**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MBEYA SUB - REGISTRY**

**AT MBEYA**

**CRIMINAL APPEAL NO. 185 OF 2023**

*(Originating from Criminal Case No. 99 of 2022 of the district court of Mbeya at Mbeya)*

**BAHATI KAFWILE .....APPELLANT**

**VERSUS**

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

**JUDGMENT**

*Date of hearing: 18/3/2024*

*Date of judgment: 29/4/2024*

## NONGWA, J.

The above name appellant was charged, convicted by the district court of Mbeya in Criminal Case No. 99 of 2022 with an offence of robbery contrary to section 287A of the Penal Code [Cap 16 R: E 2019]. In that case the appellant was charged together with another person not party to this appeal on a different offence. In the particulars of offence, it was alleged that on 20th day of May 2022 at Lumbila area within the district and region of Mbeya the appellant did steal one phone made Tecno, one coat, one bag and money TZS. 2500/= the properties of Tiberio Shitindi

and immediately before or after stealing did use a dangerous weapon to wit iron rod to threaten Tiberion Shitindi in order to obtain or retain the said properties. The appellant denied the charge.

To prove the case the prosecution called five witnesses PW1(Tiberio Shitindi) the victim, PW2 (Netike Brown Kiputa) justice of peace who recorded extra judicial statement of the appellant (exhibit P1), PW3 (F. 3119D/SGT Ramadani) recorded statement of the appellant (exhibit P2), PW4(PF23362 As. Inspector Joram) who seized the phone (exhibit P3 and seizure note exhibit P4), PW5 (PF21254 AS. Inspector Francis George) seized iron bar at appellant home (exhibit P5 and seizure note exhibit P6) PW6 (Martha Hekaluni Tende) independent witness to search at appellant's home and PW7 (F4948 DST Msamaha).

It was the prosecution evidence of PW1 that on 20/5/2022 at 06:30 while returning from work at Iyunga school area met a person he knew as Kafwile through meeting on ways. When he let him pass, he was beaten by iron bar on his head and his properties mentioned in the charge sheet were stolen. He was taken to hospital. He reported the matter to Police on 21/5/2022 and later on unmentioned date went at police to identify properties, he managed to identify a phone and coat. PW4 on his part said that on 24/5/2022 together with other police officers were on

patrol at Mbalizi, around 2200hrs one Yusuph Abraham was still operating glossary, they apprehended him. They were further told by the informer that the said Yusuph was buying stolen items, upon inspecting him, they found Tecno T 454. On interrogation, he admitted to have bought the said phone from Bahati Kafwile, they seized it. The phone was tendered as exhibit P3 and certificate of seizure as exhibit P4. PW2 evidence was in respect of recording extra judicial statement, exhibit P1. PW3 recorded statement of the appellant, exhibit P2 and conducted search at appellant's home. PW5 and PW6 evidence related to going with the accused where he committed the offence and going to his home to seize iron bar which was admitted as exhibit P5 while certificate of seizure, exhibit P6. Last was PW7 whose evidence was on extracting statement of Yusuph Anyambwile.

In defence, the appellant disassociated himself from the commission of offence, he stated to have been tracked through the phone and arrested, he denied to know his fellow accused and selling him a phone. He added that he was convicted in another case in respect of the same phone.

At the height of the prosecution evidence, the trial court found guilty of the appellant established, consequently sentenced to thirty year's imprisonment.

Aggrieved the appellant has filed the present appeal fronting nine grounds in *kiswahili* which can briefly be summarized as follows; **one,** the trial court convicted him based on evidence of PW1 who failed to mention IMEI number of the phone and there was no proof of ownership and whether it was registered in his name; **two,** that the trial court erred in convicting him while there was no proof of injury to PW1 through PF3 and doctor was not called; **three,** that the trial court erred in law in convicting him while he was not found with the stolen phone and acquitted the accused who was found with stolen property (ground 3 and 5); **four,** that the district court convicted him without any exhibit connecting him with the offence of robbery; **five,** that the district court did not discuss and evaluate evidence of identification by PW1 while it was night**; six,** that the district court erred in law in convicting the appellant without statement of the victim given to police when reporting; **seven,** that the district court erred in law in convicting the appellant based on evidence of PW1, PW2, PW3, PW4 PW5 and PW6 together with exhibit P1, 2, 5 and 6 which did

not link with the appellant; **eight,** that defence evidence was not considered.

When the appeal came on for hearing, the appellant appeared in person, unrepresented, the respondent was represented by Veneranda Masai, State Attorney. When the appellant was asked to submit on his grounds of appeal, he prayed the same to be adopted and the appeal be allowed.

The State Attorney informed the court that she was not supporting the appeal. The 1st, 2nd, 6th, 7th, 8th and 9th grounds were argued separately while ground 3rd, 4th and 5th conjointly. In the first ground the state attorney submitted that PW1 identified the phone, knew the appellant and the offence was committed on day time. Further that the appellant confessed orally to PW4 and directed them where he hidden exhibit P4.

In ground two it was stated that elements of armed robbery that is stealing, use of force and use of weapon were proved. That PF3 and a doctor would only be necessary if the appellant was charged with grievous harm

In respect of amalgamated ground three to five, the state attorney argued that being found with stolen property is not one of the elements

of armed robbery. That the appellant confessed in his confessional statements.

On whether the appellant was identified in ground six, state attorney submitted that PW1 knew the appellant before, he turned around and saw him, the offence was committed on day time with enough light.

In ground seven, it was argued that the appellant did not request to be supplied with complainant statement and that conviction was not solely based on PW1's evidence.

Regarding exhibits connecting the appellant with the offence in ground eight, state attorney submitted that all exhibits linked the appellant with the commission of the offence and that it was admitted without objection from him.

On whether defence evidence was considered, it was submission of state attorney that it was considered referring at page 11, 13 and 17 of the judgment and found to be contradictory.

Having anxiously considered oral arguments of the learned State Attorney in line with the grounds of appeal which were lodged and adopted by the appellant, I have come to the conclusions that, the vexing

issue in this appeal is whether the prosecution proved the case beyond reasonable doubt, the issue encompasses all grounds of appeal.

In our criminal justice system like elsewhere, the burden of proving a charge against an accused person is on the prosecution and the standard of proof is always beyond reasonable doubt. This is a universal standard in all criminal trials and the burden never shifts to the accused. This principle equally applies to an appellate court which sits to determine a criminal appeal in that regard. In **Phinias Alexander and Others vs Republic,** Criminal Appeal No. 276 of 2019 [2020] TZCA 1898 (16 December 2020; TANZLII) the court cited with approval the decision in **Jonas Nkize vs Republic** [1992] TLR 214 in which it was stated that;

> *'the general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or ignoring it is unforgivable, and is a peril not worth taking.'*

The term beyond reasonable doubt is not statutorily defined but case laws have defined it, in the case of **Magendo Paul & Another vs Republic** [1993] TLR 219 the Court 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 a remote possibility in his favour which can easily be dismissed.'*

In this case, the appellant was charged with the offence of armed robbery under section 287A of the Penal Code referred to in the statement of offence in the charge sheet. That provision 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.'* [Emphasis added].

According to the above provision, as also rightly submitted by state attorney, for the offence of armed robbery to be established the following three ingredients must be proved; **one,** the accused person must have stolen something; **two,** at or immediately before or after stealing, he must be armed with a dangerous or offensive weapon or instrument; and **three,** at or immediately before or after stealing, that person must have used or threatened to violence to the victim.

It is settled law that, in a criminal case, the prosecution must not only have sufficient evidence to prove the elements and commission of the

offence but also the identity of the accused which is the most important element to prove one's commission of the offence. Who committed the offence is the most important issue in any criminal case. In this case after going through the entire evidence, I am satisfied that the above three elements were met for the offence of armed robbery to have been committed. There was enough evidence from PW1 that his phone made Tecno blue in colour, coat and TZS 2500 were stolen, this constitutes stolen things. Further, there is evidence that an offensive weapon, iron bar was used in assaulting the victim to obtain the properties, the iron bar is offensive and dangerous weapons and that such violence was directed to PW1 that is the weapon that was used in order to retain property from the victim. In that sense the first task of establishing that the offence was committed was satisfied by the prosecution.

The question is whether it was the appellant who committed the offence without forgetting that there is a complaint that the stolen phone was not positively identified.

Starting with the stolen phone, the state attorney submitted that it was identified by PW1. In proving that the phone was his, PW1 stated that it was Tecno blue in colour, PW5 said it was Tecno T454 blue in colour. The law regarding identification of the property alleged to be

stolen from the victim is that such identification must be sufficient, detailed and the witness must give the description of the stolen property by giving special marks and this should be done before they are shown to the witness and before they are produced as exhibit. By doing so the court is assured that such properties are the ones stolen from the complaints or victims. In **Leonard Mathias Makani and Another vs Republic,** Criminal Appeal No. 579 of 2017 [2023] TZCA 182 (11 April 2023; TANZLII) the court stated;

> *'The proper owners or those constructively owning such stolen properties to properly and positively identify them. For such identification to be sufficient, it must be detailed and must give the description of the stolen property by giving special marks and this should be done before they are shown to the witness and before they are produced as exhibit. That way the court is assured that such properties are the ones stolen from the complaints or victims.'*

In this case the prosecution did not meet the above thread of the law, identification by PW1 that his phone was tecno blue in colour cannot be said was enough to describe a common item like phone to be the one stolen from him because colour of the stolen thing is not a special mark to identify it. PW5 gave IMEI number of the phone seized on 24/5/2022 from DW2, however, evidence of PW1 from whom the phone is alleged to

be stolen is silence if such IMEI number was mention by him to any police or PW5, considering that DW2 was not arrested based on tracking the said cell phone. It is unfortunately that the prosecution and the magistrate took the words of DW2 a co- accused as a whole sale that he bought the phone from the appellant, something which was not proved and without seeking any corroboration as required by the law. See **Frank Richard Shayo vs Republic**, Criminal Appeal No. 333 of 2020 [2024] TZCA 230 (22 March 2024; TANZLII).

In my view prosecution evidence as rightly pointed by the appellant failed completely to link the appellant with the alleged stolen phone, it was upon the prosecution to give IMEI number of the cell phone, there was a need for the prosecution to summon an expert from the service provider or TCRA so as to establish that handset was at one point before the commission of crime used by PW1. This was important since the arrest and connection of the appellant to the offence of armed robbery was a result of being mentioned by his co-accused DW2 to be the one who sold him the phone.

With these shortcomings, the phone which was a key factor in connecting the appellant with the offence was not specifically proved to be that which was possessed by the victim, identification of a cell phone

by colour which every handset has cannot be a special mark when the accused is not arrested at the crime scene. Further evidence like IMEI number which is peculiar in every cell phone together with evidence from TCRA or expert from the service provider must be brought by the prosecution to establish that it is that phone found with the accused or connecting the accused with the offence which was stolen from the victim.

Another issue raised by the appellant is his identification, it was complained by the appellant that the offence was committed at night, on the other hand the state attorney submitted that the offence was committed at day time and PW1 knew the appellant before and that it took some time before the offence being committed.

According to PW1 he was attached at 06:30 morning, in terms of section 5 of the Penal Code ‘’night” or “night-time” means the period between seven o’clock in the evening and six o’clock in the morning. With the above provision of the law, I share the view of the state attorney that 06:30 is day time as opposed to the appellant that it was night-time.

Connected with the above, the state attorney submitted that PW1 knew the victim before the commission of offence, indeed in his evidence PW1 said that he knew the appellant as he used to see him on the way and that there was sufficient light. In his judgment the magistrate was

satisfied that at 06:30 there was sufficient light, PW1 identified the assailant as Bahati Kafwile, that PW1 saw the appellant from behind and paved way for him to pass, that the appellant was familiar to PW1 by seeing him across the way and the situation was not terrifying to have impaired proper identification. In taking appellant's defence on how he was identified, the magistrate brushed the appellant evidence of not being known by PW1 for the reason that it was not introduced earlier and PW1 was not cross examined on that area.

At this moment I find it apposite to restate the law regarding evidence of visual identification, it is trite law that conviction can be grounded on evidence of visual identification, however, before a court can found conviction basing on visual identification, such evidence must be watertight so as to remove the possibility of honesty but mistaken identity. In the case **Waziri Amani vs Republic** [1980] TLR 250, the court held that;

> *'...evidence of visual identification; as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.'*

In the case of **Philimon Jumanne Agala @ J4 vs Republic**, Criminal Appeal No. 187 of 2015 [2016] TZCA 278 (22 October 2016; TANZLII), the court after studying the exposition of the law governing eyewitness identification evidence in various jurisdiction and as commented by some prominent authors, held that;

> *'Aware of this enduring problem, settled jurisprudence both here and the rest of the Commonwealth as well as in the U.S., is to the effect that eyewitness visual identification evidence is of the weakest character and most unreliable. Though totally relevant and admissible, it should be acted upon cautiously after the court has first satisfied itself that such evidence is watertight and all possibilities of mistaken identity or fabrication have been eliminated.'*

In dealing with evidence of visual identification the court is required to consider, among others the following matters; **one,** the time the witness had the accused under observation**; two,** the distance at which he observed him; **three,** the conditions in which such observation occurred, for instance whether it was day time or night time, whether there was good or poor lighting at the scene; **four,** whether the witness knew or had seen the accused before or not; and **five**, all factors on identification considered, it should also be plain that were any material impediment or discrepancies affecting the correct identification of the

accused person by the witness. See also; Shomari **Athumani @ Mwanja & Another vs Republic**, Criminal Appeal No. 650 of 2021 [2024] TZCA 46 (16 February 2024; TANZLII). A proper identification of an accused person is crucial in proving a criminal charge in order to ensure that any possibility of mistaken identification is eliminated.

After evaluating evidence of PW1 I have come to the conclusion that, it fell short of the standard required to establish visual identification of the culprit. PW1 stated that the appellant came from behind but we are not told how far PW1 observed the appellant before he let him pass and according to PW1 it is at that moment he was assaulted with iron bar and his property stolen, nothing is said about the time they observed each other.

As to whether PW1 knew the appellant prior, I don't think one or thrice meeting is enough to conclude that the assailant was known to PW1. By the way PW1 mentioned one name of Kafwile and not Bahati Kafwile as stated by the trial magistrate. In **Victor Goodluck Munuo vs Republic,** criminal Appeal No. 357 of 2019 [2023] TZCA 17389 (12 July 2023; TANZLII) the court stated;

> *'Even if the victim said she was familiar with her assailant before, she mentioned him only by the name "Victor" who used to ride*

*"bodaboda". It is our considered view that because the appellant was not found committing the alleged offence, his alleged identity is questionable. This is because it was not established that there was only one Victor, a "bodaboda" rider in the victim and/or the appellant's locality. Further, while the victim named his assailant as Victor, the charge mentioned the accused as Victor Goodluck Munuo and during his defence, the appellant mentioned his name as Goodluck Munuo. There was no any witness who came to harmonize these three sets of names.'*

In the present case only name of Kafwile was mention by PW1 which raised some doubt if it was the appellant herein Bahati Kafwile @ Bahati Ngole as indicated in the charge. This is more complicated by PW1's failure to mention the appellant at the earliest possible opportunity to person he met first or to police on 21/5/2022 when he reported the incident. Further the appellant was not arrested because of being mentioned by PW1 to police rather by DW2 who assisted them in finding the appellant, evidence which is also lacking on how the appellant was tracked. The failure to name the appellant as the culprits at the earliest possible opportunity raised PW1's credibility pertaining to identification of the appellant questionable. In **Marwa Wangiti Mwita and Another vs R.,** [2002] TRL 39

*'that failure on the part of a witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable.'*

In the present case, there is nowhere stated by any of the prosecution witnesses that PW1 ever named the appellant as the culprit in the robbery incident. The magistrate reasoned that the appellant failed to cross examine PW1 if he knew him before, while I accept that as a general rule failure cross examine a witness on a particular and important aspect is tantamount to admission of the truthfulness of that witness, there is exception to that when the accused is unrepresented as happened in this case. In **Kwiga Masa V Samweli Mtubatwa** [1989] TLR 103 the court stated;

*'A failure to cross-examine is merely a consideration to be weighed up with all other factors in the case in deciding the issue of truthfulness or otherwise of the unchallenged evidence. The failure does not necessarily prevent the court from accepting the version of the omitting party on the point. The witness' story may be so improbable, vague or contradictory that the court would be justified to reject it, notwithstanding the opposite party's failure to challenge it during cross-examination. In any case, it may be apparent on the record of the case, as it is in the instant case, that the opposite party, in omitting to cross-*

*examine the witness, was not making a concession that the evidence of the witness was true.'*

In **Zakaria Jackson Magayo vs Republic,** Criminal Appeal No. 411 of 2018 [2021] TZCA 207 (19 May 2021; TANZLII) the court stated;

*'It would also appear to us to be the law that, where, like in this case, the accused is unrepresented layman, before drawing an inference that, he did not cross examine the witness because he accepted his evidence to be true, the court has to warn itself if the layman accused knew the meaning and effect of not cross examining a prosecution witness.'*

It would be unfair to conclude that the appellant herein a lay person who clearly lacked familiarity with the courtroom strategy and tactics as well as legal knowledge, who was ambushed with an explanation of his right to cross examination after the evidence which he did not listen to with an in formed mind, when tendered against him, but who did put to a witness some questions to conclude that his failure to put question to a witness on certain aspect as an admission. Failure to cross examine a witness on identification aspect cannot be taken alone in isolation of other pertinent factors touching the identification of the appellant while in essence it is the prosecution who has to lead evidence that the offence

was not committed by no one else than the appellant, the evidence which is lacking in the appeal.

In this case the evidence regarding identification of the appellant despite the offence being committed in day time was not watertight to remove all possibility of mistaken identity. The appellant was only identified by one name which creates doubt if real PW1 knew him correctly, the name of the appellant even that single name was not mentioned by PW1 to any person who met first or police and the arrest of the appellant was not the result of being named by the victim, PW1.

Conviction of the appellant was also found based on extra judicial and cautioned statement of the appellant, exhibit P1 and P2 respectively. Regarding exhibit P2, I have found it is not free from problem because most of parts required to be filled was not filled save for signature of the appellant. For instance, the appellant was warned on offence of robbery which is a distinct offence from armed robbery, the appellant was not asked if he was ready to give his statement, if he wished any friend or lawyer to be present and that the statement would be used in court contrary to section 53 and 54 of the Criminal Procedure Act [Cap 20 R: E 2022] and which contradicts with oral evidence of PW3 that he informed the appellant all his rights. With those shortfalls I find that it is unsafe to

rely of the statement because this court had duty to make sure that the sprit and letters of the laws touching the rights of the accused person are followed even when the accused does not raise any complaint.

Regarding extra judicial statement exhibit P1, I have perused it and found that it is not confession consistent with other facts which have been ascertained and proved. To be precise part relevant part is reproduced

> *'…..tukio la kwanza nilifanya tarehe niliamka asubhui saa 11:00 nikamwona mtu anatembea nikamfuatilia nikampiga nondo ya kwanza akaanguka nikamsachi akawa anabisha nikampiga nondo ya pili nikachukua begi lake na simu na hela ……. hapo nikaondoka nikaenda kutafuta mteja wa simu nikauza kwa yusu shilingi 10,000….'*

The above statement does not mention the person who was robbed, the place, the date of crime and also is inconsistence with the facts of the case as alleged in the charge and evidence lead by the prosecution. With those shortcomings and in that sense, extra judicial statement was of no any assistance in proving guilt of the accused as it failed completely to place the appellant at the crime scene.

In view of the foregoing discussions, taking cumulatively the defects pointed in the prosecution case, the case against the appellant was not proved beyond reasonable doubt. The appeal is thus with merit and it is

accordingly allowed. I consequently quash the judgment and conviction imposed by the district court and set aside the sentence. I order that the appellant be released forthwith from prison custody unless held there for some other lawful cause.

DATED at MBEYA this 29th day of April 2024


**V.M. NONGWA**

**JUDGE**

**29/4/2024**

Right of appeal fully explained.

DATED and DELIVERED at MBEYA this 29th day of April, 2024 in presence of the appellant and the Respondent.

**V.M. NONGWA**

**JUDGE**