IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO 386 OF 2017

(ORIGINATING FROM CRIMINAL CASE NO 161 OF 2016 FROM THE DISTRICT COURT OF MOROGORO AT MOROGORO)

FELEX JOSEPH @ APOLO @BABA FRANK..... 1ST APPELLANT.

JOSEPH LUNGWA @ JOSE .....2ND APPELLANT.

HALFAN MOHAMED @ MBAVU ..... 3RD APPELLANT.

ADINANI MRISHO .....4TH APPELLANT.

VERSUS.

THE REPUBLIC ..... REPUBLIC.

Date of last order:14/06/2018

Date of judgment:28/06/2018

JUDGMENT.

MAGOIGA, J.

The appellants namely FELIX JOSEPH @APOLO @ BABA FRANK, (AMOS LUNGWA @ BABA KURWA not in this appeal) JOSEPH LUNGWA @JOSE, HALFAN MOHAMED @ MBAVU AND ADINANI MRISHO were charged with one offence of armed robbery contrary to section 287A of the Penal Code, [Cap 16 R.E. 2002] in the District Court of Morogoro. Each denied the charge against himself. After full trial, save for the second accused who was acquitted), the rest were convicted as charged, and sentenced to 30 years' imprisonment. Aggrieved by both conviction and sentence the appellants have come to this court contesting for their innocence, hence this appeal.

The facts of this case are that on the 4th day of June 2016 at Lukobe within the District of Morogoro in Morogor region, the appellants stole one sub-woofer with its speakers valued at tshs 180,000/=, cash tshs 300,000/=,

mobile phone recharge vouchers valued at tshs 1,000,000/=, one mobile phone make Tecno Y3 valued at tshs 130,000/=and one mobile phone make tecno valued at tshs 30000/=being properties of HASSAN YASIN MATANDIKO and immediately before such stealing threatened the said HASSAN YASIN MATANDIKO with firearm and shot his wife NEEMA MNOKELA and his watchman one, VUMILIA ANDASON with firearm onto various parts of their bodies in order to obtain the said stolen properties. The matter was reported to police and after through investigations the appellants were arrested at different places and interrogated and were eventually brought to court where the conviction and sentence was meted out against them.

The appellants have come to this court armed with a total of 71 grounds of appeal as listed in their main and supplementary petition of appeal duly filed in this court as follows; the first appellant have 25 grounds of appeal, the second appellant have 15 grounds of appeal, the third appellant has 22 grounds of appeal and the fourth have 9 grounds of appeal.

Sincerely going by the petition of appeal the raised grounds of appeal are centered on the following aspects: -

(a) Visual identification
(b) Admissibility of the cautioned statement and extra judicial statement
(c) Ph, plea taking and no conviction
(d) Contradictions in the testimonies of prosecution witnesses
(e) Exhibits and witnesses
(f) Admission of PF3.
(g) Trial magistrate failure to consider case for defense.

When this appeal was called for hearing the learned State Attorney informed the court that she supports the conviction of the first, third and fourth appellants but as for second appellant she supports his appeal. She was ready for hearing. The appellants were equally ready for hearing.

The first appellant started to submit on the first ground in the supplementary that PW2 testified that he was able to identify the first appellant but when

cross examined he failed to tell the intensity of light which enabled him to identify him.

On the second ground the complaint of the appellant was that he was convicted on the basis of Exh P4 the extra judicial statement which was admitted without following procedure of law. He lamented that the statement was written outside the statutory period allowed by law. He cited the cases of ATHMAN JAMBI TUPA MWANAIDI V. REPUBLIC, CRIMINAL APPEAL NO 181 OF 2005 (Unreported) DSM(CAT) and JANTA JOSEPH KOMBA AND ANOTHER V. REPUBLIC, CRIMINAL APPEAL NO 95 OF 2006 (Unreported) DSM (CAT) in which it was held that statement taken outside the prescribed period should not be admitted and acted upon. First appellant submitted that his cautioned statement was not admitted because it was ruled out that same was recorded outside the prescribed time. He concluded his submission by humbly requesting the court to consider all his grounds and set him free by finding merits in his appeal.

As for the second appellant following the learned State Attorney supporting his appeal he opted to defer his submission until the state Attorney submits.

As for third and fourth appellants took the floor each was very brief as they submitted by asking the court to go through their petition of appeal, both main and supplementary and do justice to the by setting them free.

On the other hand, republic speaking through Ms. Selina Kapange, learned State attorney, she reiterated that on their part they agree with appeal of the second appellant, one JOSEPH LUNGWA @ JOSE and support conviction and sentence to the rest of the appellants. The learned State Attorney grouped the grounds of appeal in seven groups as follows: -

1. Visual identification grounds number-1, 3,5,8,9 and 12 for 1st appellant.
   - 1,3,4,5,6,7,8 and 9 for third appellant.
   - 2,3,9,11, and 12 for 5th appellant.
2. Admission of cautioned statement and extra judicial statement.
   - 2,3,4,15 and 16 of 1st appellant

- 6 and 7 of 3rd appellant.
- 8,13 and 14 for 4th appellant

3. PH, plea taking and no conviction – 1 for all,
   2,3,11 for 3rd and 4th appellants.
4. Contradictions on PW1,PW2, and PW3 – 4,6,7,and 10 for 1st appellant
   - 5 for 3rd appellant.
5. Exhibits and witnesses. – 11,13, and 14 for 1st appellant
   - 7,16,and 12 for 3rd appellant
   - 4 for 4th appellant.
6. Admission of PF3 – 18 and 10 for 1st and 4th appellants.
7. Trial magistrate failure to consider defense- 12,17 and 20 for 1st appellant.
   - 17 for 3rd appellant
   - 4[12] for 4th appellant.

The learned State Attorney after grouping them in seven heads, she started submitting that the appellants were convicted on the basis of visual identification, cautioned statement and extra judicial statement. Starting with group three of PH, Plea Taking and no case to answer and conviction. The learned Attorney submitted that at pages 1-2 of the typed proceedings the appellants were charged, charge read over to them in a language they understand. So according to her, everything was proper. On Ph at pages 8-10, according to her PH was properly conducted and all procedure were complied to the law. And on no case to answer at pages 45-47 of the typed proceedings the court observed all procedures and appellants were addressed under section 231 (1) of the CPA. Lastly on their complaint that they were not convicted is not true, the learned attorney submitted. He concluded by submitting that all the necessary procedures were followed to the letter and invited this court to find no merits in this group of grounds.

Submitting on the visual identification, Ms. Kapange submitted that PW1 and PW2 testified to court how they were able to identify one, third and fourth appellants. In the testimonies they said there was light and they were able to identify them in the identification parade. Ms. Kapange cited the case of ISDORY CORNEL RWEYEMAMU V. REPUBLIC, CRIMINAL APPEAL NO 230 OF

2014 (Unreported) Bukoba, (CAT) in which it was held that to mention at an earlier possible opportunity and knowing each other before is very important. According to her PW1 testified that there was a bulb. As that is not enough Ms Kapange submitted that after their arrest, they were subjected to identification parade and they were able to identify appellant 3 and 4. Not only that but the exhibit tendered such as cautioned statement and extra judicial statement were supporting the ground of visual identification. And the court was satisfied same were legally procured. In the case of TUAMOI V. UGANDA [1967] EA 84 it was held that repudiated evidence can be used to convict, she concluded to this group.

As to group 4 on contradictions of PW1, PW2 and PW3, the learned State Attorney submitted briefly that to her she sees no contradiction at all, and if any, are noted are minor that cannot destroy the main case. To bolt up her submission she cited the case of MOHAMED SAID MALULA V. REPUBLIC, [1995] TLR 3 in which it was held that contradictions, if any, the court has to decide whether they are minor and inconsistency. Minor contradictions which does not go to the root of the matter can be ignored. Submitting more on contradictions she cited SARKAR ON EVIDENCE at page 48 where he explained that:

> **" normal discrepancies of evidence are those due to normal errors of observation, memory, lapse of time....."**

According to the learned state attorney, the evidence on record of PW1, PW2 and PW3 who were able to identify the appellants was proper.

Coming to exhibits and witnesses the Attorney submitted that the appellants were not arrested at the scene of crime but at different places and even the gun was not retrieved from the appellants. She was quick to point out that but that do not affect available evidence on record. Winding up on this she submitted that the number of witnesses is not an issue and that section 143 of Tanzania Evidence Act is clear on this. Those called were enough to prove the offence charged, she concluded.

Coming to group six on admission of PF3, the learned state attorney was brief that everything was proper and PW10 came to testified. He examined them all and he tendered them, so no need to recall him. The learned counsel

submitted that PW6 and PW7 are the ones who conducted Identification parade and out of that parade PW1 and PW2 identified the third and fourth appellants. If one read the testimony of PW6 and PW7 they complied with the law. She invited the court to find no merits on this group too.

As to the last group that trial magistrate failure to consider their defense. The learned state attorney submitted in reply that the evidence available was enough and the court properly convicted the appellants. She wound up by asking this court to upheld the conviction and sentence of the appellants for their appeal is without any useful merits.

As to the second appellant the learned state attorney submitted that he was convicted based on the cautioned statement and extra judicial statement of the 1st,3rd, and 4th appellants. Himself he did not admit nor was he identified. The court can warn itself of uncorroborated evidence otherwise it is dangerous. This marked the end of the submission by the republic.

In rejoinder the first appellant submitted that despite long submission of the republic by State Attorney, he still maintained identification of himself is problematic as no favorable conditions for proper identification were there. The source of light was not fully explained.

The second appellant after the submission by the state attorney submitted that he appreciates the State Attorney to support his appeal and prayed to the court to set him free by setting aside his conviction and sentence.

The third appellant rejoined that he was seriously tortured and justice of peace saw him in bad condition. The extra judicial statement and cautioned statement were procured illegally, he lamented bitterly. As to the testimony of PW1 he submitted that according to the testimony of PW1 he was invaded and ordered to lie down how possible he could identify people why lying down, to him that is impossible. As to the testimony of PW2 he rejoined that Pw2 was that he was shot and run away to sleep, according to him, it is ridiculous to come and say he identified him if at all the situation he narrated occurred. As to the ID parade he rejoined that the investigator is the one PW2 and PW1 called the to come identify them under his instructions, he concluded.

The fourth appellant rejoined by submitting that ID parade was flawed as PW1 said CPL JUMA was the one calling them contrary to Regulation 2 (h) of the PGO it can be seen at page 22 of the typed proceedings. He failed to show our position but was able to identify during night, he is liar, he concluded. This marked the hearing of this appeal.

From the facts and the evidence on record this court has noted that on 4th day of June 2016 the house of PW1 was invaded by a group of armed people who injured PW2 and PW3 and made away with some properties of PW1 as listed in the charge sheet and testified by PW1.

Equally important to note is that the incidence occurred at 1:00 hrs or 2:00 hrs according to PW3, PW2 and PW1 respectively in their testimony midnight.

There is no dispute as well that the appellants were arrested in connection with the armed robbery that occurred to the home of PW1 and after thorough investigations were arrested, charged, prosecuted, convicted and sentenced to 30 years' imprisonment.

The appellants have raised in their petition of appeal a number of grounds to faulty the findings of the trial court in their struggle to distance themselves from the alleged offence of armed robbery. The republic in support of their conviction has grouped their grounds into seven heads and argued them in extensively and in details. This court finds and has observed that, out of the rival arguments of the parties, the success of this appeal lies on the identification of the appellants in the scene of crime and their cautioned statements and extra judicial statement of the appellants.

In determining this appeal, I find it apposite to start with the issues of identification first. This has prompted the court to revisit the testimony of PW1 and PW2, because without much ado PW3 testified categorically that in the circumstances she never identified anyone. This can be gathered from her testimony in chief at page 31 where she had this to say:

> **" After they stole the properties, the bandits left. I didn't identify any of the bandits because I was carrying my baby.**

We were scared. I went to untie my husband on his hands and legs. ....."

I have deliberately started with this piece of evidence because both the republic and the appellants were serious referring to PW3 that was one of the identifying witness. Which is not the case. Now the only witnesses who remain to prove identification was that of PW1 and PW2 in this appeal. Let me start with the evidence of PW2 as identifying witness. To make things easy I find it apposite to produce the relevant testimony of PW2 regarding identification of the bandits hereunder.

" .....on 04/06/2016 I was in the house of HASSAN MATANDIKO (PW1). On that date I slept on that house when PW1 went out for hi business. I used to sleep in his house for guarding his properties. At around 01:00 hrs I heard people breaking the shop gate. I went outside and when I reached near the gate, I saw BABA FRANK (1st Accused) and he carried a firearm. The first accused shot me with the firearm. I managed to identify him by using the electricity light. The bullet hit me at my hands, my legs and my stomach. I escaped and run away. I heard the first accused saying, catch that boy is coming at the back. At the back I met with 5th accused person. I turned back to the front house and met with the 4th accused person and 1st accused person. I managed to jump the fence and run towards my home.....

.....

.....After I have recovered, I told PW1 that the one who shot me is Fisrt accused (BABA FRANK) and two others which I can identify them by their face. On 17/06/2016 I was called by the police officer at Morogoro central police, I went there and was told that they have conducted the ID parade and follow me to identify the culprits. I was taken to the place where I found eleven people stationed. I was detected to identify the bandits. I managed to identify the 4th and 5th accused persons as the ones who invaded us. The accused stood in numbers 5 and 9 but I don't remember who stood in number 5 and 9. I

made my statement and went back..... ..... I managed to identity the 4th and 5th accused because they chased me for five minutes. The electricity light were on....." (emphasis mine)

I said earlier the testimony of PW 2 leave a lot to be desired. The mention of electricity light by itself is not enough to make a correct identification unless the PW2 has given the intensity of the light in questions. If PW2 was to be believed in his testimony the occurring of events as narrated by him was so quick that the possibility of incorrect identification is not eliminated in the circumstances. The time the incident occurred definitely PW2 woke up to be met by such a horrifying sequence of events. To worsen the situation PW2 managed to identify the 4th and 5th accused persons who were chasing him!! This is ridiculous. Leave alone it was night, but how can you identify someone who is chasing you. Unless PW2 has eyes in the back head which is impossible. The court of appeal has plethora of decisions giving guidance on how to treat cases on visual identification. The most famous is the case of WAZIRI AMANI V. REPUBLIC [1980] TLR 250, and the case of SCAPU JOHN AND ANOTHER V. REPUBLIC, CRIMINAL APPEAL NO 197 OF 2008 among others and citing numerous decision where it has been held and a trite law that:-

> " *in a case involving evidence of visual identification no court should act on such evidence* ***unless all possibility of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight***"(emphasis provided) .

On a further note and vein the Court of Appeal categorically stated that:

> " ..... *it is elementary that in a criminal case where determination depends essentially on identification,* ***evidence on condition favouring a correct identification is of utmost importance" (Emphasis provided).***

In the case of SCAPU (supra) the court of considering and making more the principle elaborative held that:

" watertight identification, in our considered view, entails the exclusion of all possibility of mistaken identity. The court should inter alia, consider the following.

. how long the witness had the accused under observation.

. what was the estimated distance between the two.

. if the offence took place at night which kind of light did exist and what was its intensity.

. 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 later concentration."

Guided by the above there is no doubt that PW2 could not have identify the appellants at the scene of crime. For the first accused whom he claims to know yes, but the timing as narrated by him a possibility of incorrect identification is not removed at all. The intensity of light is left hanging in the circumstances. Let alone other factors. The learned state attorney has vigorously argued that PW1 and PW2 were able to identify the appellants with the aid of light which its intensity is a mysterious in this case. As to the Identification parade is flawed very much because it is very unfortunate to conduct an identification parade where the witness cannot describe the bandits. What PW2 said was that he identified two people by face without further description of the physique or other distinctive marks. I wonder how PW9 managed to conduct such a parade to a witness whose description was just a face. Both PW1 and PW2 none gave any description of the people they said to have identified. I have read their testimony twice in vain. If there is any identification, then is dock identification to the 4th and 5th appellant.

It on the totality of the above reasons I hereby strongly hold that PW2 did not identify either of the appellants in the circumstances he has narrated and the pace of events that were happening on the material night were not allowing to identify a person by PW1.

Now having hold that PW2 identification cannot stand in this appeal, I know go to see the evidence of PW1 on identification. Apart from the first appellant, the rest of the appellants were not known to PW1. Now how come that PW1 that he came to testify by mentioning them by the names BABA KULWA, JOSEPH and the Fourth accused by face. PW1 like PW2 does not give any description of any of the appellants. The second accused was acquitted because he denied to be called AMOS and the republic failed to counter that. PW1 failed to tell how did he manage to identify the third accused (now the second appellant) by his name Joseph so is the second accused person who was acquitted. This can be other than dock identification, which is not acceptable at all. In this he has this to say:

" I know the accused persons in dock"

I have read and re read the testimony of PW1 there is no where he is saying I saw the first appellant and identify him in the scene of crime. The only evidence which is from PW2 and whom I have hold as I did that the circumstances of identification were unfavorable, uncertain and not watertight for reasons I have endeavors to explain. The only place PW1 is identifying the first appellant is in court which is dock identification for that matter. The testimony of PW3 at page 32 of the typed proceedings can also speak very loudly when PW1 knew of the participation, if any, of the first appellant. In this when PW3 was cross examined by the first appellant she thus said:

" PW2 told PW1 that he saw you at the scene of crime while he at hospital and not in the scene of incidence"

This piece of evidence negates the holding in the case of ISDORY CORNEL RYEYEMAMU V. REPUBLIC (supra) that PW2 mentioned at an earlier opportunity the bandits while the same was reported not even at the scene of crime but in hospital. And the argument that PW1 IDENTFIED the first accused/appellant dies a natural death.

PW1 who went to ID parade when cross examined by the third appellant(in trial is the fourth accused person) at page 24 of the typed proceeidngs how he managed to identify he had this to say:

"..... God assisted me to identify you during the identification parade...".

This piece of evidence is negating that the allegation that there was a light that enabled PW1 to identify the third appellant now. He never explained how God assisted him to identify the appellant. Was it by way of dreams or vision, none can tell. In sum PW1 identification is doubtful, uncertain and not watertight worth of believe.

It on the totality of the above I hereby say that the learned trial magistrate misapprehended the evidence of the prosecution to hold that the appellants were correctly identified. It is for the above reasons I decline to buy the submission by the learned State Attorney that the appellants were properly identified by PW1 and PW2. I proceed to find merits in this ground.

Now having find that the appellants were not properly identified, save dock identification, I now come to another aspect of the admitted cautioned statement and extra judicial statement. The cautioned statement of first appellant was not admitted in evidence for it was found to be taken in abrogation of the law. But the extra judicial statement was admitted as exhibit P4. I have looked into the content of the said extra judicial statement purported to be of the first appellant in this case. The names of the first appellant are **FELIX JOSEPH@ APOLO@ BABA FRANK** BUT the exhibit **P4** the extra judicial statement is of **FELIX JOSEPH HALAMGA**. This has tasked this court to ask whether these are one and the same or are just two different people. I have traversed the entire trial record more than once and I have failed to get a hit on any connection of these different names. In the circumstances I decline to associate exhibit P4 with the first appellant because if it was read and the names were differing I would expect the prosecutor to have taken note and connect this name to the first appellant. In the absence of such evidence, I hereby expunge exhibit P4 of FELIX JOSEPH HALAMGA because I find it foreign a document in the trial court proceedings. In the absence of the extra judicial statement of the first appellant, am constrained to hold that the first appellant has never been taken to justice of peace and if he was taken then the prosecution mixed up the extra judicial statement of FELIX JOSEPH HALAMGA to that of FELIX JOSEPH @APOLO @BABA FRANK.

Now having found that the first appellant was not identified in the scene of crime. And having found that his cautioned statement was correctly rejected by the trial court, further having found as well that the alleged extra judicial statement by the first appellant was not tendered but of someone else by the name FELIX JOSEPH HALAMGA, am constrained to hold that a case against the first appellant was not proved to warrant conviction.

I now move to see the rest of evidence available as against the 3rd and 4th appellant. The 3rd and 4th appellants were convicted on the basis of visual identification and the cautioned statement and the extra judicial statement. I will start with cautioned statement which was admitted as exhibit P1. Going through it is obvious and show the 3rd appellant never sign it to signify his willingness to give the statement. When asked that question he never put his finger print to signify the willingness to give the statement. This is fatal and cannot be cured. The Court of Appeal of Tanzania faced with similar cautioned statement in the case of MSAFIRI JUMANNE AND TWO OTHERS V. REPUBLIC, CRIMINAL APPEAL NO 187 OF 2006 (Unreported) Mwanza (CAT) at page 25 of the typed judgement the court had no option but to find and hold that it was not a cautioned statement of second appellant as it lacked his signature which signify his willingness to give. Eventually the court expunged from court record the cautioned statement which found to miss the signature of the giver willing to give the statement.

In the same vein and guided by the above decision am constrained to expunge the cautioned statement of the 3rd appellant from the court record.

Second, I have had chance to read the contents of both the cautioned statement and the extra judicial statement of the third appellant and find them do not fit to be confession that can warrant conviction of the co accused for reasons that the 3rd appellant was not actually confessing but is distancing from the offence in question and throwing all blames to his co accused or appellants. The relevant law that guides how a conviction can be meted out against a co accused is under section 33 of the Tanzania Evidence Act. For easy of reference I produce it here:

> Section 33 (1)- when two or more people are being tried jointly for the same offence or for different offences out of the same transaction***, and a***

confession of the offence or offences charged made by one of those persons affecting himself and some other of those person is proved, the court may take that confession into consideration against that other person. (emphasis mine)

(2) Notwithstanding subsection (1), a conviction of an accused person ***shall not base solely on a confession by a co accused person (emphasis Mine)***

I have produced the above provision to give this court a proper guidance. From the wording of the said section a conviction can only stand if the person making confession **incriminate himself first. (emphasis mine).** Basically what is contained in the alleged confession in the cautioned statement and extra judicial statement is not incriminating the third accused (now third appellant) but he is distancing from the offence of armed robbery. Therefore, this being evidence on record same cannot stand to have conviction as charged because of the reason I have explained above. Therefore, it was wrong for the trial magistrate to convict using a confession that was not at the first place implicating the confessor himself. In fact, in the extra judicial statement the appellant is saying he never participated but he knew plan of the bandits late and never participated but he is mentioning fellow appellant. The same I unhesitatingly say it does not qualify to be the basis of conviction of fellow appellants. And since it was the basis of conviction of the 4th appellant and the first appellant I hereby their conviction based on this was wrong and unfounded.

Now having seen and observed the glaring problems with the visual identification, the cautioned statement of the appellants and extra judicial statement of appellants without looking to other raised grounds it suffices at this stage to say I find merits in the entire appeal and proceed to allow this appeal in its entirety. The other grounds become redundant and this court will not venture into them. For the above reasons I hereby with dues respect differ with the submission of the learned State Attorney on this appeal.

All the above considered, I hereby find that the case for republic was not proved beyond reasonable doubt and as such quash the judgment, and set aside the conviction and sentence of 30 years' imprisonment. The appellants are to be release from the prison unless otherwise held for lawful cause.

It is so ordered.

S.M. MAGOIGA.

JUDGE.

28/06/2018