

TANZANIA / JUDGMENT

Abillah Abdalla Chande Kido vs The Republic Criminal Appeal No15337 of 2024 2025 TZHC 514 24 February 2025 Copy

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB-REGISTRY AT DAR ES SALAAM CRIMINAL APPEAL NO.15337 OF 2024 (C/f Criminal case No. 152 of 2022, in the District Court of Temeke at Temeke) ABILLAH ABDALLAH CHANDE @ KIDOAPPELLANT VERSUS THE REPUBLICRESPONDENT

JUDGMENT

Date of last Order:25-11-2024 Date of Judgment: 24-2-2025 B.K.PHILLIP,J The appellant was arraigned at the District Court of Temeke on a charge of armed robbery contrary to section 287 of the Penal Code. He was convicted and sentenced to thirty (30) years imprisonment. Aggrieved with the District Court's judgment, the appellant lodged this appeal on the following grounds.

- a) That the learned trial magistrate grossly erred in both law and fact by conviction the appellant based on incredible visual identification.
- b) That the learned trial magistrate grossly erred in both law and fact 1 by convicting the appellant based on the evidence of prosecution while intensity of light and the position of illumination and point of confrontation was not mentioned.
- c) That the learned trial magistrate grossly erred in both law and fact by convicting the appellant with a case that was not proved to the hilt.
- d) That the learned trial magistrate grossly erred in both law and fact by convicting the appellant based on incredible, contradiction and uncorroborated evidence of prosecution witnesses.
- e) That, the learned trial Magistrate grossly erred in both law and act by convicting the appellant based on Exh. P1 caution statement which was recorded contrary to law.
- f) That, the learned trial Magistrate grossly erred in both law and fact by disregarding the appellant defence. The appellant was unrepresented, whereas the learned State Attorney Winifrida Ouko appeared for the Republic. The appeal was disposed of by written

submission. The prosecution's case before the district court was as follows: On the 12th of August 2022 at Sandal area within Temeke District in Dare es Salaam Region, the appellant stole Tshs 250,000/=, property of one Abasi Issa Milanzi and immediately before and after such stealing stabbed the said Abasi Issa Millanzi with the machete to obtain and retain the said property. The prosecution paraded four witnesses to prove its case, namely Abasi Milanzi (PW1), Idrissa Abdul (PW2), G.4605 Corporal Stanislaus ((PW3), and Dr. Shabani (PW4). The appellant was the only witness for the defence case. He denied having committed the offence charged against him. In his submission in support of the appeal, the appellant summarized his grounds of appeal into the following grounds;

- a) The evidence of visual identification relied upon in convicting the appellant was incredible and unreliable.
- b) The appellant's caution statement was obtained illegally.
- c) The trial court disregarded the appellant's defence. Submitting the issue of identification, the appellant argued that the trial court convicted him, relying heavily on the testimony of PW1 that he identified him. He contended that PW1's testimony on visual identification was not watertight and there was a high possibility of mistaken identity. PW1's allegations that he knew him (appellant) before the incident do not mean that he committed the offence charged against him, despite the fact that prior knowledge of somebody accounts much in the proper identification of an accused person. Factors that enabled such identification of the appellant remain of foremost importance. The appellant went on to submit that in the instant case, the evidence of PW1 and PW3 shows that the offence was committed at night around 19.00 hrs. That being the case, there was no prevailing condition favorable to correct identification. He contended that PW1's testimony did not give a clear picture of the light that was at the crime scene, its intensity, and the distance between that electrical light and the crime scene. He told the court that he identified him because he knew him before the incident. He was emphatic that the testimony of PW1 did not meet the standard on the requirement on visual identification stipulated in the case of Mbaraka Njija Vs Republic, Criminal appeal No. 157 of 2013 (unreported) in which the court held that " However it is now a trite law that the witness has to go further and describe the intensity and illumination of the said source of light. The record is silent on the intensity and illumination of the said security light. They differ from one security light to another hence the description of its intensity is very important so as to eliminate doubts" In conclusion, the appellant believed that the trial court overlooked observing the fundamental guideline on visual identification. The Court did not make a proper assessment regarding the issue of light at the scene of the crime because the intensity, color of the bulb, and the point and distance of the light and its illuminating point and point of confrontation were not considered. He maintained that the issue of familiarity only arises where the conditions are conducive, and in this case, the issue of familiarity does not arise at all. On the legality or illegality of the caution statement (Exhibit P1), the appellant submitted that the caution statement has two significant shortfalls. One, it does not indicate that after recording it, PW3

read it over for him (the appellant) to verify that what was written therein was correct information. Two, the caution statement was recorded out of time in contravention of the provisions of sections 50 and 51 of the Criminal Procedure Act Cap 20 R.E 2022, (“CPA”), and failure to comply with section 50 (1) (a) and 51 (1) (a) of CPA vitiated. He cited the case of Shida Lunda Aidan @ Emmilian VS Republic, Criminal Appeal No. 192 of 2014 5 (unreported), in which the court held that non-compliance with section 50(1) (a) and 51(1)(a) of the CPA vitiated caution statement Moreover, he submitted that in his defence, he stated that he was tortured and forced to sign on a paper. Since the prosecuting state attorney did not cross-examine him on the substance of his evidence, it is tantamount to acceptance of the evidence that he was tortured. He cited the case of Nyerere Nyague Vs Republic Criminal Appeal NO. 67 OF 2010, (unreported). He urged this court to expunge the caution statement from the court’s records. Furthermore, the appellant argued that the trial court grossly erred in law in disregarding his defence which raised reasonable doubt in the prosecution case because he was not cross-examined by the learned State Attorney during the hearing of the case before the trial court. He contended that it is now a trite law that failing to cross-examine a witness on material issues is tantamount to accepting his/her evidence as true. In conclusion of his submission, the appellant implored this court to allow this appeal. In rebuttal, the learned State Attorney supported the appellant’s conviction. She argued that the appellant was identified adequately by PW1, who knew 6 him before the incident, and immediately after the incident, he went to the appellant’s father to inform him that his son (the appellant) robbed him. Relying on the case of Chacha Lucas Vs. Republic, Criminal Appeal No. 67 of 2019 (unreported), the learned State Attorney argued that visual identification is considered as strong evidence. The elements required to establish/ prove the offence of armed robbery are: one, there must be proof of theft; two, use of a dangerous or offensive weapon, and three, use of a dangerous or offensive weapon that must be directed to a person. Further, the learned State Attorney cited the case of Mwaikambo Vs Republic (1982) TLR 24, in which the accused was convicted of armed robbery, and the conviction was primarily based on visual identification of the accused. In that case, the court highlighted essential conditions to be considered when assessing the reliability of visual identification, to wit; lighting, distance, and duration. Referring to the court records, the learned state Attorney submitted that PW1 identified the appellant using an electricity light that was at the crime scene. Regarding the appellant’s caution statement, the learned State Attorney argued that it was recorded in accordance with the law in compliance with 7 sections 50 and 51 of the CPA. It was read over to the appellant and signed by the appellant, thus nothing is wrong. The learned state attorney contended that the appellant’s defence did not raise any doubt. The prosecution proved the case against the appellant beyond reasonable doubt, as required by the law. She implored this court to dismiss the appeal. In rejoinder, the appellant reiterated his submission in chief. He insisted that PW1’s testimony did not adequately explain the intensity of the light from the electricity available at the crime scene. He cited the cases of Issa Mgara @ Shuka Vs. Republic, Criminal Appeal No. 37 of 2005, and Juma Ally Mustapha Vs. Republic, Criminal Appeal No. 193 of 2018 (both unreported) to cement his arguments. Having analyzed the rival arguments raised by the

parties, let me proceed with determining the grounds of appeal as summarized by the appellant. Starting with the issue of the visual identification of the appellant by PW1, it is common ground that visual identification can be used to convict an accused person. The factors to be considered when dealing with such kind of evidence were well discussed in the case of *Waziri Amani Vs Republic* (1980) TLR 250, in which the court held as follows; “Although no hard and fast rules can be laid down as to the manner a trial judge determining questions of disputed identity, it seemed clear that the issue of identification would not be properly resolved unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried.. for example questions like the following... the time the witness had the accused under observation; the condition under which such observation occurred, for instance whether it was day or night time, whether there was good or poor lighting at the scene and further whether the witness knew or had seen the accused before or not“ PW1 testified that on the fateful day, at night, bandits attacked him, and the appellant was one of them. He knew the appellant before the incident. There was an electricity light at the crime scene, which enabled him to identify the appellant. Not only that, PW1 told the trial court that the appellant injured him on his head with a bush knife. Therefore, there was no distance between the appellant and PW1. Further, PW1 told the trial Court that immediately after the incident, he went to the appellant’s father to inform him that his son (the appellant) had injured him and robbed his money. PW1’s testimony was corroborated by the testimony of PW4 (Dr. Shabani Khalid), the Doctor who treated PW1, whose testimony was to the effect that PW1 had injuries on his face and left arm caused by a sharp object. He tendered in court PW1’s PF 3 (Exhibit P2). From the foregoing, it is my settled view that PW1's testimony met the standard stipulated in the case of *Waziri Amani* (supra) on the conditions to be considered when dealing with evidence of visual identification since he stated the source of light as electricity light, he knew the appellant before the incident, and he had time to observe the appellant as he spent some time with the appellant when he was struggling to rescue himself but finally he was injured and his money stolen. Thus, the appellant was properly identified by PW1, who, immediately after the incident, went to the appellant’s father to inform him that his son had attacked him and stolen his money. The court records reveal that the appellant's caution statement, in which he admitted to having committed the offence charged against him, was tendered in court by PW3 (G 4607 Corporal Stanslaus), who recorded it and admitted in evidence as Exhibit P1. The appellant did not object to the admission of his caution statement in evidence. His contention that he was tortured and forced to sign the caution statement is a pure afterthought. Had it been that the appellant was forced to sign the caution statement, he would have raised that concern before the trial court, and a trial within a trial would have been conducted to determine whether or not the appellant was tortured and forced to sign the caution statement. Moreover, I have noted that the caution statement was recorded correctly and verified. The appellant’s argument that the trial magistrate ignored his defence is incorrect since, on page three of the judgment, the trial magistrate indicated that she considered the appellant's defence and found that PW1’s testimony was truthful. The prosecution proved the offence of armed robbery against the

appellant beyond reasonable doubt as required by the law and proceeded to convict and sentence the appellant. In the upshot, all grounds of appeal have no merit. Thus, the appeal is dismissed in its entirety. Dated at Dar es Salaam this 24th day of February 2025
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