IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM.

(CORAM: LUANDA, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 55 OF 2011

1. SHABANI RAMADHANI ALLY
2. RASHIDI KIWANGA
3. SAIDI ABDALLAH NGABANGE ..... **APPELLANT**
4. AHMADA TWAHA MBWANA

VERSUS

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

(Appeal from the decision of the High Court of Tanzania, at Dar es Salaam)

(Makuru, J.)

dated the 2nd day of June, 2010
in
Criminal Appeal No. 126 of 2007
.....

ORDER OF THE COURT

29th May, & 22nd July, 2015

MJASIRI, J.A.:

The appellants ShabaniRamadhani Ally, RashidiKiwango, SaidiAbdallahNgabange and AhmadaTwahaMbwana were jointly charged with armed robbery contrary to section 287 A of the Penal code Cap 16. R.E. 2002. They were convicted as charged and each of them was sentenced to thirty years imprisonment.

Aggrieved by both the conviction and sentence, all the accused persons appealed to the High Court of Tanzania against both conviction and sentences. Their appeal to the High Court was unsuccessful hence this second appeal. The appellants have presented eight (8) grounds of appeal. However the major grounds of appeal can be summarized as follows.

1. *The evidence of visual identification was not water tight.*
2. *The identification parade was not properly conducted.*
3. *The cautioned statements were improperly admitted.*
4. *The prosecution failed to call vital witnesses.*
5. *The evidence on record was not enough to sustain a conviction.*

It was the prosecution case that on 22nd day of June 2005 at about 22.00 hours at KiburugwaBiasi area within the Municipality of Temeke in Dar es Salaam, the appellants did steal one Toyota motor vehicle Reg. No. T.889 CAN valued at Shillings Five Million One Hundred and Fifty Thousand

The learned Senior State Attorney submitted that the appeal filed by the second and third appellants now the first and second appellants is in-competent as there is no notice of appeal. Under Rule 68 (1) of the Court Rules it is the notice of appeal which institutes the appeal.

In view of this anomaly, the appeal filed by the first and second appellants was struck out for being incompetent. The Court then proceeded with the appeal filed by the 3rd appellant who had legal representation.

Mr. Mapinduzi on his part relied on the memorandum of appeal filed by the appellants. He submitted that the appeal centres on two main issues, namely:-

1. *There was insufficiency of evidence*
2. *There were procedural irregularities.*

He also lamented that the record was incomprehensible making it very difficult to discipher what was in the record.

In relation to ground No 1, *insufficience of evidence*, he argued that the circumstances surrounding the identification of the third appellant was not watertight. According to him his client was not properly identified. There was no description of the type of electric light and the intensity of the light was not elaborated. The intensity of the motor vehicle light was also not established. No description of the 3rd appellant was given. The only person who named the appellant was PW1. The said witness being an accomplice should not have been believed.

With regard to the second issue of *procedural irregularities* Mr. Mapinduzi stated that the cautioned statement of the 3rd appellant was not properly admitted by the trial Court. He submitted that the trial court admitted the cautioned statement without conducting an enquiry as required under the law despite the objections raised by the third appellant.

On the identification parade, Mr. Mapinduzi submitted that it was not properly conducted and the procedures laid down under the Police General Orders were not complied with.

Mr. Mapinduzi also submitted that no plea was taken after the charge was substituted. The plea was taken only on June 28, 2005 (page 6 & 7 of the record) before the charge was substituted.

Ms. Haule on her part supported the conviction and sentence. She too complained about the status of the record. According to her, the basis of the conviction of the third appellant was identification and recent possession. She submitted that according to the evidence on record, it was the third appellant who hired the car. She however conceded that no physical description of the third appellant was given. There was no description of the source of light or intensity of the light. The appellant was also not known to the witnesses. The learned Senior State Attorney also accepted that the identification parade was not properly conducted and that there were some non-compliance issues. She asked the Court to expunge the identification parade Register (Exhibit 3) from the record. She also agreed that the cautioned statement of the third appellant was not properly tendered in court.

On recent possession, the learned Senior State Attorney conceded that the car was not tendered in Court as exhibit. It was not clear from the evidence on record whether the third appellant was arrested in the car or not. The car was found at Magomeni and taken to the Police Station.

After carefully going through the record and the submissions made by counsel, we are inclined to agree with Mr. Mapinduzi that there is no sufficient evidence to establish the charge against the 3rd appellant. The identification of the appellant was not watertight. Neither the source of light nor the intensity of light was established. There was also no elaboration of the distance from the source of light to the place where the incident took place. There was no physical description of the third appellant.

Taking into account the surrounding circumstances, it is evident that the 3rd appellant was not properly identified. See **WaziriAmani v Republic** (1989) TLR 250. In **Raymond Francis v Republic** (1994) TLR 100 the Court stated as under:-

"It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring correct identification is of utmost importance."

The Police General Order Number 231 on identification parades, was not fully complied with. Although the identification parade register was tendered in Court as Exhibit P3 there was no evidence that the officer in-charge of the case did not participate in the parade. There was no evidence that the suspect was informed of his right to have a relative or lawyer present. See **Rexv MwangoManaa** (1936) 18 EACA 29.

The doctrine of recent possession was not properly invoked to link the third appellant with the armed robbery. It has not been established that the third appellant was arrested in the motor vehicle in question, nor was evidence presented that the third appellant was found in possession of the motor vehicle. The motor vehicle in question was not tendered in Court during trial. It was admitted as Exhibit P1 during the preliminary hearing.

In relation to the cautioned statement of the 3rd appellant, we agree with the learned counsel that the said cautioned statement was admitted in court as Exhibit P4 despite the objection made by the 3rd appellant that it was not voluntarily made. No step was taken to conduct an enquiry as required under the law.

In **Mohamed Said Matula v Republic** (1995) TLR 3, it was reiterated that the burden of proof is always on the prosecution to prove the case against the accused person beyond reasonable doubt. The burden never shifts. Given the fact that there is no sufficient evidence and given the procedural irregularities outlined above, the conviction against the third appellant has no leg to stand on.

Upon a careful review and analysis of the evidence on record we are of the considered view that as in the case of the 3rd appellant, the evidence on record is not sufficient to sustain a conviction against the first and second appellants as well. In view of that, we find it necessary to exercise our revisional powers under section 4 (2) of the Appellate Jurisdiction Act (Cap 141, R.E 2002) and we hereby quash all proceedings of the High

Court and the District Court. The sentences imposed on them are also set aside. The three appellants should therefore be released forthwith unless they are otherwise lawfully held.

Dated at Dar es Salaam this 20th day of July, 2015.

B.M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B.M. MMILLA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL