IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUSSA, J.A., MUGASHA, J.A., And LILA, J.A.)

CRIMINAL APPEAL NO. 193 OF 2016

1. **YOSIALA NICHOLAUS MARWA**
2. **GEOFREY GEORGE KAYAMBA** .....**APPELLANTS**
3. **HAMADI SALUM MAKANGANYA**

VERSUS

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

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

(Kaduri, J.)

dated 4th day of December, 2015

in

HC Criminal Appeal No. 111 of 2014

JUDGMENT OF THE COURT

2nd & 15th April, 2019

MUGASHA, J.A.:

The Appellants and two others were charged with the offence of armed robbery contrary to section 287A of the Penal Code Cap 16 RE. 2002. The two other persons were acquitted whereas the appellants were convicted and sentenced to serve prison terms of thirty years each. Aggrieved, the appellants unsuccessfully appealed to the High Court hence this second appeal. The appellants filed a joint

Memorandum of Appeal and each of them filed a supplementary Memorandum of Appeal. In both memoranda the appellants fault their conviction basically on **one,** failure by the prosecution to parade as a witness the person who was threatened in the alleged armed robbery incident. **Two,** they were not properly identified at the scene of crime and that the purported identification parade was flawed. **Three,** their apprehension in connection with the offence was based on uncorroborated prosecution evidence. **Four,** the charge of armed robbery was not proved against them beyond reasonable doubt.

Before addressing the grounds of complaint we think it is pertinent to briefly, state the evidence upon which the appellants' conviction was based and sustained by the first appellate court.

It was alleged by the prosecution that, on 26/10/2011, at Salasala, the bandits stormed into the house of Arnold Kaene (PW5) and stole various household items including a decorder deck, music system make sony, two mobile phones make blackberry and Nokia, two pocket wallets and cash money amounting to Tzs 100,000/= the properties of Arnold Kaene (PW5). Also immediately before such

stealing they did cut one Isaack Mpangala a watchman with a bush knife.

On the fateful day, Faith Mbwito (PW6) recounted to have heard her sister and the house maid crying to have been attacked by the bandits. She woke up her husband PW5 and as they peeped through the window, saw the watchman fighting with the bandits until when he was overpowered and managed to run away for safety. Having realized that, the bandits were about to enter into their house, they opted to hide in the toilet of the master bedroom together with their kid. While there, the bandits managed to access the house after breaking the kitchen door. After hearing the bandits commanding his in-law that she would be raped if she does not show where PW5 and PW6 were hiding, PW5 recounted that, though it was dark in the toilet, he saw the 1st appellant holding a knife while he was entering their bedroom where there was light. Also PW5 told the trial court that, he was threatened by the 2nd appellant who held a knife and demanded to be given money. PW5 obliged and gave the bandit a sum of TZS 100,000/=. As the sum was found to be inadequate, the other bandits embarked on an unsuccessful search for more money and finally, they

collected the household items and disembarked. Ten minutes later subsequent to a call by neighbours, the Police went at the scene of crime and instructed PW5 to report the matter at Kawe Police Station. The injured watchman was taken to Mwananyamala hospital. Three days later, PW5 and PW6 were summoned at Kawe Police Station in order to identify the arrested culprits. Both PW5 and PW6 recounted to have identified the appellants at the identification parade which was conducted by PW7. Those identified included the 3rd appellant, a mason who had earlier on worked at their house.

PW7 Inspector Gilbert, told the trial court to have conducted the identification parade and at page 89 of the record and recounted that, PW5 and PW6 described the bandits to be tall, thin, and short and were among the five bandits. However, neither PW5 nor PW6 testified to have identified and given the description of the appellants when the Police went at the scene of crime on the fateful day. According to PW7, he conducted a first parade for 1st and 2nd appellants having mixed them with twelve (12) other people wherein PW5 and PW6 identified the appellants. In the other parade, the 3rd appellant was

mixed with eight (8) people and PW5 and PW6 identified that appellant to be among the bandits in the alleged robbery incident.

The appellants denied each and every detail of the prosecution account. The 1st appellant told the trial court to have been arrested on 29/10/2011 at 07.00hrs near Mbezi Juu and his money taken, he was later transferred to Kawe Police station where he met PW7 and other Police officers. Then, he was taken to Wazo Police station where he was beaten and stayed in custody for five days and then returned to Kawe Police Station where he stayed for four days. On 11/11/2011 he was charged together with the 2nd and 3rd appellants who were strangers and later, two other persons also not known to him were included in the charge of armed robbery.

The 2nd appellant told the trial court to be a resident of Kiwalani and went to Mbezi to attend the funeral of his mother. He was arrested in December at Mbezi Juu while on his way back home and forced to sign unknown documents. Later, he was taken to Wazo Police Station, Kawe Police and charged with offence.

The third appellant claimed to have been visited by five Police Officers on 30/11/2011 whereby his office was searched and asked if he knew PW5 (Anold Kaeni). He denied following which he was taken to Kawe Police and later Wazo Police station where he was beaten and forced to show the properties of Anold Kaeni. He was subsequently taken to Mwanyalani Police Station, locked for three days, taken back to Kawe Police Station, joined with the other accuseds and charged with the offence of armed robbery.

With that evidence the trial court was satisfied that, the prosecution case was proved beyond reasonable doubt and the appellants were convicted and sentenced accordingly.

The first appellate court in sustaining the conviction remarked as reflected at page 148 of the record of appeal as follows:

> *"The robbery was carried at night but the bandits had not disguised themselves according to eye witnesses. The house had electricity light that were on. The bandits spent some*

considerable time reaching for money and items to steal. To take this money they had to come close to the witnesses, the third appellant was a known labourer when the house was being constructed. Despite the appellants' denials, I agree with the learned trial magistrate that the identification of the appellants left no doubt... on the prosecution case based in their identification."

Reverting back to the grounds of appeal, the appellants opted to hear the response from the respondent before giving an elaboration.

On her part, Ms. Ester Martin, learned State Attorney initially supported the conviction and the sentence of the appellants. She pointed out that, notwithstanding that, the watchman was not paraded as a prosecution witness, PW5 and PW5 the eye witnesses recounted to have seen the watchman being threatened and attacked by the bandits. She thus argued that, on the basis of the direct evidence of PW5 and PW6 the prosecution had established its case and as such,

there was no need of parading the watchman as a prosecution witness. To support her contention, she cited section 62 of the Evidence Act Cap 6 RE. 2002 and the unreported cases of **RAJABU YUSUPH VS REPUBLIC,** Criminal Appeal No. 457 of 2005 and **SAID ALLY MKONG'OTO vs REPUBLIC,** Criminal Appeal No. 133 of 2009.

When asked by the Court if the threatened person was not a material witness in order to establish proof of an important element of the armed robbery, Ms. Ester succumbed to the appellants' ground of complaint. However, she still maintained that, there was sufficient evidence to prove a charge of robbery with violence under section 285 and 286 of the Penal Code. In this regard, she submitted that, the appellants were identified at the identification parade as recounted by PW7. When asked if the victims namely PW5 and PW6 gave the prior description of the appellants before identifying them at the parade, she conceded that, none of the identifying witnesses gave prior description of any of the appellants before identifying them at the identification parade. Ultimately, the learned State Attorney conceded to the appeal and urged the Court to allow it and order the release of the appellants

On the other hand the appellants agreed with the submission of the learned State Attorney and asked the Court to allow the appeal and set them free.

In the light of the foregoing the issue for our consideration is whether the charge of armed robbery was proved against the appellants.

The offence of armed robbery is a creature of section 287 A of the Penal Code which states as follows:

> *"Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or robbery instrument, or is in company of one or more persons,* ***and at or immediately before or immediately after the time of stealing uses or threatens to use violence to any person,*** *commits an offence termed armed robbery and on conviction is liable to*

imprisonment for a minimum term of thirty years with or without corporal punishment."

[Emphasis supplied]

The bolded expression clearly shows that, an important element of the offence of armed robbery is indeed the use of force against the victim for the purposes of stealing or retaining the property after stealing the same.- See the case of **SHARIFU JUMA VS REPUBLIC,** Criminal Appeal No. 445 of 2015 (unreported). Moreover, in the case of **SALUM JOSEPH @ TITO AND TWO OTHERS,** Criminal Appeal No. 131 of 2006 (unreported) the Court categorically said:

"It is a rule of law that in a charge of robbery the nature of violence used on the victim, or threat of it, must be specifically mentioned therein and eventually specifically proved by the prosecution."

As such, it is crucial to mention the person threatened or to whom the violence was directed at in the charge sheet and eventually

specifically prove the same at the trial. However, in the case at hand the charge which was laid against the appellants reads as follows:

"***STATEMENT OF THE OFFENCE***

ARMED ROBBERY: *Contrary to sections 287A of the Penal Code [Cap 16 R.E. 2002] as amended by Act No. 3 of 2011.*

PARTICULARS OF THE OFFENCE

YOSIALA NICHOLAUS MARWA, GEOFREY GEORGE KAYAMBA *and* ***HAMADI SALUM MAKANYANGA, SAID MUSA MAKOTA*** *and* ***NASIBU RASHID SIMBA*** *on the 26th Day of October, 2011 at SalaSaia area within Kinondoni District in Dar-es-salaam region, did steal one decorder deck, music system make Sony, two mobile phones make blackberry and Nokia respectively, two pocket wallets, and cash money amounting to Tshs 100,000/=, all valued at Tshs 2,486,000/= the property of one*

ANOLD KAENI *and immediately before the time of such stealing did cut one* ***ISAACK MPANGALA*** *with a bush knife in order to obtain the said properties..."*

According to the charge sheet, in the alleged robbery incident the person who was threatened and injured is one Isaack Mpangala who was the watchman in terms of the evidence of PW5 and PW6 who recounted that, he was injured to the extent of being taken to Mwananyamala hospital on 26/10/2011 to identify the bandits. In this regard, Isaack Mpangala ought to have been paraded as a prosecution witness in order to prove an important element of the offence of armed robbery on the fateful day. However, Isaack Mpangala was not paraded as a prosecution witness and his whereabout was not disclosed at the trial which commenced five months after the alleged robbery incident.

Apparently, according to the testimonial account of PW5, the watchman was among those who went at the Police on 29/10/2011 to identify the bandits. The failure to parade the watchman clouds the

prosecution case with a shadow of doubt rendering the prosecution case not substantiated as to who was threatened in the alleged robbery incident. We say so because, if summoned the evidence of the watchmen would have assisted in lending credence to the story of the victims namely PW5 and PW6 who recounted to have seen the watchman being attacked by the robbers before those robbers ventured into the their house to accomplish the stealing. In the absence of the evidence of Isaack Mpangala who was a material witness, the conviction of the appellants for the offence of armed robbery was not sound. We are fortified in that account by the decision of this Court in **AZIZI ABDALLAH VS REPUBLIC** [1991] TLR 71 at page 72 it was stated:

> *"the general and well known rule is that the prosecutor is under prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witness are within reach but are not called without*

sufficient reason being shown, the court may draw an inference adverse to the prosecution."

[See also **MASHIMBA DOTTO @ LUKUBANIJA VS REPUBLIC,** Criminal Appeal No. 317 of 2013 and **PETER MWAFRIKA VS REPUBLIC**, Criminal Appeal No. 413 of 2013 (both unreported).

In view of the aforesaid, we have seriously pondered if the evidence which remains on record can sustain the offence of robbery with violence. On this, we had to consider if the appellants were properly identified at the scene of crime. The two courts below relied on the evidence that PW5 and PW6 who happened to be the victims and claimed to have identified the appellants at the identification parade which was conducted by PW7. There is a chain of decisions of the Court elaborating on the necessity of the compliance with the tests in order to avoid mistaken identity of a suspect when the evidence before the court is that of visual identification. In particular regard to the case at hand the tests include:

1. In every case in which there is a question as to the identity of the accused, the fact of there having been

given a description are matters of the highest importance of which evidence ought always to be given, first of all of course by the person who gave the description or purports to identify the accused, and then by the person to whom the description was given. (**REPUBLIC VS M.B ALLUI** [1942] EACA 72.

2. It is settled law that, for any identification parade to be of any value, the identifying witness must have earlier given a detailed description of the suspects. [**ADRIANO S/O AYONDO VS REPUBLIC**, Criminal Appeal No 2009 (unreported)

3. The fact that a witness knew the suspect before that date is not enough. The witness must go further and state exactly how he identified the appellant at the time of the incident, say by his distinctive clothing, height, voice – See **ANAEL SAMBO VS REPUBLIC**, Criminal Appeal No 274 of 2007 (unreported).

4. Dock identification is worthless unless this has been preceded by a properly conducted identification parade. [**FRANCIS MAJALIWA AND TWO OTHERS VS REPUBLIC**, Criminal Appeal 139 of 2005 (unreported).

In the present case, the Police went at the scene of crime ten minutes after the alleged robbery incident and this is what transpired as reflected at page 73 of the record of appeal:

> *"The Police came after ten minutes after the culprits were (sic) left', The police did write the statements of all the people who were there on the material day, but the watchman on bad conditioning (sic) and he was bleeding to (sic) his head. They took to Mwananyamala hospital. Thereafter nothing was done to that night hours, (sic) instead I was told to report to Kawe the next day.*

Subsequently on 29/10/2011 what transpired is reflected at page 74 of the record of appeal as follows:

"On 29/10/2011, about 10.20 hours, I was called by police to go to identify the accused/culprits since there were some culprits arrested. I went to Kawe with my family, my wife, (Faith) Janeth, Rehema. Isaack and I. We were on the place were (sic) cannot see/saw the culprits to be identified and we were called one by one..."

We have gathered that, as regards the description of the 1st and 2nd appellants, as conceded by the learned State Attorney, neither PW5 nor PW6 gave the prior description of the appellants before identifying them at the parade. This is contrary to the evidence of PW7 who at page 89 testified as follows:

"I ordered the two suspects to be prepared and other person who were in lockup. When the complainant came they said they were invaded by people who among them were taller than other. Thin man and other was shorter...."

As for the 3rd appellant who was known to the PW5 and PW6, on account that he had earlier worked at their home during construction, apart from not being mentioned at the earliest opportunity, we wondered on the reason to parade him at the identification parade if at all he was known to PW5 and PW6. This renders such account highly suspect and tells that, neither PW5 nor PW5 had identified the 3rd appellant at the scene of crime.

Therefore, in the absence of prior description of the 1st and 2nd appellants it is unknown as to how PW7 picked those who composed the purported parade. This as well adds to another flaw to the manner in which the identification parade was prepared and conducted and thus the appellants were identified in the dock. However, since the identification parade was worthless the dock identification of the appellants was indeed valueless. See: - **MUSSA ELIAS AND TWO OTHERS VS REPUBLIC,** Criminal Appeal No. 172 of 1993 and **ANNES ALLEN VS D.P.P,** Criminal Appeal No 173 of 2007 (both unreported). In this regard, it cannot be safely vouched that, the appellants were identified at the scene of crime. Therefore, it was not proper for the

two courts below to conclude that, the identification of the appellants left no doubt on the prosecution case. In view of such misdirection and misapprehension of the evidence, an appellate court may interfere with the findings of fact by the trial court- See **SALUM MUHANDO VS REPUBLIC,** [1993] TLR 170 where it was held:

> *"where there are mis-directions and non-directions on the evidence, a court of second appeal is entitled to look at the relevant evidence and make its own findings of fact."*

In the present case we are satisfied that, both the courts below misapprehended the nature and quality of the evidence and particularly failed to address themselves on the material contradiction that were apparent in the testimonies of PW5, PW6 and PW7 and the flawed and meaningless identification parade and dock identification of the appellants.

In view of what we have endeavoured to demonstrate we agree with the learned State Attorney that the evidence on record cannot sustain the conviction of the appellants with the charges of armed

robbery or robbery with violence on account of lack of proof beyond reasonable doubt. We thus allow the appeal and order the immediate release of the appellants unless they are held for another lawful purpose.

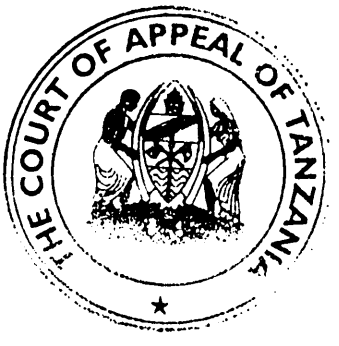
DATED at **DAR ES SALAAM** this 9th day of April, 2019.

K.M. MUSSA
JUSTICE OF APPEAL

S.E.A. MUGASHA
JUSTICE OF APPEAL

S.A. LILA
JUSTIE OF APPEAL

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



A. H. MSUMI
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