IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 184 OF 2023

(*Appeal from the Judgment of the Decision of the District Court of Temeke at Temeke given before Hon C.M Maadili, RM, dated 27th day of June 2023 in Criminal Case No. 626 of 2022)*

BENJAMIN ZAKAYO OTATO ..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

14th February & 3rd April 2024

MWANGA, J.

The factual matrix of the case of the prosecution is that on 18th October 2021 at Mbagala Rangi Tatu area within Temeke District in Dar es Salaam region the appellant, **BENJAMIN ZAKAYO OTATO** did steal the money Tshs, 5000,000/= being the property of Wastara Said Bungala and immediately before and after the stealing he smashed into the said Christian Ally Isangu @ Fatuma with a hammer on her head to obtain and retain the said property.

The circumstances and how the offense was committed are that, on the material date, on 18th October 2021 Christina Ally Isangu (the victim) was at Mbagala Rangi Tatu Bus Terminal where she conducts her business (mobile money banking business) and also where the appellant resides. On the respective date, she promised to repay the money Tshs. 5,000,000/= she had earlier on borrowed from one Wastara Said Bungala. It occurred that, the said Wastara Said Bungala sent her servant Lucy Kimaro to collect the money.

It appears that, during the collection, Lucy Kimaro was on the other side of the fence which was half built with bricks and wood at the top. Soon after the victim attempted to hand over the money to Lucy Kimaro's other side of the wall, suddenly the appellant appeared and struck the victim on the back of the head with a hammer which was rounded up with newspaper, the fact which was later, substantiated with eyewitnesses who revealed that they saw such hammer falling from a rounded up newspaper. The appellant hit the victim twice until she fell unconscious. Afterward, the appellant succeeded in snatching from the victim an envelope that contained Tshs. 5,000,000/=.

As a result of the above, the appellant ran away but not far from the scene of the crime. A good Samaritan attempted to arrest the appellant. Consequently, the appellant in an attempt to escape the arrest, which he succeeded, forcefully pierced the finger of the appellant by teeth.

On 30th October 2022, the appellant was arrested and subsequently indicted on the charge of Armed Robbery contrary to section 287A of the Penal Code, Cap 16 [R.E 2022] in the District Court of Kinondoni at Kinondoni. In the end, he was convicted and ultimately sentenced to 30 years imprisonment.

Being aggrieved by the order of conviction and sentence, the appellant herein has filed this appeal on the following grounds;

1. That the learned trial magistrate grossly erred in law and fact by convicting the appellant based on incredible visual identification of prosecution witnesses.
2. That the learned trial magistrate grossly erred in law and fact by convicting the appellant with a serious offense of armed robbery which was not investigated to prove so.
3. That the learned trial magistrate grossly erred in law and fact by convicting the appellant based on incredible, tenuous

contradictory, and uncorroborated evidence of prosecution witnesses.

4. That the learned trial magistrate grossly erred in law and fact by convicting the appellant with a case that was not proved to the tilt.
5. That the learned trial magistrate grossly erred in law and fact by convicting the appellant by failing to note that there was a variance between prosecution witnesses concerning the scene of the crime. (*locus in quo*).

In the hearing of an appeal, the appellant appeared in person whereas the respondent was represented by Foibe Magiri, learned State Attorney. The appeal was disposed of by way of written submissions, the schedule which was duly complied with by the parties.

In the first ground of appeal, the appellant raised the contention that he was convicted based on the incredible visual identification of prosecution witnesses. He argued that, since PW1 was attacked with a hummer from behind, bent, and then lost conciseness, it is quite clear that there was a possibility of mistaken identity. He proceeded that, PW1 did not have ample time to observe and take note of the obstruction which interpreted her

concentration. The Appellant cited the case of **Waziri Amanii Vs Republic (1980) TLR 250 and Scap John and Another Vs Republic,** Criminal Appeal No. 197 of 2008 (Unreported) to support his arguments. He ended his submission in this ground by stating that, he was convicted based on dock identification.

On the other hand, the learned State Attorney Ms. Phoibe Magiri refuted such arguments. It is her view that there were favorable grounds for the identifications of the appellant. The State Attorney pointed out that, the incident occurred during the daytime i.e. 08:00hrs, and the distance between the appellant and victim (PWI) was very close such that the appellant was able to attack PWI on the head. She proceeded that, PWI (victim) and PW4(the person who chased the appellant) were eyewitnesses and knew the appellant before the incident. She submitted further, that even though PWI was attacked from behind she was able to turn back after the first hit and manage to see the appellant, hence there was no obstruction for her to identify the appellant.

On top of that, PW4 chased the appellant in an attempt to arrest him after the incident but he managed to escape, therefore it proves that PW4 had ample time to observe the appellant. Furthermore, PWI gave information about the attacker as soon as the victim regained consciousness (page 7 of proceeding). The State Attorney concluded that, under such circumstances, it is not possible that two people would mistake the appellant; hence, the appellant was convicted based on the credence and strong evidence of identification.

I have heard the submissions of the parties and seriously given thoughtful consideration. This ground of appeal raises the important question of the visual identification of the appellant at the scene of the crime. However, the present case has nothing to do with the identification of the appellant. From the evidence on record, the incident of armed robbery was committed at 8:30 am at a close distance as PW1 expressed in her testimonies. The appellant was known by eyewitnesses as PWI (victim) and PW5(the person who chased him after the stealing). There is evidence that PW5 attempted to chase and arrest the appellant immediately after the

incident but he managed to escape the arrest but also pierced his finger. This entails that, there is no question of identification.

Further to that, I entirely agree with the learned State Attorney that, under such circumstances, it is not possible that two people (PW1 and PW5) who knew the appellant before would mistake him. Most importantly, this is not the case of identification but rather recognition because the appellant was known by PW1 and PW5 who were present at the scene of the crime. In the case of **Musa vs Saguda vs Republic**, Criminal Appeal No.440/2017, on page 17, the court held that where the identifying witness knew the suspect before it is a case of recognition rather than identification, and recognition is more assuring, satisfactory, and reliable than identifying the stranger. For further reference, it was held that,

> ***"Thus, in the case at hand, the recognition of the appellant by PW1 and PW5 was more clear than the identification of the stranger. given the testimony of PW1 and PW5 in the record, the trial court was right to conclude that PW1 and PW5 were credible witnesses. Quoted with approval in this is the case of Nicholaus Jame Urio v. The Republic, Criminal Appeal No. 244 of 2010 (unreported), quoted with approval the decision of***

the Court of Appeal of Kenya in Kenga Chea Thoya v. The Republic, Criminal Appeal No. 375 of 2006 (unreported), where it was stated that: -

"On our evaluation of the evidence, we find this to be a straight forward case in which the appellant was recognized by witness PW1 who knew him. This was a case of recognition rather than identification. It has been observed severally by this court, recognition is more satisfactory more assuring, and more reliable"

For the foregoing, this ground of appeal lacks merits. I am confident the appellant was recognized at the scene of the crime and therefore, the question of the possibility of mistaken identity cannot arise.

In the second ground of appeal, the appellant contends that the trial magistrate grossly erred in law and fact by convicting him of a serious offense of armed robbery which was not investigated to prove so. This ground of appeal was not argued by the parties. However, the evidence on record shows that, after the incident had occurred the victim (PW1) reported the incident to the police where she was given PF3 and the bus terminal administrator. Likewise, PW5 told the court that after he had failed to arrest the appellant he reported the incident at Kizuiani Police Station.

Consequently, the case was registered as IR. No. MBL/IR/10832/2022-Mbagala Police Station. The investigator was D/CPL Anna, D/SGNT Junaitha & D/C Jamaidini. Simultaneously, the chargesheet was prepared by the learned State Attorney from the National Prosecution Services.

In view of the above, the case against the appellant was investigated and the proper charges are armed robbery because he used the hammer which is a dangerous weapon to obtain the money before stealing. The Court of Appeal in the case of **Simon Kanoni Vs Republic Criminal Appeal No 145 of 2015** quoted with approval in the case of **Michael Joseph Vs Republic (1995) TLR 278** described the use of the knife and remarked that;

> *"…if a dangerous or offensive weapon or instrument is used, in the course of robbery, such constitutes armed robbery..."*

I'm so far as the above holding the use of harmer is equally dangerous. The offense of armed robbery is created under section 287A of the Penal Code, Cap. 16 R.E 2019 Section 287A of Penal Code, Capo 16 R.E 2022. The relevant provision reads 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 while interpreting the above provision in the case of **John Makuya Vs The Republic**, Criminal Appeal No. 62 of 2022, had this to say;

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

According to the evidence on records, PW1 who is the victim, and PW5 are eyewitnesses. They both gave an account of their testimonies that, the appellant hit the victim with a hammer which was rounded up in the newspaper before stealing the money. The victim was stuck twice on the head to obtain money which was stored in the envelope. According to PW1 and PW5, the appellant ran away with the said envelope and when he was chased by PW5 he dropped some of the money contained in the envelope. And it was around 8: 30 to 9:00 am. Interestingly, such a dangerous weapon was directed at the victim. See the case of **John Mdata Vs R,** Criminal Appeal No.453 of 2017 (Unreported).

Throughout the discussion above it comes to my mind that the evidence adduced by the Pw1 and PW5 was watertight to prove the offence of armed robbery. There is no reason why eyewitnesses PW1 and PW5 should not be believed.

Henceforth, the argument that PW1 and PW5 never named the appellant to PW2, the owner of the money has no leg to stand. Undoubtedly, the witness; PW1 and PW5 named the suspect at the earliest opportunity at the bus terminal administration and the police.

I take note of the argument of the Appellant that, eyewitness testimony can be a very powerful tool in determining a person's guilt and innocence but it can also be very devastating when false identification is made due to honest confusion or outright lying. See also the cited case of Joseph **Mkumwba Vs Republic**, Criminal Appeal No. 94 0f 2007 (Unreported). However, I do not find any flicker of doubt that PW1 and PW5 were telling lies. They were truthful witnesses. This is because, PW1 testified that, the appellant at one time had worked for her and she had known the appellant by the nickname of **Osama.** PW5 and PW6 also have in number of years known the appellant at the place of the incident. Both of them testified that the appellant had no previous criminal records. In the circumstances, in my view, these witnesses who believed that the appellant had no previous criminal records would not tell lies to the court about this involvement in the commission of armed robbery.

Given the above, the second and third ground of appeal has no merits. The appellant was convicted properly based on credible and strong evidence from prosecution witnesses. Failure to produce PF3, calls the administrator of the bus terminal to whom the incident was reported first and the investigator of the case has no substance. Again, according to section 143

of the Evidence Act, Cap. 6 R.E 2022 no number of the prosecution witnesses are required to prove a particular set of facts. In the case of **Ahmed Omari vs. Republic,** Criminal Appeal No. 154 of 1995 the court held that the conviction could be based on evidence of a single witness, as there is no law or rule which says to the contrary.

Moreover, the argument that PW1 and PW5 gave different occupations of the appellant and so did not know where he lives and his ten-cell leader and that it is an indication that they never knew the appellant before is wanting of merits.

Also, the appellant's contention on page 12 of the proceedings is that the prosecution witnesses are contradictory. For instance, PW3 said the money lent to PW1 was Tshs. 5000/= and not 500,000/= and the incident occurred at the fence while others state that it occurred at the shoe shining, or at her place. Such contradictions, according to the appellant, are doubtfully in the prosecution case.

As the learned State Attorney has pointed out, the contradictions mentioned regarding the occupation of the appellant are of less impact on the prosecution case. Further that, such contradictions do not go to the root of the case and the bottom line is that the appellant was known by the two

witnesses. She also asserted that it is trite law that not every contradiction will affect the prosecution case unless they go to the root of the case.

I firmly agree with the learned State Attorney. There are many authorities in support of her contention that not every discrepancy in the prosecution witness would cause the prosecution case to flop. The contradiction of names is a very normal thing. See the cases of **Shedrack Meshack Madija,** Criminal Appeal N. 174/2018 at 14; **Said Ally Ismail vs R,** Criminal Appeal No.249 of 2008(Unreported) **and Mohamed Said Matula Vs. R** [195] TLR 3.

In conclusion, **the prosecution has discharged the duty to prove the case against the appellant beyond reasonable doubt. As previously stated,** the incident occurred on 18th October 2021, at 8:30hrs. So, it was during the day, and according to the prosecution witnesses; **PW1(victim)** saw the appellant striking her twice with a hammer on the back of the head, and eventually, the appellant stole money in an envelope containing Tshs. 5,000,000/=.

Again, there is evidence that **PW4** was sent to collect the stolen money. She saw the appellant striking the victim with a hammer which was folded in the newspaper until she fell. **PW4 al**so saw the appellant run with

the stolen money. **PW5** also saw the appellant beating the victim with a hammer, behind the back of the head. He chased the appellant in an attempt to arrest him but the appellant got hold of her hand and bit his finger. He narrated that, he saw the appellant dropping down some stolen money. Eventually, he reported the incident to the administration of the bus terminal and the police. Last, the appellant was arrested by PW7, a Daldala driver who was informed that the appellant had committed the armed robbery against the victim.

Taking the totality of the evidence and circumstances of the case, it is my view that there was no need to establish visual identification. In other words, there was no mistaken identity because; the appellant was known to PW1, and PW5, hence it was a case of recognition.

That being said and done, the appeal is dismissed. Conviction and sentence against the appellant is upheld.

Order accordingly.

H. R. MWANGA

JUDGE

03/04/2024