucas Senior State Attorney appeared for the Republic. In his oral submission to the grounds of appeal, the appellant had nothing to add, but rather, asked for the court to adopt the grounds of appeal as appearing on his memorandum.

On the other hand, Ms. Mary Lucas Senior State Attorney consolidated all grounds of appeal by answering ground number nine which in essence reflect all grounds. In fact she has supported the grounds of appeal raised by the appellant. In her submission, Ms. Mary Lucas argued that, as per the records, the appellant has been charged with the offence of armed robbery contrary to Section 287A of

Penal Code Cap 16 R.E. 2019, and he was sentenced to serve 30 years. That due to the said provision, the prosecution needs to prove theft, and use of weapon before or after in order to get the property capable of being stolen. Supporting this argument, she cited the case of **Shaban Said Ally v. R** Criminal Appeal 270 of 2018 CAT (TANZLII).

Ms. Mary Lucas further submitted that, according to the proceeding of the trial court at page 17 to 20,the evidence shows the offence of armed robbery was indeed committed since PW2 was beaten using weapons and his Bajaji was taken, but, the evidence is not clear as to who committed the allegedly offence. This is because, the incidence allegedly happened during night, and it is obvious that PW2 failed to identify Ramadhan Nyali, because he alleged to have identified him by his face without stating the circumstances under which he identified him. That PW2 didn't explain the source of light, distance, and time used, so as to avoid mistaken identification. She further insisted that , since none of the circumstances was explained by PW2, it is quite clear that the appellant's identification was doubtful and violated the principles laid down in the case of **Waziri Aman v. R 1980** (TLR) 250 where the decision has been approved by the recent case of **John Mayala v.R** Criminal Appeal No. 345 of 2016.

Further, Ms. Mary Lucas also argued that, in his testimony, PW2 contradicted himself on how he recognized the appellant. That during examination in chief, PW2 alleged that he knew the appellant by his face and the same witness in cross examination stated that he doesn't know the appellant's name. However, PW2 Also, proceeded mentioning the name of the appellant that he is Ramadhani Nyali and thus raises doubts as to his credibility.

Moreover, Ms. Mary Lucas also challenged the appellant's arrest and his connection to the alleged offence. That as per the evidence, it was obvious that the one who was arrested and arraigned before the court was one Kelvin Mtei. Surprisingly, the record is even silent as to how the appellant was arrested. She further submitted that, this can be revealed from the evidence of PW1 D/C Gaudence from page 13 to 15, as she stated that she was informed about the stolen bajaji to be found at Msambiati area Korogwe District. That she went there and arrested the 1st accused who is Kelvin Uliriki Mtei, and filled the certificate of Seizure which was also admitted before the trial court.

The learned State Attorney also pointed out various irregularities found in the trial court's proceedings including; the 1st accused person's conviction and his disappearance in court. That the prosecution side proceeded with the case in absence of the 1st accused person without properly addressing the court as per

Section 226 Criminal Procedure Act (CPA) Cap. 20 R.E. 2022. She concluded by submitting that, this is a material irregularity but also these doubts stated caused failure by the prosecution. She thus prayed this court to allow this appeal forthwith.

I have entirely scanned the trial court's record, grounds of appeal and submission from Ms. Mary Lucas, the learned Senior State Attorney who supported this appeal. Having examined the grounds of appeal, I am of settled opinion that the grounds are centered on three issues, first is whether there was variance between the charge and evidence tendered. Second is, whether the appellant was properly identified at the scene of crime. Third is the issue as to whether the charge against the appellant was proved beyond reasonable doubt. Thus, by answering these issues, all grounds raised above will be dealt with.

On the first issue, it is undisputed that, the appellant and another person who is not part of this appeal were charged with an offence of armed robbery under section 287A of the Penal Code. In order to prove the charge on the required standard that is beyond reasonable doubt, the prosecution was required to prove all the ingredients of the offence of armed robbery. Section 287A of the Penal Code as cited above provides as follows;

*"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."*

(Emphasis added)

In the above provision I have highlighted the ingredients of the offence of armed robbery which must be established in evidence in order for the offence to be proved. On his first ground of appeal the appellant complained that there was variance between the charge and evidence on record particularly on the scene of crime and the weapon allegedly used in the commission of the said offence. I do agree with the appellant on this ground because the records are quite clear. In order to appreciate the above stance, I quote the content of the charge that stated the particulars of the offence hereunder:

*"KELVIN S/O ULIRIKI MTEI and RAMADHANI S/O IDDI SWAI @NYANI on the 5th day of June, 2020 at Kambi ya **Raha** within Hai District in Kilimanjaro Region, did steal*

one motorcycle make BAJAJ RE Reg No. MC 194 CBR valued at Tshs 7,500,000/= the property of one OMBENI S/O NELSON NKYA and immediately before such stealing did piercing (sic) him by ***knife*** *in order to obtain or to retain the said property."*

[Emphasize supplied]

Looking at the evidence on record in particulars, the testimony of the victim who testified as PW2 in comparison with the particulars stated in the charge the variance is so clear. As recorded on page 17 of the typed trial court proceedings, PW2 testified that while at Boma stand he got two passengers one of them being the appellant who asked him to take them to Urassa Mashine and when they reached at Sangoma Area is where the appellant hit his back with a sharp object. That means the incidence took place at Sangoma area and not Kambi ya Raha as alleged in the charge. Another variance is on the weapon alleged to have been used. PW2 said he was hit by a sharp object but the charge states that a knife was used.

The above pointed discrepancies are as fatal as they go to the root of the case. The weapon and the crime scene are important ingredients which form the offence, thus these variances cannot leave the prosecution case unshaken. The

evidence on record is supposed to prove the charge but given the pointed-out variances they dismantle the prosecution case. (See the case of **Maramo Slaa Hofu and Three Others v. The Republic, Criminal Appeal No 246 of 2011**(CAT) at Arusha and **Said Ally Ismail v. Republic** Criminal Appeal No.249 of 2008 and **Mathias Samwel v. Republic,** Criminal Appeal no. 271 of 2009 CAT (both unreported).

Next to be considered is the second issue, whether the appellant was identified, it is undisputed the said time of incident already the darkness prevailed. It is a trite law in order to eliminate the possibility of mistaken identity, courts of law have developed a list of factors or guidelines to be considered when examining such evidence. The list is however, not conclusive, depending on the circumstances of each case. In **Mathew Stephen @ Lawrence v. Republic,** Criminal Appeal No. 16 of 2007, the Court of Appeal of Tanzania listed the following factors for consideration in identification cases;

> *"To exclude all possibilities of mistaken identity, the Court has therefore to consider the following.* ***First,*** *the period under which the accused was under observation by the witness.* ***Second****, the distance separating the two during the said observation.* ***Third,*** *if it is at night, whether there was sufficient light.* ***Fourth****, whether the witness has seen the accused before and if so, when and how often.* ***Fifth,***

in the course of examining the accused, did the witness face any obstruction which might interrupt his concentration. ***Sixth****, ' the whole evidence before the Court considered, were there any material impediments or discrepancies affecting the correct identification of the accused by the witness."*

According to the typed record of the trial court at page 18-19 of the proceeding, PW2 described existence of lights at the Boma stand where he was hired by the appellant and another person, when, he was cross examined by the appellant he said that he was able to identify the appellant by the aid of electric bulb which was at the bus stand. Nevertheless, PW2 did not describe the intensity of those lights and the radius within which those lights could cover.

Be as it may, in evaluating the evidence at page 8 and 9 of the judgment, the learned Trial Magistrate explained that the lights were from the shops which were at the bus stand and that the Bajaj riders normally park close to the shops. With respect, no any witness came up with such evidence and it was not on record. PW2 never explained where exactly he had parked his Bajaji neither did he mention that the lights were from the shops nor he parked near the shops.

The issue of describing the intensity of light has been emphasized in a number of cases as it assists the court in determining the issue of visual identification when

it comes into evidence. PW2 did not describe the intensity of such lights or the proximity or radius within which that light could cover. (See the case of **Epafula Timotheo v. R,** Criminal Appeal No. 350 of 2014 (unreported), In view thereof it is my opinion the said discrepancies renders the identification evidence given insufficient, thus the identification of the appellant was not ideal.

In respect to the last issue which definitely carries the gist of this appeal, according to the record of the trial court proceedings at page 19 when PW2 was being cross examined by the appellant. PW2 is recorded to have said that he did not know the appellant's name but prior to that on page 18 during his examination in chief he said that he knew the appellant before the incident as he was a fellow Bajaji rider at Boma stand. Also PW2 said at this page that after the incident he went to Police Boma and reported this matter. No evidence on record that he mentioned the name of the appellant or described him at the said police station when he reported this incident. It also a trite law, mentioning 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 first report to the police officer who interrogates him or anybody else. See **Waziri Amani vs Republic** (supra), in **Marwa Wangiti Mwita and Another vs. The Republic**, Criminal Appeal No. 6 of 1995, the Court of Appeal

of Tanzania observed the following in relation to need to have an identified suspect named by the identifying witness at the earliest possible moment.

> *"The ability of the witness to name a suspect at the earliest possible opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry"*

Another unusual fact is that, there was no evidence on record on how the appellant was apprehended. PW1 who was the investigation officer who was assigned the duty of this case next day after PW2 reported, did not explain on how the appellant was arrested. He only testified on how he found the stolen property in the hands of the first accused who escaped the trial and arrested him. Regarding the appellant he only said that he did not find him with anything while he had no explanation on how he was arrested. PW1 said he knew the appellant before the case but he did not give any evidence that connected the appellant with the charged offence. He testified that the victim was the one who mentioned the names of the persons who robbed him.

Lastly, the trial court Judgment observed that the defence submitted in written submission ought to have raised in the defence or cross examination by

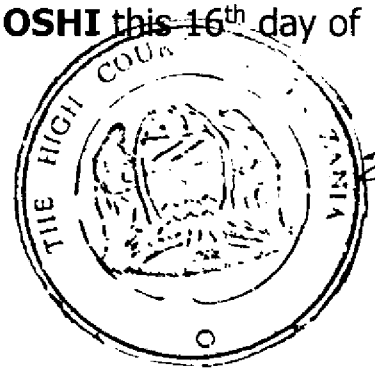
the appellant to the prosecution witnesses and relied on the principle of failure to cross-examine a witness on a vital point ordinarily implies the acceptance of truth, thus anything raised after is taken as an afterthought. I concede with this observation, but to my opinion in criminal case the burden of proof must remain intact to the prosecution without shifting the burden to defence. This standard is for prosecution to prove beyond reasonable doubt. Therefore, accused person can neither be convicted based on his inability to defend himself, nor any weaknesses in his defence. This enshrines the principle that it is not the duty of the accused to defend his innocence in a criminal trial. (See the case of **Joseph John Makune v. Republic** [1986] TLR 44, **Simon Kilowoko v. Republic** [1989] TLR 159 and **Samwel Silinga v. Republic** [1993] TLR 149.

Mindful, this being the first appellate court, I am duty bound to make a proper evaluation of the entire evidence in order to satisfy on whether or not the conviction of the appellant was justified or right. I have therefore considered and examined the evidence of PW2 (the victim), as observed above it have major inconsistencies which cast doubt on prosecution case. Subsequently, it is my considered view that, the guilt of appellant was not proved to the required standard stated above.

I accordingly allow the appeal in its entirety, quash the appellant conviction and set aside the sentenced thirty years imprisonment which was imposed on

him. I order for his immediate release from prison if he is not otherwise held for some other lawful cause.

DATED at **MOSHI** this 16th day of February, 2023.



A. P. KILIMI

JUDGE

16/2/2023

Court: - Ruling delivered today on 16th day of February, 2023 in the presence of Ms. Mary Lucas Senior State Attorney for the Respondent. Applicant also present in person.

Sgd: A. P. KILIMI

JUDGE

16/02/2023

Court: - Right of Appeal duly explained.

Sgd: A. P. KILIMI

JUDGE

16/02/2023