

IN THE HIGH COURT OF ZANZIBAR

HOLDEN AT TUNGUU

CRIMINAL APPEAL NO. 64 OF 2022

**(FROM CRIMINAL CASE NO 351 OF 2019 OF THE REGIONAL
COURT –VUGA, ZANZIBAR)**

**(APPEAL FROM THE JUDGMENT OF THE REGIONAL MAGISTRATE
COURT – VUGA)**

ABDALLA MOH'D ABDALLA

... ..

APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS

... ..

RESPONDENT

JUDGMENT

Dated: 25th April, 2023

S.HASSAN, (J)

The appellant Abdalla Moh'd Abdalla was charged with a single offence of armed robbery contrary to section 280 of the Penal Act No. 6 of 2018 Laws of Zanzibar.

The Regional Magistrate at Vuga (Hussein M. Hussein), convicted the appellant and sentenced him to serve 15 years in Education Centre. The appellant being aggrieved with such conviction and sentence appealed to this court in Criminal Appeal No. 64 of 2022.

The brief background of the case as established during the trial is that, on the 14/8/2019 at around 7:30pm (night) at Ziwa tuwe, within Urban District, in the Urban Western Region of Unguja, the appellant robbed the cell phone (Samsung black and red color) which has the value of Tzs.Three Hundred and Fifty Thousand (Tzs 350,000/) belong to Asha Ameir Moh'd. The victim was sitting outside her parents house on the baraza with her sister named Moza and she was calling and chatting through her cell phone with her sister who lives abroad. Suddenly, a man named Abdalla (Nyaku) the appellant herein, went to her and grabbed her cell phone and when she tried to stop the appellant and shout thief thief, the appellant took out a panga and threatened the victim Asha Ameir Moh'd with it and told her that if she made any noise she would cut her with it and thereafter the appellant ran away. The victim went to report the matter at Ng'ambu Police Station, the appellant was caught by the police and sent to court. At Magistrate court Vuga, the accused (appellant herein) denied the charge and the matter went to full trial and the appellant was found guilty and convicted to serve 15 years in Education Centre hence this appeal.

In this appeal the appellant is unrepresented and appeared in person, while the respondent (DPP) is represented by learned State Attorney Mr. Mohamed Abdalla.

The appellant filed his Petition of Appeal which contained five grounds of appeal, which can be summarized as follows:

1. Kwamba, Hakimu wa mahkama ya mkoa amekosea kisheria na kiushahidi kwa kusikiliza ushahidi wa PW1 alipodai kutumika silaha (panga) bila ya exhibit kuletwa mahkamani uk 3.

(That, the Regional Magistrate erred in law and facts by entertaining the evidence of PW1 who testified about the panga which was not admitted in court at page 3)

2. Kwamba, Hakimu wa mahkama ya mkoa amekosea kisheria na kiushahidi kwa kuridhia upande wa mashataka kutowakamata na kuwashitaki waliodaiwa kufuatana na mshitakiwa PW11 uk 4.

(That, the regional magistrate erred in law and fact by not arresting and charging those who were alleged to be with the accused PW11 at page 4)

3. Kwamba, Hakim wa mahkama ya mkoa amekosea kisheria na kiushahidi kwa kuridhia shtaka la kuletwa mbele yake bila ya kidhibiti (panga, simu) uk 8.

(That, the regional magistrate erred in law and facts by admitting the charge without there being admitted exhibit panga and cell phone at page 8.)

4. Kwamba, Hakim wa mahkama ya mkoa amekosea kisheria na kiushahidi kwa kuridhia ushahidi wa PW1 kudai kuporwa simu bila ya ithibati wala risiti ya manunuzi ya simu hiyo uk 3.

(That, the regional magistrate erred in law and facts by admitting the evidence of PW1 who testified to being robbed the cell phone without a prove of receipt of such cell phone at page 3.)

5. Kwamba, Hakim wa mahkama ya mkoa amekosea kisheria kwa kuegemea upande wa mashtaka na kutompa faida ya shaka muomba rufaa licha ya ushahidi dhaifu wa upande wa mashtaka ambao hauna mashiko una mapungufu mengi ya kisheria. *(That, the regional magistrate erred in law by relying to the evidence of prosecution side which was very weak and unreliable and without given a benefit of doubt to the appellant)*

In his submission in chief in support of his appeal, the appellant being a layman did not have much to say he prayed to the court to go through his memorandum of appeal and finds merit in his appeal and also prayed to be acquitted and found innocent.

On the other side, the respondent through SSA Mr Mohamed, opposed the appeal and supported the decision of the trial court on both the conviction and sentence and went on to submitting on grounds of appeal as follows:

The respondent combined 1st and 3rd ground of appeal and submitted that the evidence of **PW1** at page 3 reflects the reasons of exhibit "panga" not being submitted in court.

With respect to 2nd ground the respondent submitted that during the testimony of **PW1** she did not give names of other suspects as reflected at page 3 line 7 therefore it was only the appellant and not other people who were with him.

With respect to 4th ground of appeal, the respondent submitted that the ownership of the cell phone was not the issue at trial court. At trial court the issue was armed robbery with force.

With respect to 5th ground of appeal, the respondent submitted that, the evidence of **PW1** and **PW2** was enough in their case. At the end the respondent prayed the court to dismiss the entire appeal for lack of merits.

In his short rejoinder, the appellant reiterated what he stated in his submission in chief and state the case against him was all lie and not proved hence he further prayed for his appeal to be allowed.

After reading the Petition of Appeal and submissions made by both the appellant and the respondent herein, this court is now tasked to make determination and decide whether this appeal has merit or otherwise. In order to do so, I fully remain alive to the fact that this being the first appellate court is an appeal court for both facts and the law as held so by the Court of Appeal of Kenya in the case of **Kiilu & another v. R [2005] Eklr** as follows:

"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. It is not the function of the appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion, it must make its own findings and draw its own conclusion. Only then it can decide whether the Magistrate's findings should be supported. In doing so it

should make allowance for the fact that the trial court has held the advantage of hearing and seeing the witnesses"

Guided by the above cited principle relating to the duty of the first appellant court, I have considered the grounds of appeal, the evidence on record, the submissions of both parties and before I start tackling the grounds of appeal, I will first address the issue of identification and discover whether the appellant at trial court was well identified and recognized and that, there is no issue of mistaken identity. It is on records of the trial court particularly at page 25 and 26 of the judgment the issue of identification was determined by the trial magistrate. At page 26 of the judgment the trial magistrate stated the evidence of **PW1** and **PW11** gave evidence by pointing the accused person "**Dula Nyaku**" as rightly pointed out by trial magistrate when cited the case of **Waziri Amani v. R [1990] TLR 250** at page 252.

Furthermore, in the case of **Said Chally Scania v. R, Criminal Appeal No. 69 of 2005** (unreported) after drawing inspiration from **Waziri Amani case**, the Court said the following:

" We think that where a witness is testifying about another in un favourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all aids to unmistakable identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view, and also whether the person is familiar or a stranger"

It is on trial court records at page 3 that **PW1** stated that the incident took place at around 7:30pm night outside the house when the appellant took her phone and that she identified the person by the name of Nyaku, at page 4 **PW1** stated that ***"it was night but with the help of electricity light I managed to identified the accused person"*** moreover, **PW11** at page 4 of the records testified that she was

sitting outside with her sisters Asha and Mvita and three people passed nearby and one of those three men named ***Dula Nyaku*** snatched the cell phone of Asha, she went on to testify that ***" we recognized the suspect by using lamp, our house has four lamps at four corners, neighbor's house also has lamps which enable light"***

From the above testimony of **PW1** and **PW11**, this court can draw the conclusion that; the appellant was well recognized and identified by **PW1** and **PW11** using lights but also the appellant was not stranger to **PW1** and **PW11** because they named him by the nick name of ***"Dula Nyaku"***, hence, it is the view of this court that, there was no any issue of mistaken identity the appellant was well recognized and identified by the victim herself **PW1** and corroborated by witness **PW11**, the issue of recognition is well settled as in the case of **Kenga Chea Thoye v. R, Criminal Appeal No. 375 of 2006** (unreported) where the Supreme Court of Kenya held:

"Recognition is more satisfactory, more assuring and more reliable than identification of stranger"

Having determined the issue of identification and recognition of the appellant, now this court will make findings on the grounds of appeal.

I will start by making findings on the 5th ground of appeal. In this ground the appellant has faulted the trial magistrate for relying on weak and unreliable prosecution evidence and without given him the benefit of doubt. On the other side the respondent replied by stating that the evidence of **PW1** and that of **PW11** was enough evidence in their case.

To get to the bottom of this ground, it is on record that, the appellant was convicted for armed robbery offence, so in order to determine this ground this court will first make reference to **section 280 of Penal Code Act No. 6 of 2018** which reads the following:

280. A person who steals anything, and, at or immediately before or immediately after the time of stealing, is armed with any dangerous or offensive weapon or instrument, or is

in company with one or more other person or persons, or if, at or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other personal violence to a person is guilty of an offence termed "armed robbery" and is liable to imprisonment for life.

For the prosecution to prove the charge of armed robbery they must prove the following ingredients as held in the case of **Shabani Said Ally v. R, Criminal Appeal No. 270 of 2018**, (unreported) the Court of Appeal held the following:

" (1) It follows from the provision of section 287A of the Penal Code that in order to establish armed robbery, the prosecution must prove the following:

(a) There must be proof of theft

(b) There must be proof of the use of a dangerous or offensive weapon or robbery instrument at or immediately after the commission of robbery

(c) Use of dangerous or offensive weapon or robbery instrument must be directed against a person.

In the trial court records there is no evidence that, the trial magistrate had identified or directed his mind with the above named ingredients to determine whether the prosecution has proved the case beyond reasonable doubt before he convicted the appellant, so it's a duty of this court to put the ingredients of armed robbery to test to establish if whether the prosecution has managed to prove the case beyond reasonable doubt or otherwise.

The evidence adduced by **PW1** at page 3 of the proceeding was to the effect that she was outside her house on the 14/08/2019 at around 7:30pm night sitting on "baraza" chatting and phoning her sister who lived abroad when the appellant went to her and took her phone by force. The evidence of **PW1** was corroborated by **PW11** at page 4 of the proceeding.

With that evidence, it is clear that there was an offence of stealing of a cell phone belonged to **PW1**. So this court will hold that the first ingredient was proved by the

prosecution. Refer the case of **Japhet John Mataya v. DPP, Criminal Appeal No. 150 of 2015** (unreported) where the Court of Appeal held the following:

" For robbery to be established, proof of the ingredients of theft have to be proved beyond reasonable doubt. In other words, no offence of robbery can be said to exist if in the first place, the offence of stealing has not been proved. This is what was underscored by the Court of Appeal in the case of Leonard Zadekia Maratu v. R, Criminal Appeal No 86 of 2005 (unreported) that, 'it occurs to us that robbery is an aggravated form of theft which is accompanied by force. Indeed, without a theft there is no robbery'".

With respect to second and third ingredient, it is in trial court record at page 3 where **PW1** stated that the appellant threatened her by panga when she wanted to make noise and was warned that if she made any noise she would be cut by panga.

It is no doubt that violence was used by the appellant in the process of stealing the cell phone and that violence was directed to **PW1** who was the claimant and that the claimant was threatened by panga which is *dangerous and offensive weapon or robbery instrument*. This court is of the view that the prosecution managed to prove the second and third ingredients as well. Refer the case of **Michael Joseph v. R, [1995] TLR 278** where the Court of Appeal stated the following:

" Though there is no express and specific definition of what constitutes 'armed robbery' it is clear that if a dangerous or offensive weapon or instrument is used in the course of a robbery, that constitutes armed robbery."

Having established that the prosecution has managed to prove the ingredients of armed robbery at the trial court, the 5th ground of appeal is dismissed for lack of merit.

With respect to 4th ground of appeal, where the appellant faulted the trial magistrate for convicting him without the receipt of cell phone being brought to court to prove

ownership. The respondent reply was that, the ownership of the cell phone was not an issue, the issue at trial court was armed robbery with force.

In determine this ground I will make reference to the case of **Joseph Severin Mtega @ Zungu v. R, Criminal Appeal No. 60 of 2012** (unreported) where the appellant raised as a ground that ownership was not proved. The court of Appeal held that:

" The appellant stole the motorcycle from Msanga who was in possession of it, hence was a special owner, and that what the appellant did constituted theft. The Court went further to state: " we agree with Mr. Nchimbi to the effect that it was immaterial whether the motorcycle was owned by the mission or not. As Msanga was the one who possessed the motorcycle at the time of robbery, it was immaterial to prove ownership"

In the case in hand, the cell phone was used by **PW1** at a time of robbery, so it was immaterial whether she tendered in court a receipt to prove ownership or not. This court agrees with the respondent that the ownership of the cell phone was immaterial and not an issue because at a time of theft **PW1** was in possession of it, hence she was the owner, therefore 4th ground of appeal lacks merit and it is also dismissed.

With respect to 1st and 3rd grounds of appeal, the appellant faulted trial magistrate for convicting him with armed robbery offence without the instrument used in such offence being admitted in court as evidence. The respondent stated that, the evidence of **PW1** at page 3 reflects the reason why such instrument was not brought in court.

The fact that the stolen phone and weapon used to threatened **PW1** were not found in the appellant's possession as narrated so by **PW111** at page 8 of the proceedings, this court is of the opinion that the appellant was properly charged as the actual offender in terms of section **22 (a) of the Penal Act No. 6 of 2018** which reads the following:

22. When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:

(a) a person who actually does the act or makes the omission which constitutes the offence.

In this case the appellant was well and properly identified by **PW1** and **PW11** as the one who stole the cell phone even though the item and the panga were not found, I am of the view that the issue of credibility of **PW1** and **PW11** is important to be established by the court as held in the case of **Crosperry Ntagalindo @ Koro v. R, Criminal Appeal No. 312 of 2015** (unreported) where the Court of Appeal held that:

" Every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons not to believing him"

This court having gone through the records of evidence of **PW1**, **PW11** and that of **PW111** finds no good and cogent reasons not to believing their evidence even though the cell phone and panga was not found in the possession of the appellant. It is the view of this court that in many occasions especially after the commission of the offence, the stolen goods or weapon used are most of the time concealed or hidden by the perpetrators of the crime in order to destroy or cover the evidence, hence, I see no reason to fault the findings of the trial court, the 1st and 3rd grounds of appeal lacks merit and are hereby dismissed.

Having dismissed the **1, 3, 4 and 5th grounds of appeal**, this court has no reason to address the **2nd ground of appeal** because it will not help the appellant to overturn the conviction, therefore I will not make any determination on the 2nd ground of appeal.

That being said, this appeal is hereby dismissed for lack of merit.


S. HASSAN (J)

It is so ordered.

Dated: 25th April. 2023.

Court:

Right of Appeal is explained.

Court:

This Judgment is delivered today 25th April, 2023 in the presence of the Appellant and the Respondent.