IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 30 OF 2017

(Originating from Kinondoni District Court, Criminal Case No. 28 of 2013)

ABRAHAM MOSES @ ABUNUASI

RAJABU ABEID @ SUALILA

EMMANUEL PETER @ SILWAMBO.....APPELLANTS

VS

REPUBLIC.....RESPONDENT

JUDGMENT

LUVANDA, J

The appellants namely Abraham Moses @ Abunuasi(1st appellant, 5th accused at a trial) .Rajabuabeid @ Sualila (2nd appellant, 6th accused at a trial court) and Emmanuel Peter @Silwambo (3rd appellant, 7th accused at a trial court) are appealing against conviction and sentence of thirty years imprisonment, for an offence of armed robbery C/S 287 A Cap 16 R.E 2002. Before the District Court of Kinondoni, the appellant were indicted for conspiracy to commit on offence contrary to section 384 Cap 16 R,E 2002 (1st count) and armed robbery contrary to Section 287A Cap 16 R.E. 2002 (being second, third fourth, fifth and sixth counts). It was a prosecution case that the three appellants (together with four others who were acquitted at a trial) on 15/1/2003 at about 05.00hrs At Manzese

Uzuri, while armed with matchet, swords, axes and gun they invaded and robbed Mohamed Shomari(second count), Khamis Ibrahim (third count), DaudNgoda (fourth count), DaudiKafisa (fifth count) and Philipo Paulo (sixth Court), who were community police (Police Jamii), where they steal various properties including mobile phone and cash money. Thereafter the appellants disappeared to unknown destination and were arrested on divert dates, on different occasion (destinations).

PW2, 3 and 4 alleged to had identified the 7th accused (3rd appellant) at a scene, while the 5th accused (first appellant) was identified by PW3. All three appellants had denied involvement into commission of the offences. The trial court found the three appellants quilty for an offence of armed robbery. And were convicted and sentenced to serve a term of thirty years imprisonment. Aggrieved, the appellants preferred this joint appeal on separate grounds of appeal, but are all coached into a single ground that the trial magistrate erred in law and fact to convict them while the prosecution had failed to prove it is case beyond reasonable doubt.

At the hearing, Mr. Kisima Adolf learned State Attorney, supported the appeal on the ground that the evidence on identification was not proper, because there was no enough tight, and all witness did not explain the nature source and intensity of light. He cited a case of **Scup John vs Republic** Criminal Appeal NO 197/2008 CAT to cement his proposition that the identification was not proper.

In this matter the prosecution case was hinged solely on visual identification evidence. PW2 stated that he identified the 7th accused (3rd

appellant herein) but did not explain a source of light. Again PW2 stated that the 3rd appellant was familiar to him but did not explain how. PW3 stated that he identified the 3rd appellant through a tubelight which were on. But he did not explain the distance towards the alleged tubelight and the intensity of it is light and whether the tubelights were inside or outside. Equally PW4 stated that he identified the 3rd appellant as there was enough light from neighboring house, but did not explain a distance and the source of the alleged light. PW5 stated that he know some of the accused from childhood and they stay together at Manzese. But PW5 was not specific and did not point finger to any accused at the dock.

Again there were serious notable inconsistency on the testimony of the prosecution witnesses regarding a destination or scene of a crime, while PW2, 3, and 5 stated that it occurred at Manzese Uzuri, PW4 put that the incidence occurred at Tandale Uzuri. It is not clear whether Manzese Uzuri and Tandale Uzuri is the same place or destination. it is not known whether the incidence occurred inside the office or outside, as PW1 stated that he saw people in their office.

Again PW4 stated that an incidence took about 5 to 6 minutes while PW5 stated that an episode took 18 minutes. More important, PW2 ,3,5 put that only the 3rd appellant was holding a gun, while PW4 stated that two culprits were armed with a gun including the 7th accused.

The identification of the 3rd appellant by PW4 was suspect and unreliable, as PW4 put that he lied down with stomach touched down. Similarly PW2 put that he lied down at once when he was forced to do so

by 7th accused who was holding a long gun and the culprits were observing if any one of them (complainant) was looking on them (culprits).

Again PW3 was contradicting himself. As at first he stated that he know the 3rd appellant, but on cross examination PW3 changed a story and put that he come to know the 3rd appellant after the later was arrested.

In the circumstance, so far the incidence happened at 05.00hrs where it was still dark (as put by PW4) and so far the visual identification was week, unreliable to the extent that did not eliminate all possibility of mistaken identification and in view of notable inconsistence, contradictions and discrepancy on the prosecution evidence, the findings of the trial court cannot let to stand.

The trial magistrate did not deliberate on these mentioned inconsistence and discrepancy. Instead the trial magistrate made a finding that all prosecution witness were credible and their purported credibility was measured by what was asserted by the trial magistrate over a concern of witnesses to name the offender at the earliest possible moment. Possible moment. In **Osca Nzelanivs Republic**, criminal Appeal No. 48/2013 CAT at Mbeya, page 11, the Court held, I quote,

> *"it is trite law that in assessing a witness credibility, his or her evidence must be looked at in its entirety, to look for inconsistencies, contradictions and or implausibility; or if it is entirely consistent with the rest of the evidence on record"*

It is my findings that the purported credibility on the prosecution witnesses was premised on a wrong and unsupported assumption, as there is no evidence on record to substantiate that the prosecution witnesses had named the culprits at the earliest moment, as prosecution witnesses statement were not tendered.

In passing, I will comment on a sentence meted to the appellant. The appellants were arraigned with six counts being conspiracy to commit an offence (first count) and armed robbery (second, third, fourth, fifth and six counts). The trial court convicted them for armed robbery and said nothing on a count pertaining to conspiracy to commit an offence. On sentencing, the trial court imposed a sentence of thirty years imprisonment without specifying which count was it for. This type of sentence amount to omnibus sentence, which is not allowed under penology.

Be as it may, the appeal has merits. The trial court findings and conviction are quashed, and an omnibus sentence is set aside. The appellant are to be released forthwith.

Appeal allowed.

E. B. LUVANDA
JUDGE
12/6/2018