IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE SUB-REGISTRY OF TABORA

AT TABORA

DC. CRIMINAL APPEAL NO. 38 OF 2022

(Originating from Urambo District Court Criminal Case No. 128 of 2020)

JAYOKA S/O CHEYO @ MABIRIKA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date:13/07/2023 & 4/8/2023

BAHATI SALEMA, J.:

In the District Court of Urambo, the appellant **Jayoka S/O Cheyo** was convicted for two offences of Armed Robbery contrary to section 287A and Grievous Harm contrary to section 225 of the **Penal Code**, Cap. 16 [R.E 2022].

As the appellant pleaded not guilty to both counts, the prosecution paraded witnesses. After the full trial, the appellant was found guilty and convicted of the counts of offence and sentenced to serve a custodial sentence of thirty (30) years and one (1) year respectively.

The appellant now seeks to impugn the decision of the District Court upon a petition of appeal comprised of six grounds as follows;

1. *That, the case for the prosecutions was not proved, against the appellant, beyond reasonable doubt as required by the law.*
2. *That, the appellant was not positively identified by both PW1 and PW2.*
3. *That, there was an unjustified delay in arresting the appellant occasioned by the failure of the prosecution to offer an explanation why it took that long (six months) which goes to the root of whether he was indeed identified at the scene of crime to be a* ***"particep criminis"*** *to the offence charged.*
4. *That Exhibit P2, the extra-judicial statement purported to be made by the appellant before PW4 did not comply with the Chief Justice's guidelines.*
5. *That, exhibit P3, the caution statement allegedly made by the appellant before PW5 was made upon expiry of the time prescribed by sections 50 and 51 of* ***the Criminal Procedure Act****, Cap.16 [R.E. 2019].*
6. *That, the learned trial magistrate did not consider the defence evidence of the appellant when composing the judgment.*

The appellant prays this Court to allow the appeal to quash the conviction, the sentence and order for the appellant's release from prison custody.

At this moment, I find it pertinent to highlight the facts leading to the arraignment of the appellant. On the 15th day of November 2019 at about night hours at Upele village within Urambo District in Tabora Region, the appellant and others allegedly did steal cash TZS 380,000/=, one mobile phone make Tecno valued TZS 40,000/= and one motorcycle make sunlug valued TZS 2,000,000/= all items with a total value of TZS 2,420,000/=. The

stolen properties were alleged to be of one Bugari s/o Mtungulija and that immediately before and after such stealing they did use shotgun, bush knife and clubs to obtain the said properties, on the same victim Bugari Matungulija by stabbing him on his head and hands by using a sharp object.

On the date of the hearing, the appellant was unrepresented whereas the Republic was represented by Ms. Wivina Rwebangira, Mr. Charles Magonza and Ms. Idda Rugakingira, learned State Attorneys.

The appellant being a layperson prayed to this court his grounds of appeal be adopted as part of the submissions.

In her reply, Ms Wivina Rwebangira, State Attorney submitted that the appellant was charged with 2 offences namely Armed Robbery and Grievous bodily harm.

On the **first ground** of appeal that the case for the prosecutions was not proved, against the appellant, beyond reasonable doubt as required by the law.

Starting with the first offence, which is provided under section 287A of the **Penal Code**, Cap. 16, she stated that 3 ingredients must be established. According to the above provision for the offence of armed robbery to be proved the prosecution must prove that, **one,** there was an act of stealing; **two,** that, immediately after stealing the assailant was armed with a dangerous or offensive weapon or robbery instrument; and **three,** that the said assailant used or threatened to use actual violence in order to obtain or retain the stolen property.

According to the proceedings she stated that it is true there was stealing of techno Mobile, Motorcycle and TZS 380. This was testified by PW1, the

complainant who identified Jayoka Cheyo, the accused herein. The second ingredient is that the appellant used weapons, PW1 explained in the court that he was threatened by a bush knife and short gun also he was cut on his finger and was treated at Kaliua Mission Hospital.

As to the 3rd ingredient, the bandits used a bush knife and shotgun to threaten PW1 and PW2 and managed to steal the said properties as clarified by PW1 and PW2.

On the second count of the offence of grievous harm, it was established by PW1 whose finger was cut and went to the hospital for treatment. Therefore, the prosecution established the case beyond reasonable doubt.

The **second ground** of appeal, is that the appellant was not positively identified. The learned state attorney submitted that the appellant was identified by PW1 and PW2. PW1 stated that he identified Jayoka Cheyo by a solar bulb since he did not wear a mask. PW2 also identified him through solar light since he used to be their servant when they were growing tobacco. To fortify her argument, she cited the case of **Waziri Amani v Republic,** 1980 TLR on page 280 when the Court reiterated the principles to be taken into account when deliberating whether or not to rely on such evidence. Before relying on such evidence, the court should put into consideration such factors as the time the witness had the accused under observation, the distance at which the witness had the accused under observation if there was any light, then the source and intensity of such light, and also whether the witness knew the accused before the incident. She submitted that PW1 and PW2 mentioned the appellant by his name in this case, PW2 identified

him since she stayed with them for 2 years. As to the distance, she identified him through solar light since he did not wear musk. The time, it was during night hours and PW1 and PW2 managed to identify him.

The **third ground** of appeal is that there was unjustified delay in arresting him. The learned State attorney submitted that this is a new ground that should not be considered. Strengthening her stance, she referred to the case of **Joel Mwangambako v Republic**, Criminal Appeal No. 516 of 2017 where the court held that;

> *"However, we would hasten to say that the second ground of appeal as we enumerated earlier is a new ground and therefore, cannot be entertained by the court. It is generally not looking at issues or matters that were neither raised nor decided by the trial court or the High Court on appeal unless they were pure matters of law. See* ***Hassan Bundala @ Swaga v Republic,*** *Criminal Appeal No 386 of 2015."*

She submitted that PW5 H. 980 DC Halifa testified that the incident occurred on 15th November 2019 and the efforts of police reached on 28/5/2020 PW5 clarified why he was arrested after 6 months.

As to the **fourth ground** of appeal, the extra-judicial statement did not comply with the Chief Justice's guidelines. She submitted that the extra-judicial statement tendered by PW4 Monica Muhandikila was not objected to and was admitted properly. Fortifying her argument, she referred to the case of **Kashindye Meli V Republic** [2022] TLR 376, 378.

On the **fifth ground** of appeal, on the caution statement, the statement was within time and was not objected to when PW5 tendered it. The **last one** is that the trial court did not consider the evidence of the defence. The defence was considered by the trial court. She prayed this court to dismiss this appeal.

In his brief rejoinder, the appellant stated that he was not found with anything and he wondered how the prosecution witnesses managed to see him from outside. Finally, he prayed for the appeal to be allowed and for the Court to set him free.

After a careful review of the record and the submissions made by parties, the main issue for consideration and determination in this appeal is whether or not the appeal has merit.

Beginning with the first ground of appeal, the case was not proved against the appellant beyond reasonable doubt.

Section 287A of the **Penal Code**, Cap.16 [R. E 2022] defines, armed robbery to mean;

> *"Any person who steals anything and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument or is in the company of one or more person and at or immediately before or immediately after the stealing threatens to use violence to any person."*

Beginning with the first ground of appeal that the ingredients of the offence of Armed Robbery under section 287A of **the Penal Code**, Cap. 16 [R.E.

2022] were strongly established by both PW1 and PW2 in that the attackers used a bush knife and gunshot in the commissioning of the offence.

Having keenly perused the court records, the court found that PW1 stated that the robbers were armed with a machete and a shotgun. PW2, also supported that the invaders started to assault them.

On the second ground of appeal, the appellant was not positively identified by PW1 and PW2.

It is trite law that no court should act on the evidence of visual identification, unless, all possibilities of mistaken identity are eliminated and the court is satisfied that the evidence is watertight -See **Waziri Amani v. Republic** (1980) T.L.R. 250; **Stuart Erasto Yakobo v. Republic**, Criminal Appeal No. 202 of 2004 and **Richard Otieno @ Gullo v. Republic**, Criminal Appeal No. 367 of 2018 (both unreported).

In this ground, the issue is whether the appellant was properly identified at the scene of the crime as testified by PW1 and PW2. In the instant case, the appellant's main complaint as far as identification is concerned was that the identification at the crime scene was unreliable as the solar light by PW1 was not conducive to proper identification. In countering the appellant's arguments, the learned state attorney relied on familiarity between the appellant and both PW1 and PW2; that he was their servant for almost 2 years and identified him by the solar light.

I shall start with visual identification where PW1 and PW2 stated that they were able to identify the appellant as there was a solar bulb shining in the room and the culprits had a torch. I take note that both witnesses did not state the source of light which enabled them to identify the appellant who

was outside. During cross-examination, PW2 only disclosed it was 3 meters away. PW1 managed to identify the appellant who did not cover his face with a mask. Notwithstanding the stage of disclosing the source of light by the identifying accused persons, the pertinent question to be considered is whether the said solar bulb was so bright to the extent of eliminating the possibility of mistaken identity. The answer to this question is implausible. The record of appeal bears no evidence as far as the intensity of light, the time he stayed to observe. It is so doubtful whether the prosecution witnesses were able to properly identify the appellant at the scene of the crime. Their account is doubtful following criteria led in the case of **Waziri Amani v R** [1980] TLR 250 and **Kazimili Mashauri v R**, Criminal Appeal No. 252/2010 CAT Mwanza (unreported) *Whether the witness knew the accused before the incident, the amount of time the witness had the accused under observation, The distance between the witness and the accused person during the commission of the offence;the kind of light present and its intensity and whether there was any impediment or obstruction between the accused and the witness.*

In this appeal, to rely on evidence of visual identification, the surrounding circumstances of the offence should be shown on the record. Still, upon perusal of the court records I have noted that the evidence given by PW1 and PW2 on their identification of the appellant falls short of the standard laid down in **Waziri Amani** (*Supra*). Their evidence was not watertight and it cannot be said that based on that evidence the appellant was positively identified at the scene of the crime. In **Osca Mkondya v. D.P.P**, Criminal No. 505 of 2017, the Court was guided by its previous decision in **Juma**

Hamad v. Republic, Criminal Appeal No. 141 of 2014 (both unreported) where it stated:

> "*When it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable identifying witness to see and positively identify the accused persons. Bare assertions that "there was light" would not suffice*".

Similarly, in **the case of Elias Yobwa @ Mkalagale v. Republic**, Criminal Appeal No. 405 of 2015 when the Court was resolving an issue regarding recognition by the identifying witness as in the present case, it cited the case of **Said Chally Scania v. Republic**, Criminal No. 89 of 2005 (both unreported) and stated that:

> *"We wish to stress that even in recognition cases, clear evidence on the source of light and its intensity is of paramount importance. This is because, as occasionally held, even when a witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made*".

Having considered the circumstances of the present case, it is not safe to conclude that the appellant was properly recognized by PW1 and PW2 at the scene of the crime while the intensity of light was not stated. This ground is with merit.

On the third ground of appeal, there was an unjustified delay in arresting the appellant occasioned by the failure of the prosecution to explain

why it took that long (six months) which goes to the root of whether he was indeed identified at the scene of the crime to be a "*particep criminis*" to the offence charged.

PW5 H. 980 DC Halifa testified to the court that when the incident occurred on 15/11/2019, PW5 visited the place of the incident and upon interrogation. PW1 named the appellant as the culprit who committed the offence and identified Jayoka who used to be their servant; the efforts of the police reached on 28/5/2020 who was arrested by the villagers at Mpandamlowoka and brought to Kaliua police.

It is a settled position that unexplained delay to arrest a suspect casts doubt on the veracity of the witnesses. In this connection see the cases of **Juma Shabani @ Juma v. Republic**, Criminal Appeal No. 168 of 2004; **Chakwe Lekuchela v. Republic**, Criminal Appeal No. 204 of 2006; and **Samuel Thomas v. Republic**, Criminal Appeal No. 23 of 2011 (all unreported).

In the present case, the state attorney contended that the reason for the delay to arrest the appellant immediately after the incident was that he disappeared from the scene of the crime. Therefore, from the evidence there was an explained delay in arresting the appellant.

As to the fourth ground of appeal that Exhibit P2, the extra-judicial statement purported to be made by the appellant before PW4 did not comply with the Chief Justice's guidelines.

The importance of compliance with the said Chief Justice Guideline was reiterated in the case of **Japhet Thadei Msigwa V R**, Criminal appeal No.58 of 367 of 2008 where the Court stated as follows;

"...The Justice of Peace ought to observe, inter alia, the following: (i) The time and date of his arrest; (ii) The place he was arrested; (Hi) The place he slept before the date he was bought to him. (iv) Whether any person by threat or promise or violence has persuaded him to give the statement. (v) Whether he really wishes to make the statement of his own free will. (vi)That if he makes a statement, the same may be used as evidence against him."

Compliance with the above conditions is crucial to enable the Court to ascertain if the suspect was willing at the time of making his confession and knew the implications of his making the statement or not and to enable the Court to know the circumstances which prevailed at the time the statement was taken and be in a position to determine if the said statement was made voluntarily or not. If the criteria are not observed it may lead to a finding that the same was not voluntarily made and hence inadmissible.

From the extra-judicial statement purported to be made by the appellant before having perused, it was properly recorded before the justice of the peace and was admitted as exhibit "P2". Hence this ground has no basis.

On the 5th ground of appeal that exhibit P3, the caution statement allegedly made by the appellant before PW5 was made upon expiry of the time prescribed by sections 50 and 51 of **the Criminal Procedure Act**, Cap.16 [R.E. 2022].

I had a chance to peruse the caution statement as rightly submitted by the learned state attorney, the statement indicates that it was recorded from 16.30 and finished at 18.00 hrs within the period available for

interviewing a person. I subscribe with the learned state attorney that this ground has no base since sections 50 and 51 of **the Criminal Procedure Act**, Cap.20 were complied with.

The last ground of appeal is that the learned trial magistrate did not consider the defence evidence of the appellant when composing the judgment. The learned State Attorney submitted that the evidence was well considered by the trial court.

As repeated by the higher court, the trial court has to subject the entire evidence on record to scrutiny, which entails considering the defence evidence before making any finding of guilt. Where the trial court fails to do so, the first appellate court is enjoined to do so in its role to re-evaluate the whole evidence on record to make its findings of fact either concurring with the trial court or otherwise where both courts below fail to do so. The Court has the power to step into the shoes of the first appellate court and do what that court omitted to do. In the cases of **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149; **Joseph Leonard Manyota v. Republic**, Criminal Appeal No. 485 of 2015 (unreported), cited recently in the Court's recent unreported decision in **Yustus Aidan v. Republic**, Criminal Appeal No. 454 of 2019.

Guided by the above authorities, this court traversed the defence and noted that the appellant's defence was that he visited his boss Bugali s/o Matungilija at Upele village on 27/5/2020 and left peacefully and thereafter he was arrested by two militiamen of the village and also, he stated that he was alleged of an offence he did not commit regarding the source of light were too weak to be relied upon by the court.

Although the trial court did not evaluate well the defence, having perused the proceedings, I am satisfied that the prosecution proved its case since other evidence such as a caution statement and extra-judicial statement corroborate.

As noted from the prosecution evidence the appellant himself admitted to the cautioned statement and when the prosecutor sought to produce it, the appellant did not object to its production; and so, it was admitted as Exhibit P2 and P3. He is now seeking to challenge its admissibility in this Court. It was never raised with the first trial court. Again, as a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided in the court below to be raised on appeal (See **Kennedy Owino Onyango and Others v R**, Criminal Appeal No. 48 of 2006 (unreported) but due to the significance of this point this court revisited the basic legal principles on the subject the grounds of appeal and noted that they complied.

For the above reasons, I find that the evidence presented by the prosecution was sufficient to prove the offence of armed robbery beyond reasonable doubt. Therefore the 1st, 3rd, 4th, 5th and 6th grounds of appeal have no basis and for the foregoing reasons, the appeal is dismissed.

Order accordingly.

A. BAHATI SALEMA
JUDGE
4/8/2023

Court: Judgement delivered in presence of both parties.

A. BAHATI SALEMA
JUDGE
4/8/2023

Right of Appeal fully explained.

A. BAHATI SALEMA
JUDGE
4/8/2023