

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

(CORAM: MKUYE, J.A, KAIRO, J.A. And MLACHA, J.A.)

CRIMINAL APPEAL NO. 30 OF 2023

**MARKBRUNO ZACHARIA.....1ST APPELLANT
MANENO YAHAYA BAKARI.....2ND APPELLANT
SHABANI MBAGA.....3RD APPELLANT**

VERSUS

THE REPUBLIC RESPONDENT

**Appeal from the decision of the High Court of Tanzania,
at Morogoro)**

(Ngwembe, J.)

dated the 3rd day of October, 2022

in

Criminal Appeal No. 07 of 2022

JUDGMENT OF THE COURT

29th May & 11th June, 2024

MKUYE, J.A.

The three appellants, Markbruno Zacharia, Maneno Yahaya Bakari and Shabani Mbaga (1st 2nd and 3rd appellants) were, along with other two accomplices, charged with the offence of armed robbery contrary to section 287A of the Penal Code, [Cap 16 R.E. 2002 now R.E. 2022]. It was alleged that the appellants, on 04/05/2018 at Modeco area Mazimbu Ward within the District of Morogoro in Morogoro Region, stole a motorcycle with Reg. No. MC 680 AAS worth TZS. 2,200,000.00, cash

TZS. 150,000.00 mobile phones, to wit, two (2) Samsung, two (2) Techno, one (1) ATM card and various identity cards all being the properties of one Gabriel Pastory, and immediately before such stealing, threatened the said Gabriel Pastory with a firearm, bush knife and clubs in order to obtain the said stolen properties.

Before embarking on the appeal on merit, we find it apt to give albeit briefly, the background of this matter. It goes thus:

Gabriel Pastory @ Kondo (PW1) and Stella Deus (PW3) were husband and wife who ran a stationary and mobile money transfer business at Msamvu Ndege Wengi area. On 4/5/2018, PW1 and PW3 conducted their business until at about 9:30 p.m. when they called it a day and headed home towards Modeco area, Mazimbu Ward by a motorcycle.

On arriving at home, and as the two were about to alight from the motorcycle which was ridden by PW1, they were approached and stopped by three figures who emerged from a nearby path. Suddenly, a gun was brandished by one of the culprits who commanded both PW1 and PW3 to raise up their hands or else get killed.

The victims complied with the orders and while held at gun point, other culprits ran-sacked PW1 and took from him his wallet allegedly

containing TZS. 150,000.00, an Automated Teller Machine Card (ATM), two Techno, two Samsung and one ITEL Mobile Phones.

The assailants also took PW3's handbag which contained mobile phones and money amounting to TZS. 30,000.00.

After the culprits had completed their criminal activity, they ordered the victims to lie down and off they went on board PW1's motorcycle. The incident was reported to the police who arrived at the scene of crime.

According to the victims, they managed to identify the appellants at the scene of crime with the aid of the light from electric bulbs positioned at their house and the left and right neighbouring houses; and that the 1st and 2nd appellants were known to PW3.

It is however, not established as to what or to which event that led to the arrest of the 1st appellant who then named the 2nd and 3rd appellants leading to their arrest. Nonetheless, the 1st and 2nd appellants, each recorded a cautioned statement and two separate identification parades were conducted in respect of the 1st, 2nd and 3rd appellants who were then identified by PW1.

The appellants were arraigned before the court leading to their conviction and sentencing as alluded to earlier on.

Aggrieved by the decision of the trial court, they unsuccessfully appealed to the High Court.

Still protesting their innocence, they have now appealed to this Court on a joint memorandum of appeal containing thirteen grounds of appeal supplemented by the 3rd appellant's own memorandum of appeal consisting six grounds of appeal which can be paraphrased as follows: -

- 1) The prosecution failed to tender registration documents of the alleged motorcycle and receipts of the stolen mobile phones to prove ownership.*
- 2) The identification of the appellants was doubtful as the intensity of light was not stated neither was the description of the 1st appellant given by PW3.*
- 3) The charge was defective in that the properties stolen were at variance with both PW1 and PW3's account.*
- 4) The identification parade register contravened the requirements of Rule 2 (c), (d), (j), (k), (o), (q) and (s) of the PGO No. 232.*

- 5) *The cautioned statements of the 1st and 2nd appellants contained procedural irregularities as for the 2nd appellant it was not read out in court and neither were the two admitted.*
- 6) *The first appellate court failed to notice that the trial court relied on extraneous matters to convict the appellants.*
- 7) *There was material contradiction between PW1 and PW3 on the amount of stolen money, whether it was TZS. 180,000.00 or TZS. 150,000.00.*
- 8) *That, upon repudiation of the identification parade register a trial within trial was not conducted.*
- 9) *There was a misdirection by the first appellate court that Gabriel Pastory and Gabriel Pastory Kondo were the same person.*
- 10) *The identification parade was unprocedural.*
- 11) *The appellants were not addressed in terms of section 231 of the CPA and required to make a reply thereto.*
- 12) *The trial court's judgment lacked points for determination hence contravening the provisions of section 312 of the CPA.*
- 13) *The case was not proved beyond reasonable doubt."*

The separate memorandum of appeal lodged by the 3rd appellant has basically reiterated the grounds in the substantive memorandum of appeal except for ground 5 of the same to the effect that:

"5) The learned Appellate Judge failed to properly consider the defence of the appellant".

When the appeal was called on for hearing, the appellants appeared in person without any representation; whereas the respondent Republic had the services of Ms. Mary Lundu, learned Senior State Attorney teaming up with Mses. Upendo Shemkole, learned Senior State Attorney together with Rosemary Mgenyi and Veronica Chacha, both learned State Attorneys.

On being invited to amplify their grounds of appeal, all the appellants opted to adopt their grounds in the memorandum of appeal and sought the indulgence of the Court to let the learned State Attorneys respond first with a view to rejoining later, if need would arise.

On their part, the respondent prefaced by declaring their stance that they were supporting the appeal on two main grounds. It was Ms. Mgenyi who made submissions on behalf of her colleagues. She mentioned the two points being on visual identification together with irregular identification parade; and failure to call material witness to testify in court.

In relation to the issue of identification, she submitted that, ordinarily, the visual identification evidence needs to be watertight in order to mount a conviction against the accused. She elaborated that among the factors to be considered include the duration of the commission of the offence; intensity of light enabling the identification, if the witness was familiar to the assailant and the description of the culprit.

Ms. Mgenyi went on submitting that, in this case two witnesses PW1 and PW3 were at the scene of crime. She argued that, PW1 testified that he saw three persons in front of him and that he was able to identify them due to light from bulbs from his house and the left and right neighbouring houses. However, he did neither explain the intensity of the said light which enabled identification nor describe the physique or clothes of those people which could have assisted the arresting officers to arrest them. In her view, this raises doubt as to how he managed to identify them. At most, she argued that the identification of the appellants by PW1 was a mere dock identification.

As regards PW3, Stella Deus, she argued that she testified to have identified the appellants since they were unmasked; she was near to the appellants and saw PW1 holding a gun; and that she was familiar to 1st

and 2nd appellants having seen them when they went to her business and deposited money.

Ms. Mgenyi assailed PW3's evidence for her failure to provide description of the appellants or the attire they wore; to explain the duration of the incident or even the time the 1st and 2nd appellants spent at her place of business when she saw them. In addition, she questioned why PW3 did not describe or even mention the appellants to the police who responded to the scene of crime which raises doubt if they were the ones who attacked them. To fortify her argument relating to factors to be considered in visual identification, she referred us to the case of **Leonard Mathias Makani and Another v. Republic**, Criminal Appeal 579 of 2017 [2023] TZCA 182 (11 April 2023).

Ms. Mgenyi went on challenging the identification parade that was conducted. She argued that, in order for identification parade evidence to be effective, a description of the suspect must be given prior to the identification parade which in this case was not done. As such, she was of a view that, since there was no description of suspects prior to the identification parade, such evidence raises doubts.

The other reason for supporting the appeal is the failure by the prosecution to call material witnesses to testify in court. It was the

learned State Attorney's submission that it is not shown in evidence as to how the appellants were linked and arrested in connection with this offence as neither the arresting officer (s) nor investigator was called to testify in court and there was no reason advanced for failure to call such material witnesses. While relying on the case of **Omary Hussein @ Ludanga and Another v. Republic**, Criminal Appeal No. 547 of 2017 [2021] TZCA 543 (30 September 2021), she urged the Court to draw adverse inference against the prosecution where such witnesses are within reach but are not called without sufficient reason being advanced by the prosecution. See also: **Aziz Abdallah v. Republic** [1991] TLR 71.

For these reasons, Ms. Mgenyi implored the Court to allow the appeal, quash the conviction, set aside the sentence and release the appellants forthwith from custody.

In rejoinder, all the appellants agreed with what was submitted by the learned State Attorney. Each appellant urged the Court to allow his appeal and set him free.

We begin with the issue of visual identification. The law relating to visual identification evidence is now well settled in that it is the weakest kind of evidence and no court should act on such evidence unless all the

possibilities of mistaken identity are eliminated and the court is satisfied that the evidence before it is absolutely watertight. See: **Waziri Amani v. Republic** [1980] TLR 250.

In order to eliminate such mistaken possibilities, it is expected that the witness will mention all the factors enabling unmistakable identification such as the proximity to the person being identified, the source of light, its intensity, the length of time of observing the person being identified and whether the person was familiar to the witness. This stance was taken in the case of **Leonard Mathias Makani** (supra) cited by the learned State Attorney in which the Court restated the guidelines to be considered in order to satisfy itself if the visual identification is watertight including:

"... the time the culprit was under the witness observation, the witness proximity to the culprit when the observation was made, the duration the offence was committed, if the offence was committed in the night time, sufficiency of lighting to facilitate positive identification, whether the witness knew or had seen the culprit before the incident and description of the culprit..."

[See also: **Wakutanga Matatizo and Another v. Republic**, Criminal Appeal No. 359 of 2016 [2019] TZCA 477 (11 December 2019); **Said Chally Scania v. Republic**, Criminal Appeal No. 69 of 2005 [2007] TZCA 180 (16 March 2007); and **Ibrahim Ramadhani Manguvu v. Republic**, Criminal Appeal No. 26 of 2016 [2016] TZCA 574 (28 October 2016)].

The importance of explaining the intensity of light and description of suspects was also reiterated in the case of **Ackley Paul and Another v. Republic**, Criminal Appeal No. 110 of 2008 [2012] TZCA 129 (18 September 2012) and **Issa Mgara @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005 (unreported).

Apart from that, the ability of the witness to name the suspect at the earliest possible opportunity is an important assurance of the reliability of the witness, in the same way an unexplained delay or complete failure to do so is to put a prudent court to inquiry - (See: **Marwa Wangiti Mwita and Another v. Republic**, Criminal Appeal No. 6 of 1995 [2000] TZCA 23 (12 June 2000)).

In this case, as was rightly argued by Ms. Mgenyi, although PW1 testified to have identified the appellants through the light which illuminated from their house and neighbouring houses on the left side

and right side, he did not explain the intensity of such light. Neither did he explain the distance from where he was to the place the light was illuminating. Apart from that, he did not give description of the culprits be it in the form of their physique or the attire they wore on the date of incident. To that extent his identification evidence remains suspect as it does not come vividly on how he was able to identify them and more so when taking into account, if we go by their evidence on their proximity, that those people pointed the gun to PW1 while others were searching him.

The same applies to PW3 who also testified to have identified the culprits. This witness, in particular, testified to have seen the 1st and 2nd appellants prior to the incident when they went at her place of business and transferred money. PW3, apart from the failure to state the intensity of light which enabled her to identify the culprits, she did not even describe their physique and attire or mention them to the police or other people who came at the scene of crime after the incident.

We think, mentioning the culprits to the police would have assisted them in their investigation or arresting the culprits. That was not done. Failure to mention the suspect at the earliest opportune time is a sign of

unreliability of such witness and puts a prudent court to inquiry – See: **Marwa Wangiti Marwa’s** case (supra).

On the other hand, having scrutinized the record of appeal, we have been unable to spot how and what made the appellants to be arrested in connection with this offence as none of the witnesses testified to that effect. What we gather is that after the appellants’ arrest, two identification parades were conducted in which PW1 allegedly identified all the appellants.

However, it is settled law that in order to have an effective identification parade, the identifying witness must comply with a very crucial factor which is providing description of the culprit before identifying such culprit in the identification parade.

In the case of **Yosiala Nicholaus Marwa and 2 Others v. Republic**, Criminal Appeal No. 193 of 2016 [2019] TZCA 147 (9 April 2019) while discussing the issues of visual identification, the Court stated thus:

"1. In every case in which there is a question as to the identity of the accused, the fact of there having been given the 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 V. M. B. Allui** [1942] EACA 72.*

*2. It is settled law that, for the identification parade to be of any value, the identifying witness must earlier given detailed description of the suspects. [**Adriano s/o Ayoub v. Republic**, Criminal Appeal No. 29 of 2009 (unreported).*

(See also: **Flano Alphonse Masalu @Singu and 4 Others v. Republic**, Criminal Appeal No. 366 of 2018 [2020] TZCA 197 (30 April 2020)).

The importance of the witness to identify the culprit after having given the suspect's description prior to the identification parade is to lend assurance to the Court of the witness's dock identification of the suspect. This stance was taken in the case of **Abdul Farjala and Another v. Republic**, Criminal Appeal No. 99 of 2008, where the Court stated that:

"It is trite law that the test in an identification parade is to enable a witness to identify a person or persons who she or he had not known or seen before the incident. An identification parade held soon after the incident in which a witness positively identifies an accused lends assurance

*to the court of that witness's dock identification
of the person..."*

In this case, as was rightly submitted by the learned State Attorney, PW1 was called to identify the culprits in the identification parades which were organized by PW5 and allegedly identified the culprits. According to the record of appeal, PW1 was able to identify the 1st and 3rd appellants in the identification parade organized by PW6 consisting twelve people including them. He also identified the 2nd appellant in the identification parade which comprised 10 people including the 2nd appellant. However, as alluded earlier on, PW1 had not given any description of the culprits before being subjected to the identification parades to identify the culprits. Thus, going by the above cited authorities, the identification by PW1 in the identification parade did not have any effect to the identification of the appellants. What remained was a mere dock identification which could not amount to identification sufficient to mount a conviction.

In this regard, we are in agreement with the learned State Attorney that identification evidence was not watertight to link the appellants with the offence they were charged with.

We now turn to the issue of failure to call material witness to testify in court. The learned State Attorney's concern is that there was

no investigator of the case or police officer who arrested the appellants who was called to testify in court, and that no reason was advanced for failure to call them.

In the case of **Rehani Said Reyamila v. Republic**, Criminal Appeal No. 222 of 2019 [2021] TZCA 301 (13 July 2021), when the Court was confronted with akin scenario, it drew adverse inference on the failure by the prosecution to summon material witness. While relying on the case of **Boniface Kundakira Tarimo v. Republic**, Criminal Appeal No. 351 of 2008 [2011] TZCA 194 (4 October 2011), the Court stated that:

"It is thus now settled that, where a witness who is in better position to explain some missing links in the party's case, is not called without sufficient reason being shown by the party, an adverse inference may be drawn against the party, even if such inference is only permissible".

In this case, as rightly submitted by Ms Mgenyi, neither the investigator of the case nor the police officer who arrested the appellants was called to testify in court. On top of that, no reason was advanced by the prosecution for the failure to call them. In our view, such witnesses were very crucial. Had they been called to testify in

court, they would have assisted to establish how the appellants were arrested, identified and how they were connected with the offence.

Given the circumstances, we think this is a proper case to draw adverse inference against the prosecution for their failure to call such material witness to testify in court in that perhaps such witness might have testified against the prosecution. (See also: **Omary Hussein @ Ludanga's** case (supra); **Issa Reji Mafita v. Republic**, Criminal Appeal No. 337 of 2020 [2021] TZCA 404 (24 August 2021) and **Yohana Chibwingu v. Republic**, Criminal Appeal No. 117 of 2015 [2015] TZCA 170 (4 June 2015).

In this regard, taking the totality of what has been submitted by the learned State Attorney, we agree with her that due to the inadequacy in identification evidence and failure to call material witness to testify in court, the case against the appellants was not proved to the hilt.

In the circumstances, much as we agree with the learned State Attorney, we find it not necessary to further determine the other appellants' grounds of appeal as doing so would amount to a mere academic exercise.

Consequently, we allow the appeal, quash the conviction and set aside the sentences meted out against the appellants. We further order for their immediate release unless they are otherwise held for other lawful reason(s).

It is so ordered.

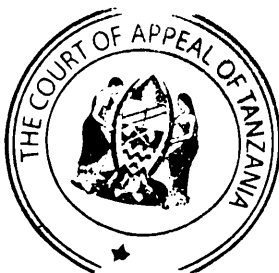
DATED at **MOROGORO** this 10th day of June, 2024.

R. K. MKUYE
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

L. M. MLACHA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of June, 2024 in the presence of the Appellants in person and Ms. Upendo Shemkole, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



R. W. Chaungu
R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL