IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[MOROGORO SUB-REGISTRY]
AT MOROGORO

CRIMINAL APPEAL NO. 41 OF 2023

(*Originating from Criminal Case No. 28 of 2022, in the Resident Magistrate's Court of Morogoro at Morogoro, Hon. Barabara SRM dated 16th May 2023*)

DIRECTOR OF PUBLIC PROSECUTIONS .....APPELLANT

VERSUS

MICHAEL RAYMOND .....1ST RESPONDENT

JOHN KESSY.....2ND RESPONDENT

JUDGEMENT

06/02/2024 & 28/02/2024

KINYAKA, J.:

The respondents were jointly charged before the Resident Magistrate's Court of Morogoro (hereinafter referred to as the "trial court") of an offence of Attempted Armed Robbery contrary to section 287B of the Penal Code, Cap. 16 R.E. 2019. It was alleged before the trial court that on 30/05/2029 at 00:00 hours at Milama Kidawa in Mvomero District, Morogoro region, the respondents attempted to steal solar panel and water pump properties of Alphonce Didas Temu @ Kagere. It was averred that in the course of stealing the said properties, the respondents assaulted Hassan Selemani and Mazengo Raphael with panga in order to obtain the same.

The trial court heard prosecution's five witness and two defence witnesses who were the accused persons. On conclusion of the hearing, the trial court found that the case against the respondents was not proved beyond reasonable doubt. The trial court found that the defence evidence casted doubt on the prosecution case on the credibility of the prosecution witnesses which was not certain, and that the prosecution evidence on visual identification did not guarantee that PW1 and PW2 clearly identified the culprits.

Aggrieved by the decision of the trial court, the appellant preferred one ground of appeal that the trial court erred in law and in fact for holding that the prosecution case was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant was duly represented by Mr. Shabani Kabelwa, learned State Attorney. The respondents did not appear despite service by publication effected on Mwananchi newspaper dated 16/01/2024, 17/01/2024 and 18/01/2024. Basing on that ground, hearing of the appeal proceeded in absence of the respondents.

In support of the appeal, Mr. Kabwela began by reproducing section 287B of the Penal Code which the respondents were charged with. He submitted that the prosecution managed to prove all ingredients of the offence of

Attempted Armed Robbery, which include; the proof that the accused persons are actually the ones who committed the offence, the intention to steal anything from another person, proof that the person must be armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons, and the use of threat or attempted threat to use actual violence to any person.

Mr. Kabwela contended that the first element that the accused persons are actually the ones who committed the offence, was proven by the evidence of PW1 and PW2 on page 8 and 11 of the proceedings, respectively. He added that PW1 and PW2 testified to have clearly identified the respondents through two torches carried by the respondents and solar light which was bright at the time of commission of the offence. He argued that the trial court was wrong to hold that the identification of accused persons was through visual identification instead of by way of recognition. He submitted that the respondents were identified at the scene of crime and the identification was by recognition coupled with the fact that PW1 was able to name the suspects at the earliest opportunity. He cited the case of **Jumapili Msyete v. R., Criminal Appeal No. 110 of 2014 (2015) TZCA 234**

TANZLII on page 14 to 15 and argued that identification by recognition is more reliable than that of a stranger or by voice.

Counsel cited the case of **Dickson Elia Nsamba Shapwata and Another v. R., Criminal Appeal No. 92 of 2007** (unreported) on page 7 and argued that the differences in the testimony of PW1 and PW2 on the distance between 10 meters and 10 to 15 meters were minor.

In respect of the second element of crime on the intention to steal anything from another person, Mr. Kabelwa submitted that the evidence of PW1 on 8 and 9 of the proceedings, proved that the 1st respondent tried to remove solar panel. He contended that PW2 on page 11 of the proceedings testified that they witnessed the respondents removing the water pump from its setting and tried to remove solar panel. He added that the evidence of PW5 on page 30 of the proceedings that when he visited the scene of crime, he found a water pump and water pipe around the well corroborate the evidence of PW1 and PW2. From that evidence, Mr. Kabelwa argued, the respondents intended to steal the water pump and solar panel.

On the third element that the person must be armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons, Mr. Kabelwa argued that the offence was committed by the respondents who

were armed with panga as testified by PW1 and PW2 on page 9 and 11 of the proceedings, respectively.

Supporting the fourth element on the use of threat or attempted threat to use actual violence to any person, Mr Kabelwa submitted that the prosecution proved that the respondents used threats through testimonies of PW1 and PW2 on page 9 and 11 of the proceedings, respectively. The Appellant prayed for the Court to allow the appeal, enter conviction and sentence against the respondents as charged.

In determining the present appeal, I am called to decide whether the trial court erred in acquitting the respondents. The reasoning of the trial court is found on the 5th through to 12th page of the decision. The trial court's holding that the prosecution failed to prove the offence against the respondents on the required standard, was based on lack of proper identification, incredibility of the prosecution witnesses, and doubts that were casted on the prosecution case.

I have taken time to travel through the prosecution evidence in the trial court's proceedings. It is without doubt that the evidence of the prosecution through PW1, PW2, and PW5, and Exhibit PEII (sketch map), PEIII (water pump), PEIV (water pipe) PEV (solar panel), and PEVI (solar

machine/battery), clearly establish that the offence of attempted armed robbery was committed. In particular, it was established that there was an intention by the culprits to steal Exhibits PE III and PEV, that the culprits were armed with panga, were in company of two persons, and that they used actual violence to PW1 and PW2 to the extent of injuring PW1.

Mindful of the principle enshrined in the case of **Mariki George Ngendakumana v. The Republic, Criminal Appeal No. 353 of 2014** (unreported) on page 6, that in criminal cases, it is not enough for the prosecution to prove that the offence was committed but also to prove that the accused is the one who committed the same, the crucial question that has exercised my mind is who actually were the culprits? Were the respondents the culprits?

From the judgment of the trial court, the evidence to prove that it is the respondents who committed the offence is the base of the decision of the trial court, the subject of the present appeal. Relying on the case of **Waziri Amani v. Republic [1980] T.L.R. 250)** which underlined that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated, the trial court held that the respondents were not properly identified. The Honourable trial magistrate premised his

conclusion on the fact that the prosecution evidence of PW1 and PW2 did not guarantee that they clearly identified the culprits to satisfy the court that the two culprits, that PW1 and PW2 alleged to have seen and identified, were the accused persons. It follows therefore that in the present appeal, the issue of identification is a very important key in determining whether the respondents are linked to the commission of the offence as alleged by the prosecution.

In his submission in support of the appeal, Mr. Kabelwa argued that the respondents were identified not by visual identification but through recognition of PW1 and PW2 who testified that they knew the respondents before. On my part, in order to establish whether or not the respondents were properly identified, I deem it crucial to reproduce the relevant piece of evidence of PW1 and PW2 who claimed to have identified the respondents. PW1 on page 8 through to 9 of the proceedings from the 3rd line testified:

> *'.....we saw a motorcycle around the area and I asked my colleague that I should go and see why it was parked there. On arrival, I was surprised that the motorcycle disappeared without my knowledge. Then I saw two persons with two torches which was on. I asked the watchman to join me and approached those*

two persons. We saw John Kessy and Michael Raymond trying to steal a water pump. There was solar light there so we properly identified them the light was bright enough and we were about 10 feet away from them. I know them very well long time.....Michael Raymond tried to remove solar panel but I hit him with a stone and he ran away....'

PW2 on page 11 from the 1st line testified:

'.....Then we saw two persons holding torches and they were trying to steal a water pump. Hassan told me that those persons were John and Michael. I told him yes; because I also saw them, we were about 10 to 15 meters from them and there was sufficient solar light. We waited until they removed the water pump from its setting and they went ahead trying to remove the solar panel. Hassan threw a stone to the 1st accused and he ran away.'

Having scanning the above extract, I agree with the learned state attorney that the culprits were identified through identification by recognition and not by visual identification. The same are two different versions of identification. While in the former, the identifying witness asserts to have known the

suspects way back before the commission of the crime, in the later, the identifying witness claim to have encountered the suspect for the first time at the scene of crime.

It is for that reason that even the evidence to prove identification relied upon in identifying the culprit varies in some aspects. For instance, in cases where the prosecution relies on identification by recognition to prove that the accused is the one who committed the offence like in the present case, it was prudent to first and foremost, establish how the witnesses came to know the accused persons, secondly, what assisted the witness to identify the accused persons, and thirdly, whether the accused persons were named by the witness at the earliest opportunity, [see the case of **Jumapili Msyete v. Republic, Criminal Appeal 110 of 2014** (unreported) on page 13 through to 16].

As stated earlier on, from the testimonies of PW1 and PW2, the identification of the accused persons was by way of recognition. This is evidenced by the testimony of PW1 on page 9 of the typed proceedings where, upon being cross-examined by the 1st accused, he stated to have known the first accused as they lived within the same street, on the other hand, on page 12 of the

typed proceedings, PW2 told the court that he knew the 2nd accused person as they stay within the same village since the year 2014.

A closer look at the extract above and the entire evidence on record has made it apparent to me that the said identification of the respondents was highly doubtful. I will start with the testimony on how the identifying witnesses came to have known the accused persons.

As illustrated above, both PW1 and PW2 claimed to have known the respondents as they lived with them in the same street and village, respectively. However, they didn't mention the names of the street or village. I find the omission capable of weakening the recognition of the respondents as at the preliminary inquiry, the respondents admitted their personal particulars which included the fact that they are residing at Milama village, within Mvomero. On the other hand, on being probed of their place of residence before being affirmed, both PW1 and PW2 informed the court that they are residents of Dakawa.

Without doubt, I find the identifying witnesses' omission not to specifically mention the street or village within which they were living with the accused persons fatal. The omissions discredit the alleged recognition of the respondents herein. I say so because, the proof that the witnesses were

familiar to the respondents before the day they recognized them at the crime scene, forms the foundation of the identification by recognition relied upon by the prosecution in establishing the involvement of the respondents in the commission of the crime, failure of which, makes the said identification weak and unreliable.

Further, from the evidence of PW2 on page 11 of the proceedings, it was PW1 who allegedly recognized the culprits and thereafter informed PW2. In my view as the evidence indicates that PW1 and PW2 were together witnessing the incident, it was expected for each of them to identify the respondents as they both knew them before. However, PW2's testimony reveal that he agreed by saying "Yes" to PW1's suggestion that the two persons were the respondents. The fact that PW2 was informed by PW1 that the persons they saw were Michael and John, creates doubt on PW2's identification of the respondents. If both PW1 and PW2 were at the same scene of crime and eye witnesses, why should PW1 inform PW2 that the persons they saw were the respondents? Why wouldn't PW2 identify them by himself or similar as PW1? In my considered view, PW2 did not identify or recognize the respondents until when he was informed by PW1 that the

culprits were the respondents. The piece of evidence discredits the prosecution evidence on identification by recognition.

I have also been doubtful as regards to the testimony of PW1 that he saw two persons with lighted torches and identified them to be the respondents. Applying common sense and logic, it is difficult for a person against whom the lighted torch is directed to in the midnight at 00:00 hours, to see and identify the person who is holding the torch. That said, it was extremely difficult for the identification witnesses to identify the respondents under such circumstances.

In addition to the above, in terms of identification by recognition, the distance of 10 feet and 10 metres (32 feet) or 15 metres (49 feet) is not the same especially at 00:00 hours. It means that even if there was sufficient solar light as alleged by the prosecution, the distance of 32 or 49 feet as testified by PW2 at 00:00 hours cannot be held to establish proper identification or recognition of the respondents. Suffices it is to hold that the distance the identifying witnesses were from the accused was not clearly established.

Again, the fact that PW1 and PW2 were at the same place watching the respondents while attempting to steal the items, make it impracticable for

one to have identified them from 10 feet and the other from 10 to 15 metres which is 32 to 49 feet, respectively. The credibility of PW1 and PW2 regarding the distance at which the culprits stood varies.

Furthermore, PW1 testified on page 9 from the 4th line of the proceedings that he inflicted a cut on the 2nd respondent who cried like a pig but he was not injured. He testified further that the 2nd respondent was like a magician because he and PW2 could not handle him and disappeared. The testimony reveal that PW1 was not settled and had no settled mindset at the time of identification.

The Court of Appeal was confronted with a much alike situation where the identifying witness was throughout engaged in a fight with the armed bandits in the case of **Baya s/o Lusana v. Republic, Criminal Appeal No 593 of 2017 (Unreported).** In making its deliberation on page 10 of its judgment, the Court warned itself as to whether under those circumstances the identifying witness was not in a position of making unmistaken identification of the accused person and cited with approval the Kenyan case of **Wamalwa and Another v. Republic [1999] 2 EA 358** where it was stated that:

"The Court should always warn itself of the danger of convicting on identification evidence where the witness only sees the perpetrator of an offence fleetingly and under stressful circumstances."

All that said, I find that the above evidence impair the prosecution witnesses' identification of the respondents which the prosecution heavily relied upon to establish that the respondents were the ones who committed the offence of an Attempted Armed Robbery.

Much as I am alive to the settled position that identification by recognition may be more reliable than that of identification of a stranger, [**see the case of Jumapili Msyete v. Republic** (supra)], I am also aware that mistaken identification may be made in both circumstances. As I observed and pointed out above, the identification of the respondents by PW1 and PW2 was manned with doubts including PW1's unsettled mindset during the identification, failure to mention the street or village within which the accused were staying with the identifying witnesses, the distance between the identification witnesses to that of the respondents which was not clearly established, and the fact that it was PW1 who named the culprits to PW2, despite being present at the same place and time.

Flowing from the reasoning above, it is clear to me that the respondents were not properly identified or recognized. I am satisfied that the identification of accused persons was improperly done with reasonable possibility of a mistaken identification. It means that the first element as to whether the respondents were the one who committed the offence they were charged with, was not established by the prosecution.

Apart from the above pointed out shortfalls of the identification evidence relied upon by the prosecution in a bid to pursue the trial court to enter conviction against the respondent, I have also noted some deficiencies in the prosecution case as gathered from the trial court proceedings. I will start with the evidence of PW1 that he saw a motor vehicle parked around the area, but to his surprise it disappeared without his knowledge. In essence, the same leaves a lot to be desired. I have asked myself, how could a motorcycle that PW1 saw and was in move towards the same, disappear without his knowledge?

Apart from the above, PW1 and PW2 testified that the respondents removed water pump but when they tried to remove solar panel, PW1 hit the 1st respondent by a stone and the culprits ran away. Objectively, one would ask, if the solar panel was not removed by the respondents, who removed and

dismantled the items, including solar machine/battery which made it possible to be taken and produced before the trial court? With such discrepancies, I am bold that the above impair credibility of the evidence of the prosecution and hence casting doubts on the accused persons' involvement in the commission of the alleged offence.

In view of the above observations, I entirely agree with the trial court that the prosecution failed to establish the offence against the respondents beyond reasonable doubt. I therefore uphold the decision of the trial court and its acquittal of the respondents. I accordingly dismiss the appeal for lack of merit.

It is so ordered.

Right of appeal fully explained.

DATED at **MOROGORO** this 28th day of February 2024.

H. A. KINYAKA

JUDGE

28/02/2024