

**IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA**

(CORAM: MWANDAMBO, J.A., KITUSI, J.A., And MGONYA, J.A.)

CRIMINAL APPEAL NO. 625 OF 2020

KAMUGISHA ELIZEUS WILLIAMU 1ST APPELLANT

SAMWEL BONIFACE JOHN2ND APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Appeal from the decision of the Resident Magistrate's Court
at Mbeya – Extended Jurisdiction)**

(Mwakatobe, SRM Ext. Jur.)

dated the 30th day of September, 2020

in

Criminal Appeal No. 4 of 2020

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JUDGMENT OF THE COURT

6th & 15th December, 2023.

MGONYA, J.A.:

This appeal arises from the decision of the Resident Magistrate's Court of Mbeya (N. W. Mwakatobe, SRM Extended Jurisdiction) in Criminal Appeal No. 4 of 2020 dated 30th September, 2020 in which the appellants herein were convicted and sentenced to 30 years for gang robbery contrary to section 285, 286 (1) and (2) and 287C of the Penal Code.

The facts of the case at the trial court by the prosecution are simple and brief. The incident can easily be described as a day time robbery. It

was alleged that on 22nd August 2019 at Sae area within the City and Region of Mbeya, the victim (PW4), Lilian d/o Kalabi Mrisho was walking along the road carrying a handbag containing cash money TZS. 50,000/= (Fifty thousand shillings), one gown and one kitenge was heading back home from a place called Soweto. Along the same road, the 1st appellant was driving a motorcycle with registration number MC 456 CCC make King Lion carrying the 2nd appellant on the back seat. While the victim was walking, the appellants who were coming from behind, grabbed the victim's bag and managed to run away using the said motorcycle. In the process of grabbing the victim's handbag, the appellants used actual violence to the victim where she sustained injuries as a result of her resistance. Upon the victim's cry for help, the 1st appellant was arrested by one Abilahi Shaibu (PW3) with the victim's handbag and the motorcycle. The 2nd appellant managed to escape.

The victim reported the matter to Ilomba Police Station. Still at the station, the 1st appellant who was brought at the station by PW3 along with the grabbed handbag, was successfully identified by the victim to be her assailant. Upon inspection of the grabbed handbag, all the contents therein were intact save for the TZS. 50,000/- which was found missing. The 1st appellant through his cautioned statement mentioned the 2nd

appellant to be his partner in crime. Through his assistance, the 2nd appellant was later arrested at his home. They were both charged with the offence of gang robbery.

Upon hearing, the trial court was convinced that the prosecution proved its case beyond reasonable doubt. The conviction of the 1st appellant was mainly based on being found with the stolen items as he was arrested trying to escape and also upon identification by the victim at the police station. The 2nd appellant's conviction was based on being mentioned by the 1st appellant in his cautioned statement as his companion in committing the crime. Both appellants were sentenced to serve 30 years imprisonment. They unsuccessfully appealed to the High Court at Mbeya against the decision of the trial District Court.

Being dissatisfied with the decision of the two courts below, and still convinced of their innocence, the appellants have jointly filed this second appeal to challenge the findings of both the trial and appellate courts to this Court. They have raised eight grounds in the memorandum of appeal which can be summarized as follows: **one**, that both the trial and first appellate court acted upon weak visual identification evidence relying on the evidence of PW2 and PW4; **two**, that the 2nd appellant was wrongly convicted as he was not found with anything connected to the incident;

three, is the failure for both the trial and first appellate court to consider and evaluate defence evidence; and **four**, that the prosecution case was not proved beyond reasonable doubt.

When the appeal was called on for hearing, the appellants appeared in persons, unrepresented whereas, Ms. Revina Tibilengwa learned Principal State Attorney, assisted by Mr. Alex Mwita, learned Senior State Attorney and Mr. Emanuel Bastome, learned State Attorney, appeared for the respondent/Republic.

When the appellants were called upon to argue their grounds of appeal, they urged the Court to adopt their grounds as they appear in their joint memorandum of appeal and their written arguments in support which, in principle, had three points elaborating the grounds of appeal. Further, they opted to hear first the learned Senior State Attorney's reply submission to their grounds of appeal and later make their response.

Submitting in reply on visual identification, Mr. Mwita began by supporting the 2nd appellant's appeal. Regarding the first appellant he was properly identified as the record reveals as he was apprehended at the scene of crime trying to escape after the victim's cry for help, where he was arrested by PW3 and taken to the police station. Further, at the station, the 1st appellant was identified by PW4, with the items he stole

from her. Mr. Mwita further submitted that, the 1st appellant was also arrested with the motorcycle which was well identified by PW2 who was the owner. From the above submission, it is the learned State Attorney's assertion that, since the 1st appellant was arrested at the scene of crime, his identification cannot be disputed. On this, he referred the Court to the case of **Jumane Mpini @ Kambilombilo and Another v. Republic**, Criminal Appeal No. 195 of 2020 (unreported).

Responding further to the issue of identification, Mr. Mwita referred us to page 44 of the record which shows that the 2nd appellant was associated with the crime after he was mentioned by the 1st appellant in his cautioned statement. In that case, Mr. Mwita was of the view that this kind of evidence needed to be corroborated. However, looking at the record, the said evidence was never corroborated. He said, despite of that shortfall, the 2nd appellant never confessed to commit the offence charged be it orally or through any cautioned statement. At any rate, Mr. Mwita submitted that, there was no any identification parade that was conducted in respect of the 2nd appellant's identification especially by the victim who was at the scene of crime. In the premises, it was his concern that there was no enough evidence to ground the 2nd appellant's conviction. In

conclusion to this ground, Mr. Mwita supported the ground on weak evidence of identification to have merit as it relates to the 2nd appellant.

Responding to the ground that the 2nd appellant was wrongly convicted as he was not arrested with anything connected to the incident, Mr. Mwita conceded that indeed, the 2nd appellant was not arrested with any exhibit relating to the offence charged.

On the ground that both the trial and first appellate court failed to consider and evaluate defense evidence, Mr. Mwita referred this Court to page 71 of the record where the learned appellate Magistrate (Ext. Jur.) agreed that the trial court did not consider the defence case. However, she took the view that defense case did not shake the prosecution case.

Responding to the ground that the prosecution case was not proved beyond reasonable doubt, Mr. Mwita was of the view that, indeed, the 2nd appellant's case was not proved as submitted earlier. However, he insisted that, the charge of gang robbery against the 1st appellant was proved beyond reasonable doubt and his conviction was proper. To bolster his stand, he cited the case of **Patrick Lazaro & Nestory Bernado v. Republic**, Criminal Appeal No. 229 of 2014 where the appellant was convicted despite the fact that the other offender was not identified. He

thus urged the Court to allow the 2nd appellant's appeal and reject the 1st appellant's appeal.

In rejoinder, both appellants had nothing to say but urged us to allow this appeal, quash their conviction and set aside the sentences imposed on them.

Having considered the appellants' grounds of appeal and their brief written submission and the arguments by the learned Senior State Attorney, we have to state that, the ground faulting the appellants' identification need not detain us much. There is sufficient evidence which proves that the 1st appellant was arrested at the scene of crime and upon being brought to the police station, he was positively identified by the victim who went to report the matter. He was further found in possession of the stolen items and the motorcycle which was later identified by PW2 who rented the same to him on that material day. Moreover, since the offence was conducted during day time, there was no possibility of mistaken identity.

As for the 2nd appellant, there is no evidence on record to show that the parade was conducted to enable PW4 identify him as the 1st appellant's co-offender. Indeed, the record reveals that, the 2nd appellant

was joined in the case after being mentioned by the 1st appellant in the cautioned statement.

We are inclined to agree with the learned Senior State Attorney that the 2nd appellant was incriminated in the offence charged by the 1st appellant's confession through his cautioned statement.

Under the circumstances, we agree with Mr. Mwita that the 2nd appellant's conviction was improper for lack of evidence of identification upon the 1st appellant's uncorroborated confession in incriminating him in the offence charged. Accordingly, we quash his conviction and set aside the sentence.

The next question for our consideration is whether the charge of gang robbery could have been committed by the 1st appellant alone. Section 285 (2) of the Penal Code provides:

*"285(2) **Where two or more persons steal anything, and at or immediately before or immediately after stealing, use or threaten to use actual violence to any person or property in order to obtain or retain the thing stolen commits an offence of gang robbery.**"*
[Emphasis provided].

The key words in the definition of gang robbery are "*two or more persons steal anything*". In order to prove the charge of gang robbery therefore, it is imperative that the offence has to be committed by two or more persons. In his submission Mr. Mwita was of the view that, the charge stands intact despite the 2nd appellant's acquittal. We do not agree with Mr. Mwita's assertion on this point because, in our view, the charge cannot stand since conviction was improper.

In our considered view, in the circumstances of this case, the charge against the 1st appellant on gang robbery cannot stand as the prosecution evidence did not prove that there were two or more persons who committed the offence contrary to section 285 (2) of the Penal Code. Unlike the offence of gang rape which can be committed by one or more persons on the basis of which Mr. Mwita cited to us the case **Patrick Lazaro** (supra), that case is distinguishable because the section 131A of the Penal Code is not identical to s. 285(2) of the same code. It is thus our finding that, the charge of gang robbery against the 1st appellant alone cannot stand to warrant his conviction.

From the above, we hold that it will be unsafe to sustain the 1st appellant's conviction as he could not have committed the charged offence alone.

Consequently, we allow the appeal, quash conviction and sentences against the first appellant on the charged offence. The appellants shall be released from custody forthwith unless they are held for some other lawful cause.

DATED at **MBEYA** this 15th day of December, 2023.

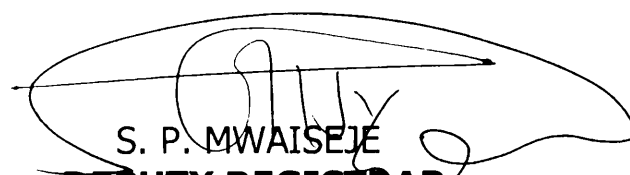
L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 15th day of December, 2023 in the presence of the Appellants in person and Mr. Augustino John Magessa learned State Attorney for the Respondent is hereby certified as a true copy of the original.




S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL