IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 38 OF 2022

(Originating from Criminal Case No. 128 of 2021 of Hai District Court at Hai)

GODBLESS ELIUFOO URASSA ....APPELLANT

VERSUS

REPUBLIC .... RESPONDENT

JUDGMENT

30/01/2023 & 09/02/2023

SIMFUKWE, J.

The appellant, Godbless Eliufoo Urassa, was arraigned before Hai District Court (the trial court) with the offence of Armed Robbery contrary to **section 287A of the Penal Code Cap 16 R.E 2019.** He was convicted as charged and sentenced to serve thirty (30) years imprisonment. Aggrieved, he filed this appeal.

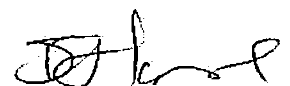
The particulars of the offence were that on 3rd day of May, 2018 at Machame Uswaa village within Hai District in Kilimanjaro Region, the appellant was alleged to have stolen cash money Tshs 700,000/-, Kshs 700/-, USD 15/- eight telephones make Tecno Y6 valued at Tshs 200,000/- Sony valued at Tshs 400,000/- Samsung valued at Tsh

150,000/- Nokia valued at Tshs 80,000/-, alkatel valued at Tshs 200,000/-, Huawei valued at Tshs 200,000/-, Tecno valued at Tsh 200,000/-, headphone valued at Tshs 15,000/-, bush knife valued at Tshs 7,000/-, power bank value at Tshs 60,000/- radio m-power valued at Tshs 30,000/-, two airtel modem valued at Tshs 70,000/-, two USB flash 8GB valued at Tshs 30,000/-, one USB flash 32GB valued at Tshs 32,000/, two USB flash make SanDisk valued at Tshs 24,000/-, one haircutting machine valued at Tsh 60,000/-, one external GB 500 valued at Tshs 150,000/-, four torch make lontor valued at Tshs 40,000/-, one Roller of electronic wire 1.5 valued at Tsh 130,000/-, 2 dozen of candles valued at Tshs 72,000/-, soap valued at Tshs 8,000/-, six toothpaste valued at Tshs 21,000/-, 2 chain valued at Tshs at Tshs 10,000/-, different mobile vouchers valued at Tshs 270,000/-. All properties valued at 5,952,700/- the properties of one OMBENI S/O AIKONEA MASAWE, and immediately before or after such act did hit and cut the said OMBENI S/O AIKONEA MASSAWE, with bush knives on different parts of the body in order to obtain or to retain the said properties.

It was alleged by the prosecution before the trial court that the appellant together with four others invaded the shop of one Ombeni Aikonea Massawe. That, immediately after they have invaded him, they assaulted him and stole some of the properties in his shop as listed herein above. The bandits even proceeded to Ombeni's house armed with weapons, invaded Ombeni's wife and stole some of the money. The matter was reported to the police station and the victim was taken to hospital for treatment. The appellant was arraigned before the trial court, after full trial, he was convicted as charged and sentenced accordingly. He was aggrieved, hence this appeal, advancing five grounds of appeal as follows:

1. *That the trial court grossly erred in Law when convicted and sentenced the Appellant while there was variance between the charge sheet and Evidence rendering the charge incurably defective.*
2. *That, the learned trial magistrate erred in Law and fact when convicted the Appellant and eventually sentenced him while there was serious contradiction on prosecution account denting their credibility.*
3. *That, the learned trial magistrate grossly erred both in Law and fact in believing that the Appellant was positively identified at the scene of crime while the conditions and circumstances at the scene of crime were not conducive for proper and correct identification.*
4. *That the trial court erred both in Law and fact in failing to note that an unexplained delay by the Victim of the alleged offence (PW1) to mention/Name the culprit (s) of the said incidence at the earliest possible opportunity casts a shadow of doubts and cannot attract the confidence of his testimony before the court of Law.*
5. *That the trial magistrate grossly erred both in law and fact in convicting and sentencing the Appellant basing on a charge which was not proved beyond reasonable doubt against the Appellant and to the required standard by the Law.*

The hearing of this appeal was conducted through filing written submissions as prayed by the appellant. The appellant appeared personally to argue the appeal while the Republic/respondent was represented by Ms. Mary Lucas learned State Attorney.



The appellant randomly submitted in support of the grounds of appeal as follows:

On the 3rd ground of appeal in respect of identification, the appellant submitted to the effect that since the incident is said to have occurred at night at 22:00hrs then, the circumstances and conditions at the alleged crime scene were not conducive for proper and correct visual identification. That, the victim (PW1) never mentioned the special and important ingredients for proper identification. He submitted further that the guiding principle in cases of this nature is always that no court should act on evidence of visual identification unless and until all possibilities of mistaken identity are eliminated.

The appellant faulted the evidence of PW1 who said that he was invaded by five people and managed to identify only three of them. He was of the view that it is not convincible for a person to be invaded by a group of people and start concentrating in recognizing the bandits instead of finding a way to rescue himself. That, in this case the victim testified that the bandits started assaulting him by beating and cutting him using bush knives and piece of iron in several parts of the body something which made him loose strength, fell down and remained silent. From this piece of evidence, the appellant raised the following concerns; first, he said one will ask himself on what exactly was PW1 doing during the saga which had befell him; was he fighting against his invaders? Was he looking at them so as to identify/recognize them or was he rescuing himself by pretending to have lost consciousness? From these questions, the appellant believed that it left so many to be desired leading to the conclusion that PW1 was not credible and reliable witness and his evidence is just fictious stories fabricated against the appellant.

To cement the point of identification, the appellant cited the case of **Galous Faustine Stanslaus vs Republic, Criminal Appeal No. 02 of 2009** (unreported) in which the Court of Appeal while citing with approval the case of **Issa Mgara @Shuka vs Republic, Criminal Appeal No 37 of 2005** said that:

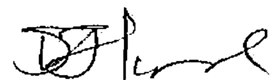
> *"...even in recognition cases where such evidence may be more reliable than identification of stranger clear evidence on source of light and its intensity is of paramount importance. This is because, occasionally held, even when the witness is purporting to recognize someone whom he knows, as was the case here, mistakes in recognition of close relatives and friends are often made."*

The appellant went on to refer at page 9 of the said judgment where the Court went ahead and insisted that:

> *"Courts therefore should be wary of not only honest but mistaken identifying witnesses, but also outright dishonest witnesses...Even in most favorable conditions, there is no guarantee against untruth evidence."*

The appellant also quoted page 9 of the case of **Galaous Faustine** (supra) which quoted the case of **Jaribu Abdallah vs R Criminal Appeal No 220 of 1994** (unreported) where the Court held that:

> *"...it is not enough merely to look at factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence."*



It was the argument of the appellant that evidence of PW1 was supposed to be approached with great caution as it indicated a manifest intention or desire to lie in order to obtain or attain a certain end against the appellant. He said that it is inconceivable in one's mind that the appellant could be such a foolish as to be able to go to invade the victim (PW1) who claimed to had known him before the incidence without any attempt of concealing his identity (face). He made reference to the case of **Julius Mwanduka @ Shila vs R, Criminal Appeal No. 322 of 2016** (unreported) at page 14 where the Court held that:

> *"...Besides, we find it highly improbable that the Appellant went to the scene without any attempt to hide his identity to the victims who knew him very well..."*

Submitting in support of the 4th ground of appeal, the appellant's argument was that a credible identifying witness would be expected to give a description of the suspect in relation to physiques, attires etc. and if he knows him, to name him at the earliest possible opportunity. In the instant matter it was argued that the alleged robbery incidence is said to have occurred on 03.05.2018 at 22:00hrs and it was reported to the police authorities on the same night. He blamed PW1 and PW2 for failure to name the him to those alluded people who came across at the earliest possible opportunity. That they never mentioned the appellant to the police when they reported the incident on the same night. The appellant referred to page 16 of the proceedings to support the contention.

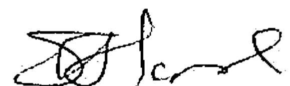
The appellant continued to state that no arresting officer who was called to testify the fact that he was given any name of the alleged suspects. Also, PW1 and PW2 did not identify the names of police officer to whom

they gave the names of the suspects so as to support their allegations. The appellant cemented his point with the case of **Marwa Wangiti vs Republic, Criminal Appeal No. 06 of 1995** (unreported) which underscored the importance of an identifying witness to name the suspect at the earliest possible opportunity. He quoted the holding that:

> *"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability in the same way as an unexplained delay or complete failure to do so should put a prudent court into inquiry...."*

While concluding this ground, the appellant argued that failure on part of PW1 and PW2 to disclose the name of the appellant to those who came across with them at the earliest possible opportunity cannot attract the confidence of their evidence before the court of law and casts serious doubts on their reliability as witnesses.

On the 2nd ground of appeal which concerns contradictions on prosecution evidence, the appellant noted that there was contradiction in evidence between the evidence of PW1 and PW2 to the effect that, PW1 at page 16 of the typed proceedings testified that he was admitted at the hospital for four months while PW2 stated that her husband (PW1) was admitted at the hospital for four days. From the noted contradictions, the appellant was of the view that evidence of PW1 and PW2 has no legs to stand. He further stated that if these two witnesses lied then what could have prevented them from fabricating this serious case which attracts severe and harsh sentence against the appellant?



In the final analysis, the appellant prayed the court to find merit in his appeal and allow the same by quashing the conviction and setting aside the sentence and set him free.

In reply to the first ground of appeal, on variance between the charge sheet and the evidence, it was submitted that the charge was properly crafted since it contained the particulars, the names of the person who stole the properties, owners of the properties and the injured persons. Also, on 10/08/2021 the prosecution substituted a charge which was read to the accused person whose particulars of the offence differs from the facts narrated at page 1 of the judgment. The learned State Attorney concluded that there is no variance of the charge and evidence, thus the ground was raised without merit.

Responding to the 2nd ground of appeal on contradictions of prosecution evidence, Ms. Mary stated that there is no contradiction to vitiate the proceedings since PW1 testified on what happened at the shop and what he found at his homestead while PW2 testified what happened at home. That, PW3 testified how he helped PW1 and he was informed by PW1 immediately who were the bandits.

She contended further that during cross examination, PW1 said the incident took 15 minutes the fact which was not in the statement made at the police. That, the statement of PW1 which was not tendered as exhibit did not say the bandits proceeded for 15 minutes. She opined that probably PW1 was not asked about it unlike in his testimony before court where the appellant asked him during cross examination. Ms. Mary was of the opinion that, the same was not a contradiction. She argued that even if it was, yet it would not vitiate the credibility of PW1. She made

reference to the case of **Abdallah Rajabu Waziri vs Republic, Criminal Appeal No. 116 of 2004.**

The learned State Attorney explained further that evidence of PW1 was credible and enough to warrant conviction for its coherence and consistence. She subscribed to the case of **Shabani Daudi vs Republic, Criminal Appeal No. 28 Of 2001**(unreported) which held that:

> *"Credibility of a witness can also be determined in other two ways that is, one, by assessing the coherence of the testimony of the witness and two, when the testimony of the witness is considered in relation to the evidence of other witnesses..."*

The learned State Attorney opted to reply the 3rd, 4th and 5th grounds of appeal together. She submitted to the effect that the appellant was identified properly since he was known to PW1 from childhood as the dual were living in the same village. That at the time of incident PW1's visual identification was aided by electricity light at the shop since he said there were seven electric bulbs, three bulbs inside the shop and four bulbs outside.

The learned State Attorney made reference to the case of **Lidumula s/o Luhusa @Kasuga vs Republic, Criminal Appeal No. 352 of 2020** which held that:

> *"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."

On the strength of above authority, it was Ms. Mary's contention that PW1 gave explanation of the intensity of light as seen at page 17 of the proceedings.

It was contended further that the appellant was properly identified at the scene of the crime by PW1 and the same was immediately mentioned to PW3 who came to assist PW1 and took him to the police. He mentioned the appellant before being taken to Hospital. That, the prosecution evidence proves that the appellant was among the bandits who invaded PW1 as stated in the charge sheet and immediately before stealing they did cut PW1 in order to obtain and retain PW1's properties. Hence, the charge was proved beyond reasonable doubt.

In conclusion, the learned State Attorney implored the court to dismiss this appeal except a ground of sentence.

I have carefully considered the rival submissions of both parties; the trial court's records and grounds of appeal. The issue is ***whether evidence adduced by the prosecution before the trial court proved the offence charged beyond reasonable doubts.***

In scrutinizing this issue, I will determine all the grievances raised in the grounds of appeal having in mind that this being the first appellate court, the court is obliged to re-evaluate evidence on the record in case the trial court did not evaluate evidence properly.

On the 1st ground of appeal, the appellant condemned the trial magistrate for convicting the appellant while there was variance between the charge

sheet and evidence. On the other hand, the learned State Attorney argued that there was no any variance between the charge sheet and prosecution evidence.

The appellant did not state the said variance. I have examined the entire evidence *vis a vis* the charge sheet and failed to note the alleged variance. Therefore, it goes without saying that this ground has no merit.

On the 2nd ground of appeal, the appellant faulted the trial magistrate for relying on the prosecution evidence to convict the appellant while the same contradict each other. The noted contradiction is in respect of the evidence of PW1 and PW2. That, PW1 said that he was admitted at the hospital for four months while PW2 said that PW1 was admitted for four days. Replying the above noted discrepancies, the learned State Attorney submitted that there was no material discrepancy.

The law is clear in so far as inconsistences / contradictions of evidence is concerned. The law recognizes two forms of discrepancies, material discrepancy and normal/ minor discrepancy. Material discrepancy is the one which touches and destroy prosecution evidence while normal discrepancy is the discrepancy which does not touch the root of the prosecution evidence. Recently, the Court of Appeal at Moshi in the case of **EX. G. 2434 PC. George vs Republic, Criminal Appeal No.8 of 2018, [2022] TZCA 609** at page 11 had this to say in so far as contradiction of evidence is concerned:

> *"We shall therefore bear in mind that not every contradiction and inconsistencies are fatal to the case* ***[Dickson Elia Nsamba Shapwata & Another v. Republic, Criminal Appeal No. 92 of 2007***

(unreported)]. And that minor contradictions are a healthy indication that the witnesses did not have a rehearsed script of what to testify in court. ***[Onesmo Laurent @ Saiikoki v. Republic, Criminal Appeal No. 458 of 2018*** *(unreported)]."*

Having established the above position of law, the question is whether there was such discrepancy and whether the same crumbles the prosecution case.

I keenly perused the proceedings and noted the said discrepancy. That, PW1 at page 14 of the typed proceedings said that he was admitted at the hospital for four months while at page 21 PW2 stated that her husband was admitted for four days. The question which follows is *whether the said discrepancy affect the prosecution case.*

I hasten to conclude that the noted discrepancy does not affect the prosecution case. I am convinced that the discrepancy might be the result of a slip of a tongue. There is no dispute that the victim was assaulted and that he was taken to hospital. Apart from that, whether he was admitted for four months or four days, it does not take away the fact that the offence of armed robbery was committed. Thus, the noted discrepancy does not affect the case at all.

The third ground of appeal concerns identification. The appellant lamented that he was not properly identified since the conditions and circumstances were not conducive for proper identification. The appellant went an extra mile by citing the authorities to cement the point of identification. On her side, the learned State Attorney argued that the

appellant was properly identified since the two knew each other before the incidence. That, the identification was aided with the light of electric bulbs.

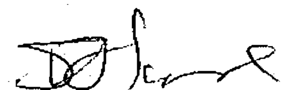
I am aware of the law in respect of the identification of accused persons in unfavorable conditions. As rightly submitted by the appellant it is dangerous to convict on the evidence of a single witness of identification where the conditions for such identification are unfavorable. In the case of **Mohamed Bakari and 7 Others v. Republic [1989] TLR 134** it was held that *where conditions for identification are unfavourable corroboration is necessary.*

The offence of which the appellant was charged and convicted of, was committed at night. In the course of said the robbery, PW1 was assaulted. The real issue in controversy, is whether the appellant was identified sufficiently to warrant his conviction.

In the case of **Kulwa Makwajape & 2 Others v. R, Criminal Appeal No. 35 of 2005** (unreported) it was held that:

> "... *the intensity and illumination of the lamp is important so that a clear picture is given of the condition in which the appellants were identified.*"

In the instant case, from the available evidence, I am of considered opinion that the appellant was well identified as rightly submitted by the learned State Attorney and these are my reasons: ***first,*** there is evidence which is undisputed that the victim and the appellant knew each other for a long time. See the case of **Kisinza Richard v. Republic [1989] TLR 143.** ***Second,*** the victim explained the conditions which aided him to properly identify the appellant. That, at the shop there were seven electric



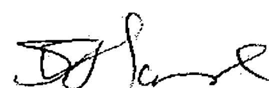
bulbs whose light was intense. ***Third,*** the victim identified the appellant for the second time at his homestead. Furthermore, the incident was reported at the earliest possible time to PW3, whose evidence corroborated that of PW1. Therefore, there was no mistake in identifying the appellant.

From the above noted points, I am satisfied that the appellant was properly identified by PW1 as one of the bandits who invaded his shop and homestead and committed the offence of armed robbery.

On the 4th ground the appellant questioned the victim's evidence to the effect that there was delay to mention the culprit hence it does not attract the confidence of his evidence. The learned State Attorney argued to the contrary. That, the culprit was mentioned to PW3 who went to assist the victim.

It is settled law that the culprit has to be mentioned at the earliest stage so as to attract confidence of the witness. The same was stated in the case of **Juma Omary vs Republic (Criminal Appeal 568 of 2020) [2022] TZCA 7] 98, [Tanzlii]** at page 10 where the Court of Appeal stated that:

> *"Ordinarily if the witness mentions a suspect to someone, that other person is expected to corroborate that evidence in court. This position was taken in the case of Samwel Nyamhanga v. Republic, Criminal Appeal No. 70 of 2017 (unreported)..."*



I fully subscribe to the above decision. In the case at hand, the record is clear at page 23 of the proceedings of the trial court; when PW3 was testifying he stated that:

> *"Ombeni told me that he was invaded and assaulted by Godbless Eliufoo Urassa. I know Godbless, he is resident of Mamba -Uswaa..."*

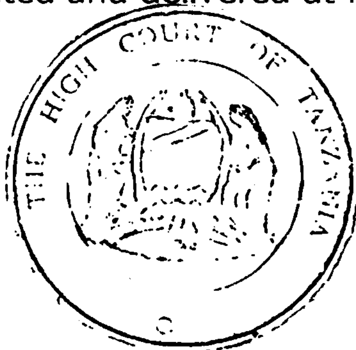
From the above quotation, it is clear that the culprit was named by the victim (PW1) to PW3 at the earliest time. Thus, the grievances established under the 4th ground of appeal are unfounded.

The last ground of appeal was that the prosecution case was not proved beyond reasonable doubts. Ms. Mary for the respondent submitted that the offence was proved beyond reasonable doubt.

Before the trial court, the learned trial magistrate from page 5 to 9 of the judgment thoroughly scrutinized the prosecution evidence and that of the defence side and at the end she concluded that the case was proved beyond reasonable doubts. I intensely read the available evidence on the record, and I wish to conclude that I find no reasons to fault the trial court's findings since evidence was scrutinized well.

It is on the basis of the above findings that, I hereby find that this appeal lacks merits, and I accordingly dismiss it in its entirety. Conviction and sentence confirmed.

Dated and delivered at Moshi this 9th day of February, 2023.



S. H. SIMFUKWE

JUDGE

09/02/2023