IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 114 OF 2023

(Original Criminal Case No. 98/2022, District Court of Kinondoni (Hon. Kaluyenda, PRM))

MRISHO RASHID ADAM.....APPELLANT

VERSUS

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

31/10/2023 & 10/11/2023

JUDGMENT OF THE COURT

KAFANABO, J.:

This is an appeal challenging a decision of the district court of Kinondoni, at Kinondoni (Hon. J.A. Kaluyenda) delivered on 14th February 2023.

The facts of the case are that the appellant herein and another person by the name of Robert Charles, not part of this appeal, were jointly charged with armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2019. The particulars of the offence show that, the appellant and the said Robert Charles on the 7th day of March 2022 at Mabibo Sokoni area within Kinondoni district in Dar es Salaam region, stole one mobile phone, make tecno, worth Tanzania Shillings(TZS) 25,000/=, one hand bag worth TZS 30,000/=, one rasket bag worth 35,000/= and one Khanga worth TZS

8000/= all properties valued at TZS 380,000/=, the properties of one Beatrice Samson and immediately before and after such stealing slashed the said Beatrice Samson with a panga/machete on her left hand in order to obtain and retain the said properties.

The case against both accused persons was heard and determined. The 1st accused was found guilty of the offense as charged and sentenced to 30 years' imprisonment. The 2nd accused was acquitted as the prosecution failed to prove a case against him to the required standards.

The appellant being aggrieved by the said conviction and sentence appealed to this court marshaling six grounds of appeal, namely:

1. That the learned trial magistrate erred in both law and fact by basing the appellant's conviction on charge sheet that had variance on the properties and value amount mentioned by PW1.
2. That the learned trial magistrate erred in both law and fact by convicting the appellant based on incredible, tenuous contradictory and uncorroborated evidence of prosecution witnesses.
3. That the learned trial magistrate erred both in law and fact by convicting the appellant based on incredible visual identification.

4. That the trial court judgment lacks punctual or legal points of determination in accordance with mandatory(sic) of section 312(1) of the Criminal Procedure Act Cap. 20 R.E. 2019.
5. That the learned trial magistrate erred in both law and fact by failing to analyse the appellant's defence.
6. That the learned trial magistrate erred in both law and fact by convicting the appellant with a case that was not proved to the hilt.

On 31st October, 2023 the court ordered that the appeal be disposed of by way of written submissions and both parties complied with the schedule of filing the same. Save that the rejoinder submission of the appellant was not filed.

In support of the appeal, the appellant made his submissions starting with the first ground of appeal. The said ground of appeal is to the effect that the learned trial magistrate erred in both law and fact by basing the appellant's conviction on a charge sheet that had variance on the properties and value amount mentioned by PW1 in her evidence. The appellant argued that the testimony of PW1 who testified on 26/07/2022, whose testimony is available on page 8 of the trial court proceedings, varies with the charge against him.

As regards the 2nd, 3rd, and 6th grounds of appeal all of them are challenging the credibility of the evidence that led to the conviction of the appellant. The appellant is challenging the visual identification of the accused by PW1 and that the evidence is contradictory and inconsistent referring to section 3(2)(a) of the Evidence Act, Cap 6 R.E 2019 as the duty of proving beyond reasonable doubt was not discharged. He argued that it was not established that he was the one who attacked PW1. Referring to (page 8, line 2 of the trial court proceedings) he relied on the contradiction as to who took the PW1's bag between the first and second accused. He discredited the witness as contradicting herself and thus not reliable. The case of **Joseph Mkubwa v.R Criminal Appeal No. 94 of 2007** (unreported), was cited in support of the submission.

On the issue of improper identification of the appellant, the cases of **Republic v Mohamed Bin Alhui [1942]9 EACA 72** and **Marwa Wangiti Mwita and Another v. R [2002] TLR 39** were cited to support the argument that identification of the accused was not credible.

Another argument of the appellant was that the prosecution did not call key witnesses to testify. The other appellant's argument is who is the police

officer who issued PF3 and who returned the same. The appellant is of the view that police officers who issued PF 3 should have testified in court.

In response to the appellant's submissions, the respondent argued together grounds 1, 2, 3, and 6 of the appeal as they are based on the variance of the charge and the evidence, incredible, contradiction, and uncorroborated evidence. It was submitted that the claim by the appellant is baseless because the alleged contradiction and variance of the evidence mentioned by the appellant do not go into the root of the case. The case of **Mohamed Said Matula v. The Republic [1995] TLR 3** was cited and the case of **Ex. G. 2434 Pc. George vs Republic (Criminal Appeal 8 of 2018) [2022] TZCA 609** (6 October 2022) was cited in support of the submission. The respondent further argued that they managed to prove the case beyond reasonable doubt.

As regards the 4th and 5th grounds of appeal the appellant submitted that the trial court's judgment did not contain factual and legal points for determination contrary to the requirements of section 312 (1) of the **Criminal Procedure Act, Cap. 20 R.E.2019**. It was argued that the court should not only summarise and analyse the body of the evidence and the law but also evaluate the evidence in order to determine its worth, credibility

or believability, and significance by using the legal standards of admissibility, burden, and standard of proof and weight of such evidence. It was argued that the trial court judgment is simply a summary of the testimony of the prosecution witnesses. No evaluation of the law and legal principles, and no summary or evaluation of the appellant's defence. The cases of **Amiri Mohamed v, R [1994] TLR,138, Hussein Idd v. R. [1986] TLR** were cited supporting the argument that failure to consider defence is fatal.

In respect of grounds four and five of the appeal, the respondent concurred with the submissions of the appellant in the sense that the judgment by the trial court violates section 312(1) of the **Criminal Procedure Act, Cap. 20 R.E. 2019 (**hereinafter the CPA), citing the case of **Kadege Thabit @ Sankala vs Republic (Criminal Appeal No. 409 of 2021) [2023] TZCA 17711 (4 October 2023).**

After reviewing the appellant's grounds of appeal and the parties' submissions in respect of the same, this court proposes to commence with the 4th and 5th grounds of appeal on the judgment of the lower court not being in compliance with the requirements of section 312(1) of the CPA and not considering the appellant's defence. As submitted by both parties, this court also agrees that the judgment did not set out clear points of

determination as far as the offence of armed robbery is concerned. The said section provides that:

> *'Every judgment under the provisions of section 311 shall, except as otherwise expressly provided by this Act, be written by or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer as of the date on which it is pronounced in open court.'*

Reading the judgment of the trial court does not contain relevant ingredients of the judgment as required by the foregoing provision of the law. The only relevant part of the judgment that attempts to make an analysis and evaluation of the evidence is page 5 of the judgment, which is extremely scanty. In the case of **Massanja Maliasanga Masunga & Others vs Republic (Criminal Appeal No. 328 of 2021) [2023] TZCA 17780 (26 October 2023)** it was held that:

> `***We agree that where the trial court or the first appellate court does not consider a party's defence, it is an irregularity but the same is curable. The first appellate court has to consider***

the defence as a remedy and if it does not, the second appellate court has a duty to consider the defence and make a decision.'

In the light of the above position of the Court of Appeal, this court has to consider defense of the appellant and make a decision. The defence of the appellant is found on pages 30 to 33 of the trial court proceedings. The defence case was conducted on 24/01/2023. DW1, the appellant herein, testified that on 28/02/2022 he was at the place of business around 10.00 hours and met with sungusungu whom, after a brief interrogation, they searched him where he was found with a mobile phone, cash, and keys and was taken to police station. He also testified that a lot of people were arrested that day for loitering and on 05/04/2022 he was arraigned in court for the offence of armed robbery unknown to him.

DW2, not a party to this appeal, testified that on 26/02/2023 on his way back home he met a group of people with clubs and machetes who stopped and interrogated him, searched him and he fought with them, he was overpowered, arrested, and taken to a police station. On 05/04/2022 he was arraigned in court and charged with the offence of armed robbery.

Given the evidence above, now this court may turn to the issue of judgment not complying with section 312 of the CPA. It is the position in our jurisdiction that the same is curable by the appellate court stepping into the shoes of the trial court in determining the relevant points of resolving the case, in this case, armed robbery.

Section 287A of the **Penal Code, Cap. 16 R.E. 2019** provides that:

> *'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 in order to obtain or retain the stolen property**, commits an offence 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 above-reproduced section makes it clear regarding the ingredients of the offence of armed robbery which will, to a greater extent, form points of determination in this case. The said points were restated in the case of **Shabani Said Ally vs Republic (Criminal Appeal 270 of 2018) [2019] TZCA 382** (6 November 2019) where it was held that:

It follows from the above provision of the law that 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 a dangerous or offensive weapon or robbery instrument against at or immediately after the commission of robbery.

3. That use of dangerous or offensive weapon or robbery instrument must be directed against a person. See:- Kashima Mnadi v. Republic, Criminal Appeal No. 78 of 2011 (unreported).

Now therefore, the appellant complained that the trial court judgment lacks punctual or legal points of determination in accordance with mandatory requirements of section 312(1) of the Criminal Procedure Cap. 20 R.E. 2019. It followed that, this court answered that ground in the affirmative, and that since the said defect is curable, this court will proceed to determine legal points as required by law.

Further, in determining the said points this court will be answering also grounds one, two, three, and six of the appeal. That is to say, this appeal can be disposed by combining the said four grounds of appeal because they boil down to one issue, that is, whether the prosecution proved its case against the appellant beyond a reasonable doubt. In other words, whether on the basis of the prosecution evidence, the appellant was properly convicted of the offence of armed robbery.

The first point of determination is whether the appellant stole the properties belonging to PW1.

According to the testimony of PW1, the victim of armed robbery, contained on pages 7-10 of the trial court proceedings, it is clear that on 07/03/2022 the appellant assisted by one Robert Charles managed to steal from her a handbag, which contained two mobile phones (tecno and itel), wallet in the handbag with cash TZS 30,000/= and a khanga. PW1 also identified the accused properly as the robbery took place in the daylight morning at 7.00 hrs where the appellant and another person ordered her to surrender her bag which she refused and a scuffle began between PW1 and the appellant herein, and the said other person attacked her with a machete.

In his submissions, the appellant portrayed the variance between the charge sheet and the evidence of PW1. The appellant argued that the charge sheet mentions one mobile phone of tecno worth 25,000/= to have been stolen and the total value of the properties stolen to be 380,000/=. But PW1 testified that two mobile phones were stolen one being tecno valued at 290,000/= and itel worth 25,000/= and the total value of the properties stolen becomes 388,000/= making the charge defective. The appellant argued that the defect is incurable.

As argued by the respondent, it is also this court's view that the variance in the charge sheet and that of the prosecution witnesses is trivial in nature and does not go into the root of the case. The appellant was sufficiently informed of the charge against him and thus the said variance is trivial and did not prejudice the appellant in any manner whatsoever. See the case of **Mohamed Said Matula v. The Republic [1995] TLR.**

Moreover, the appellant complained that he was not properly identified. The cases of **Republic v Mohamed Bin Alhui [1942]9 EACA 72 and Marwa Wangiti Mwita and Another v. R [2002] TLR 39** were cited to support the argument that the identification of the accused was not credible. 1st of all the case of Mohamed Bin Alhui (supra) is distinguishable, as the PW1 is

the one who described the accused and not the other way round. Also, the case of Marwa Mwita does not support the appellant's case because the appellant was identified the next day after the commission of the offence.

The appellant also argued that visual identification of the appellant at the scene of the crime did not lead to proper identification of the appellant as none of the other prosecution witnesses identified the appellant. The other argument of the appellant was who called PW2 to arrest the accused. This is immaterial given that the offence was committed in the morning in sufficient daylight, and PW1 testified that the scuffle between her and the appellant took almost 10 minutes and the appellant was well marked by PW1 having not camouflaged his looks and had a broken tooth.

Further, at the scene of the crime, only three persons were there. That is PW1 (the victim), the appellant, and the other assailant. Further, PW1 and the appellant scuffled for some minutes at a very close range, fighting for a handbag.

The appellant was identified by PW1 and arrested on 08/03/2022, just a day after the robbery when the memory was very fresh in the mind of PW1. The argument of the appellant will not shake the evidence of the prosecution because the appellant was properly identified and arrested by Inspector Nuru

Mrisho, PW2. In the case **Julius Charles @ Sharabaro & Others vs Republic (Criminal Appeal 167 of 2017) [2018] TZCA 59 (19 July 2018) following the case of Waziri Amani vs Republic (Criminal Appeal 55 of 1979) [1980] TZCA 23 (6 May 1980):** the Court of Appeal observed:

'It is trite that evidence of visual identification is of the weakest kind and for that reason, should not be acted upon to find conviction unless all the possibilities of a mistaken identity have been eliminated. In the case of Waziri Amani (supra)….., the Court stated as follows:

> "*Evidence of visual identification is not only of the weakest kind, but it is also most unreliable and a court should not act on it unless all possibilities of mistaken identity are eliminated and it is satisfied that the evidence before it is absolutely watertight".'*

Also in the case of **Abel Mathias @ Gunza @ Bahati Mayani vs Republic (Criminal Appeal No. 267 of 2020) [2023] TZCA 25** (20 February 2023), the Court of Appeal held that:

> '*The failure to name or describe a suspect may be validly raised where there is an unexplained delay in arresting that particular suspect. In*

this case there is no such delay, therefore the complaint is misplaced and we dismiss it.'

It is this court's finding that the appellant was properly identified by PW1 by even mentioning his peculiar mark of a broken tooth. Further, there was no delay in arresting the appellant Therefore, there was no possibility of mistaken identity in identifying the appellant.

Another argument of the appellant was that the prosecution did not call key witnesses to testify. However, the alleged key witnesses are neither named nor identified by the appellant in order for the court to weigh out the significance of their testimony in this case. This will not detain the court as much, because in this matter all material witnesses were called to testify. Further, it is the duty of the prosecution to prove their case as per section 143 of the Evidence Act, Cap. R.E. 2019. However, in exceptional cases, the court may draw an adverse inference to the prosecution case if they fail to call a key witness to testify. In this case, there is no such situation. Therefore, the cases of **Hemed Said vs Mohamed Mbilu [1984] TLR 113, and Azizi Abdallah v. R [1991] TLR 711** cited by the appellant are distinguishable.

Therefore, given the evidence on record, the appellant was properly identified as the person who committed theft of the properties of PW1, the victim of armed robbery. Consequently, the ingredient of theft is established against the appellant.

The 2nd point for determination is the use of a dangerous or offensive weapon or robbery instrument against at or immediately after the commission of robbery.

It was the testimony of PW1 that since she was fighting back against the robbery, the appellant and the other person accompanying the appellant used a machete and slashed PW1 to compel her to surrender the handbag which contained other stolen items. PW1 was slashed and injured by the machete at the elbow of her left hand. This forced her to surrender her bag as she was already injured. The appellant and the other person ran away. The injury of PW1 was confirmed by other prosecution witnesses including PW3 (a medical doctor) who tendered PF3 of PW1 confirming the injury inflicted on her because of the attack by a sharp object which was a result of robbery.

The appellant was not short of trials, he argued in his submission that who, amongst the police officers, issued PF3 and who returned the same. The

appellant is of the view that police officers who issued PF3 should have testified in court. This is not necessary so long as prosecution is satisfied that the case has been proved beyond reasonable doubt. However, the medical doctor (PW3) who attended PW1 and authored the PF3, testified in court and tendered the same as exhibit P1. This was sufficient as far as evidence concerning PF3 was concerned.

Therefore, it is this court's view that the use of a dangerous or offensive weapon or robbery instrument against at or immediately after the commission of robbery was established.

Another element is that the use of dangerous or offensive weapon or robbery instrument must be directed against a person.

Given the testimony of PW1 which was corroborated by testimonies of other prosecution witnesses from PW2, PW3 and PW4, a machette was used and directed to PW1 whose handbag and other items were stolen by the appellant and colleague. It is that machete that was used to injure the PW1 which led PW3 to conduct a minor surgery on her hand. Therefore, this court concludes that the machete was used to injure PW1 who eventually surrendered her handbag to the appellant and colleague.

This court has also considered the appellant's defence as regards casting doubt in the prosecution case. However, given the nature of the evidence adduced by the appellant in his defence, the prosecution case has not been shaken by the appellant's defence.

Given the above, it is this court's finding that the respondent managed to prove his case beyond reasonable doubt as all basic ingredients of the offence of armed robbery have been proved by the prosecution.

This court, therefore, finds that grounds one, two, three, and six of the appeal have no merit and thus are dismissed.

Grounds 4 and 5 of the appeal were found to have merit but did not affect the root or core of the case as they were curable and have been cured by this court. This court stepped into the shoes of the trial court and cured the defects which led to the determination of other grounds of appeal which have been dismissed.

Therefore, the appeal is partly allowed as regards grounds 4 and 5, the rest of the grounds are dismissed.

The appeal as far as conviction and sentence are concerned is dismissed. This means that the conviction and sentence of the accused remains intact. The accused shall continue to serve his sentence of 30 years' imprisonment as per the judgment of the trial court.

It is so ordered.

K. I. KAFANABO
JUDGE
10/11/2023

Judgment delivered in the presence of the Appellant and in the presence of Mr. Adolf Kisima, State Attorney, for the Respondent.

Right of appeal explained.

K. I. KAFANABO
JUDGE
10/11/2023