IN THE COURT OF APPEAL OF TANZANIA

AT TABORA

(CORAM: LILA, J.A., LEVIRA, J.A. And MWAMPASHI, J.A.)

CRIMINAL APPEAL NO. 381 CF 382 CF 383 OF 2017

1. SADICK S/O HAMIS @ RUSHIKANA
2. SYLVESTER S/O TAMATI
3. ABEL S/O BENEDICTOR ..... **APPELLANTS**

VERSUS

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

(Appeal from the decision of the High Court of Tanzania, at Tabora)

(Mallaba, J.)

dated the 11th day of August, 2017
in
Criminal Appeal No. 130 of 2016

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JUDGMENT OF THE COURT

20th October & 1st November, 2021

LILA, J.A.:

The three appellants, Sadick S/o Hamis @ Rushikana, Sylvester S/o Tamati and Abel S/o Benedictor (henceforth the 1st, 2nd and 3rd appellant, respectively), were together with four others (who are not parties to this appeal), jointly and together, charged with armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2002, as

amended by the Written Laws (Miscellaneous Amendments) Act No. 3 of 2011. [now R.E. 2019].

It was alleged in the particulars of the offence that, the accused persons on 28th day of April, 2014 during night time at Ussoke Village Urambo District and Tabora Region did steal cash TZS. 6,035,000.00, airtime vouchers valued at TZS. 250,000.00 and one cellular phone make Tecno valued at TZS. 70,000.00 the properties of Ibrahim Mohamed and that immediately before and after stealing they threatened Ibrahim Mohamed and Mwajuma Haruna by firing several gunshots and by using a "panga" in order to steal and retain the stolen properties. They denied the accusations and at the close of the prosecution case, the 5th accused one Mussa Hatibu @ Mussa Bonge was discharged for no case to answer. The case proceeded with defence hearing and, after a full trial, the trial court convicted the remaining accused persons, the appellants inclusive, and sentenced each of them to serve a jail term of thirty (30) years.

On first appeal to the High Court, the appeals by other convicts succeeded save for the appeals by the appellants, hence the present second appeal to this Court.

Brief background evidence leading up to this second appeal was not complicated. Ibrahim Mohamed (PW3) and Mwajuma Haruna (PW1) were husband and wife who resided at Ussoke Mjengo area within Urambo district. They owned a shop in which they sold various items. On 28/4/2014 around 20:00hrs, the couple was asleep in their house. PW1 who happened to be awake heard some gossips outside saying "we have already reached". Then she heard gunshots and out of fear she ran to the kitchen and hid herself by lying down. While right there, she heard someone asking for her whereabouts. After about fifteen minutes she was faced with a man holding a "panga" in his hand, rose her up, held her and demanded to be given money. She led the man to her bed room where she surrendered the money she had kept under the bed and in the "sufuria" which amounted to TZS. 6,035,000.00. According to her, the other things stolen were mobile phone vouchers valued at TZS. 250,000.00 and a tecno make mobile phone valued at TZS. 70,000.00. She claimed to have managed to identify Sadick Mirambo (then 1st accused) because he resided at Ussoke with the aid of electricity light that was still on in the house. She then fell unconscious only to recover the next day while in hospital. On 20/5/2014 she was able to identify

three suspects including the 1st and 2nd appellants in an identification parade conducted by the police.

When all the above episode was happening, PW3 had, upon hearing the gunshots, ran out of the house and hidden himself somewhere until when there was silence when he emerged and found the money, vouchers and a mobile phone taken away by invaders and his clothes spread all over. He reported the matter to the police and was later informed that the suspects were arrested.

Inspector Joseph G. Mjeja (PW2) conducted the identification parade which comprised ten participants and claimed that he did so in compliance with the Police General Orders No. 262 whereat PW1 identified Ramadhani kassim (then 7th accused) and Silverster Musa (then 2nd Accused, now 2nd appellant). He also said one Banana Ibrahim managed to identify Silverster Musa (2nd appellant) and Ramadhani Kassim (then 7th accused) and that he filled Form No. 186. He tendered the Identification Parade Register which was admitted as exhibit P1.

Other witnesses who testified for the prosecution were Shaban Kayanda (PW4) and Mery Mohamed (PW5) whose evidence never implicated any of the appellants, hence no any need to recite their respective testimonies.

A policeman E. 1336 D/CPL Jonas (PW6) interrogated and recorded the 1st and 3rd appellants' caution statements (exhibits P2 and P3, respectively) in which he alleged that they admitted committing the offence. A/inspector Gabriel (PW7) recorded the 2nd appellant's cautioned statement. D/CPL Amis (PW8) told the trial court that the 2nd appellant led police from Tabora to his residence at Mkuyuni Area, Mahina Street in Mwanza in which a gun which had a magazine with five bullets and a pistol No. MCM 330 made Australia was recovered and they were tendered as exhibits P5, P6 and P7 respectively.

In their respective defences, the appellants denied to have committed the offence. The 1st appellant claimed to have been arrested at the garage located along Sikonge Road on 11/5/2014 around 10:00hrs, questioned about the incident and denied involvement despite being subjected to torture. The 2nd appellant claimed to have been arrested in a bus at Nzega while on the way to Tabora from Mwanza, taken to the RCO's office and joined with other persons he never knew and was also tortured. On his part, the 3rd appellant alleged that he was arrested in Tabora town while on a *"bodaboda"* coming from his customers of clothes heading to the guest house in which he was staying. He also claimed to have been tortured.

Notwithstanding the appellants' denials, the trial court found the charge proved to the hilt. The learned trial magistrate, while properly directing his minds to the settled legal position that evidence of visual identification is of the weakest kind as stipulated in **Waziri Amani vs R** [1980] TLR 250, he considered the evidence of PW1 who claimed to have seen and identified the appellants with the aid of electricity light and particularly so because they were her fellow villagers. It was his finding that PW1 also identified the 2nd appellant at the identification parade, that he led PW8 to Mwanza where a gun, magazine and bullets (exhibits P5, P6 and P7) were recovered and also wrote a cautioned statement in which he confessed committing the offence and named others he was with, the 2nd and 3rd appellants inclusive. He discounted the allegations by the appellants that they were arrested and tortured before being forced to sign the cautioned statements because in the 2nd appellant's PF3, the doctor indicated that the injuries were not fresh. In short, the learned magistrate based on the identification evidence by PW1 and cautioned statements to convict the appellants and three other persons.

As hinted above, the appellants' appeal to the High Court was not a success. The learned judge at first postulated various principles of law

as he understood them including those governing proper identification laid down in **Waziri Amani vs R** (supra), **Phillip Rukaiza vs Republic**, Criminal Appeal No. 215 of 1994 and **Mwalimu Ally and Another vs Republic**, Criminal Appeal No. 39 of 1991 (both unreported), those governing conduct of identification parade as propounded in **Jandika Mwakarija and Another vs Republic**, Criminal Appeal No. 175 of 1991 (unreported), those governing confessions as pronounced in **Seleman Rashid and Another vs Republic**, [1981] TLR 252 and those governing determination of credibility stated in **Rashid Kaniki vs Republic**, Criminal Appeal No. 116 of 1993 (unreported). In the final analysis he was satisfied that PW1 was credible and the appellants were properly identified by use of electricity light. As for the failure to name or describe the bandits at the earliest opportunity, relying on the case of **Aziz Athuman vs Republic**, Criminal Appeal No. 222 of 1994 (unreported), he held that the delay had a plausible explanation that PW1 fell unconscious after the incident but that was after she had already identified some of the robbers. In respect of the 1st appellant, the learned judge dismissed his contention that he was tortured because his cautioned statement (exhibit P3) was admitted without objection that he was tortured for

which an inquiry could be conducted by the trial court to ascertain the voluntariness during the time of recording it. In the circumstances, he held his contention an afterthought. In sum, he found the identification evidence and his confession impeccable.

As for the 2nd appellant, the learned judge was of the view that he was properly identified by PW1 and that was corroborated by his confessional statement and PW8's evidence that he led police from Tabora to his residence at Mwanza in which exhibits P5, P6 and P7 were recovered.

Lastly, the learned judge found that the confessional statement of the 3rd appellant sufficiently incriminated him as the same was admitted without any objection that it was taken involuntarily from him. Raising an allegation of torture at the defence stage was found to be improper as, in terms of the Court's decision in **DPP vs Nuru Mohamed Gulamrasul,** [1988] TLR 82, it denied the prosecution an opportunity to rebut the same. In that accord, he held that his allegation of being tortured deserved no serious consideration.

The learned judge, as shown above, in the end, found the appellants' appeals unmerited and dismissed them. The appeals by other

appellants were allowed and the learned judge ordered their release from prison.

Undaunted, the appellants lodged separate memoranda of appeals seeking to fault the High Court decision. The 1st and 2nd appellants raised six (6) grounds of appeal each whereas the 3rd appellant raised three (3) grounds of appeal. Subsequent to that, the 1st appellant lodged a supplementary memorandum of appeal with three (3) grounds whereas, the 2nd and 3rd appellants lodged a joint supplementary memorandum of appeal comprising one (1) ground of appeal. They also filed lists of authorities to support their respective grounds of appeal.

In terms of the nature and substance, the appellants' complaints revolve around these eight issues to wit:-

1. *The identification evidence did not meet the thresholds of a proper identification.*
2. *The cautioned statements by the appellants were wrongly relied on to ground their conviction.*
3. *The identification parade was wrongly conducted.*
4. *The preliminary hearing was irregularly conducted.*
5. *The appellants were not accorded the right to decide whether the prosecution witnesses who had already testified should be recalled when the charge was amended after five witnesses had already testified.*

6. *The appellants were not reminded the substance of charge before trial commenced.*
7. *The evidence by PW6 was not corroborated by independent witness.*
8. *The prosecution did not prove the charge against the appellants beyond reasonable doubt.*

The appellants appeared in person before us for hearing of the appeal and had no legal representation. Mr. Rwegira Deusdedit, learned Senior State Attorney, represented the respondent Republic.

The appellants adopted their respective grounds of appeal and urged us to consider them with the view of allowing their appeals. They otherwise left it for the respondent Republic to respond first to their grounds of appeal after which they could make a rejoinder if anything pressing would arise.

On taking the floor, Mr. Deusdedit was quick to state it categorically that he was supporting the appeal. According to him, the determination of the appeal hinges on two issues only and he pointed them out to be whether or not, on the evidence on record, **one**; the appellants were properly identified and **two**; it was proper to base the appellants' conviction on cautioned statements.

Elaborating on the first issue, Mr. Deusdedit, straight away showed dissatisfaction in the manner the appellants' cautioned statements were treated by both courts below. He contended that much as the cautioned statements by 1st and 3rd appellants (exhibits P2 and P3, respectively) were tendered by PW6 and were not objected to, yet they were not read out after they were cleared for admission so as to enable the appellants know the contents thereof. He added that the same was the case for the 2nd appellant's cautioned statement which was received by the trial court and admitted as exhibit P4 after a trial within trial following the objection raised by the 2nd appellant. Even PW1, during trial within trial, was not sworn in or affirmed, he further argued, hence making the whole process of tendering exhibit P4 faulty. For these infractions, Mr. Deusdedit urged the Court to expunge the cautioned statements from the record of appeal. The expunction of the cautioned statements would automatically lead to the 3rd appellant's appeal being allowed as his conviction was solely based on his cautioned statement, he concluded.

Submitting on whether the appellants were properly identified, the learned Senior State Attorney argued that both courts below relied on PW1's evidence of visual identification to convict the appellants. He contended that although PW1 claimed to have seen and identified the 1st

appellant who was not a stranger to her through the aid of electricity light, she did not name him at the earliest opportunity to the police or other people at the hospital. Arguing further, he said even the conduct of the identification parade whereat she claimed to have identified the 1st appellant was superfluous because she knew him before the incident while for the 2nd appellant it was ineffectual as she had not described him to the police prior to the conduct of the parade. Worse still, he argued, even the appellants' arrest was not an outcome of the information she gave to the police. Mr. Deusdedit was emphatic that these shortfalls render the evidence of identification of PW1 doubtful and the appellants should benefit from that. All in all, he was of the view that the appellants' participation in the commission of the offence was not proved beyond doubt and he beseeched us to allow their respective appeals.

It was uncontroverted that the robbery incident occurred at night time and the evidence relied on by the prosecution at the trial was visual identification by PW1 and the appellants' cautioned statements. That said, we entirely agree with the learned Senior State Attorney that resolution of this appeal rests on the consideration and findings on those two aspects.

Like the learned Senior State Attorney, we propose to first deal with the issue of cautioned statements. As rightly argued by the learned Senior State Attorney, the 3rd appellant's cautioned statement formed the sole basis of his conviction and they formed one of the bases of the 1st and 2nd appellants' conviction. The record bears testimony that the appellants' cautioned statements were admitted as exhibits P2, P3 and P4 but were not read out after being cleared for admission as exhibits. It is trite law that all documentary exhibits should be read out after they are admitted and failure to do so is a fatal and incurable irregularity with the effect that exhibits P2, P3 and P4 should be expunged from the record (See **Robison Mwanjisi v. Republic**, [2003] TLR 218). Both courts below, therefore, wrongly acted and relied on the cautioned statements to ground the appellants' conviction. And, since the 3rd appellant's conviction, as rightly argued by the learned Senior State Attorney, rested solely on exhibit P4, then we unhesitatingly proceed to allow his appeal.

We now turn to consider the issue of identification. Here, we are asked to consider whether visual identification evidence was sufficient and whether the identification parade was of any benefit to the prosecution case in the present case.

We shall begin with visual identification. It is now settled that when the issue of visual identification arises, among the important aspects to be considered is the time the witness had the accused under observation, the distance at which the witness had the accused under observation, if there was any light, then the source and intensity of such light and whether the witness knew the accused before. (See **Waziri Amani V. Republic** [1980] TLR 250, **Raymond Francis v. Republic** [1990] TLR 100 and Marwa **Wangiti Mwita and Another** [2002] TLR 39.). It is similarly settled principle to the effect that although relevant and admissible, eyewitness visual identification evidence is of the weakest character and most unreliable which should be acted upon cautiously after the court has first satisfied itself that the conditions were favourable for a proper identification, such evidence is watertight and all possibilities of mistaken identity have been eliminated. This rule applies even in cases of recognition. [See **Waziri Amani v. R.,** (1980) T.L.R 250 and **Shamir s/o John v.R.,** Criminal Appeal No. 166 of 2004 (unreported)]. A further caution was given in **Shamir John v. R.,** (supra) as cited in **Philimon Jumanne Agala @ J4 vs Republic**, Criminal Appeal No. 187 of 2015 that:-

> *"Admittedly, identification in cases of this nature, where it is categorically disputed, is a very tricky*

issue. There is no gainsaying that evidence in identification cases can bring about miscarriage of justice. In our judgment, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the courts should warn themselves of the special need for caution before convicting the accused in reliance on the correctness. This is because it often happens that there is always a possibility that a mistaken witness can be a convincing one. Even a number of such witnesses can all be mistaken.

It is now trite law that the courts should closely examine the circumstances in which the identification by each witness was made. The Court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows: How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance?

... Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."

Guided by the above legal pronouncements, we now subject the prosecution evidence to objective scrutiny. It is on record that PW1 knew the 1st appellant before the incident as she claimed that he resided at Ussoke and his name was Sadick Mirambo. In the circumstances, it would have been expected that PW1 would name the 1st appellant as being one the bandits who stormed into their house and robbed them at the earliest opportunity. This Court has consistently held that failure on the part of a witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable. (See **Marwa Wangiti Mwita and Another v. R.,** [2002] T.L.R. 39 and **Joseph Mkumbwa & Another v. R.,** Criminal Appeal No. 94 of 2007 (unreported). Conversely, in the present case, there is nowhere stated by any of the prosecution witnesses that PW1 ever named the appellant to have participated in the robbery incident. The learned judge seemed not to have appraised himself properly with the facts of the case for it appears his understanding was

that there was delay in naming the 1st appellant which he found to have been explained away by the fact that PW1 fell unconscious after the incident and recovered while in hospital. That does not find support from the record. PW1's evidence that she saw and identified the appellants and in particular the 1st appellant at the crime scene is, for this reason, doubtful.

We revert to the issue of identification of the appellants in the identification parade. PW1 claimed to have ably identified the 1st and 2nd appellants at the identification parade. That evidence is supported by PW2 who conducted the parade. Reliability of such a claim taxed our minds profoundly for two reasons. **One**, the record of appeal tells it all that PW1 never gave the descriptions of those who robbed her to anybody let alone the police before the identification parade was conducted. It is trite law that to afford credence in the identifying witness, the conduct of the parade must be preceded with the identifying witness' description of the suspect to the police. (See **Yohana Chibwingu vs Republic**, Criminal Appeal No. 117 of 2015 (unreported) in which the case of **R v Mohamed** [1942] EACA 72 was cited. In **Yohana Chibwingu's** case, the Court categorically stated that:-

"That 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 and the terms of that description are matters of highest importance of which evidence ought 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."

In situations where an identification parade is conducted without prior description of the suspect the identification report is taken to be unworthy of credit (See **Muhidini Mohamed Lila @ Emolo and Three Others vs Republic**, Criminal Appeal No. 443 of 2015 (unreported) where the Court stated that:-

"since therefore, in the case at hand, the requirement of giving the description of the suspects prior to the identification parade was not complied with, there is no gainsaying that the evidence obtained from the parade is unworthy of credit."

Two, if PW1 had known the 1st appellant why again participate in the identification parade so as to identify him? That was a useless exercise. The Court made that position clear in the case of **Mbaruku Deogratias vs Republic**, Criminal Appeal No. 279 of 2019 (unreported) that:-

> *"According to PW1, the appellant was an acquaintance with whom she had sex before the one the subject of this case. Whether that is true or not, the law is clear that identification parades serve no meaningful purpose when the witness alleges that he or she is familiar with the suspect. We have decided so in many cases including* ***Karim Seif @ Slim v. Republic,*** *Criminal Appeal No. 161 of 2017 (unreported)."*

(See also **Doriki Kagusa v. Republic,** Criminal Appeal No. 174 of 2004, and **Charles Nanati v. Republic,** Criminal Appeal No 286 of 2017 (both unreported).

Before we conclude, we think we should briefly address another piece of evidence which, on the face of it, may seem or tend to link the 2nd appellant with the commission of the offence charged. That is, that he led police to his residence in Mwanza hence led to the alleged recovery of exhibits P5, P6 and P7 in his residence. Apart from the 2nd appellant's cautioned statement which could not withstand the wrath of being expunged from the record of appeal for not having been read out after it was admitted as exhibit, there is no other evidence linking the recovered exhibits with the present robbery incident. We leave it there.

All said, evidence placing the appellants at scene of crime is lacking with the resultant effect that their participation stand not proved beyond doubt. Accordingly, we entirely agree with the learned Senior State Attorney that appellants' conviction was not supported by evidence. The appeal is allowed, convictions are quashed and the sentences set aside. We order that all the appellants be released from prison forthwith if not incarcerated therein for another lawful cause.

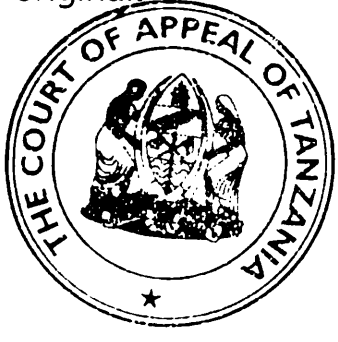
DATED at **TABORA** this 29th day of October, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 1st day of November, 2021 in the presence of the Appellants in person and Mr. John Mkony, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL