IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 169 OF 2023

(Originating from Criminal Case No. 200 of 2022 before the District Court of Ilala at Kinyerezi before Hon. N.A BARO dated 15th May, 2023)

HEMEDI ALLY @SPIDER ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

24th April & 5th June, 2024

MWANGA, J.

In the District Court of Ilala at Kinyerezi, the appellant, **HEMEDI ALLY @SPIDER,** was charged and convicted of armed robbery contrary to Section 287A of the Penal Code [Cap. 16 R.E 2019], currently [R.E 2022]. The particulars of the offense against the appellant were that on the 6th day of April 2022, at about 5:00 am at Chanika Vikongoro area within Ilala District in Dar es Salaam Region, he stole one Television made Star X 43 inches

worth Tshs. 900,000/=, the property of one Khadija Seif Mohamed, and immediately before and after such stealing, he threatened one Ally Seif Mohamed with a manchette to obtain and retain the said stolen property.

The story started like this. On the 6th of April 2022, at around 5:00 am, one Hadija Seif Mohamed, her brother Ally Seif Mohamed, and other family members were at home where they live. While asleep, she heard the sound of a knocking on the door in his brother's room. She heard her brother shouting that there were thieves. Subsequently, she peeped out the window and saw three bandits uncovering their heads, but she did not know any of them because she saw them at the back. His brother also woke up, supported her in observing what happened, and found that her TV Star X 43 inches had been stolen. She said her brother Ally Seif Mohamed was able to identify the appellant as there was electricity light, and the event took place for 20 to 30 minutes.

On the other hand, Ally Seif Mohamed gave a different account on what happened. He said he heard the sound as if the door was broken. He asserted that he saw the two bandits wearing coats while each was holding a manchette. Subsequently, the bandits ordered him to lie down on the floor. As a result, they took the TV described as Star X 43 inches. After that, he

approached her sister and told her that the one who stole the TV was a "spider" who wore a "Simba Sports Club uniform."

They both contended that, upon happening of the event, they shouted for help from the neighbors. Subsequently, they reported the incident at Chanika Police Station.

In an attempt to arrest the appellant, one Ramadhani Omary-Police Jamii, who was in the chairman's office, received the RB from Chanika Police Station about the incident of stealing committed by the appellant. He arrested the appellant as directed by the local chairman.

The appellant was arraigned in court and charged with the offense of armed robbery. The prosecution rested their prosecution after producing four witnesses, and upon their testimonies, the appellant was convicted and sentenced to 30 years imprisonment. Believing innocent, the appellant appealed against both conviction and sentence, hence this appeal on the following grounds;

1. The learned trial magistrate erred in law and fact to convict the case in which the ingredient of the robbery offense was not proved to the required standard.

2. The learned trial magistrate erred in law and fact by failing to draw the inference adverse to the prosecution for failing to bring in court the evidence of the alleged stolen TV, making Star X 43.
3. That the learned trial magistrate erred in law and fact to convict and sentence the appellant using improper evidence of identification in the scene of the crime while PW1 and P2 were in a state of shock and confusion and hence failed to give prior information of the appellant
4. That the learned trial magistrate erred in law and fact to convict and sentence the appellant using improper evidence of identification while their oral account is silent on the intensity of lights.
5. That the learned trial magistrate erred in law and fact to convict and sentence the appellant based on the evidence of PW1, PW2, PW3, and PW4, which were incredible, highly improbable, and implausible as their oral evidence differs from one and the other.
6. That the learned trial magistrate erred in law and fact, disbelieved the appellant's evidence, and relied on concocted

evidence of PW1, PW2, and PW3, resulting in miscarriage of justice and constituting a mistrial.

7. The learned trial magistrate erred in law and fact in convicting the appellant based on the c prosecution case, which was not proved beyond a reasonable doubt.

The appeal was argued through written submission after leaving the court. Looking closely at the grounds of appeal filed by the appellant, one can quickly notice that the appellant faults the trial court decision in two main areas. One is that the offense of armed robbery was not proved according to the law under section 287A of the Penal Code, Cap. 16 R.E 2019. Second, the appellant was not appropriately identified as the person who committed the offense of armed robbery.

The ingredients of the offense of armed robbery are provided under Section 287A of the Penal Code, Cap 16 [R. E 2022] 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 to obtain or retain the stolen property, commits an offense 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 Court of Appeal of Tanzania, while dissecting the above provision in the case of **John Makuya Vs. Republic**, Criminal Appeal No. 62 of 2022, had the following observations;

"The provision above envisages two categories of armed robbery, either of which the prosecution must lead evidence to prove beyond a reasonable doubt. First is stealing, and at or immediately before or after being armed with any dangerous or offensive weapon or instrument. The second category also requires proof of stealing, at or immediately before or after the stealing, the accused person used or threatened to use violence to any person to obtain or retain the stolen property."

According to the evidence on records, PW1 and PW2 alleged that the appellant and another person who is at large invaded them while holding manchettes at home around 5:00 hrs and stole a TV worth Tshs. 900,000/=. PW1 narrated further that, before the theft, he was threatened with the said manchette and forced to lie on the floor.

Looking at the evidence adduced, one can note that the offense has the necessary ingredients. As the law stands today, if a dangerous or offensive weapon or instrument is used in the course of robbery, such constitutes armed robbery. See the case of **Simon Kanoni Vs. Republic,** Criminal Appeal No. 145 of 2015 quoting the case of **Michael Joseph Vs. Republic (1995) TLR 278.** Again, in the case of **Shabani Said Ally v. Republic,** Criminal Appeal No. 270 of 2018 (unreported), the court held that for the prosecution to establish an offense of armed robbery, the following must proved;

i. There must be proof of theft; see the case of **Luvana v. Republic**, Criminal Appeal No. 1 of 2005 (unreported).
ii. There must be proof of using a dangerous or offensive weapon or robbery instrument at or immediately after the commission of a robbery.
iii. The use of dangerous or offensive weapons or robbery instruments must be directed against a person; see Kashima Mnadi v. Republic, Criminal Appeal No, 78 of 2011 (unreported).

Given the above, one can tell that the person involved in the conduct narrated must have committed the offense of armed robbery.

As it can be inferred from the evidence adduced, this case hinges on the question of identification. The evidence occurred during the night at 5:00 am, and there is consensus, even on the part of the prosecution, that PW1 did not identify the appellant. However, there is contention that PW2 identified the appellant, and the appellant firmly refused the assertions.

It is common ground that the identification of the appellants at the time of the incident was primarily based on the visual identification of PW1 and PW2. These were the only witnesses who saw and identified the appellants at the crime scene. It is a trite principle of law that visual identification evidence is of the weakest kind and most unreliable. It should only be acted upon cautiously when the court is satisfied that the evidence is watertight and that all possibilities of mistaken identity are eliminated. This Court enunciated this principle in **Amani Waziri v R,** (1980) TLR 250.

As I have reiterated earlier, in the present appeal, it is undisputed that PW1 and PW2 were invaded by a gang of robbers at night time at about 5 a.m. in their house at Vikongoroni at Chanika. They were invaded when PW1 and PW2 were awoken from sleep. In such circumstances, as correctly submitted by the appellant, the evidence of PW1 and PW2 must be treated with great caution to ensure that such evidence is watertight. From the

evidence of PW1, it is apparent that soon after the robbers had invaded their house, they managed to wake up and started observing them. PW1, Hadija Seif told the court that she saw three bandits uncover their heads but did not know any of them. She said his brother (PW2) also woke up that night and helped him to observe them as there was electricity light in an event that took place for about 20 to 30 minutes. She also testified that when they woke up, they found their TV Star X 43 inches had been stolen, and according to PW1, her brother (PW2) managed to identify the appellant. In that situation, it can be concluded that PW1 could not identify the appellant and his co-bandits at that particular time.

On the other hand, PW2 told the court that he heard the sound of the door being broken. According to him, he saw the two suspects wearing coats, each holding a manchette with the aid of electricity lights. After they got inside, the bandits, including the appellant, ordered him to lie down on the floor. As a result, they took the TV described as Star X 43 inches. They both shouted for help. After the incident, he went to her sister and told her that the one who stole the TV was a spider who wore a "Simba Sports Club uniform." Subsequently, they reported to the neighbors and Chanika Police Station.

As rightly argued by the appellant, PW1 and PW3 do not show the intensity of the light from the electric light, which enabled him (PW1) to identify the appellants. Likewise, in the case of PW2, the position is not clear either. If, according to PW2, he managed to observe the bandits when they were together with PW2 or after the bandits had broken when the thieves forced their way into the house. This is because PW1 said she was the appellant at the back and that there were three in total, whereas PW2 said that PW1 was not aware of what was happening. His testimony was that, after the incident, he went to the room of PW1 and informed her that it was the appellant who robbed them while armed. At the same time, it appears that PW1 was the one who spotted the bandits.

It is hard to tell the electric bulb light in the surrounding circumstances without describing its intensity. Light provided favorable conditions for the proper identification of the appellant. On such evidence, the incident having taken place at night, I agree with the appellant that the evidence of visual identification of the appellant was not watertight. As this Court observed in **Waziri Amani** (supra) 250, the incident took place under such circumstances that from the evidence of visual identification, it can hardly be said that all possibilities of mistaken identity were eliminated.

On several occasions, this Court has reiterated the cardinal principle of evidence of visual identification. The principle is that visual identification evidence is the weakest and most unreliable and that courts should only act on it when satisfied that possibilities of mistaken identity are eliminated. This Court underscored this principle in **Waziri Amani v. Republic** (1980) TLR 250. The Court's predecessor, the Court of Appeal for East Africa, had also restated the principle in **R v. Eria Sebwato** (1960) EA 179 and **Mugo v. R.** (1966) EA 124, among others.

With such doubts unresolved, it would be unsafe to sustain the conviction.

For the foregoing reasons, I allow the appeal, quash the conviction, and set aside the sentence. Unless otherwise stated, the appellant is to be released immediately.

Order accordingly.

H. R. MWANGA

JUDGE

05/06/2024