IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM
(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A., And MAIGE, J.A.)

CRIMINAL APPEAL NO. 493 OF 2019

1. **MAULID DOTTO @ MAU MCHINA**
2. **NESTORY ANTONY @ CHINA** ..... **APPELLANTS**
3. **BAVON ERNEST**

VERSUS

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

(Appeal from the Judgment of the High Court of Tanzania, at Dar es Salaam)
(Mkasimongwa, J.)

dated the 22nd day of December, 2017
in
Criminal Appeal No. 69 of 2014

.....

JUDGMENT OF THE COURT

24th September & 7th October, 2021

MWAMBEGELE, J.A.:

In the Resident Magistrates Court of Dar es Salaam sitting at Kisutu, the three appellants, together with six others who are not parties to this appeal, were arraigned for armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002. The appellants were found guilty, convicted and each sentenced to thirty years in prison. Their appeal to the High Court was not successful, for Mkasimongwa, J.

dismissed it in its entirety on 22.12.2017. Still protesting their innocence, they preferred this second and final appeal.

The brief facts leading to the appellants' arraignment can be stated as follows: on 14.05.2011 at about 04:00 hours, Abeid Kassim (PW1) and his wife Mwanahamis Salehe (PW2) were fast asleep in bed together with their prematurely born child when a gang of bandits armed with machetes stormed into their house. PW1 climbed onto the kench of the house when the uninvited guests entered and demanded for money; Tshs. 10,000,000/= which they claimed PW2 had withdrawn from the bank. PW2 had ran and hid into the toilet but aborted the mission having realised that they left unattended their prematurely born baby in bed. She gave them Tsh. 300,000/=. They demanded for some more money. One of the bandits climbed to the kench where PW1 was and attempted to make him alight to no avail. In the process of climbing, that culprit trampled over the infant child. As good luck would have it, it was not hurt. They searched the room and managed to retrieve some Tshs. 400,000/= more. At the end of the day, they managed to make away with Tshs. 700,000/= cash and an assortment of items including a laptop and ornaments.

The room was allegedly illuminated by light from Energy Server with the assistance of which they managed to identify some of the culprits during the incident. They were later identified through identification parades conducted.

The appellants were arrested and prosecuted, found guilty, convicted and sentenced as already alluded to above. As already stated, their first appeal to the High Court proved futile, hence this second appeal.

When the appeal was placed before us for hearing, the three appellants appeared in person, unrepresented. The respondent Republic appeared through Ms. Florida Wenceslaus and Ms. Gladness Senya, learned State Attorneys. When we called the appellants to argue their appeals, the first and second appellants simply adopted their memorandum of appeal as their oral arguments without more. The third appellant also adopted the memorandum of appeal and had the following in clarification; he submitted that his cautioned statement was wrongly admitted in evidence as it was tendered by E 3324 D/Cpl Hassan who testified twice; as PW8 (at p. 79) and as PW6 (at p. 65). It was not stated why the witness did not tender his cautioned statement while he testified as PW6 but as PW8, he argued. That put the credibility of the witness to serious question, he submitted.

On that note, it was his argument that PW8 who also testified as PW6 was not a witness of truth, for he did not even say he was testifying for the second time. He thus prayed that his evidence against him was weak and thus his appeal should be allowed.

Responding, Ms. Wenceslaus expressed her standpoint at the very outset that the respondent Republic supported the appeal by the appellants. She submitted that the identification of the appellants at the *locus in quo* was not watertight. She contended that the intensity of light which was said to illuminate the room was not explained by the identifying witnesses. The distance and time the identifying witnesses had with the culprits was also not explained, she submitted. She argued that the threshold of identification of culprits in offences committed at night as set out in the famous case of **Waziri Aman v. Republic** [1980] T.L.R. 250 were not met. She thus argued that it was not safe to convict the appellants on the strength of those weak circumstances.

With regard to the cautioned statement of the third appellant in which he is said to have implicated others, the learned State Attorney submitted that it was wrongly admitted in evidence as it was admitted in a ruling of a trial within a trial as appearing at p. 100 of the record of appeal.

She added that PW6 was called to testify as PW8 without leave of the court which was not proper.

In sum, the learned State Attorney supported the appellants' appeal and implored the Court to allow it and set all the three appellants free.

Given the response of the learned State Attorney, the three appellants had nothing in rejoinder. They simply supported what the learned State Attorney submitted and prayed. They also prayed that they should be set free.

As may be seen above, we have summarized the submissions of the parties in respect of only the grounds of identification and cautioned statement of the third appellant because we think the appeal can be disposed of on those two grounds only. The parties had submitted on other grounds as well but for the reasons we have assigned, we did not see it relevant to summarise their submissions on those grounds.

We begin our determination of the appeal by addressing the ground of identification of the appellants at the scene of crime. On this issue, we find it pertinent to recall what the Court articulated in the oft-cited **Waziri**

Amani (supra), cited to us by the learned State Attorney. The Court observed at pp. 251 - 252:

> *"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification* ***unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.****"*
>
> [Emphasis added].

Then, the Court went on to provide the following guidelines at p. 252:

> *"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity; it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried.* ***We would, for example, expect to find on***

record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in 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. *These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."*

[Emphasis added].

Applying the above guidelines to the case before us, we are of the view that the evidence of PW1 and PW2, who were the identifying witnesses, fell short of meeting the threshold set by the **Waziri Amani** case. As submitted by the learned State Attorney, the offence was committed at night and two identifying witnesses did not explain the intensity of light supposedly illuminated from the Energy Server. The time under which the two witnesses had the culprits under observation and the attire of the culprits were not fully elaborated by the two identifying witnesses. PW2 took refuge in the kench. In that state of commotion, it is

doubtful if he could identify the culprits from above. We say so because, the culprits were complete strangers to both identifying witnesses and extent of lighting in the room was not explained with certainty. It is on this premise that we find merit in this complaint and allow it.

With regard to the confession of the third appellant, we agree with the appellants and the respondent Republic that it was wrongly admitted in evidence. As evident at p. 100 of the record of appeal, it was admitted in the ruling of a trial within a trial as Exh. P9. Likewise, it was tendered by PW8 who also testified as PW6. The record is not clear why he did not tender it when he first testified as PW6. He was recalled to testify without leave of the court but did not re-testify as PW6, instead, he testified as a new witness; PW8 and that fact was not disclosed to the trial court. Given this state of affairs, we agree with the third appellant that this witness's second testimony was not only an afterthought but also the procedure of recalling him was not followed and thus Exh. P9 was improperly tendered and admitted in evidence and for that matter it deserves to be expunged from the record. That is the reason why we also find merit in this ground and allow it as well.

In the upshot, we find merit in this uncontested appeal and allow it. Consequently, we quash the convictions of the appellants and set aside the sentences imposed on them. We order that the appellants, Maulid Dotto @ Mau Mchina, Nestory Antony @ China and Bavon Ernest, be released from prison custody forthwith unless they are held there for some other lawful cause.

It is so ordered.

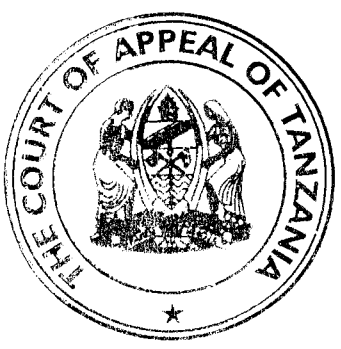
DATED at **DAR ES SALAAM** this 06th day of October, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered on this 7th day October, 2021, in the presence of 2nd and 3rd appellants in person linked via video facility from Ukonga Prison and Ms. Esther Kyara, learned Senior State Attorney linked via video facility from DPP'S office Dar es Salaam for the respondent and in absence of the 1st appellant, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL