IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TANGA SUB - REGISTRY

AT TANGA

CRIMINAL APPEAL NO. 67 OF 2023

HAJI RAHIM ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Arising from Criminal Case No. 43 of 2022 of the District Court of Tanga at Tanga)

JUDGMENT

30/05/2024 & 06/06/2024

NDESAMBURO, J.:

As per the charge sheet amended on the 22nd of July 2022, the appellant was found guilty of an offence of armed robbery under section 287A of the Penal Code, Cap 16 R.E 2022. The prosecution alleges that on the 12th of April 2022, in the Amboni area of Tanga District, Tanga Region, the appellant stole a Huoniao motorcycle bearing registration number MC 433 DFK, valued at Tshs. 2,000,000, belonging to Philipo William Danga. The prosecution further asserts that the appellant, armed with a knife, threatened Halfan Ramadhan, the motorcycle's rider, before absconding with that motorcycle.

The appellant denied the offence, leading to a full trial. The prosecution presented six witnesses and submitted two unobjected exhibits, while the defence called no other witnesses besides the appellant himself.

On the day of the incident, PW2, Halfan Ramadhani Hassan, a bodaboda rider, was approached at his parking station on Street No. 14 around 12:40 hours by two individuals he recognized by face: one tall with a fair complexion and the other short with a dark complexion. They requested a ride to an area known as Kona Z and agreeing on the fare, he took them there. Upon arrival, the tall passenger brandished a knife, threatening PW2 with a knife which he threw towards him. Fortunately, he evaded the attack. The tall man then forcibly took the motorcycle and fled while the short man claimed ignorance of the situation. PW2 sought help from fellow riders, leading to the apprehension of the short individual. He was taken to Chumbageni Police Station. At the Police Station, this short man identified his accomplice as "Haji" (the appellant) from Usagara Mabangi. Subsequently, they went to the appellant's house despite a search in Usagara Mabangi yielding only the appellant's bag which had when he committed the alleged offence. PW2 later received a call from the appellant's sister,

informing him that his motorcycle was at Mazinde Police Station. Accompanied by investigators, PW2 reclaimed his bike from the station.

PW3, Omary Nasoro Shani, was initially charged alongside the appellant but later on, his charge was dropped, testified in court that he recognized the appellant as a fellow football player. On the day of the incident, the appellant visited their residence and requested Shani to accompany him to the Amboni area using a motorcycle. They hired a motorcycle from PW2 on Street No. 14 and headed to Amboni. Upon arrival, the appellant brandished a knife, threatened PW2, and forcibly took control of the motorcycle. PW3 remained at the scene with PW2. Subsequently, PW3 was taken to Chumbageni Police Station. Later, they went to Usagara, the appellant's purported residence, only to find his bag, but not the appellant himself.

At the end of the trial, the appellant was convicted and sentenced to serve the mandatory sentence of thirty years imprisonment.

The appellant is aggrieved by the findings and conviction filed seven grounds of appeal. His grounds of appeal are as follows:

1. *As the preliminary hearing was neither conducted nor the disputed facts read and explained to the appellant, the proceeding and the judgment of the trial court are nullity.*
2. *As the appellant was never been supplied with the complainant's statement despite being prayed, the proceeding and the judgment of the trial court are nullity.*
3. *The Trial Magistrate erred in law and fact in convicting the appellant based on the improper identification of the appellant.*
4. *The Trial Court erred in law and fact in convicting the appellant based on improper identification of Exhibit P2.*
5. *The trial magistrate erred in law and fact in convicting the appellant despite the failure by the prosecution to prove who was the owner of Exhibit P2, a motorcycle and whether the said was the one which was alleged to be robbed from PW2.*
6. *The Trial Court erred in law and fact in convicting the appellant although the prosecution failed to prove when and where the appellant was arrested and for what offence.*
7. *The Trial Court erred in law and fact in convicting the appellant without considering and evaluating his defence.*

The appellant based on the grounds above prayed that the appeal be allowed, the conviction and sentence be set aside.

In this appeal Mr. M. A. Kajembe, a learned counsel, appeared for the appellant and the Republic/Respondent was Ms.

Farida Kaswella, a learned State Attorney. The matter proceeded by way of written submissions. The appellant through his learned counsel during submission, abandoned the second ground.

Submitting the first ground, the learned counsel averred that, on 22nd July 2022, the charge sheet was amended whereas, the appellant was joined to the charge as the first accused person while Omary Nasoro, PW3 stood as the second accused. On the same day, the preliminary hearing was conducted and whereas in paragraph 5 of the memorandum of facts, it was alleged that the accused persons committed the offence together. Later on, the charge against Omary Nasoro was withdrawn and a substituted charge against the appellant was read over to him and he pleaded not true. The prosecution proceeded without conducting another preliminary hearing in respect of the appellant. The learned counsel argues that proceeding with the hearing without conducting another preliminary hearing was an irregularity as the provision of section 192 of Criminal Procedure Act Cap 20 R.E. 2022 was not complied with. Additionally, the failure to conduct another preliminary hearing and explain to the appellant the effect of the changes of the charge sheet and its effect that the alleged offence was committed by him solely and not with PW3 as started

earlier did prejudice his knowledge and his right to a fair hearing. The learned counsel cited the Court of Appeal case of **Republic v Abdallah Salum @ Haji**, Criminal Revision 4 of 2019 where the Justices of Appeal held that failure to conduct the preliminary hearing is a fatal irregular.

In the third ground, Mr. Kajembe challenges the identification of the appellant by PW1, Philipo William Danga, PW2, Halfan Ramadhani Hassani, and PW3, Omary Nassoro. He argues that the appellant under the charge sheet and memorandum of fact, it was stated that the appellant lives at Amboni Tanga, however, PW3 who was initially charged as the primary suspect, identified the appellant as "Haji" from Usagara Mabangi and mentioned that they played football together, without providing a detailed description. Additionally, his evidence was not corroborated. Mr. Kajembe contends that if PW3 truly knew the appellant, he would have been able to give his full name and exact address. He asserts that PW3's vague identification was an attempt to exonerate himself from liability as a co-accused.

Additionally, PW2's statement contradicts PW3, claiming he went to Haji at Kona Z Amboni as stated by PW2 without explaining how he knew the appellant resides there and not

Usagara. This inconsistency in the appellant's residence further weakens the case.

Furthermore, PW1 gave conflicting dates for the incident. During his examination-in-chief, he stated that the incident occurred on the 12th of April 2022, while during cross-examination, he mentioned the 12th of April 2023. Additionally, PW4, A/Insp Emmanuel Ndaki's identification of the suspect is unreliable, as he failed to describe the appearance of the person he arrested. Moreover, his claim that the appellant was arrested by another officer with the alleged motorcycle, Exhibit P2 is uncorroborated, since that officer was not called as a witness. Mr. Kajembe cited **Azizi Mohamed v Republic** [1991] 71 to support this contention, emphasizing that the prosecution did not call witnesses present at the time of the appellant's arrest to corroborate PW4's testimony.

Mr. Kajembe consolidated the fourth and fifth grounds, arguing them together. These grounds concern the improper identification of the motorcycle, Exhibit P2 and proof of its ownership. He asserted that at the time of the arrest and handling of the motorcycle at Chumbageni Police Station, it had no registration number, raising doubts about how it was identified by the prosecution witnesses.

He noted that PW1 identified the motorcycle through its registration card, Exhibit P1, which described it as multicoloured. However, PW1 failed to mention the chassis number. He also claimed the motorcycle had no registration number placed on it. Mr. Kajembe criticized the trial magistrate for recording Exhibit P2 with its chassis number when PW1 had not identified it by that number, citing the Court of Appeal decision in **Ezra Peter v The Republic**, Criminal Appeal No. 409 of 2019, to highlight this as a critical error.

Furthermore, both PW2 and PW4 did not mention the chassis number when identifying the motorcycle. Instead, they only indicated they could identify it by the chassis number without specifying it. Mr. Kajembe also pointed out contradictions in the testimonies of PW5 and other witnesses regarding the motorcycle's colour and chassis number. PW5 identified the motorcycle as red, PW4 as black, D/Cpl Mwinyi, PW6 as black, and both PW1 and PW2 as multicoloured. The chassis number described by PW5 also differed from that mentioned by the trial magistrate and PW6. Mr. Kajembe argued that the trial magistrate failed to evaluate these discrepancies, which he contends are significant and undermine the reliability and credibility of the witnesses.

Lastly, Mr. Kajembe argued the sixth and seventh grounds together, focusing on the prosecution's failure to prove where the appellant was arrested and the trial court's disregard for the appellant's defence. He noted that PW4 testified the appellant was first arrested by an unknown officer for not wearing a helmet and later as a theft suspect at an unknown place. This testimony was not corroborated by any other officer or any occurrence book (OB) from Mazinde police station, Korogwe. Mr. Kajembe argued that the prosecution needed to corroborate PW4's testimony regarding the arrest's location and reason.

Moreover, in his defence, the appellant testified he was arrested on the 10th of May 2022, while sleeping in a hotel room en route to Morogoro. He claimed he was detained at Mombo Police Station for two weeks before being moved to Mazinde Police Station and then to Chumbageni Police Station. However, the trial magistrate did not consider this defence.

Mr. Kajembe insisted that the prosecution failed to prove its case beyond reasonable doubt and urged that the trial court's judgment and sentence be quashed and the appellant be released.

In response to the appeal, Ms. Kaswella clearly stated that they are contesting the appellant's appeal. Regarding the first

ground, Ms. Kaswella acknowledged that a preliminary hearing was not conducted after the substituted charge was read to the appellant. However, she argued that this omission did not prejudice the appellant. The learned State Attorney noted that the purpose of a preliminary hearing is to expedite trials, therefore, the appellant suffered no prejudice, and the proceedings and judgment were not vitiated. She cited the case of this court of **Bryton Kaundama v Republic**, Criminal appeal No. 7 of 2023 and the decision of the Court of Appeal in **Bernard Masumbuko Shio and another v R**, Criminal Appeal No. 213 of 2007 where the Justices of Appeal it was held that:

> *"Failure to hold preliminary hearing does not vitiate the trial if the accused person was not prejudiced...therefore, in a case where preliminary hearing is not conducted it does not automatically vitiate the trial".*

The learned State Attorney distinguished the case of **Republic v Abdallah Salum Haji**, (supra) cited by the appellant's counsel. In that case, the issue was the failure to observe section 192(3) of Cap 20, where undisputed facts were not read to the accused after the preliminary hearing. In the

present case, the preliminary hearing was not conducted following the removal of the second accused person.

Regarding the third ground, Ms. Kaswella argued that PW3's evidence is sufficient for identifying the appellant. She noted that PW3, PW1, and the appellant were seen together by PW2, who took them to Amboni where the crime occurred. PW3 also led the police to Usagara, where they found the appellant's bag, indicating his presence in both areas. Therefore, PW3's testimony was corroborated by PW1 and PW2.

Ms. Kaswella dismissed the argument that PW3 did not mention the appellant's full name as immaterial because the appellant knew each other and were together before and during the crime. Additionally, she argued that the appellant's residence in Amboni and Usagara is not a discrepancy based on the evidence.

Regarding the date contradiction, Ms. Kaswella acknowledged that PW1 mentioned two dates but deemed this a minor issue that does not undermine the case. She cited the Court of Appeal decision in **Dickson Elia Shapwata & Another v Republic**, Criminal Appeal No. 92 of 2007, to support her stance.

On identification, Ms. Kaswella noted that PW2 testified that PW3 and the appellant boarded his motorcycle around 12:30 PM, and PW1 testified that PW2 called him around 12:40 PM to report the robbery. This 10-minute difference supports PW1's ability to recall the appellant.

PW4 testified that he arrested the appellant without a helmet and rode a motorcycle without registration numbers. During interrogation, the appellant identified himself as Haji Rahim, and PW4 identified him in court as the person he arrested. This testimony was corroborated by other witnesses.

Ms. Kaswella emphasized that the case of **Azizi Abdallah v Republic** (supra) is distinguishable because PW4's testimony aligned with the other prosecution witnesses. She further argued that the prosecution has the discretion to choose and call witnesses and is not obligated to call every possible witness, as decided in **Yohanis Msigwa v R** (1990) T.L.R. 148.

In respect of the fourth and fifth grounds, the learned State Attorney submitted that the contradictions in identifying the motorcycle are minor and do not undermine the case. PW1, the owner of the motorcycle, identified it as having mixed colours, specifically red and black. Other witnesses described the

motorcycle as black or red, which aligns with PW1's description since the motorcycle has both colours. She referred to the case of **Dickson Elia Shapwata & Another** (supra).

She further added that the appellant was arrested with the same motorcycle reported stolen at Korogwe, verified by matching its chassis number with that on PW1's ownership card. She added that the minor error in the chassis number mentioned by PW5 is attributed to a lapse in memory, as the numbers were almost identical with only a few skipped digits and letters.

Therefore, she submitted that the discrepancies highlighted by the appellant's counsel did not go to the root of the case. She emphasized that minor discrepancies are unavoidable and do not affect the prosecution's case if they do not go to its root. She supported her argument with the Court of Appeal case **Jonas Boniphace Massawe v R**, Criminal Appeal No. 52 of 2020.

Concerning the sixth and seventh grounds, Ms. Kaswella submitted that the appellant was initially arrested by PW4 for riding a motorcycle without a helmet and without registration numbers. He was subsequently arrested for armed robbery. PW4's testimony aligns with and corroborates the rest of the prosecution witnesses, making the evidence credible.

She further submitted that the appellant's alibi defence was considered by the trial court before his conviction. The appellant failed to comply with section 194(4) of Cap 20, which requires issuing a notice to the court and prosecution before the hearing. Despite this, the trial court did not disregard the appellant's evidence; it considered it and provided reasons for finding that his defence did not undermine the prosecution's case.

Ms. Kaswella concluded by urging the court to find the appellant's grounds of appeal baseless, to dismiss the appeal, and to uphold the trial court's conviction and sentence.

In rejoinder, Mr. Kajembe reiterated his submission in chief.

Having gone through the record of appeal and submission from both sides, this court will decide the appeal in a style submitted by the parties.

The first ground of the appeal concerns the preliminary hearing. The learned counsel for the appellant contends that a preliminary hearing initially took place when the appellant was charged alongside a co-accused. He argues that after the charges were amended and the appellant became the sole accused, no new preliminary hearing was held, prejudicing the appellant and

invalidating the proceedings. However, Ms. Kaswella contends that this omission did not prejudice the appellant.

It is not disputed that the charge sheet was amended, removing PW3 and leaving only the appellant charged with the current offence. Additionally, it is not disputed that by the time the charge was substituted, the preliminary hearing had already been conducted, and no fresh preliminary hearing was subsequently held. However, as correctly submitted by Ms. Kaswella, the Court of Appeal in various decisions, including the case of **Bernard Masumbuko Shio and Another**, (supra) held that the purpose of the preliminary hearing is to expedite trials and that failure to conduct it does not vitiate the trial unless the accused person was prejudiced. Therefore, where a preliminary hearing is not conducted, it does not automatically vitiate the trial.

The question, therefore, is whether the appellant was prejudiced by this omission. This will be addressed in conjunction with the appellant's complaint that he was prejudiced by the initial preliminary hearing, which indicated that the offence was committed by the appellant along with PW3.

The record indicates that the appellant was fully accorded all his rights, including the right to cross-examine the prosecution's witnesses, the right to object to the tendered exhibits, and the right to defend himself. These rights ensure that the appellant's rights were maintained, and to my holding, the absence of a preliminary hearing did not prejudice his case in any how.

As per records, during the preliminary hearing, the fact that the appellant is now complaining about (that the offence was committed along with PW3) was not among those admitted by the appellant. As it was a disputed fact, the prosecution had the duty to present witnesses to prove it. Therefore, I do not agree with the appellant's counsel that the appellant was prejudiced by this. Moreover, according to the decision of the Court of Appeal in **Pantaleo Teresphory v Republic**, Criminal Appeal No. 515 of 2019, facts read during the preliminary hearing, except for those undisputed and signed by the parties, do not constitute evidence.

With due respect to the learned counsel for the appellant, the case of **Republic v Abdallah, Salum @ Haji**, (supra) he had cited, involved the court's failure to observe the provision of section 192(3) of Cap 20, as the memorandum of undisputed facts

was not read over and explained to the accused before being signed. As Ms. Kaswella correctly submitted, the case is distinguished from the current case. The justices of the Appeal in that case held as follows:

> *"However, there is nothing on record showing that before signing the memorandum, the undisputable facts were read over and explained to the respondent in a language he understands as prescribed under Section 192(3) of the CPA. There is also nothing showing that the PRM (extended Jurisdiction) explained to the accused person about the nature of the Preliminary Hearing in line with Section 192(2) of CPA".*

Consequently, I confidently conclude that the absence of a fresh preliminary hearing did not prejudice the appellant in any manner. Therefore, the failure to conduct a new preliminary hearing by the trial court was not a fatal error. Consequently, the first ground of appeal is dismissed.

The second ground pertains to the identification of the appellant. On this issue, the court will scrutinize the available evidence to determine whether the appellant was properly identified. Specifically, the court will reevaluate the evidence to

ascertain whether all possibilities of mistaken identity have been eliminated and whether the evidence presented is watertight.

Legal precedent establishes stringent criteria for visual identification to secure a conviction. The court should only rely on such evidence if is satisfied that the evidence is watertight and that all possibilities of mistaken identity are thoroughly eliminated. Precedents such as **Waziri Amani v Republic**, [1980] TLR 250, and **Emmanuel Luka and Others v Republic**, Criminal Appeal No. 325 of 2010 underscore this principle.

In the celebrated case of **Waziri Amani v Republic**, (supra) the court cautioned 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. Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the*

surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: 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 further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."

The Court of Appeal in **Cosmas Chalamila v Republic,** Criminal Appeal No. 6 of 2010, held that:

"....it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such suspect to a person whom he first reports the matter to him/her before such a person is arrested. The description should be on the attire worn by a suspect, his appearance, height, colour and/or any special mark on the body of such a suspect."

In this case, the incident occurred in broad daylight, allowing for a clear identification of the appellant. The trial court concluded that the appellant was properly identified due to the offence being

committed during daylight hours. Additionally, the appellant was identified by PW2 and PW3, their piece of evidence was corroborated by PW4. The respondent maintained that there was sufficient evidence for the appellant's identification, supported primarily by the testimony of PW3, PW1 and PW2. The respondent's counsel further emphasised the evidence of PW3 corroborated the evidence of PW1 and PW2. However, upon review, I find that the identification of the appellant is not conclusive, and I will explain why.

From the record on page 14 of the proceedings, PW1, a bodaboda rider stationed at the same stand as the rider of the robbed motorcycle, testified that on the day of the incident, he observed two individuals approaching their stand and was able to identify them by their faces.

These individuals hired PW2, who later called PW1 to inform him that he had been robbed of his motorcycle. Under cross-examination by the appellant, PW1 stated he identified the appellant due to the crime he committed.

PW2 on his side, testified that on the incident day, he was approached by two individuals he recognized by their faces: one tall and fair-complexioned, the other short and dark. The tall

individual robbed him of his motorcycle. During cross-examination, PW2 stated he knew the appellant from the day of the incident.

Despite the incident occurring in broad daylight, the testimonies of these witnesses are insufficient. Neither witness provided a detailed description of the appellant that could conclusively identify him. PW1 claimed to identify the individuals by their faces, and PW2 apart from identifying the appellant by his face, described the person who hired him as one tall and fair and the other short and dark, with the former being the one who committed the robbery. This description is too vague to be reliable, as many individuals could fit such general characteristics.

Moreover, an investigator, PW5, Coplo Daudi, testified about being assigned the case. He interrogated PW3, who identified the appellant as Haji, stating that Haji committed the robbery and fled. However, PW5 did not specify whether PW3 provided a detailed description of the appellant before the appellant was brought to him. Additionally, there was no testimony confirming that the Haji Rahim arrested at Mazinde and brought to Tanga was the same Haji mentioned by PW3.

PW4, Assistant Inspector Emmanuel Ndaki, a police officer, ordered his fellow police officers to arrest the appellant on the 1st

of June 2022, for riding a motorcycle without a helmet. Upon apprehending the appellant, they discovered that the motorcycle lacked a registration plate. The arrested person identified himself as Haji Rahim. PW4 then requested the motorcycle's registration card and it seems, he released him. Subsequently, according to his testimony, on the 14th of June, 2022, PW4 rearrested the appellant inside his room after receiving information about a robbery involving a motorcycle, which happened to be the same motorcycle the appellant was riding during his initial arrest. However, PW4 did not provide details to the court regarding how he identified the re-arrested individual as the same person found riding the motorcycle without a helmet. Given this lack of clarity in the evidence presented, it is difficult to assert that PW4's identification of the appellant was watertight.

Another witness who identified the appellant was PW3. He testified that after being arrested for the offence, he identified the appellant as the second person accompanying him on the motorcycle ridden by PW2, and who robbed the motorcycle from PW2.

The records suggest that PW3 knew the appellant before the incident as his fellow footballer, making his identification by recognition more reliable than identification by a stranger. However, it is undisputed that PW3 was initially charged alongside the appellant with armed robbery, but the charges against him were dropped, and he was called as a prosecution witness. Under these circumstances, as Mr. Kajembe pointed out, PW3 may had an interest in exonerating himself from liability as a co-accused. This claim cannot be disregarded. PW3 is a witness with an interest to serve. Therefore, his testimony must be approached with caution and needs corroboration, as established in the Court of Appeal case of **Godfrey Elisalia and Others v The Republic**, Criminal Appeal No. 39 of 2022. Upon reviewing the record, there is no evidence to corroborate PW3's testimony as to the identification and participation of the appellant in the offence charged.

Given the above, it is evident that the identification of the appellant was not watertight and the prosecution did not eliminate all possibilities of mistaken identity. Consequently, the trial court was not justified in concluding that the evidence for the appellant's identification was watertight.

From the foregoing, I strongly contend that the identification of the appellant in the prosecution's case raises significant doubts and thus, the prosecution's case was not proved to the required standards. This ground alone will surface to determine the current appeal. Therefore, the appellant's appeal is allowed. The conviction is quashed, and the sentence is set aside. I hereby order the immediate release of the appellant from prison custody, unless there are other lawful reasons for his detention.

It is so ordered.

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

H. P. NDESAMBURO

JUDGE