IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[MOROGORO SUB-REGISTRY]

AT MOROGORO

CRIMINAL APPEAL NO. 8219 OF 2023

(Appeal from the judgement of the District Court of Kilombero Kilombero in Criminal Case No. 386 of 2020 dated 17th November 2021 before Hon. T. A. Kaniki, RMI)

EMANUEL WILSON SONGORO ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

29/05/2024 & 06/06/2024

KINYAKA, J.:

On 5th November, 2020 the appellant herein was arraigned before the District Court of Kilombero hereinafter "the trial court" where he was charged and prosecuted for the offence of Armed Robbery contrary to section 287A of the Penal Code Cap. 16, R.E. 2002.

It was alleged by the prosecution that on 24th June 2020 at about 19:00 hrs at Maendeleo area in Ifakara within Kilombero District in Morogoro, PW1 was on her way back home from her mobile money business using a motorcycle transport facility commonly known as "bodaboda" which was ridden by PW2.

On their way, they meet two persons. One of person blocked PW2, the bodaboda driver, beat his head by using a stick. At the same time another person grabbed PW1 and started assaulting her and inflicted wound cuts in different parts of her body using a bush knife.

It was alleged that the suspects took from PW1, one mobile make TECHO valued at TZS 160,000, four buttons mobile phone make Nokia valued at TZS 180,000, two mobile phones make Itel valued at TZS 50,000, cash money TZS 940,000, one bag of TZS 15,000, two Selcom machine worthy TZS 800,000, one pair of eye spectacles valued at TZS 150,000, hand watch valued at TZS 10,000, Airtel Till of TZS 2,049,000, Tigo Till of TZS 300,000, TTCL Till of TZS 300,000 and one umbrella of TZS 5,000, all valued at TZS 5,259,000.

In his defence, the appellant denied to have been involved in the commission of the offence he was charged with.

Having considered the evidence adduced by both the prosecution and the defense side, on 17th November2021, the trial court found the accused guilty of the offence charged. He was thus convicted and sentenced to serve thirty years imprisonment in jail. Aggrieved by the trial court's conviction and sentence against him, the appellant preferred the present appeal protesting

his innocence basing on thirteen (13) grounds of appeal as reproduced herein below:-

1. That Your Honorable Judge, the process was not fair to the extent of affecting the roots of the case and that the case was not proved beyond doubts to warrant conviction and sentence. The trial Magistrate erred in law and upon facts in reasoning;
2. That Your Honorable Judge, Search was improperly conducted with no Independent witness. Police Officers alone entered my house and conducted search where I was beaten thorough and forced to sign the seizure certificate. Your Honors, the exhibit Mobile phone tendered before the court was brought in the house by the police Officers on the searching date. Despite my objection on the admissibility of the same, the court was not on my side and I wonder to read on the proceeding that I did not object;
3. That there appeared errors on face of records to wit that whatever I objected, the trial Magistrate had wrote "no objection" Your Honorable Judge all these lead to unfair and unjust conviction;
4. That the Identification parade was not conducted professionally. All people attended parade were short and black except I appellant who was

tall and brown. PW3 one F 2180 CPL Nuru took me out of police lock up and called PW1 one Beatrice Mhelule to identify me before the identification parade was conducted. Your honor Judge, this is Grave Miscarrying of Justice as my identity was put on the eyes of complainant (witness) before the process. The irregularity is FATAL and has affected the main part of the proceedings;

5. That the trial Magistrate erred in law and upon Facts for not warning herself the danger of admitting prosecution evidences which were tendered by Police Officers and complainant (victim) leave alone PW6 the medical officer whose testimony has no connection with the Identity of Appellant;
6. That Your honorable Judge, I was arrested at Ifakara Police station where I went to claim for my properties after being released by court under S. 225(5) of the Criminal procedure Act Cap 20 R.E 2022 in Criminal Case No. 149/2020 accused for Burglary and theft. It is PW3 D/CPL Nuru whom we have a conflicting history as he had sexual affairs with my wife until I divorced with her and he, PW3 got Married to my divorced wife because they stated such relation even before our divorce) PW3 had arrested me following his jealousy. The trial failed in reasoning

and assessing the evidence from appellant which shocked the prosecution evidence and leaves unanswered doubts;

7. That the learned trial Magistrate erred in law and fact in relying on exhibit PEI (Techno phone) to convict and sentence the appellant without observing the requirements provided on section 169(1((2) of the C.P.A CAP 20 (RE 2019) now RE 2022;
8. That the learned trial Magistrate erred in law for failure to realize that search was executed in contravention of section 38(1)(2) of the C.P.A CAP 20(RE 2019 now RE 2022) read together with paragraphs l(a)(b) and (r) and 2(a) and (b) of the Police General order (PGO)No 22G;
9. That the learned Magistrate erred In relying on the seizure certificate (PE2) which resulted from a search that was conducted In Violation of the law;
10. That the learned trial Magistrate erred In law and fact In relying on evidence of PW3 and Pw5 to convict the appellant while they were not officer in charge of a police station nor did they have written authority from the OCS of the area to execute the search;
11. That prosecution failed to account the chain of custody of the exhibit P11 which was tendered by PW1 i.e.

(i) Police officers did not comply with PGO No. 229;

(ii) Ownership of the phone was not proved at all; and

(iii) It's not known how PEI came back to the hand of Pw1 (victim);

12. That the learned trial Magistrate erred in convicting the appellant In a case where the identification was not watertight as:

(i) Victim did not give description of the appellant when reporting to police;

(ii) Intensity of light was not explained; and

(iii) Time Victim spent when identifying the bandits not revealed;

13. That the learned trial Magistrate failed to observe contradictions between PW2 and PW4 whereby PW3 stated that they arrest search and seized the phone but PW4 said they arrested only.

As for appearance before the court on the date the appeal was called on for hearing, the appellant appeared in person without legal representation. The Respondent entered appearance through Mr. Shaban Kabelwa, learned State Attorney.

Upon being called to argue his appeal, the appellant urged the Court to analyze and make determination of the same and set him free.

In response, Mr. Kabelwa conceded to the appellant's appeal. He thus argued in support of the 5th and 12th grounds of appeal revolving on the PW1's identification of the appellant, the 7th, 8th, 9th, 10th and 13th grounds in relation to search and seizure, and the 1st ground which was premised on the trial court's conviction of the appellant without proof that he committed the offence beyond reasonable doubt. The learned counsel didn't submit on the 2nd, 3rd 4th 6th and the 11th grounds of appeal.

In respect of 5th and 12th grounds, relating to the appellant's identification at the scene of crime and at the identification parade, Mr. Kabelwa admitted that according to the testimony of the prosecution including that of the two victims, PW1 and PW2 on page 9 through to 12 of the proceedings, it is clear that the identification was not watertight. He restated the principle of law that when the victim identifies the accused person for the first time, he must make a description of the accused person including his appearance, how he looks like, the way he dressed at the place of incident, and his physical characteristics. In view of the foregoing, he contended that the evidence was not sufficient to establish identification.

He added that even at the identification parade, the procedure set by the law in PGO No. 226 was not complied with. He elaborated that according to the holding in the case of **Ndalo Sumuni Mabuse @Amiri Ronaldo & Others v. R.**, Criminal Appeal No. 117 of 2023**,** on page 40 and 41, when an identification parade has to be conducted, the identifying witness must describe the suspect before the exercise is carried out. He said, in the present matter, PW1, PW2 and PW5 did not state the characteristics of the accused when testifying and when the identification parade was conducted.

As regards to the 7th, 8th, 9th, 10th and 13th grounds of appeal relating to search and seizure of the items found with the appellant, the learned state attorney referred the Court to page 14 and 15 of the proceedings and pointed out tha, when PW3 was testifying, he did not state the reasons for conducting search without warrant. To make matters worse, in the entire proceedings, no independent witness was called to testify on the search and seizure exercise. He told the court that even in the certificate of search and seizure, there is nowhere it is indicated that there was an independent witness. Buttressed by the holding in **Hussein Malulu @Elias Hussein & 2 Others v. R.**, Criminal Appeal No. 263 of 2021 where the Court of Appeal

on page 12 through to 17 explained the manner of conducting search, Mr. Kabelwa was of a firm conclusion that there was a clear abrogation of the procedure in the process rendering the exercise illegal.

Turning to the appellant's complaint on the first ground that the offence against him was not proven, Mr. Kabelwa highlighted that all exhibits which were admitted by the trial court were not tendered in accordance with the law. He cited the case of **Robinson Manjisi & 3 Others v. R.** (2003) TLR 218, the Court of Appeal stated that whenever it is intended to introduce any document in evidence, it should first be cleared for admission and be actually admitted before it is read out otherwise it is difficult for the court to be seen not to have been influenced by the same.

Elaborating more on the defect, Mr. Kabelwa averred that all the exhibits received by the trial court as shown on page 10, 15, 24 and 28 of the proceedings were not cleared for admission. He said, all witnesses who tendered the exhibits were not led to identify the documents before they were admitted in evidence hence infracting the procedure as per the above decided case and the Court Exhibit Guidelines issued by the Chief Justice.

He argued that the consequence of failure to adhere to the foregoing procedure is that the exhibits so admitted becomes of no weight deserving to be expunged from the record. He expounded that upon the expunction of the exhibits from the record, it is clear that the remaining oral testimony lacks value which means that offence against the appellant is not proven beyond reasonable doubt. On the basis of such submissions, Mr. Kabelwa prayed that the Court be pleased to set the appellant free.

The appellant had nothing to rejoin.

I have examined the records of appeal in light of the submissions by the learned State Attorney and his prayers in support of the appellant's appeal. Despite his concession to the appeal, I am still duty bound to determine whether the present appeal is merited.

In respect of the 5th and 12th grounds of appeal, I agree with the learned State Counsel that the identification of the appellant was improperly done. As it was stated in the case of **Waziri Amani v. R.** (1980) T. L. R. 250, for an identification of a suspect to be deemed to have been properly conducted, four factors must be considered to wit, the time the witness had the accused under observation; the distance at which he observed him; the conditions in

which such observation occurred; for instance whether it was day or night-time, whether there was good or poor lighting at the scene; and whether the witness knew or had seen the accused person before or not. The Court of Appeal clarified more on the foregoing in the case of **Sosthenes Myazagiro @ Nyarushashi v. Republic**, Criminal Appeal No. 276 of 2014 where on page 6, it made the following remarks:-

> *"Water tight identification in our considered view, entails among other things the following: -How long the witness had the accused under observation? What was the estimated distance between the two. If the offence occurred at night, which kind of light existed. Whether the accused was known to the witness before the incident whether the witness had ample time to observe and take note of the accused without obstruction such as attacks, threats and the like which may have interrupted the latter's concentration."*

In the present matter the prosecution relied on the evidence of two identifying witnesses, PW1 and PW2, in a bid to establish that the appellant was the one among the two assailants seen at the crime scene committing the offence against the victims. In their evidence, both witnesses told the trial court that they identified the accused person at the crime scene through the motorcycle light and at the identification parade which was conducted

on 24th July 2020. On page 9 of the typed trial court's proceedings, PW1 testified:-

> *"Thereafter on 24th July,2020 I was informed by the police officer that some people were arrested I have to go to the police station so that I can identify the person who did robbery to me.The identification parade was conducted. I managed to identify the accused person on that parade..."*

As to how she identified the appellant at the crime scene, during cross examination by the appellant on page 10 of the proceedings, PW1 stated:-

> *"I managed to identify you.....through the light of the motorcycle I saw you.."*

Similarly PW2 testified on page 11 of the proceedings that:-

> *"....One among them was the accused person, I managed to identify him through the light of the motorcycle dressed trouser and t-shirt.....On 24th July 2020 we were informed by the police officer/investigator that there were accused arrested that we can*

identify the one committed such offence, robbed us. So, on the identification parade I managed to identify the accused person.."

From the above piece of the prosecution evidence, I will now apply the principles laid down in the case of **Waziri Amani** (supra) in the mater under consideration and proceed to test whether both the motorcycle light and the identification parade established the identity of the accused person, the appellant herein without any possibilities of mistaken identification.

Starting with the identification at the crime scene, admittedly, from the evidence of the two witnesses, nothing has been revealed as to the intensity of the light that came from the motorcycle capable of identifying the suspects at the material time, at night. In my considered view, it was not sufficient for the identifying witnesses to just mention the source of the light without describing the intensity of the light which was relied upon by the victims to identify the accused person. In the case of **Samsom Chacha Mwita Pius Kipepeo v. Republic**, Criminal Appeal No. 76 of 2018 [2022] TZCA 415 (12 July 2022) on page 15 to 16 of the decision, the Court of Appeal underlined:-

".....apart from stating that there was electricity tube light inside and outside the shop, the identifying witnesses did not describe the intensity of that light. Failure by an identifying witness to describe the intensity of light which aided him or her to make identification raise doubts on credibility of his or her evidence. In the case of Hassan Said v. Republic, Criminal Appeal No. 264 of 2015 (unreported), the Court observed that:

> *"It is however, now settled, that if a witness is relying on some source of light as an aid to visual identification such witness must describe the source and intensity of such light in details. The Court has repeatedly in its various decisions in this respect, emphasized on the importance of describing the source and the intensity of the light which facilitated a correct identification of the appellants at the scene of crimes. See Waziri Amani v. Republic (supra), Richard Mawoko and Another v. Republic, Criminal Appeal No. 318 o f 2010 (CAT) at Mwanza and Gwisu Nkono/i and 3 others v. Republic, Criminal Appeal No. 359 o f 2014 (CAT) at Dodoma (both unreported)."*

Again, no description of the suspect as he appeared at the crime scene was sufficiently made by the identifying witnesses. In his testimony, PW2 alluded to have identified the suspect who wore t-shirt and trouser. In my opinion such a description is too general and wanting. In my understanding of the

law relating to identification, the witness ought to describe further the colour of the clothes, the accused person's distinctive physical appearance that is his height, skin colour and even his voice [See the case of **Anael Sambo v. Republic,** Criminal Appeal No. 274 of 2007 (unreported)].

Again, much as I am aware that PW2 told the court that before the fateful night the appellant was familiar to him while on the other hand the appellant was a stranger to PW1, under both circumstances the exhaustive description of the appellant was crucial as the danger of mistaken identity is possible even in the cases of recognition a familiar person. [See the case of **Samwel so Kivike v. Republic**, Criminal Appeal 320 of 2015 [2016] TZCA 697 (28 July 2016)]

I am also at one with the learned State Attorney that the procedures for conducting identification parade were flawed. As it can be gleaned from the earlier illustration of the portion of the testimony of the identifying witness as regards to how they came to identify the appellant at the identification parade, none of them testified to have given the description of the appellant prior to the parade either to the police or any other person. On the contrary, both identifying witnesses informed the court that after the arrest of the

appellant they were told to go and identify the culprit in the identification parade. It is settled as submitted by Mr. Kabelwa that prior to conducting the identification parade, the identifying witness must describe the suspect. The standpoint was also underscored by the Court of Appeal in the case of **Samsom Chacha Mwita Pius Kipepeo v. Republic** (supra), where on page 17 the apex Court held:-

> *"It is trite law that to afford credence in the identifying witness, the conduct of the parade must be preceded with the identifying witness' description of the suspect to the police before seeing him at the parade. In situations where an identification parade is conducted without prior description of the suspect, the identification report is taken to be unworthy of credit. In* ***Muhidini Mohamed Lila @ Emolo and 3 Others v. Republic,*** *Criminal Appeal No. 443 of 2015 (unreported), the Court stated that:*
>
> > *"...since therefore, in the case at hand, the requirement of giving the description of the suspects prior to the identification parade was not complied with, there is no gainsaying that the evidence obtained from the parade is unworthy of credit."*
>
> *Similarly, in the case at hand, we agree with Ms. Mbuya that the Identification Parade conducted by PW3 is unworthy of credit."*

From the analysis above reasons, I agree with Mr. Kabelwa's contention that the appellant's conviction was premised on a weak identification evidence. In that aspect, it cannot be safely concluded that the prosecution proved its case beyond reasonable doubt justifying the appellant's conviction and sentence by the trial court. In my profound view, the glaring deficiencies in the identification of the appellant have created doubts that ought to be resolved in favour of the appellant. [See the case of **Suleiman Dago Swalehe v. Republic**, Criminal Appeal No. 59 of 2022) 2024 TZCA 280 (29 April 2024)].

On the basis of the above, I find merit in the fifth and twelveth grounds of appeal. Since the determination of the grounds suffice to dispose of the appeal, I find the no compelling need of determining the remaining grounds as the same will amount to a mere academic exercise that will serve no purpose.

In the final event I allow the appeal. The conviction and sentence meted to the appellant are hereby quashed and set aside. As a result, I order for immediate release of the appellant from prison unless he is held therein for other lawful cause.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 6th day of June 2024.

H. A. KINYAKA

JUDGE

06/06/2024