THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA SUB REGISTRY

PC. CRIMINAL APPEAL NO. 8 OF 2023

(From criminal Appeal No. 18 of 2009 of the district court of Chunya in Criminal Case No. 128 of 2009 of Primary Court of Chunya at Makongolosi)

DAUDI MWAKALINGA .....APPELLANT

VERSUS

MAJUTO LUCAS .....RESPONDENT

JUDGMENT

Date of hearing: 11/3/2024

Date of judgement: 28/3/2024

NONGWA, J.

The appellant Daudi Mwakalinga has been in court for fifteen years trying to assail the judgment in Criminal Case No. 128 of 2009 of the primary court of Chunya district at Makongolosi in which he was convicted and sentenced together with one Baraka Lyela not part to this appeal to imprisonment of fifteen years with the offence of robbery with violence contrary to section 285 and 286 of the Penal Code Cap. 16 of the Laws of Tanzania. Particulars of the offence as reproduced in the judgment is that on 11/8/2009 at 21:30 night at Makongolosi within Chunya district in Mbeya region the appellant and another together and jointly by using

force and threat did rob the complainant his handset make of Nokia valued at Tsh 140,000/= all items valued at Tsh. 210,00 the act which is contrary to the law. After full trial the appellant was convicted to minimum sentence of fifteen year's imprisonment.

His appeal to the district court of Chunya in Criminal Appeal No. 18 of 2009 proved futile. The appellant appealed to this court vide Criminal Appeal No. 13 of 2013 but it was struck out for being incompetent. Aggrieved he appealed to the Court of Appeal through Criminal Appeal No. 407 of 2013 which met the preliminary objection questioning its competence. The Court of Appeal sustained objection and eventually the appeal was dismissed with an advice that the appellant was at liberty to apply for extension of time within which to file the appeal in this court. Acting on those advice, the appellant through Misc. Criminal Application No. 8 of 2023 applied and was granted extension of time to file the appeal out of time, hence this appeal.

In the self-crafted petition of appeal the appellant fronted six grounds of grievances which can be summarized; **one,** that the appellant was convicted while the stolen mobile phone was not found with him; **two,** that the complainant's case and defence was not evaluated properly hence reaching wrong decision; **three,** that a doctor who prepared PF3 was not called as required by section 240(3) of the CPA; **four,** that the

court did not consider contradictions in evidence of PW1, PW2 and PW3, that no police was called and certificate of seizure produced; **five,** that the appellant was convicted on poor evidence of visual identification and no prior description was given, hence case not proved; and **six,** defence evidence was not considered.

When the appeal was called on for hearing the appellant appeared in person, unrepresented. The respondent did not enter appearance. When the appellant was given chance to submit on his grounds of appeal, he prayed the same be adopted and the appeal allowed.

Having considered the record and grounds of appeal, the main complaint is that the case of the respondent was not proved beyond reasonable doubt, the gist of ground 1, 2, 4, and 5, then I will address the remaining grounds should the need arise.

The matter having started in the primary court, this is the second appellate court, as a general principle, the court is not expected to interfere with the concurrent findings of facts made by the lower courts. Interference can only occur, where there is misapprehension of evidence as stated in cases such as the **DPP vs Jaffar Mfaume Kawawa** [1981] TLR 149, **Jafari Mohamed vs Republic,** Criminal Appeal 112 of 2006) [2013] TZCA 344 (15 March 2013; TANZLII) and **Bathromeo Vicent vs**

Director of Public Prosecutions, Criminal Appeal No. 521 of 2019 [2024] TZCA 186 (18 March 2024; TANZLII). In Jafari Mohamed case the court stated;

> *'An appellate court, like this one, will only interfere with such concurrent findings of fact only if it is satisfied that "they are on the face of it unreasonable or perverse" leading to a miscarriage of justice, or there have been a misapprehension of evidence or a violation of some principle of law…'*

In this case from the particular of offence as geared in the judgment and evidence of PW1, the offence was committed at night hours, the respondent identified the appellant by appearance, visual identification. It is trite law that conviction can be grounded on evidence of visual identification, however, before a court can found conviction basing on visual identification, such evidence must be watertight so as to remove the possibility of honesty but mistaken identity. In the case **Waziri Amani vs Republic** [1980] TLR 250, the court held that;

> *'...evidence of visual identification; as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.'*

In the case of **Philimon Jumanne Agala @ J4 vs Republic**, Criminal Appeal No. 187 of 2015 [2016] TZCA 278 (22 October 2016; TANZLII), the court after studying the exposition of the law governing eyewitness identification evidence in various jurisdiction and as commented by some prominent authors, held that;

> *'Aware of this enduring problem, settled jurisprudence both here and the rest of the Commonwealth as well as in the U.S., is to the effect that eyewitness visual identification evidence is of the weakest character and most unreliable. Though totally relevant and admissible, it should be acted upon cautiously after the court has first satisfied itself that such evidence is watertight and all possibilities of mistaken identity or fabrication have been eliminated.'*

In dealing with evidence of visual identification the court is required to consider, among others the following matters; **one,** the time the witness had the accused under observation**; two,** the distance at which he observed him; **three,** the conditions in which such observation occurred, for instance whether it was day time or night time, whether there was good or poor lighting at the scene; **four,** whether the witness knew or had seen the accused before or not; and **five**, all factors on identification considered, it should also be plain that were any material impediment or discrepancies affecting the correct identification of the

accused person by the witness. See also; Shomari **Athumani @ Mwanja & Another vs Republic**, Criminal Appeal No. 650 of 2021 [2024] TZCA 46 (16 February 2024k; TANZLII). A proper identification of an accused person is crucial in proving a criminal charge in order to ensure that any possibility of mistaken identification is eliminated.

In this appeal PW1 is the only eyewitness, part of his testimony goes as follows

> *Ilikuwa tarehe 11/08/2009 majira ya saa tatu na nusu za usiku nikiwa nimetoka kwa dada yangu mama Edward anayeishi Bwawani nilipofika karibu na Gest House ya Milligate nilikutana na vijana wawili ambao kwa pamoja walinizuia, sikuelewa nia yao, ndipo mmoja wao alinikaba shingo, na mmoja aliingiza mkono kwenye mifuko yangu ya suruali na kuweza kuchukua simu aina ya Nokia 1600, pamoja na pesa tasilimu Tshs. 70,000/- nilijitahidi kujinasua lakini walinizidi nguvu nakuweza kukumbia baada ya kufanikiwa kuninyanga'nya vitu hivyi* ***kwa kuwa nilikuwa namtamhua mmoja wao kwa sura,*** *nilienda kutoa ripoti kituo cha polisi muda huo, na nilipewa PF3 kwa matibabu na ambacho nakitoa kama kielelezo hapa Mahakamani.*

The bolded phrase pertains to identification of the appellant and according to the respondent, identification was by visual. There is no evidence regarding light which enabled to identify the appellant and indeed it seems was a stranger to him. I am not losing sight that source

of light was disclosed on question of clarification from gentlemen assessors who set with the trial magistrate. While noting that the case was prosecuted by the complainant himself, I am of the view that he never intended to reveal source of light under which he identified the appellant and therefore answer in questions posed by the court need be ignored. By the way it cannot be regarded as question of clarification the same having not surface in the respondent's testimony. According to Cambridge dictionary clarification is an explanation or more details that makes something clear or easier to understand. Therefore, by asking a completely new question it cannot be said that question was seeking more details from a witness, rather it was building the respondent's case.

The trial magistrate in his judgment discussed ingredients of robbery with violence which he was satisfied were established, however he was satisfied that it was the appellant who committed the offence, there is no recital of evidence pertaining to the appellant's identification. Furthermore, there was no description of the suspect who the respondent is said to have identified at crime scene to the first person he met. Per his evidence he went to report to the police and nothing was said about description of the culprits. It is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give detailed description of such a suspect to a person whom he first reports the matter

to, before such a suspect is arrested. See **Sayi Jalucha & Another vs Republic**, Criminal Appeal No. 443 of 2019 [2023] TZCA 117 (16 March 2023; TANZLII).

In the case at hand, since the incident took place at night under unfavourable conditions, including the terrifying situation obtained at the scene, all conditions of visual identification ought to have been met. The respondent in his evidence stated that *ndipo mmoja wao aliniakaba shingo, na mmoja aliingiza mkono kwenye mifuko yangu ya suruali na kuweza kuchukua simu aina ya Nokia 1600, pamoja na pesa tasilimu Tshs. 70,000/- nilijitahidi kujinasua lakini walinizidi nguvu nakuweza kukumbia baada ya kufanikiwa kuninyanga'nya vitu hivyo…* Unfortunately, evidence is silent how he managed to identify the appellant while he was held in his neck. Also, he did not tell the court who did what between the appellant and his colleague. Having scrutinized the evidence adduced by PW1 before the trial court, I am certain that the respondent (PW1) did not elaborate environment in which he managed to identify the appellant considering that he was in terrifying state and held his neck. To the say the least the appellant was not positively identified.

Another glaring issue is identification of mobile phone which was found with the appellant. The trial court was certain that mark of the mobile phone given by the appellant was sufficient and the same was

found with the appellant. It the law that for identification of stolen property to be sufficient, it must be detailed and must give the description of the stolen property by giving special marks and this should be done before they are shown to the witness and before they are produced as exhibit. Doing so the court is assured that such properties are the ones stolen from the complaints or victims. See **Leonard Mathias Makani and Another vs Republic,** Criminal Appeal No. 579 of 2017 [2023] TZCA 182 (11 April 2023; TANZLII).

In this case, according to the respondent his phone his mobile phone was made nokia 1600 and it had a mark of burn at the screen *ilikuwa na alama kwenye screen kama imeungua* and when put on displayed *pia nilikuwa nimeweka maneno yangu yenye ujumbe "maisha ni kutafuta sio kutafutana"* the said handset was admitted as exhibit PII. What I note from the proceedings the appellant was not asked if had any objection to the same being tendered in court. Also, record is silence on who kept the said phone before it was brought to court and there is no evidence that it was put on to confirm if it had a message as testified by the respondent.

As if that was not enough there is contradiction as to special mark of the phone allegedly stolen from the respondent, while PW1 said it had a burn on the screen, PW2 said that PW1 told him that his phone had a line on screen and mark J behind. With those contradiction it becomes clear

that a phone PW2 alleged was found with the appellant is not the same stolen from the respondent. The contradiction on the special mark of the phone impacted the case of the respondent, making it unproven.

In our criminal justice system like elsewhere, the burden of proving a charge against an accused person is on the prosecution including when the case is prosecuted by private prosecutor or claimant as commonly conducted in primary court. This is a universal standard in all criminal trials and the burden never shifts to the accused. As such, it is incumbent on the trial court to direct its mind to the evidence produced by the prosecution in order to establish if the case is made out against an accused person. This principle equally applies to an appellate court which sits to determine a criminal appeal in that regard.

In convicting the appellant, the trial magistrate was of the view that the appellant did not state in evidence where he was at the night of crime. Part of the judgment reads *ilikuwa ni wajibu wa washtakiwa kuithibitishia mahakama ni wapi walikuwa mnamo tarehe na muda wa tukio kutendeka. Washtakiwa walishindwa kuiondolea mashaka mahakama hii kuwa simu waliokutwa nayo ilikuwa mali ya nani na waliipata vipi….* This incept tell that the trial court wrongly shifted the burden of proof onto the appellant's shoulders, this was wrong because even in cases depending on the doctrine of recent possession, the duty of the prosecution to prove

allegations remains there. In **John s/o Makolobela Kulwa Makolobela and Eric Juma alias Tanganyika vs Republic** [2002] TLR 296 the court stated;

> *'A person is not guilty of a criminal offence because his defence is not believed; rather, a person is found guilty and convicted of a criminal offence because of the strength of the prosecution evidence against him which establishes his guilt beyond reasonable doubt.'*

The appellant having denied to have been involved in the commission of the offence, it became impossible for him to prove the negative. From the description of the mobile phone given by the respondent which was common feature to be found in any used mobile phone, it rendered the allegedly stolen phone unproved. The same was further blown by the contradiction in description given by PW1 and PW2 on the special mark of the stolen mobile phone, thus making the whole complainant's case unproved as required by rule 5(1) of the Magistrates' Courts (Rules of Evidence in Primary Courts) Regulations, G.N. 22 of 1964 to the effect that in criminal cases, the court must be satisfied beyond reasonable doubt that the accused committed the offence.

It is unfortunately that the first appellate court did not put evidence in record to proper scrutiny, it just indorsed the judgment and brushed

away grounds of appeal filed by the appellant without more ado, hence reaching to the erroneous decision.

With the foregoing, I find no need to address the other remaining complaints, the findings above that the case for the respondent was not proven beyond reasonable doubt is sufficient to determine this appeal. Consequently, I allow the appeal, quash the conviction and set aside the sentence imposed on the appellant. The appellant if he is still in prison, should be released forthwith unless he is otherwise lawfully held.

V.M. NONGWA

JUDGE

28/3/2024

DATED and DELIVERED at MBEYA this 28th day of March 2024 in presence of the appellant.

V.M. NONGWA

JUDGE