IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO. 276 OF 2016

(Originating from The District Court of Kinondoni at Kinondoni, Criminal Case No 145 Of 2014 Before: Hon. Mushi A– RM Dated 18th November, 2015)

ALBANUS ALBANUS KOSA----------1st APPELLANT

SALUM ALBUDUL MUSA----------2nd APPELLANT

VERSUS

THE REPUBLIC ---------- RESPONDENT

JUDGMENT

Last order date: 07th June, 2018
Judgment date: 19th June,2018

MLYAMBINA, J.

The appellants were convicted of Armed Robbery contrary to Section 287A of the Penal Code Cap 16 (R.E.2002) and sentenced to 30 years imprisonment. Been aggrieved with the conviction and sentence, the appellants lodged this appeal on the following grounds; -

1. That, the learned RM grossly erred in law and in fact by taking into account the in-credible and un-reliable visual identification of PW5 and PW9 against both appellants at the LOCUS IN QUO.
2. That, the learned RM erred in law and in fact by upholding to un-procedural identification parade conducted by PW7

where PW5 and PW9 did identify both appellants as t was no evidence to suggest that PW7 ever met with both witnesses to ascertain from them circumstances of the crime before, neither did he inquire from them what led them to identify the suspect, all those contravened rules and regulation of P.G.O no 232 rules (1) and (2).

3. That, the trial RM erred in law and in fact by convicting both appellants on basis of 4th accused's retracted caution statement exhibit P1 tendered by PW2, without any justified corroborated prosecution evidence contrary to the mandatory provision of Tanzania evidence Act Cap 6 (R.E.2002).
4. That, the learned RM erred in law and in fact by convicting both appellants in prosecution case which was properly investigated as no forensic evidence in terms of finger prints lifted from exhibits P7,8,9 and 10 retrieved from the scene by PW10 to tally with theirs to directly connect them to the crime at hand.
5. That, the learned RM erred in law and fact by convicting both appellants in a case where the prosecution failed to prove their guilty beyond any speck of doubt as charged.

WHEREFORE, the appellant prayed that the Court to allow this appeal, quash the conviction and set aside the sentence.

In addition to the above grounds of appeal, the appellant lodged other three supplementary grounds of appeal, namely; -

1. That, the trial Magistrate erred in fact in convicting the appellant relying heavily on identification evidence against the appellant which was not water tight taking into account that no iota evidence on record to show that PW5 and PW9 (the victims) had given a physical description of the appellant to those whom the event was firstly reported apart from the entire description.
2. That, the prosecution case against the appellant was unattainable at all as none of the arresting or investigating team who bothered to interview or interrogate the appellant in connecting with allegedly looted properties nor the commission of offence.
3. That, the appellant was convicted on unfair trial as the parties were not equal before the law (in court) taking into account that in the judgment the trial Magistrate had wholly evaluated and considered the prosecution evidence only and in event entering a conviction to the appellant without evaluating and considering or discounting the appellant's defence case.

WHEREFORE, the appellants prayed that the Court to allow this appeal, quash the conviction and set aside the sentence.
During hearing, the appellants appeared in person while the respondent was represented by learned State Attorney Christin Joas.

The appellants substantially prayed their 8 grounds of appeal be adopted and be upheld by quashing and sentencing aside the grounds of appeal.

On the second ground of appeal on identification parade that, the first appellant argued that, it was the first respondent submission that PW5 and PW9 identified the accused because there was enough light. However, both PW5 and PW9 never explained as to which type of light was it or many volts.

According to the first appellant, PW5 and PW9 never explained the distance between the light and the accused *vis-à-vis* the place they stood. PW5 and PW9 told the court that they discovered the accused because of the police uniform wore by the accused on that day. But they failed to explain how the accused looked like because of the light. They identified the accused basing on the police uniform only.

On the third ground of appeal, the first appellant submitted that, the court convicted the appellants basing on the evidence of PW4. The fourth accused was set free for lack of sufficient

reasons. (see page 28 of the judgment). At page 31 of the judgment the court convicted the accused basing on the evidence of the fourth accused but it is the same evidence which set the fourth accused free.

The first appellant went on to tell the Court that, he reported at police on 10th of March, 2014. Thus, it was at Buguruni police station. The police never interviewed the first appellant till when he was taken to the police. To buttress his argument, the first appellant prayed to refer this court to the case of **Hamidu Son of Hussein and 4 Others vs the Republic, Criminal Appeal No 138, 139, 140, 141 and 142 of 2011 (unreported)** as well as the case of **Kassim Said and 2 Others vs the Republic, Criminal Appeal No. 208 of 2013 Court of Appeal of Tanzania (unreported).**

The first appellant went on to submit that, at page 61 of the proceedings shows PW9 was called by PW7 at Kawe Police Station. "*njoni hapa polisi kawe wale wezi wenu tayari tumeshawakamata*". PW7 was a one who prepared the parade. PW9 identified the accused at Kawe Police Station.

At page 12 of the decision of **Kassim case** (*supra*), the witness was supposed to explain the outlook of the accused that he identified the accused after talking about 10 minutes. But he never even identified "mwanya". The first appellant prayed for

this Court to go through page 6 of the cited **Hamidu S/O Hussein case** (*supra*). The accused who were identified by wearing black clothes were set free because there are a lot of black clothes.

The second appellant on his part was of view that, all what have been submitted by the first appellant touches them jointly. The first appellant added that at page 86-87 of the proceedings, the provision used was to set the appellants free but the court used it to convict the appellant. That is Section 230 of the Criminal Procedure Act, Cap 20 (R.E.2002).

The second appellant therefore prayed with all the submissions made, Section 230 of the Criminal Procedure Act be used to quash and set aside the conviction and sentence of 30 years so that the appellants can be set at liberty to join their families.

In reply, the learned State Attorney was of submission that the respondent supports the appeal. To reach such goal, the learned State Attorney argued four points to support the appeal.

The first issue is on identification. The learned State Attorney submitted that PW5 and PW9 who were the eye witnesses stated that the offence was committed in the night and they managed to identify the appellants using full light. The learned State Attorney submitted that it is not mentioned which type of light.

On identification, the second appellant stated that, if the incidence happened in the night there are things to be considered. **One**, the witness has to explain the source of light and intensity. **Two**, length of time the person been identified. **Three**, whether the person is familiar or not. **Four**, proximity to the person been identified. These were stated in the case of **Saidi Chaly Scania vs the Republic Criminal Appeal No.69 of 2005 (unreported).**

The learned State Attorney invited this Court to go thorough page 27 of the proceedings, PW5 did not state which type of the light. PW5 does not state the time spent used to identify the appellants and does not state the description of the appellants if they were tall, fat, thin, short etc.

PW9 at page 59 of the proceedings state that the appellants slept ground downwards "*kifudifudi*". The learned State attorney questioned how did PW9 manage to identify the appellants?

The learned State Attorney viewed that, soon after the appellants been arrested, identification parade was to be conducted. In this case the identification parade had weaknesses. PW9 at page 60 stated that "*the appellants were mixed tall one, short, black and white.*" This is not supposed to be. People of same size has to runup during identification parade.

PW7 who prepared the parade asked to tender the identification parade but it was rejected by the appellants. The record does not show if it was rejected or admitted as an exhibit. If it was objected, the Magistrate was required to make inquiries.

The issue of identification of the appellants herein calls great consideration in this appeal. The reason being that, it is now settled law in a case entirely depending on the evidence of identifying witness such evidence must be absolutely water tight to justify a conviction. In the case of **Waziri Amani vs R (1980) TLR 250** it was held; -

> *"The first point we wish to make is an elementary one and this is the evidence of identification, as Courts in East Africa and England have warned in a number of cases, is of weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight"*

In the case of **Hamis Shingo (appellant) vs the Republic, Criminal Appeal No. 586 of 2015 Court of Appeal of Tanzania at Dodoma** (unreported) it quoted with approval its own earlier decision in the case **Said Chally Scania vs**

Republic, Criminal Appeal No. 377 of 2013 (unreported) in which it was observed that; -

> *"...we think that where a witness is testifying about identifying another person in un-favorable circumstances, like during the night, he must give a clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all aids to unmistaken identification like proximity to the person being identified, the source of light and its intensity..."*

As correctly submitted by the learned State Attorney, the condition for visual identification includes for the witness to mention the source of light, its intensity, length of time being identified and familiarness. (**See Omary Msawila Mrisho vs the Republic, Criminal Appeal No. 593 of 2015 Court of Appeal of Tanzania (unreported).**

In the instant case, page 27 of the proceedings, as viewed by the learned State Attorney, reveals that, PW5 did not state which type of the light. PW5 did not state the time spent used to identify the appellants and did not state the description of the appellants if they were tall, fat, thin or short. Worse indeed, at page 59 of the proceedings it shows that PW9 stated the

appellants slept ground downwards "*kifudifudi*". For that reason, it was difficult for (PW9) to identify the appellants.

In the premises of the foregoing, I'm convinced that the nature and quality of evidence relied upon by the District Court of Kinondoni on identification of the appellants merit our intervention.

As regards the Caution Statement of the fourth accused which was used to convict the appellants, the learned State Attorney submitted that the appellants herein had no Caution Statement. At 17 of the proceedings, Caution Statement of the fourth accused, PW2 prayed to tender it as an exhibit but it was rejected by the advocate of the fourth accused because his client was tortured. With such rejection, the learned State Attorney was of view that, they had expected for the Magistrate to had made inquiry to find whether the Caution Statement was taken legally. The learned State Attorney refereed us to the case of **L' Mazombi vs Republic (1991) TLR 200** in which it was held;

> *"a trial within a trial has to be conducted whenever an accused person objects to the tendering of any statement he has recorded"*

The learned State Attorney was of view that they should have expected the Magistrate to have done so. It was the view of the learned State Attorney that such Caution Statement should have

been expunged. PW10 tendered 'nondo', lope, plaster, 'bisibisi' and a car but the Certificate of Seizure was not tendered. As such, the learned State Attorney failed to believe if the said exhibits were found at the scene. The learned State Attorney in concluding her submission supported the appeal. The appellants had nothing to rejoin.

I have carefully considered the submissions of both sides on the issue of Caution Statement; the records clearly reveal that the advocate of the fourth accused rejected the tendering of the Caution Statement because his client was tortured. It is true the trial Court did not conduct a trial within a trial as far as admission of such Caution Statement is concerned. In my found opinion, as opposed to the submission of the learned State Attorney, there is no mandatory procedural legal requirement of conducting a trial within a trial in the Resident Magistrate Courts.

In the case of ***KULWA ATHUMANI @ MPUNGUTI 2. HAMISI JUMA SHOKA 3. HARUNA HASSANI @ KICHWA 4. RAMADHANI SALUM @ BABU MSENDA VERSUS THE REPUBLIC CRIMINAL APPEAL NO. 29 OF 2005 Court of Appeal of Tanzania (unreported),*** it was held;

> *"unlike the practice applicable in the High Court, where a trial within a trial is held in order to establish the voluntariness of a disputed statement in the subordinate*

courts, no such practice is applicable. In that case, an enquiry on the voluntariness or otherwise of the statement can be ascertained from the evidence on the record...."

In the totality of the afore findings, the conviction entered against the appellants is quashed and the sentence imposed is set aside. The appellants are to be released from custody forthwith unless they are held for some lawful cause. It is ordered accordingly.

Y. J. Mlyambina

Judge

19/06/2018

Dated and delivered this 19th day of June, 2018 in the presence of the appellants in person and learned State Attorney Monica Ndakidemi for the respondent.

Y. J. Mlyambina

Judge

19/06/2018