

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

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 66 OF 2017

*(Appeal from decision of the Resident Magistrate's Court of Kibaha at Kibaha,
Before: Mwailolo, H. I – Dated 18/11/2016)*

MOHAMED S/O MADADI @ BWANDA..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Mohamed s/o Madadi @ Bwanda and Amiri s/o Ally were jointly charged for armed robbery contrary to section 287 of the Penal Code Cap 16 R.E. 2002. However, at the end of the hearing the trial Magistrate decided to let the 2nd accused free due to age (15 years) and proceeded with the 1st accused who is the Appellant in this appeal. The trial court on 18th November, 2016 convicted him and subsequently sentenced him to serve 30 years' imprisonment. Being dissatisfied with the conviction and sentence, he preferred this appeal, armed with eleven (11) grounds of appeal which were filed in this court on 6th March, 2017.

During the hearing, the Appellant relied solely on the grounds contained in the petition of appeal and prayed this court to consider them let him free. The respondent was represented by her learned State Attorney Faraja George (SA), who did not oppose the appeal. In other words, she did not support the conviction and sentence.

The learned State Attorney argued that the identification of the accused raised serious doubt due to the fact that the incidence occurred during night and PW1 in her evidence stated that the robbers were wearing Masks in their heads. Further PW1

clearly stated that during the fracas, she managed to enter into the room of her children, the robbers also entered therein, but the room was total dark. However, PW1 managed to identify the appellant who was holding a light flash (torch). In the circumstances, the light of a torch leaves serious doubt of proper identification of the accused. PW1 also failed to describe the physical features of the appellant. Time spent to recognize the robber that he was the one called @ Jembe is highly doubtful.

The learned State Attorney proceeded to cite the case of **Scapu John and another V. R 1997** (unreported) and **James Chilonji V.R 101 of 2013** at page 5 (Unreported), the two cases described light of a torch to be not enough to identify the accused. Finally, the learned State Attorney drew the attention of the court on the admissibility of caution statement that was contrary to the laid down procedures. The republic prayed to consider those factors and allow the appeal.

Considering the submissions of the learned State Attorney and the grounds of appeal, two important legal issues are obvious. **One**, whether the Appellant was properly identified in the scene of crime. **Second**, whether the trial court followed the laid down procedures in admitting caution statement of the appellant. These two issues are the crux of the whole of this appeal.

To recap, the evidence of PW1 who was the victim and target of the robbers, at page 6 of the proceedings she stated that her house had enough light for the house had electricity. However, the robbers covered their face which causes difficult to identify them. The children's room, where they entered and closed the door and put off all lights turning the room into a total darkness, yet the robbers also entered therein demanding money to PW1. The robbers used torch to identify the where about PW1 in that room. Through the torch light which was in the hands of one of the robbers, PW1 saw the face of Jembe for the mask was removed. The robbers have two torch

in their hands. PW1 was the only one who identified the appellant at the scene of crime.

The issue of identification of the Appellant, be it day light or during night is now settled, after having series of authoritative decisions of this Court and the Court of Appeal. The genesis of proper and correct identification in cases whose determination hinges on the identification of the accused, was reiterated by the Court of Appeal for Eastern Africa way back in 1942 in the case of *Mohamed Alhui V. Rex* (1) it was held that:

“In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given”

The holding of the court was adopted by the Court of Appeal of Tanzania in various decisions including the Case of *Waziri Aman vs R (1980 TLR 250* whereby the court reiterated authenticity of identification by raising the following fundamental issues:

- What kind of light was on at the scene of crime at the time;
- What was the intensity of that light;
- What was the distance between the source of light and where the witness was;

On the same vein, the Court of Appeal in the **Criminal Appeal No. 197 of 2008** (Unreported) at page 7 added other fundamental issues that:

- Whether the accused was known to the witness before the incident;

- Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like which may have interrupted the latter's concentration.

In order to convict an accused person based on the identification at the scene of crime, all the above issues must be answered in affirmative, otherwise doubt may end up in favour of the accused. In this appeal, the incident occurred at night, though the house is alleged to have electricity inside and outside, yet the robbers covered their face with masks, hence identification became almost not possible. Worse still PW1 admits that light at the room of her children, where she was hiding, were put off, hence had total darkness.

Though, it may be true that the appellant was known to PW1, yet the visual identification during night in a total darkness and on the circumstances of threat to life is of the weakest kind of evidence and most unreliable.

The question of intensity and sufficiency of light for purposes of visual identification and recognition is fundamental. It is again in record that the armed robbers were holding and controlling the torchlight, which they were flashing while forcing. In ***Kasim Said and 2 others V R criminal appeal No. 208 of 2013*** (unreported), the Court of Appeal emphasized the need for the trial court to determine sufficiency of light for purposes of both visual identification and recognition:

When it comes to issues of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to see and positively identify the accused person. Clear evidence of the sources of light, and its intensity is of paramount importance. The fact that a witness knew the suspect before the fateful

date is not enough. The witness must go further and state exactly how he identified the appellant at the time of the incident.

On the strength of the foregoing reasons, I cannot say with certainty that PW1 identified and recognized the appellant free from every reasonable possible error. Thus the learned State Attorney was right to support the appeal. This ground alone suffices to decide this appeal. However, there is another legal issue to be considered before conclusion. At page 33 of the proceedings, the appellant objected the admissibility of caution statement, that it was not taken freely. However, the objection was withdrawn late on. It is a trite law that once a caution statement is objected, the court must proceed with inquiry. In the circumstances of that objection, the objector withdrew the objection and the trial magistrate had no reason to make further inquiry.

However, I am inclined to the views of their Lordship of the Court of Appeal in Criminal Appeal No. 253 of 2012 where Justice Juma J.A, at page 31 held that:

“In every case where an accused person is unrepresented, a trial court has a duty to give an accused person an opportunity to object to the admission of cautioned statement. This duty of the trial court extends also to cases where an accused person is represented but the learned counsel does not object to the admission of the caution statement. It does not take away much time to simply alert the accused person that a confessional document is about to be offered as self – incriminating evidence”

In conclusion, the Court of Appeal quoted the wording of Justice Philip Nnaemeka – Agu of Supreme Court of Nigeria who in **Michael Okaroh Vs. The State, SC 58/1989** held:

“It goes without saying that a Counsel in court in a capital trial has a very important and sacred duty to perform. He owes that duty to not only his client and the court but also to society at large. It is of the very essence of that duty he should promptly take objection to every irregularity at the trial, be that an irregularity relating to procedure or to evidence called at the trial”

Where, as in this case, the counsel for the accused did not see anything wrong in the procedure adopted at the trial by withdrawing the objection purely based on forgetfulness of the proper section of the law. This is a demonstration of non-seriousness on the part of the counsel during trial. Thus the learned State Attorney was right not to support conviction and sentence of the appellant.

Having said so much, I allow the appeal, quash the conviction of the appellant and set aside the respective sentence. The appellant is to be set free unless otherwise lawfully held.

Dated at Dar es Salaam this 14th Day of June, 2018



P. J. Ngwembe, J.

14/06/2018

Delivered at Dar es Salaam in Chambers on this 14th day of June, 2018; in the presence of the Appellant and Ms. Elen Masululi State Attorney for the respondent.



P.J. Ngwembe, J

14/6/2018

