

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM.

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO 261 OF 2017.

**(ORIGINATING FROM KILOSA DISTRICT COURT IN CRIMINAL CASE NO 243 OF
2016 BY HON. KHAMSI, RM)**

MARTIN ERASTO @ MAWANJA..... 1ST APPELLANT.

SAMWEL SEHEBA @ MAJUTO2ND APPELLANT.

MAJALIWA JEREMIAH @ MANGWEA.....3RD APPELLANT.

EDWARD BILISHANI 4TH APPELLANT.

Date of last order:18/06/2018.

Date of judgment: 29/06/2018.

JUDGMENT.

MAGOIGA, J.

The appellants were jointly and together charged on one count of armed robbery contrary to section 287A of the Penal Code, [Cap 16 R.E 2002]. All the appellants denied the charge levelled against them. After full trial, the District Court of Kilosa found them guilty as charged, convicted and sentenced them jointly and together to serve 30 years' imprisonment. Aggrieved and dissatisfied with both conviction and sentence have come to this court to contest for their innocence, hence, this appeal.

The facts of this case are that on 30th day of September, 2016 at or about 23:30 hrs at Muyune-kibedya within Gairo District in Morogoro region did steal cash money Tshs 6,000,000/= and three mobile phone having the value of 120000/= all the properties of SAID CHIMONO and immediately before such stealing did shot two bullets on air to threat SAID CHIMONO in order to obtain that properties and thereafter retain the stolen properties. The bandits varnished. The incidence was reported to police and through

investigation was conducted leading to the arrest and consequently charging of the appellants in court.

The appellants duly filed memorandum of appeal and supplementary memorandum of appeal containing a list of 46 grounds of appeal in total. When this appeal was called for hearing the appellants appeared in person and unrepresented and were ready for hearing. Respondent, the Republic was represented by the Ms.Selina Kapange, learned State Attorney. The learned State Attorney was ready for hearing and readily informed the court that she supports the appeal for all appellants.

Before I consider the submission of the parties who are not at issue, as to the merits of this appeal, this court has noted several facts which I find it imperative to produce hereunder. **One**, there is no dispute that on 30th day of September 2016, the home of PW1 was invaded by several bandits who injured PW1 and stole several properties including cash money of PW1. **Two**, there is no further dispute that the incidence was reported to police and upon investigation the appellants were arrested on different places and dates by the police in connection with the commission of the armed robbery at the home of PW1. **Three**, there is no dispute that after being arrested the first, second, third and fourth appellants were interrogated in their cautioned statement admitted to have committed the offence charged and some were found with the stolen items. **Four**, there is no dispute that the admitted cautioned statements (exhibits P1, P3) were all procured without the appellants signing to show their willingness to give the statement voluntarily. **Five**, further there is no dispute that same were admitted without following the laid down legal procedures. **Six**, there is yet no dispute that the identification parade conducted was a farce. **Seven**, there is no dispute that this is one of the poorly investigated, poorly prosecuted and poorly decided case I have met so far. There are many more but for now that suffices at least for the day.

As already noted both the republic and the appellants are in agreement that this court allow this appeal and set the appellants free. In the sense I will not look into each and every ground raised nor will follow the usual manner. However, the submission by the learned will be a guide. The learned state attorney submitted in support of the appeal that two issues in the

memorandum of appeal suffices to dispose of this appeal. These are visual identification and cautioned statements of the appellants admitted in court. Ms. Kapange started with the tendering and admission of exhibits which were the basis of their conviction. The trial court in obvious disregard of the lawful established procedure of admitting cautioned statement, in particular, when objected by admitting them without conducting an inquiry. The learned counsel went on submitting that PW9 tendered the cautioned statements of the 2nd, 3rd, and 4th appellants omnibus and the appellant were not given chance to object, as the record shows what was under discussion was money but what was tendered was their cautioned statements. According to her that was irregular in the circumstances and there was no fair trial at all. In the circumstances the learned counsel invited the court to expunge them from the court record.

I have had an opportunity to go through the trial court's record. What the learned state attorney is vivid and is an error apparent of the face of the record. A good example is when PW5 intended to tender cautioned statement of the first appellant, the accused was asked if had an objection, he replied that "**I find everything written**". The message here is that he was seriously saying that, is not his statement or to be more specific the accused is saying the police gave him already prepared statement which he was beaten to sign. Here any prudent public prosecutor was to ask for conduct of an inquiry and magistrate was to order for an inquiry to establish its voluntariness before admission. But this was not done.

As to the cautioned statement of the 2nd, 3rd, and 4th appellants the record is clear as day light that same were omnibusly admitted without giving the appellants an opportunity to object, if any. This was wrong and incurable irregularity for condemning the appellants unheard. This was against the principle of fair trial. In the case of ROMAND MAKINI V. REPUBLIC [1980] TLR 148 it was held that the right to be heard is natural and even God heard Adam before conviction.

The learned state attorney has humbly asked this court to expunge all the cautioned statements of the appellants from the court record. I have gone through the record of the trial court in total I agree with the submission by the learned State Attorney that what she has submitted is what transpired

in court. And I hereby, without much ado, expunge all cautioned statements of the appellants from the record for the reasons I have explained above.

Another point taken by the learned state Attorney is the evidence of visual identification. Ms. Kapange submitted that because the incidence took place at night, though PW1, PW2 and PW3 says the light was on but they never say anything to intensity of the light and they never gave any description at least to prove that in the circumstances they identify the appellant. Without describing the physique or any identical mark of the appellant even the conduct of the ID parade become useless, she submitted. The State attorney cited the case of WAZIRI AMANI V REPUBLIC [1980] TLR 250 which gives conditions to be met before visual identification can be accepted, she insisted, none was observed in this appeal. Concluding on visual identification she lamented that it was a poorly investigated and prosecuted case. Submitting on the ID parade the learned Attorney submitted that without prior description of the appellant the whole exercise becomes useless. She equally invited the court to expunge them from the court record.

I have read the trial record and in particular the testimonies of PW1, PW2 and PW3 I this court join hands with the learned Attorney that without explaining the conditions and the intensity of light at such hours of the night is very dangerous to believe visual identification. The circumstances for correct visual identification, in this appeal, if any, was not favourable, certain and weak to be believed. As to the ID parade, I agree with the learned Attorney that it was not possible to have an ID parade without prior description. Anything out of that is an exercise in vain.

That said and done, I hereby for the reasons given above expunge all the cautioned statements of all appellants admitted in evidence in serious abrogation of the procedure from the court record. Having expunged and discarded the evidence of the cautioned statements, and having discounted that the appellants were not identified in the scene of crime, I find no other evidence to warrant the given conviction and sentence. The trial Magistrate basis of conviction was the said cautioned statements, without which no conviction can stand. In the same vein I allow this appeal.

In the upshot, I find merits in this appeal and allow it, by setting aside the judgment and sentence meted out against the appellants. It is further ordered the appellants be released from prison unless they are held there for another lawful cause.

It is so ordered.

Dated at Dar es salaam this 29th day of June, 2018.


S.M. MAGOIGA.

JUDGE.

20/06/2018

