

TANZANIA / JUDGMENT

# BALAI JOSEPH

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IN THE COURT OF APPEAL OF TANZANIA AT TABORA (CORAM: MWANPAMBO, J.A.. FIKIRINI, 3.A. And NGWEMBE. J.A.)<sup>1</sup> CRIMINAL APPEAL NO. 626 OF 2021 BALAI S/O JOSEPH..... APPELLANT VERSUS THE REPUBLIC..... RESPONDENT (Appeal from the decision of the High Court of Tanzania at Tabora) fBahati. 3.^ dated the 27th day of August, 2021 in Criminal Appeal No. 10 of 2020 JUDGMENT OF THE COURT 7th & 11th June, 2024 MWANPAMBO, J.A.: The appellant Balai Joseph was aggrieved by the convictions and sentences for the offence of armed robbery and grievous harm passed by the District Court of Nzega in Criminal Case No. 23 of 2019. His appeal to the High Court at Tabora was barren of fruit which culminated into the instant appeal in the appellant's quest to protest his innocence. Before the trial court, the appellant stood charged with four counts. Two of the counts involved breaking into a building and committing an offence therein. The third count involved armed robbery and the fourth one related to grievous harm. All counts were in connection with the events which took place on the night of 15 February 2019 at a house of Ester Kisiza at an area called Mwanshina - Mbogwe within Nzega District, Tabora Region. After a trial involving 6 prosecution witnesses and one from the defence side, the trial court found the case for the prosecution proved to the required standard on the 3rd and 4th counts. It convicted the appellant as charged followed by the corresponding sentences which earned the appellant the mandatory 30 years' imprisonment for armed robbery and one year for grievous harm ordered to run concurrently. The trial court acquitted the appellant on the first 2 counts involving breaking into a building and committing offences therein. Apparently there was no appeal against the acquittal on the said counts. The evidence on which the trial court found the prosecution case proved and ultimately grounded the appellant's convictions was to the following effect: On the night of 15 February 2019, Mayunga Malingila (PW1) and Ester Kisiza (PW2) who were husband and wife respectively, were invaded by a group of bandits who stormed and broke into their house. The bandits had machete, stick and stone with which they allegedly threatened PW1 and PW2 leaving them with severe bodily injuries demanding money from the shop operated by PW1 in the same premises. Despite resistance from the victims the bandits prevailed over them. They managed to get away with several items from them including; phone make techno, pair of shoes, TZS 40,000/= cash, 2 bicycles and shop items. Before the victims were overpowered, PW2 is said to have grabbed a torch from the appellant who was not only well known to her but also a regular customer at her shop and which facilitated her identification. In response to an alarm raised by the victims for help, Mwika Kisinza (PW5) and other people

responded who went to the scene of crime and told by PW2 that one of her assailants was Balai Joseph; the appellant. According to PW2, she was able to identify the appellant through light illuminated from a torch grabbed from the appellant in the course of confrontation. That disclosure resulted into the crowd involving 30 people pursuing the appellant at his home at a neighbouring village Nhobola in connection with the incident. However, that could not make the appellant surrender to the demand from people who went to his 3 house to arrest him until the police came early in the morning who arrested him and subsequently arraigned him in court to answer the charge to which he pleaded not guilty. In the meantime, PW1 and PW2 who sustained several injuries in their bodies inflicted by the bandits were taken to hospital for treatment after obtaining PF3s from the police. Following conviction and sentences on the 2 counts, the appellant appealed to the High Court as alluded to earlier on which concurred with the findings of the trial court on his guilt and dismissed his appeal. It is remarkable that, in convicting the appellant, the trial court was satisfied that PW2's evidence of identification was impeccable placing the appellant at the scene of crime on the material night. It is equally significant that, in his defence, the appellant did not deny familiarity with PW2. His defence was that he never participated in any crime during the material night as he was at his home sleeping with his wife. Before us, the appellant faults the first appellate court for sustaining conviction and sentences on 4 grounds. However, upon close examination, the grounds boil down to one main issue; whether the case for the prosecution was proved against the appellant beyond reasonable doubt in view of weak identification evidence and contradiction in the evidence of PW2 and PW4. The appellant appeared in person during the hearing of his appeal fending for himself. Having adopted his grounds of appeal, he preferred to let the respondent Republic learned State Attorney to respond to the grounds in the memorandum of appeal reserving his right to rejoin, if need arose which he did. Mr. Joseph Makene, learned State Attorney who represented the respondent resisted the appeal. The substance of Mr. Makene's submission was that, the first appellate court rightly concurred with the trial court on the guilt of the appellant since their evidence grounding his conviction was watertight. The learned State Attorney placed reliance on *Waziri Amani v. Republic* [1980] TLR 250 on the conditions for a watertight identification to ground a conviction. Counsel argued the conditions for a watertight identification were met in the instant appeal. He pointed out that, one, PW2 managed to identify the appellant assisted by light illuminated from a torch she had grabbed from her assailant in the 5 course of the confrontation; two the appellant was not a stranger to PW2 but a person well known to her and; three, PW2 named the culprit to the people who responded to her cry for help following the invasion which lent credibility to her evidence in line with the Court's previous decisions, in particular, *Masamba Musiba @ Musiba Masai Masamba v. Republic*, Criminal Appeal No. 138 of 2019 and *Minani Evarist v. Republic*, Criminal Appeal No. 127 of 2007 (both unreported). He added further that, PW2's evidence on familiarity was supported by the appellant. Discounting the appellant's complaint on the contradiction in the testimonies of PW2 and PW4, the learned State Attorney argued that, no such contradictions existed and if so, they were too minor to affect the respondent Republic's case placing reliance from the Court's decision in *Charles Nanati v. Republic*, Criminal Appeal No. 286 of 2017 (unreported). Finally, Mr. Makene addressed the Court on the general complaint involving proof of the respondent Republic's case on the required standard. To this, the learned State

Attorney impressed upon the Court to sustain the concurrent findings of fact by the two courts below that the evidence led by the prosecution established existence of the essential ingredients in both counts. With regard to armed robbery, the learned State Attorney urged that there was sufficient proof of theft of various items from PW2's house through use of threat and weapons directed at the victim consistent with the court's holding in *Amos Sita @ Ngili v. Republic*, Criminal Appeal No. 436 of 2021 (unreported). With that the learned State Attorney concluded urging the Court to dismiss the appeal. In his rejoinder, the appellant challenged the concurrent finding on his guilt on several fronts; one, poor analysis of identification evidence since, not only there was no description and capacity of the torch used by PW2 to identify him, such torch was not tendered in evidence. Besides, the appellant contended that there was no evidence as to the direction the said torch illuminated light. Two, no exhibit was tendered during the trial linking the appellant with any of the alleged stolen items which rendered the prosecution evidence too weak to sustain conviction. On that note, the appellant beseeched the Court to allow his appeal. We propose to preface our discussion on the issues for the determination of the appeal with the obvious reason, that is, since this is a second appeal, the Court's interference with the concurrent findings of fact by the two courts below is very limited except where it is established that, such concurrence resulted from misapprehension, misdirection or non-direction of the evidence resulting in miscarriage of justice. The reason for this is obvious the Court's jurisdiction in second appeals is circumscribed by section 6 (7) (a) of the Appellate Jurisdiction Act (the AJA) which requires the Court to determine such appeals on points of law only. That means, our role is limited in determining whether, there was a correct application of the law to the facts/evidence resulting into the concurrent findings of fact. As submitted by Mr. Makene, the offence of armed robbery entails existence of two ingredients; stealing by the use of force or threat directed at the victim. The evidence on record proved as much through PW1 and PW2 that a number of items including cash were stolen from them on the material right by 4 bandits who were, according to them armed with stones, stick and machete. It was equally proved that, in the process the bandits inflicted multiple bodily injuries on PW1 and PW2 such that, they had to be taken to hospital for treatment after obtaining PF3s from the police as stated by PW6. Both PW1 and PW2 testified that, it took them a month to heal from the wounds sustained from the invasion. As the prosecution proved the ingredients of the offence of armed robbery, the remaining issue relates to the culprit the prosecution led evidence to prove that it was none other than the appellant who committed the evidence. Out of 6 witnesses for the prosecution, only 2 were eye witnesses. However, it is only PW2 who was found to have positively identified the appellant. Both courts below accepted that PW2's evidence passed the test of factors for a positive identification set out in *Waziri Amani* (supra) and many others in that regard. To start with, it was not disputed that the appellant was well known to PW2 for as many as 17 years. It was equally common ground that, the appellant was a regular customer at PW2's shop buying cigarettes. In that regard, PW2's identification was by recognition as distinct from visual identification of a stranger. Nevertheless, as the Court has held in various cases, recognition alone is no guarantee to a mistaken identity. There must be cogent evidence to lend credence to the evidence of identification by recognition particularly, where an offence is committed in unfavourable circumstances such as night, as it were. See for instance: *Said Chally Scania v. Republic*, Criminal Appeal No. 69 of 2005. It is

significant that, the courts have given the deserving warning to the caution against acting on evidence of visual identification unless such evidence is watertight and free from mistaken identity particularly where it involves a stranger. Since, in *Jumapili Msyete v. Republic*, Criminal Appeal No. 110 of 2014 (unreported), the Court discussed at a considerable length different categories of identification that is, visual, recognition and voice and the type of evidence required to prove in each category. These are; foundational, complimentary, assistive and corroborative. We cannot do better than reproduce part of what the Court said in that case thus: "Accordingly, the type of evidence required to prove identification might differ in some aspects, but some may be common in all types of identification. Foundational and assistive evidence, for instance, is necessary in all types of identification, but corroborative may not be. For instance, in visual identification, identification parades, or recent possession, has been invariably been used to corroborate, but it may not be so in recognition cases. In visual identification, description of the suspect build or attire may be necessary but in recognition cases, naming the suspect would be sufficient"[at p. 16]. Earlier on, the Court stated: "But it is equally true that no hard or fast rules can be laid down as to the manner a trial judge should determine questions of identity, provided that in each case there should be a careful and considered analysis of all the surrounding circumstances of the crime being tried (*Waziri Amani v. Republic* (supra)). Essentially therefore this means [that] each case will have to be decided on its own peculiar surrounding circumstances"[at p. 13]. Subjecting the foregoing to the instant appeal, although the appellant was adamant that he was not positively identified due to failure to describe the type of the force and capacity, we are satisfied that PW2's evidence was satisfactory. In her evidence at page 15 of the record, PW2 stated: "I "They had the flash light on, I saw two men whom I argued with them.... I managed to grab the flash light and I directed it to them. I was able to see the robbers and I was able to identify Balai Joseph. He was the one who had the flash light first. The other robber had [a] stick and the machete. Both men had black sweaters with long sleeves. But during the confrontation the sweater of Balai that covered him fell off. They did not cover over their [faces], I know Balai [who] lives at the neighbouring village and he is my customer who buys [cigarettes]." Answering questions in cross - examination by the appellant, PW2 said: "I know you as Balai Joseph, you are the peasant also the robber, I used to sell you cigarettes... After the crowd gathered, they came to look for you...." It is plain from the foregoing that, PW2 was not controverted on how she identified the appellant using flash light directed to him and his fellow conspirator. Besides, PW2 named the appellant to person who responded to the call for help which resulted into his arrest later that morning. As we held in *Jumapili Msyete* (supra), naming a culprit is one of the key factors lending credence to identification evidence by recognition. Like the two courts below, we are satisfied that the appellant was positively identified at the scene of crime and so we find no justification to disturb the said court's concurrent findings of fact. Finally, the appellant sought to challenge PW2's evidence allegedly because it was contradictory to PW4 in relation to the manner in which PW2 got hold of the torch from him. Mr. Makene submitted that there was no such contradiction. We think there was such contradiction we are far from accepting that such a contradiction was material to dent PW2's credibility going to the root of her evidence. We say so because, PW4 did not witness the confrontation between PW2 and the robbers. He came in later and was told by PW2 on what had already taken place. So, between

PW2 and PW4, the best person to believe must be PW2. Secondly, in convicting the appellant, the trial court did not rely on PW4's evidence rather on PW2 with regard to identification. Thirdly, whether PW2 did indeed grab the torch the appellant or pick it form the ground was totally irrelevant. What mattered was how PW2 used that torch to illuminate light towards the appellant which enabled her to 13 recognize him. In the upshot, we reject that complaint as urged by Mr. Makene. On the whole, we have seen no semblance of merit in this appeal and dismiss it as we hereby do. DATED at TABORA this 10th day of June, 2024. L. J. S. MWANDAMBO JUSTICE OF APPEAL P. S. FIKIRINI JUSTICE OF APPEAL P. J. NGWEMBE JUSTICE OF APPEAL The Judgment delivered this 11th day of June, 2024 in the presence of the appellant who appeared in person and Mr. Nurudini Mmary, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original. J. J. KAMALA DEPUTY REGISTRAR COURT OF APPEAL 14

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