

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CONSOLIDATED CRIMINAL APPEALS NOS. 204 AND 404 OF 2016

**(Appeal from the decision of the Resident Magistrate's Court of Morogoro
at Morogoro in Original Criminal Case No. 119 of 2014)**

**JUMA ALLY JUMA
RASHID IDD KILAGALE**

} **APPELLANTS**

Versus

THE REPUBLIC RESPONDENT

JUDGMENT

4th & 11th April, 2018

DYANSOBERA, J.:

The appellants Juma Ally Juma and Rashid Idd Kilagale were jointly charged along with eight others in the Court of a Resident Magistrate of Morogoro with diverse a total of eight counts, namely unlawful assembly, riot, assault causing actual bodily harm, aiding a prisoner to escape, stealing and abducting with intent to do harm all in contravention of the Penal Code, Cap. 16 of the Revised Edition, 2002. While the other accused persons, that is the 2nd, 3rd, 4th, 5th, 6th and 9th were acquitted and the 1st accused died before the conclusion of the case, the appellants and one Ahmad Rajab Omary Kinoro who featured at the trial as the 10th accused were convicted. Their convictions and sentences were in respect of the 1st, 2nd, 6th and 7th counts. In the 1st count, each was sentenced to one year term of imprisonment. The trio was sentenced in the 2nd count to a fine of

100,000/= each or in default of the payment of the fine, to serve two years term of imprisonment. In the 6th and 7th counts, the two appellants and their fellow were, each, sentenced to four years prison term and the sentences were ordered to run concurrently. Aggrieved by the trial court's decision the appellants have appealed to this court.

The brief background facts are as follows. F. 8271DC Salehe (PW 1) and F.1270 PC Edson (PW 2) are police officers stationed at Mkuyuni Police Station. On 3rd August, 2014 at around 1700 hrs they were coming from Kiziwa within Mkuyuni area. When they arrived at Misala area, they met Ally Mussa who was riding a motor cycle Reg. No.T.162 CSC make Fekon carrying three passengers. They stopped him and discovered that apart from carrying three passengers, he wore no helmet and had no driving licence. The said motor cycle rider removed the switch from the motor cycle and took to his heels. These police officers impounded the motor cycle and took it to the police station. Later, Ally Mussa went to the police station to collect his motor cycle and demanded it back. The police refused to give it back to him until a traffic case against him was determined. He was locked up in a police cell.

At around 1930 hrs., a group of about ten people went to the police station to go bail for Ally Mussa but did not succeed to bail him out. They dispersed. At around 2000 hrs a group of motor cycle riders invaded the police station, threw the stones and bricks to the police station, took the motor cycle and removed Ally Mussa from the police lock up and drove away with him. PW 1 and PW 2 fired in air to scare them but were injured. PW 1 said that he identified the two appellants by electricity light while PW 2 said that he identified all the accused persons. As to how he did identify

them, PW 2 told the trial court that he identified them first when they went to bail out Ally Mussa and for the second time when he was fighting with them and that at the area, there was sufficient light. Abdallah Said (PW 3) and MG 54525 Said Omary (PW 4) were militia men. They testified that on that material day there was commotion at the police station but they then took refuge upon seeing the group of motor cycle riders. Their evidence was supported by Maua Chande (PW 9) who said that one of the militia man took refuge to her house for his safety. SP Abdallah (PW 8) with other police officers including D. 9236 Cpl Said (PW 5), E.426 D/Sgt Leonard (PW 6), E. 9123 D/Cpl Juma (PW 7) and a civilian one Rashid Tamimu (PW 10) went to the crime scene. PW 8, a Regional Crimes Officer stationed at Katavi who by then the Officer in Charge of Criminal Investigation Department in Morogoro District interrogated PW 1 on what was the matter and he was told that some people had invaded the police station, were throwing stones at the police station. PW 1 told him those people wanted their fellow who had been locked up to be released and be given the motor cycle. PW 8 called Kinole Village Executive Officer and together with other police officers managed to apprehend the appellants and their fellows. PW 7 recorded the statement of some witnesses and collected some bricks and tendered them in court –Exhibit P 3. PW 6 interrogated the 10th accused who was injured and recorded his cautioned statement-Exhibit P. 2. He also interrogated other accused persons who denied complicity.

The appellants and their fellow accused denied complicity. They denied having gone to Mkuyuni police station arguing that they were apprehended while they were at their respective homesteads.

The learned Resident Magistrate was satisfied that the case against the appellants and the 10th accused was demonstrated beyond peradventure.

On appeal each appellant filed a separate petition of appeal. The appeals were consolidated.

The petitions of appeal raised twenty grounds of appeal in total. However, in my view, determination of these appeals depends entirely on the first ground of appeal on each petition which is on whether or not the identification was water tight to sustain a conviction. This is because as was correctly submitted by the two learned State Attorneys, that is Jennifer Masue and Neema Mbwana, all the witnesses who testified to have been at the crime scene said that they saw a group of motor cycle riders without stating who identified who and how. The learned State Attorneys declined to support conviction on account that the identification was not watertight. This court was referred to the case of **Malick Said Mapululu and 3 others v. R**; Criminal Appeal No. 160 of 2005 and the case of **Ahmad Hassan Marwa v. R**; Criminal Appeal No. 264 of 2005 at p.8. Both State Attorneys prayed that the convictions against the appellants be quashed and the sentences set aside and they be freed.

It is plain and certain that in the instant appeal, the whole case hinged on the identification of the culprits. There is no dispute that the invasion of the police station was made by a group of motor cycle riders at about 2030 hrs. Although PW 1 said that he identified the appellants by electricity lights and PW 2 identified all the culprits, there was no evidence to establish how these two witnesses managed to identify the culprits who were in a group of many motor cycle riders and at that time. The record showed that all the rest eight witnesses did identify none of the culprit, leave alone the appellants.

The Court of Appeal of Tanzania in the case of **Shamir John v. R**; Criminal Appeal No. 166 of 2004 (Mwanza Registry-unreported) had occasion of giving a detailed analysis on how to go about in cases depending on identification. At pp. 10 and 11 of the typed judgment the Court observed as follows.

"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 judgement, whenever the case

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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 of the identification or identifications. We are saying so advisedly. 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."

The said Court went further and stated:

"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

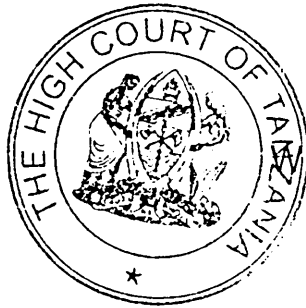
before? How often? If only occasionally, had he any special reason for remembering the accused? What interval had elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses when first seen by them and his actual appearance?"


In the present case, there was a group of people who invaded the police station. It was at night and the invaders were throwing stones and bricks. PW 1 and PW 2 even attempted to fire in the air to scare them away. PW 3 and PW 4 took refuge and hid themselves to save their lives and were clear that they identified none. It was not stated that the culprits, or the group for that matter, was familiar to PW 1 and PW 2. None of the witness found the appellants and their fellows at the crime scene, rather, all of them were arrested at their home villages of Kinole, Kibwaya and Kalundo in which case they were picked randomly. In such circumstances it was difficult to say for sure who exactly committed the alleged offences. I find that the identification having been not water tight, the conviction against the appellant was uncalled for and illegal. The appellants are challenging the trial court's finding.

Learned State Attorneys who represented the respondent Republic are in support of the appeals. I find nothing material to fault them.

In the upshot, I find the appeal meritorious and allow it. I quash the convictions and set aside the sentences. I order the appellants to be released forthwith from custody unless they are held for some other lawful causes.

DATED, SIGNED and DELIVERED at Dar es Salaam this 11th day of April, 2018.




P. DYANSOBERA
JUDGE