IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 33 OF 2023

(Arising from the District Court of Mkuranga in Criminal Case No. 281 of 2021)

1. **ADAM NGOTA SAID @ NGOTA..... ..... 1ST APPELLANT**
2. **SWAIBU HAMAD @ NDAGULA.....2ND APPELLANT**
3. **DUNIA SALUM LUBAHA.....3RD APPELLANT**

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

23rd October & 12th December, 2023

BWEGOGE, J.

In the District Court of Mkuranga, the above-named appellants herein were jointly charged with armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. of 2019] and convicted forthwith. The particulars of the offence alleged that on 26th day of September, 2021 at Mkuranga Village in

Mkuranga District the appellants stole one television make Samsung (Led Series 32") worth TZS 500,000/=, smartphone make Techno (iPad 7F) worth TZS 300,000/=; one modem worth TZS 60,000/=; one memory card worth TZS 20,000/=; one doorbell worth TZS 60,000/=; and two cameras worth TZS 300,000/=; the properties of one Salma Fereji Hamis. Further, the particulars depict that the stolen properties were worth TZS 1,240,000. Likewise, it was alleged that immediately before and after stealing the appellants threatened the victim by using machetes to obtain and retain stolen properties.

The prosecution case in the trial court, as depicted by the record brought hereto, is thus: On 26th September, 2021, during the hours of darkness, PW1 was asleep in her bedroom. She was awoken by security alarm in her sitting room. She rushed to the sitting room where she met two bandits armed with machetes, specifically the 2nd and 3rd appellants herein. PW1 witnessed the 2nd and 3rd appellants collecting the properties and handing them to the 1st appellant who was outside the house through the broken window. They had ordered PW1 to sit down and keep quiet. The 3rd appellant subdued PW1 having threatened her with a machete and kept a watchful eye on her while

the 2nd appellant continued to collect valuable properties from her house and pass them to the 1st appellant who was outside.

It is the prosecution case that PW2 had well recognized the bandits as they were familiar to her. The identification was aided by the electric tube lights. And, the bandits had spent more than twenty minutes with PW1 having subdued her whereas they didn't cover their face. In respect of the 1st appellant, PW1 enlightened the trial court that he identified him with the aid of electric tube lights installed on the fence. PW1 had likewise deponed that she was close to the 1st appellant's family as the 1st appellant's aunt is married to PW1's relative. And, in respect of the 2nd appellant, PW1 explained that the same was a renowned criminal who had recently denounced his criminal conduct and vowed before the OCD to be of good behaviour whereas thereafter he earned his living as a motorcycle tax rider (bodaboda) normally parking his motorbike at Kisiju bus stand. Likewise, PW1 described the 3rd appellant as a bus conductor who roamed at the bus stand attracting potential passengers to the vehicle.

One Mohamed Mwinyijuma (PW2) is the PW1's son. He resided in the servant quarter. On fateful night He was likewise awoke by the alarm. He attempted to rush inside the house to render assistance to PW1 in the main

house. He was blocked and subdued by the 1st appellant herein. Then he witnessed the 2nd and 3rd appellants who were armed with machetes coming out of the main house. The 2nd appellant was holding the television screen. All bandits had jumped over the fence. PW2 had a curious glance over the fence and saw the bandits mounting the motorcycle with registration No. MC, 677 CYJ, black in colour, and disappeared. PW2 testified that he identified the bandits with the aid of electric tube lights at a short distance. Further, PW2 claimed to know the appellants herein very well. He mentioned the 1st and 2nd appellants by their first names, explaining that they were renowned motorcycle taxi riders. Likewise, PW2 referred to the 3rd appellant as a bus conductor whom he met every day at the bus stand attracting potential passengers to the passenger vehicle.

Thereafter, PW1 and PW2 reported the crime to the police PW1 and mentioned the bandits at the earliest opportunity whereas investigation was immediately commenced. During the investigation, one H6512 DC Ndaki (PW5) traced the motorcycle with registration Mc.677 CYJ, black in colour, mentioned by the victims. He discovered that the said motorcycle belonged to one Hassan Salum Mpangamawe, PW4 herein. Eventually, he seized the motorcycle (exhibit P.3). PW4 (Hussein Salum Mpangandani) explained that

on the material date, he had hired the said motorcycle to the 2nd appellant herein. Later on, the appellant herein was arrested having been implicated by the victims.

PW4 testified that he hired the motorcycle to the 2nd appellant on 25/09/2021 around 19:00hrs. It was agreed that the 2nd appellant would return the motorcycle the same day at 21:00hrs. However, it was not until 26/9/2021 that PW4 regained his motorcycle through the 1st appellant. Later, PW4 was arrested on the allegation that his motorcycle was employed in a robbery.

It is likewise, the prosecution case that the 3rd appellant admitted the commission of a crime before H2373 DC Marwa (PW3) who interviewed him in the presence of his mother namely, Zena Yusuph Kipeze whose statement was admitted in evidence as exhibit PQ1.

All appellants herein refuted the allegations levelled against them. Generally, they made an evasive defence in that they were not actual offenders as no stolen property was found with them. They attacked the identification evidence made by PW1 for being weak and, or unreliable.

After the conclusion of the trial, the trial court found that the prosecution side proved the case beyond reasonable doubt. Consequently, the appellant

was convicted of the charge and the sentence of 30 years imprisonment was imposed on them. The appellants were aggrieved by the conviction and sentence; hence, this appeal.

The appellants herein fended for themselves whereas the respondent Republic was represented by Ms. Amina Macha, learned state attorney. The appeal was argued by written submissions.

The appellants, in substantiating their argument that the prosecution failed to prove the case beyond reasonable doubt, argued on premises that: **One,** the trial magistrate erroneously referred the 3rd appellant as a bus conductor at Kisiju bus stand contrary to what was deponed by the PW2 who purported to identify him. **Two,** the charge sheet was incurably defective for failure to disclose in the particulars of the offence to whom the threat was directed. That there was a variance between particulars of the offence indicated in the charge sheet and the judgment of the trial court. In the same vein, it was alleged that the judgment alleged that the properties belonged to Salma Fereji Khamis while the particulars of the offence indicate the properties belonged to Salima Fereji Hamis. This variance, in the appellants' opinion, was fatal. **Three,** the trial magistrate failed to evaluate and consider the evidence adduced by defence contrary to the law. That the omission suffices

to vitiate the conviction. **Four,** the trial court relied on the weak identification evidence to convict them of the heinous offence. That it is a trite law that visual identification is the weakest kind and most unreliable evidence which can only be relied upon when all the possibility of mistaken identity is eliminated. That it was necessary before relying on the evidence of PW1 and PW2 to determine the distance at which the witness saw the accused persons, the distance from the source of light, and the intensity of light. Likewise, the trial court was supposed to determine whether the witness knew the accused before and whether the environment at the scene of the crime was favourable for identification. The appellants referred the cases of **Amani Waziri vs Republic** [1980] TLR 250 and **Mohamed Said Matula vs. Republic** 1995 TLR 3, among others, to bolster the point. In the same vein, the appellants alleged that the prosecution witnesses failed to prove the intensity of light and the identification of the appellants was not done at the earliest opportunity. **Five**, the prosecution failed to establish the chain of custody of the motorcycle (exhibit P.3) from the point it was seized to the point it was tendered in court. **Six**, the caution statement of the 3rd appellant (exhibit P1) was recorded by PW3 after the expiration of four hours contrary to the law.

In responding to the argument that the trial magistrate erroneously referred to the 3rd appellant as a bus conductor contrary to what was deponed by the PW2, Ms. Macha submitted that both PW1 and PW2 testified that the 3rd appellant was a bus conductor. That any contradiction arising in the testimonies of the key witnesses herein is minor which doesn't go to the root of their evidence.

Regarding the allegation that the judgment of the trial has it that the properties belonged to Salma Fereji Khamis while the particulars of the offence indicate that the properties belonged to Salima Fereji Hamis, Ms. Macha opined that the misnomer was occasioned by a mere slip of the pen which didn't prejudice the appellant. Likewise, the attorney contended that the particulars of the offence charged clearly reveal that the properties belonged to Salma d/o Fereji Khamis whom the appellant threatened by machete to facilitate the alleged robbery. Hence, the charge sheet disclosed all the information of the offence enough for the appellant to make defence thereto.

Concerning the allegation that the trial magistrate failed to evaluate and

consider the evidence adduced by defence contrary to law the attorney contended that the defence martialed by the appellants was considered against the strength of the prosecution case. That the trial court scrutinized, evaluated and analyzed the evidence laid on that table by both parties to the case and found the appellants herein guilty as charged.

In respect of the allegation that the trial court relied on the wea identification evidence to convict the appellants herein, the attorney contended that the appellants were properly identified as they were familiar to the key witnesses (PW1 and PW2). Therefore, PW1 recognized the 1st and 2nd appellant by their names. The learned state attorney maintained that there was a conducive environment for the identification of the suspects as the electric light blazed the crime scene. That identification was made at a close distance; and the appellants had spent considerable time with the victims, as reflected in the testimony of PW2. That the ability to mention the names of the suspects of crime at the earliest opportunity is an assurance of the witness's reliability. The counsel referred the case of **Marwa Wangiti Mwita & Another v. Republic** [2002] TLR 39 to buttress the point. Hence, in the opinion of the attorney, PW1 and Pw2 are credible and reliable witnesses of truth.

Pertaining to the argument that the prosecution failed to establish the chain of custody of the motorcycle (exhibit P.3) from the point it was seized to the point it was tendered in court, the attorney submitted that exhibit P3 is something which cannot easily change hand and it cannot be tampered with. Hence, strict application of the principle cannot apply. The case of **Deus Josias Kilala** @ Deo **vs Republic** (Criminal Appeal 191 of 2018) [2020] TZCA 1809 was cited to validate the point.

Lastly, responding to the allegation that the caution statement of the 3rd appellant (exhibit P1) was recorded by PW3 after the expiration of four hours contrary to the law, the attorney contended that exhibit P.1 was recorded on time. The attorney admitted the fact that the cautioned statement was repudiated and retracted by the appellant. However, the trial court conducted mini-trial and made a ruling in that the incriminating statement was voluntarily made. That page 32 of the typed proceeding patently reveals that the prosecutor prayed the trial court to allow the statement to be read by the witness whereas the trial court granted the prayer. Hence, the allegations made herein are baseless.

Now, I am bent on canvassing the grounds of appeal commencing with the pertinent and delicate ground that the trial court acted on weak evidence of visual identification. The law pertaining to visual identification evidence is settled in the case of **Waziri Amani vs. Republic** (supra) in that the court should not act on the evidence of visual identification unless all possibilities of mistaken identity are eliminated. See the cases: **Republic vs. Allui** [1942] 9 EA 72; **Waziri Amani vs. Republic** [1980] TLR 250; **Shamir s/o John V. Republic,** Criminal Appeal No. 166 of 2004, CA (unreported), among the plethora of decided cases in this respect.

In particular, the Apex Court in the case of **Philemon Jumanne Agala @J4 vs. Republic** (Criminal Appeal No. 187 of 2015) [2016] TZCA 278 appositely clarified the factors to be considered by the court in ascertaining the credibility of the evidence of visual identification thus:

> *"It is now trite law that the courts should closely examine the circumstances in which the identification by each witness was made. The Court has already prescribed in sufficient detail the most salient factors to be considered. These may be summarized as follows: How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen*

> *the accused before? How often? If only occasionally, had he any special reason for remembering the observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance? …* ***Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."*** [Emphasis mine]. See also the cases; **Jaribu Abdalla vs. Republic,** Criminal Appeal No. 220 of 1994 (unreported) and **Yohana Kulwa Mwigulu & Others vs. Republic** (Criminal Appeal 192 of 2015) [2015] TZCA 30. [Emphasis mine].

Upon scrutiny of the record of the trial court, it is apparent that both PW1 and PW2 claimed to be familiar with the appellants herein. Moreso, PW1 enlightened the trial court that the 1st appellant is their distant relative. The same claimed to have recognized the appellants herein by the aid of sufficient electric tube light which blazed the sitting room and premises outside the house at a close distance. PW1 deponed that the 1st appellant received stolen properties through the broken window at her close eye range while she was subdued by the 3rd appellant. For this very reason, PW5 told the trial court that he opted to refrain from conducting an identification

parade. He ascertained that the bandits were mentioned at the earliest opportunity. In the case of **Marwa Wangiti Mwita & Another v. Republic** (supra), the Apex Court expounded that:

> *" The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry."*

See also the same position in the cases of **Jaribu Abdallah vs. Republic** [2003] TLR 271; **Mafuru Manyama & Two Others vs. Republic**, Criminal Appeal No. 256 of 2007, CA (unreported); **Kenedy Ivan vs. Republic,** Criminal Appeal No. 178 of 2007, CA (unreported); **John Gilikola vs. Republic**, Criminal Appeal No. 31 of 1999, CA (unreported) and **Yohana Dionizi & Shija Simon vs. Republic**, Criminal Appeals No. 114 and 115 of 2009, CA (unreported).

I need not reiterate that both PW1 and PW3 had identified the 1st and 2nd appellant by their names and mentioned them at the earliest opportunity to the police. Likewise, the description given by both key witnesses led PW5 to arrest the 3rd accused who had admitted commission of the alleged offence to PW3. Further, the testimony of PW4 augments the recognition evidence

deponed by PW1 and PW2. It was deponed by PW4 that he hired his motorcycle to the 2nd appellant on 25/09/2021 around 19:00hrs. It was agreed that the 2nd appellant would return the motorcycle the same day at 21:00hrs. However, it was not until 26/9/2021 that PW4 regained his motorcycle through the 1st appellant who pretended that the 2nd appellant had fallen sick. It is the same motor bicycle identified by PW2 as the means of transport used by the bandits who robbed them on that fateful night. The fact that the vehicle was returned by the 1st appellant, who was likewise identified to have been at the crime scene with the 2nd appellant, bolsters the identification evidence given by key witnesses in this case. It suffices to point out that all appellants herein were correctly identified at the scene of the crime.

Based on the above factual matrix, I subscribe to the opinion of the respondent's attorney in that the identification evidence deponed by PW1 and PW1 was watertight to ground conviction on its own.

I would now proceed to address the remaining argument fronted by the appellant in defeating the prosecution case at the trial court. The appellant alleged that the trial magistrate erroneously referred the 3rd appellant as a bus conductor contrary to what was deponed by the PW2. Upon scrutiny of

the record of the trial court, I found that as rightly submitted by Ms. Macha, the record is clear in that both PW1 and PW2 testified that the 3rd appellant was a bus conductor at the bus stand whom they were familiar with. Hence, the trial magistrate didn't invent evidence in his judgment which was not deponed by the prosecution witnesses as it was alleged by the appellants herein.

It was also argued by the appellants that the charge sheet was incurably defective for failure to disclose in the particulars of the offence to whom the threat was directed to sustain the charge of robbery. Unarguably, the provisions of section 135(a)(ii) of the Criminal Procedure Act [Cap. 20 R.E. 2022] instructs that a statement of offence ought to describe the offence and should contain a reference to the section of the enactment creating the offence. I have gone through the particulars of the offence of the charge preferred against the appellants. With due respect, I found the complaint herein misconceived. As rightly asserted by Ms. Macha, the particulars of the offence charged clearly reveal that the properties stolen belonged to Salma d/o Fereji Khamis whom the appellant threatened by machete to facilitate the alleged robbery. I would subscribe to the learned state attorney's opinion that the charge sheet disclosed all the information of the

offence enough for the appellant to make defence in the charged of robbery they were charged with.

Likewise, it was alleged that the judgment of the trial court indicates that the properties belonged to **Salma Fereji Khamis** while the particulars of the offence indicate that the properties belonged to **Salima Fereji Hamis.** The appellant insinuated that the purported variance was fatal. I fail to agree with the appellants in this respect. The difference in spelling of the victim's names; **Salma Fereji Khamis** and **Salima Fereji Hamis** found in the judgment and particulars of the offence doesn't render the charge defective. The error is an innocuous one. The appellants were not prejudiced by the alleged inaccuracy. I, likewise, find the complaint herein unmerited.

Further, the appellants alleged that the trial magistrate failed to evaluate and consider the evidence adduced by defence contrary to the law. Upon scrutiny, I found that the record clearly depicts that the trial court had revisited both the prosecution and defence case, evaluated the evidence laid on the table and made the finding that the prosecution case was watertight to ground conviction. To my opinion, the defence case was considered.

Be that as it may, I find it pertinent to revisit the defence case and find whether it casts doubt on the prosecution case. The 1st appellant testified that he was arrested at home on 14/9/2021 and brought to Mkuranga police station where he was joined with the 2nd and 3rd appellants herein whom he doesn't know. He challenged the testimony of PW1 in respect of the circumstances she identified him and he denied to have returned the motorcycle to PW4. The 2nd appellant made defence that he was arrested on 11th October, 2021 on his way home. That he was not found with any stolen items. That the evidence brought against him was concocted. That he doesn't know PW4. And, the 3rd appellant testified that he was arrested on 17/10/2021 at Mkuranga while brawling with a person who owed him his money and was joined by the appellants herein who are strangers. He denied confession of the commission of the crime.

It is obvious that, save the 1st appellant who challenged the identification evidence deponed by PW1, the remaining appellants made general denials which didn't shake the prosecution case. And, based on the credible evidence made by PW1, PW2 and PW4, the defence made by the 1st appellant amounts to an afterthought. Therefore, I find the complaint herein unmerited as well.

It was also charged by the appellants that the prosecution failed to establish the chain of custody of the motorcycle (exhibit P.3) from the point it was seized to the point it was tendered in court. This complaint need not detain me. As rightly submitted by the learned state attorney, the seized item is not of such nature of the item that can be easily tampered with. In the case of **Joseph Leonard Manyota vs Republic**, Criminal Appeal No. 485 of 2015(2017) TZCA 261 it was held:

> *"... it is not every time that when the chain of custody is broken, then the relevant item cannot be produced and accepted by the court as evidence, regardless of its nature. We are certain that this cannot be the case say, where the potential evidence is not in the danger of being destroyed or polluted, and/or in any way tampered with. Where the circumstances may reasonably show the absence of such dangers, the court can safely receive such evidence despite the fact that the chain of custody may have been broken. Of course, this will depend on the prevailing circumstances in every particular case.* "

And, in the same vein, in the case of **Deus Josias Kilala** @ Deo **vs. Republic,** the Court opined:

> *".....our decision in Paulo Maduka (supra) is authority of the peremptory requirement for the prosecution to produce evidence or chronological documentation and or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of an exhibit allegedly seized from the accused. While we appreciate the aforesaid statement of principle, we*

> *think, as we held in* ***Vuyo Jack v. Republic****, Criminal Appeal No. 334 of 2016;* ***Issa Hassan Uki v. Republic****, Criminal Appeal No. 129 of 2017; and* ***Kadiria Said Kimaro v. Republic****, Criminal Appeal No. 301 of 2017 (all unreported****), the said requirement must be relaxed in cases relating to items which cannot change hands easily and therefore not easy to tamper with.*** *"Emphasis mine."*

In this case, the impugned exhibit, a motorcycle, was identified by the registration number. The owner (PW4) explained the circumstances under which it came into the possession of the 2nd appellant who had employed the same in the commission of offence. PW4 had identified the motorcycle in court as his own property which was hired to the 2nd appellant. Hence, regardless of wanting appropriate chain of custody in the testimony of PW5, no ground would lead this court to suggest that the exhibit was tampered with. I would dismiss this complaint as well.

Lastly, it is the appellants' complaint that the caution statement of the 3rd appellant (exhibit P1) was recorded by PW3 after the expiration of four hours contrary to the law. Admittedly, the 3rd appellant repudiated the confession statement allegedly made by him before PW3. The min-trial was conducted and the trial court ruled that the incriminating statement was made voluntarily by the 3rd accused and admitted the same in evidence as exhibit

P1. The complaint made herein that the caution statement was recorded after the expiration of four hours was not raised in the trial court. The record entails that the statement was made on 17/10/2021. The 3rd appellant has not enlightened this court at what date and time he was arrested. Neither, the prosecution case is silent in this respect.

Hence, there is no way this court may delve into this complaint. Be that as it may, even without the incriminating statement, there remains sufficient identification evidence against the 3rd appellant to ground his conviction on the offence he was charged with.

Given the foregoing, I find the appeal herein devoid of merit. The appeal is hereby dismissed in its entirety. The conviction and sentence entered by the trial court are hereby upheld.

I so order.

DATED at **DAR ES SALAAM** this 12th December, 2023.

O. F. BWEGOGE

JUDGE