**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY OF DODOMA**

**AT DODOMA**

**DC CRIMINAL APPEAL NO. 80 OF 2023**

(*Originating from the Judgement of Singida District Court in Criminal Case No. 103 of 2022*)

**SADAM RAMADHAN ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

*Date of last order:* 26/10/2023

*Date of Judgement:* 10/11/2023

**LONGOPA, J:**

This is an appeal against conviction and sentence to serve 30 years imprisonment for offence of armed robbery contrary to Section 287A of the Penal Code Cap 16 R.E.2022. The Appellant was a second accused in a criminal trial involving a child of 16 years of age as the first accused. It was alleged that the Appellant and his co-accused person stole a mobile phone made TECNO POP5 valued at TZS 250,000/= and a pair of shoes (sandals) worth TZS 25,000/=, both being property of one Ramadhan Juma and immediately before and after stealing did use machetes to threaten Ramadhan Juma to obtain and retain the said properties.

Being aggrieved by both conviction and sentence, the Appellant raised a total of eleven grounds of appeal contained in the Petition of Appeal. The grounds of appeal as per Petition of Appeal are hereby reproduced:

a. *That, I pleaded not guilt when the charge was read against me before the trial court;*
b. *That the Complainant brought a mere story before the trial court as he didn't produce any document or phone IMEI number that he owned mobile phone make techno pop5, and he had on the day of incident;*
c. *That, on reporting the matter to the police station, the complainant alleged that he had identified the accused persons since they live in his street, but he did not mention their names or give earlier description or peculiar mark of identities of their bodies, this bring doubt about his alleged identification of the accused person on material night;*
d. *That, since the Complainant alleged that they live in the same street with the accused person, he could report the matter to street leaders (Mwenyekiti wa Mtaa) but he failed to do that, this raises doubt about the occurrence of the alleged incident;*
e. *That, if truly the incident occurred, why the Complainant didn't mentioned number of chip lines which were carried by the alleged stolen phone? And from which company? Under*

*such circumstances, the alleged incident is purely a cooked case against appellant;*

f. *That, the accused statement taken by H7563 Petro was not taken according to the law because the accused was given a chance to call his lawyer or relative, something which is injustice.*

g. *That, the 1st accused as a child PW 2 Judith Misango was there during interrogation to safeguard his interest, but not as a witness against him, also as a child he should have been given a chance to call his lawyer or relative as demanded by the law, since that was done his legal rights were clearly violated.*

h. *That, nothing was recovered from me or under my knowledge, to warrant conviction and sentence against me.*

i. *That, Kisimbo Garage had security guard and normally at the alleged time when the incident occurred the area is so busy, why the Complainant didn't raise alarm to draw people attention? It is evident that this was a cooked case against the accused (complainant).*

j. *That, by the trial court to demand 1st accused to adduce evidence that the complainant incriminated him because he refused to connect him with his sister and the 2nd accused to adduce evidence that he was incriminated because he prevented him and other people from beating the 1st*

*accused, is the same demanding them to prove their innocence beyond reasonable doubt.*

k. *That, taking into regards, circumstances of the alleged incident, evidence adduced before the trial court, the guilt of the accused person was not proved beyond reasonable doubt.*

l. *That, I beg the High Court to quash both conviction and sentence and set me to liberty.*

m. *That I wish to be present during hearing of my appeal.*

Summed up, these grounds fall in three main clusters namely: the identification of the accused person was not proper; irregularities in recording the cautioned Statement and the prosecution failure to prove their case to the required standard of proof beyond reasonable doubt.

On 25th October 2023 when the appeal was scheduled for hearing the Appellant appeared in person while the Respondent was represented by Ms. Patricia Mkina, State Attorney.

In support of the appeal, the Appellant adopted all grounds of appeal as presented in the Petition of Appeal. The Appellant submitted that he was convicted and sentenced without any exhibits being tendered in the trial court. He reiterated that the Complainant alleged to have been invaded using a machete which was not tendered before the trial court. It was

Appellant's submission that there was no evidence of the Complainant being injured or attending medical treatment because of alleged incident.

The Appellant submitted further that evidence before trial court was based on allegedly identification using solar power road lights on the road within township. Absence of any eyewitness of the incident who was brought before trial Court casts reasonable doubt as to the occurrence of the alleged incident.

Further, the Appellant submitted that there was no information that alleged incident was reported to the street leader (Mtaa Chairman). This is despite the allegations by the Complainant that the Appellant and his co- accused at the trial court live in the same street.

The Appellant concluded his submission that there were no eyewitnesses to the alleged incident. The case was based on fabrication by the Prosecution to frame the Appellant with a child who was a co-accused. According to the Appellant, it was the act of humanity and being a law-abiding citizen to advise the complainant and other people not to take justice in their own hands by beating the child who was a co- accused. The Appellant prayed for this Court to allow the appeal and set him at liberty.

Ms. Patricia Mkina, State Attorney opposed the appeal. It was submitted that it is true that the accused person did not plead guilty to the offence. It is that plea of not guilty that made the Prosecution to call witnesses to

prove prosecution's case. It was subsequently upon full hearing of the case that the Appellant was found guilty of the offence.

It was a further submission of the Respondent that it is true that there was no evidence as to the phone IMEI number before the trial court as the subject matter that led to the case. However, Ms. Patricia argued that all the prosecution witnesses who testified at the trial Court in totality led evidence that concluded that Appellant was responsible for armed robbery as stood charged.

In respect of identification of the Appellant, it was submitted that there was a proper identification of the Appellant and his co-accused. First, PW 1 knew the Appellant and his co -accused as they lived in the same street. Second, PW 1 properly identified the Appellant and his co-accused using road solar light as he was standing near the solar light pole. Third, the incident continued for about 1 minute and some second which was enough to identify them properly. As such, Ms. Patricia invited this Court to take note that all requirements for identification of the Appellant was adhered to as per case of Waziri Amani versus Republic.

In respect to compliance with law in recording cautioned statement, it was submitted that the Appellant was afforded opportunity to call a relative or lawyer to attend his interrogation, but he elected the same to be taken in absence of any relative or lawyer.

It was a further submission by the Respondent that Prosecution brought witnesses before the trial court. The testimonies of prosecution's witnesses were watertight to establish commission of the offence of armed robbery. The testimony of PW 1 that Appellant and co accused did commit the offence was corroborated by Cautioned Statement of the Appellant which was Exhibit P2. In that exhibit, the Appellant did admit having committed the offence of armed robbery.

Regarding the eyewitnesses, the Respondent argued that it is true that there were no independent witnesses. However, it was submitted available evidence on record including that of PW 1 was tight and adequate to substantiate the commission of offence of armed robbery. This was coupled with Exhibit P2, on record, which corroborate existence of the commission of the offence. Ms. Patricia Mkina, State Attorney concluding by inviting this Court to dismiss the appeal for lack of merits and uphold the conviction and sentence passed by the trial court.

In determining this appeal, it is important to analyse whether the prosecution proved a case against the Appellant beyond reasonable doubt. This forms a crux of this appeal as all grounds advanced by the Appellant tend to challenge credibility of prosecution evidence to prove the alleged offence of armed robbery.

Determining the culpability of an accused person in criminal case, several principles must be considered. The first and foremost is the cardinal

presumption of innocence of the accused person until the contrary is proved as per Article 13(6)(b) of the Constitution of the United Republic of Tanzania, 1977 [Cap 2 R.E. 2002]. It is in line with the presumption of innocence principle that in any trial, the prosecution is obligated to prove the case beyond reasonable doubt against an accused person. The prosecution is duty bound to prove all ingredients of the offence to the required standard of proof beyond reasonable doubt.

This requirement was echoed in the case of **Maliki George Ngendakumana v. Republic**, Criminal Appeal No 353 of 2014 [2015] TZCA 295, where the Court of Appeal instructively held that:

> *It is a principle of law that in criminal cases a duty of the prosecution is of two folds, one to prove that the offence was committed and two, it is the accused person who committed it.*

Further, in **Magendo Paul and Another v. Republic** [1993] TLR 219 CAT, it was held that:

> *For a case to be taken to have been proved beyond reasonable doubt, its evidence must be strong against the accused person as to leave only a remote possibility in his favour which can easily be dismissed.*

Generally, the burden of proof in a criminal case does not shift to the accused person. The accused only needs to raise some reasonable doubt on the prosecution case, and he need not to prove his innocence. This was held in Mohamed Haruna @ Mtupeni and Another v. Republic, Criminal Appeal No. 25 of 2007, where the Court of Appeal stated that:

> *Of course, in cases of this nature the burden of proof is always on the prosecution. The standard has always been proof beyond reasonable doubt. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on basis of weakness of his defence.* See also the case of Mwita and Other v. Republic [1977] TLR 54.

The offence of armed robbery to which the Appellant stood charged and convicted by the trial court is stipulated under section 287A of the Penal Code, Cap 16 R.E. 2019 as follows:

> *Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or robbery instrument, or is a company of one or more persons, and at or immediately before or immediately after the time of stealing uses or threatens to use violence to any person, commits an offence termed armed robbery*

*and on conviction is liable to imprisonment for minimum term of thirty years with or without corporal punishment.*

According to the cited provision above to prove offence of armed robbery three ingredients must exist. One, there was stealing; two, that immediately before or after stealing the invader had a dangerous or offensive weapon; third, that the invader used or threatened to use actual violence to obtain or retain the stolen property.

In recent case of **Amosi Sita @Ngili v. Republic**, Criminal Appeal No. 438 OF 2021 [2023] TZCA 17697 the Court of Appeal reiterated its earlier decision in the case **Shaban Ally v. Republic**, Criminal Appeal No. 270 of 2018 when discussing ingredients of armed robbery. I quoted the holding for easy of reference: -

*From the above position of the law in order to establish an offence of armed robbery, the prosecution must prove the following: (1) There must be proof of theft; See the case of* ***Dickson Luvana v. Republic****, Criminal Appeal No. 1 of 2005 (Unreported); (2) There must be proof of the use of dangerous or offensive weapon or robbery instrument against at or immediately after the commission of the offence; and (3) That, the use of dangerous or offensive weapons or robbery instrument must be directed against a person; see* ***Kashima Mnandi v. Republic****, Criminal Appeal No. 78 of 2011 (Unreported).*

From the available evidence of prosecution, the three ingredients of offence of armed robbery exist in circumstances of the case at hand. PW 1 who was a victim testified that his mobile phone made Tecno Pop5 and sandals were stolen. Further, PW 1 testified that the Appellant and the first accused were armed with machete each and that PW 1 agreed to surrender the properties because they were armed thus threatened by the accused persons.

The immediate issue is whether the Appellant and his co-accused, who was conditionally discharged by the trial court, were properly identified by PW 1 considering that offence was alleged to have been committed at 0500hrs. It was PW 1 testimony that light used to identify the Appellant and co-accused was road solar light. The strength of testimony of PW 1 is based on visual identification.

It is trite law that evidence of visual identification is unreliable and one of the weakest kind of evidence. In that regard, the trial court is required to convict an accused person basing on such evidence after being satisfied that there was no any possibility of mistaken identity. To determine whether the evidence on visual identification is watertight, the Court considers different factors established by case laws. These factors include the distance at which the witness observed the accused, the source and intensity of light and whether the accused person was known to the witness before the incident. These factors were stated by the Court of

Appeal in the landmark case of **Waziri Amani v. Republic** [1980] TLR 250 that:

> *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 question as the following posed and resolved by him; the time the witness had the accused under observation; distance at which he observed him; the conditions under which such observation occurred, for instance, whether it was day or night time, whether there was a 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 few of the matters to which the trial judge should direct his mind before coming to any definite conclusion on the issue of identity.*

See also the case of **Chacha Jeremia Mrimi and three Others v. Republic**, Criminal Appeal No. 551 of 2015 [2019] TZCA 52 where the Court of the Appeal stated that:

> *To guard against the possibility the court has prescribed several factors to be considered in deciding whether a*



*witness has identified the suspect in question. The most commonly fronted factors are: how long did the witness have accused under observation? At what distance? What was source and intensity of the light if it was at night? Had the witness ever seen the accused before? How often? If occasionally, had he any special reason for remembering the accused person? What interval has lapsed between the original observation and subsequent identification at the police? Was there any material discrepancy between the description of the accused given to the police by the witness, when first seen by them and his actual appearance? Did the witness name or describe the accused person to the next person he saw? Did that/those other person/s give evidence to confirm it.*

See also **Stephen Paul & Another vs Republic** (Criminal Appeal 455 of 2016) [2020] TZCA 1922 (18 December 2020), at pages 14 and 15; and **John Paulo @ Shida vs Republic** (Criminal Appeal 335 of 2009) [2011] TZCA 114 (24 March 2011), at pages 7 and 8 on the need to describe the accused person properly in terms of attire worn by the accused, appearance etc.

The trial court was satisfied that the Appellant was properly identifies by PW 1. At page 5 of the judgement, the trial magistrate stated that in present case the complainant said he was invaded by two people who he

managed to identify by the aid of road lights. According to PW 1, he saw the accused persons who appeared in front of him and he was near the light pole. It was PW 1 further testimony that the incident took place for about one minute and some seconds. Also, the complainant said he knows the accused well for he used to see them in the street.

I have gone through the evidence on record. PW 1 did not testify on the intensity of the light which aided him to identify the Appellant. PW 1 stated that he knew the accused person as they live in the same street. However, the name of the street was not given, and no other witness corroborated this fact that indeed PW 1, the accused and his co-accused lived in one street. There was no testimony from PW 1 as to how long had the three been living together in one street to satisfy the Court that there was no element of mistaken identity to the Appellant and co- accused. Furthermore, the fact that PW1 observed the Appellant and his co accused for just one minute and few seconds, there are possibility of mistaken identity as time was so short. This is coupled with fact that PW 1 was allegedly under threat from or apprehension of being harmed by the accused persons.

I hasten to find this time would be too little for PW 1 to have properly identified Appellant and his co accused given that the incident happened at 0500hours. That said, I find that the evidence of identification of the Appellant at the scene of crime was not watertight to warrant conviction and sentence against the Appellant.

The other set of evidence relied upon by the trial court to arrive at the decision is the admission/confession of the Appellant recorded by PW 2. This cautioned statement admitted as Exhibit P.2. It is a fact that cautioned statement of the Appellant's admission as part of the prosecution evidence was upon trial court's satisfaction that the statement was made voluntarily. The main question regarding this cautioned statement is whether it was recorded within the time prescribed by the law.

It is a trite law that the Court has always taken great exception to cautioned statements which the police take outside the period prescribed by section 50 and 51 of the Criminal Procedure Code, Cap 20 R.E. 2022. In the case of **Abdallah Ally @Kalukuni v. Republic**, Criminal Appeal No. 131 of 2016, a cautioned statement which was taken three days after the appellant's arrest on two counts of burglary and stealing. The appellant learned counsel had submitted that in terms of section 50(1) (a) of the CPA, the cautioned statement which was taken beyond four hours after his arrest should not have been admitted as evidence. The learned counsel urged the Court to expunge the statement from the record. The Court duly obliged stating that:

> *We entirely agree with Ms. Msalangi. On the reading of evidence on record the only material evidence to connect appellant with the offences he was charged with was that of the cautioned statement. The said cautioned statement was*

*taken beyond four hours period from the time of his arrest. This goes contrary to section 50(1)(a) of the CPA.*

This was also the decision in the case of **Idd Muhidin @Kibatamo v. Republic**, Criminal Appeal No. 101 of 2008.

In the instant case there are two main aspects. One, the evidence on record is contradictory regarding time when Appellant was arrested. This makes it difficult to gauge whether the cautioned statement of the Appellant (Exhibit P.2) was recorded within prescribed time limit. It is on record that PW 1 stated that arrest of the Appellant was done on 7/10/2022 at 0600hours. Conversely, DW 1 and DW 2 testified to have been arrested on 6/10/2022 at 1500hours. The Prosecution did not call any witness to corroborate PW 1's testimony that arrest was effected on 7/10/2022 around 0600 hours. It is on record that Exhibit P.2 was recorded from 0900 to 0930 hours on 7/10/2022. According to PW 2, this statement was recorded after completion of recording the cautioned statement of the 1st accused (Appellant's co-accused) from 0800 to 0830 hours. It is doubtful that Exhibit P 2 was recorded within prescribed period as per requirements of the law given evidence of the Appellant (DW 2) that arrested was done in the previous day.

Second aspect about cautioned statement which is Exhibit P.2 relates to when exactly was the same recorded. Testimony of PW 2 is to the effect that Exhibit P.2 was recorded from 0900 to 0930 hours. According to PW 2,

this cautioned statement was recorded after the completion of recording the cautioned statement of 1st accused. However, testimony of PW 3 indicates that she was called in the afternoon on 7/10/2022 to witness the recording of Exhibit P.1 which was the cautioned statement of the 1st accused. As per PW 3, recording of the first cautioned statement commenced at 1400hours and it took about 45 minutes. This testimony tallies with that of the DW 2 that his cautioned statement was recorded from 1400hours on 7/10/2022. This contradiction is glaring on the veracity of the cautioned statement.

The totality of PW 2 and PW 3 testimonies casts reasonable doubts as to the exact time when was the cautioned statement recorded. It is Exhibit P2 that was relied heavily by the prosecution to corroborate PW 1's testimony. This contradiction as to the timing of the cautioned statement of the Appellant makes Exhibit P.2 unreliable evidence as it is not clear whether the cautioned statement recorded at 0900 as per evidence of PW 2 is the same with that recorded after completion of recording of the Cautioned Statement of 1st accused i.e. after 1400hours.

It is my settled view that Exhibit P.2 should have been given little weight by the trial court in arriving at the verdict against the Appellant. This is because the timing of recording the cautioned statement is contradictory in the light of testimonies of Prosecution's witnesses PW 2 and PW 3 considered in their totality. Such contradiction of the testimony should be

interpreted in favour of the Appellant as it pokes holes in the evidence of the prosecution's case.

It is my findings that Prosecution's evidence had been tainted by legal challenges. These challenges in my view impair to great extent proof of the commission of the offence allegedly to have been committed by the Appellant and his co-accused. Evidence of PW 1 on proper visual identification of the Appellant casts reasonable doubts on its reliability. Similarly, cautioned statement namely Exhibit P2 have serious challenges on their reliability to establish the commission of the offence of armed robbery. In absence of any other corroborating evidence, the offence charged lacks any sufficient proof to warrant conviction. Thus, it is my finding that the case against the Appellant was not proved beyond reasonable doubt as required by the law.

I will address two points before I conclude. First, at page 6 of the judgement, trial magistrate noted that failure by the accused person to cross-examine the witness on allegation of existence of grudges and that 2nd accused just assisted the 1st accused by advising the complainant and other people to take the 1st accused to police station implies that the accused person accepted the truth of Complainant's evidence.

I am also aware of the decision in the case of **Haruna Mtasiwa v. Republic** (Criminal Appeal 206 of 2018) [2020] TZCA 230 (15 May 2020), where the Court of Appeal at page 24 held as follows:

*It is the law in this jurisdiction founded upon prudence that failure to cross-examine on an important matter ordinarily implies the acceptance of the truth of the witness's evidence on that aspect.*

Is it true that the Appellant failed to cross-examine on an important matter? According to the trial magistrate, the failure to cross-examine witnesses by the Appellant was regarding alleged grudges and the fact that 2nd accused (Appellant herein) just assisted the 1st accused by advising the complainant to take the accused to police station implies that the accused accepted the truth of the Complainant evidence.

I am of a different view altogether on this aspect. The decisions of the Court of Appeal emphasize on failure to examine on important matters. I think important matter regarding commission of offence of armed robbery does not include issues of grudges between Complainant and accused persons in the circumstances.

It is on record, at pages 8 and 9 of typed proceedings, that both the Appellant and 1st accused person did cross-examine on important matters regarding the commission of an offence. These included timing of the commission of alleged offence, identification of the accused persons, being in possession and use of any dangerous or offensive weapon or robbery instrument, retrieval of dangerous or offensive weapons or robbery

instrument as well as retrieval of alleged stolen goods, and so on. These were pertinent issues regarding the offence of armed robbery for which the Appellant and his co- accused stood charged. It would be improper to find out that any failure to cross-examine on aspects that do not address elements of the offence could amount to failure to cross- examine on important matter thus implying acceptance by the Appellant on evidence of the Complainant.

The second point is on conviction of the accused persons in the case at hand. I have perused the record of the trial court and noted that conviction was not properly done. For easy of reference, I will quote a relevant part on pages 11 and 12 of the judgement. It indicates as follows:

> "...I find **the accused person** guilty of the offence of armed robbery contrary to section 287A of the Penal Code, RE 2022 and **convict him** forwith.

Signed

**U.S. Swallo**

**Principal Resident Magistrate**

**19/5/2023**

**PREVIOUS RECORD**

S/A: We have no criminal record of **the accused person**. We pray for severe punishment as a lesson to the accused person and others.

**MITIGATION**

**I am a first offender. I have a family depending on me. I pray for lesser punishment.**"

From the extract above, I am convinced that there was no proper conviction of the Appellant. Throughout the proceedings, record demonstrates that there were two accused persons. The 1st accused person was one Baraka Jumanne and the 2nd accused was Sadam Ramadhan (Appellant herein). It is not clear who among the two accused persons- the Appellant or the 1st accused was convicted and given opportunity to mitigate.

I am mindful of the contents provision of Section 235(1) of the Criminal Procedure Act, Cap 20 R.E. 2019. It provides that:

> 235.-(1) The court, having heard both the complainant and the accused person and their witnesses and the evidence, shall convict the accused person and pass sentence upon or make an order against him according to law or shall acquit or discharge him under section 38 of the Penal Code.

Though trial court's judgement seems to have complied with the provision of the CPA, a question left unanswered is who among the two accused persons was convicted by the trial court and afforded an opportunity to mitigate on sentence intended to be imposed? It is uncertain whether it is the Appellant, or the 1st accused person who was convicted in the circumstances.

I am of a settled view that trial magistrate should have entered conviction for each of them or for both accused persons. That would reflect the prevailing reality that two accused persons stood charged for the same offence and both were found guilty as charged.

The reasons set out above, I consequently allow the appeal, quash the conviction, and set aside the sentence imposed by the trial magistrate. The appellant be set at liberty unless held on for some other lawful cause.

It is so ordered.

**DATED** and **DELIVERED** at **DODOMA** this 10th day of November 2023.


**E.E. LONGOPA**

**JUDGE**

**10/11/2023.**