IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 50 OF 2019

(Originating from Criminal Case No. 326/2017 of Kilosa District Court and Kilosa)

DOTTO CHILABI..... 1ST APPELLANT

YOHANA S/O SAMWEL ..... 2ND APPELLANT

MAFUMBA S/O HUSSEIN .....3RD APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last Order: 30/08/2019
Date of Judgment: 21/10/2019

J U D G M E N T

MGONYA, J.

The Appellant, **DOTTO CHILABI, YOHANA S/O SAMWEL** and **MAFUMBA S/O HUSSEIN** were arraigned before the Kilosa District Court charged with **Armed Robbery contrary to section 287 A of the Penal Code, Cap. 16 [R.E. 2002].** The Appellant was found guilty, convicted and sentenced to thirty years imprisonment. Being aggrieved by the

decision of the court, the appellant has appealed to this court against both conviction and sentence.

In the Petition of Appeal, the appellant basically had nine grounds of appeal. However, just before hearing of the Appeal, Appellants presented before the court another six additional grounds of which basically were just repetition of the above nine grounds, of which the same are as below:

1. ***That the learned trial court erred in iaw and fact in convicting the Appellants on the basis of the defective charge.***
2. ***That the learned trial court erred in law and fact for failure to observe that the evidence laid before the court by the prosecution witnesses (PW1 and PW2) differs with the charge sheet.***
3. ***That the learned trial court erred in law and fact by convicting the Appellants without considering the principles which have to be taken into account in respect of chain of custody and preservation of the exhibits.***
4. ***That the learned trial court erred in law and fact in convicting the 3rd Appellant by relying on the exhibit P3 (cautioned statement) which was illegally obtained and un-procedural admitted in court.***

5. ***That the learned trial court erred in law and fact for convicting the Appellants by relying upon unreliable and incredible visual identification evidence of PW1 and PW2.***
6. ***That he learned trial Magistrate erred in law and fact when failed to assess carefully the credibility of the prosecution witnesses (PW1 and PW2) what's why he arrived in a wrong findings.***

On their submission in chief, which was very brief, all Appellants prayed the court to consider their grounds of Appeal and set them free.

Ms. Faraja George the learned State Attorney, in her submission made it clear that going through the grounds of Appeal and the entire record, the Republic supports the Appeal. Out of 15 grounds of Appeal, Ms. George requested the Court that she is to submit, on the 3rd ground respectively on identification which dominated the Appellants conviction. However, in their view, the said identification was poor to command the Appellants' conviction and sentence thereafter.

The learned State Attorney averred to strongly believe and agree that, in this case the identification evidence of accused

persons was not reliable at all. According to PW1 (Hassan Matetemi - Victim) confessed that the event took place at midnight around 01:00 on 06/11/2017.

Further, according to the witness, is that they were invaded by people whom he could not identify since it was night. However, they succeeded to steal some items such as television set, remote control to the later, music system and other items.

On the testimony of PW2 the learned State Attorney states that PW2, the wife of PW1 - One Shari Sharifu Sokoine also admits to have been invaded by some people at their house at night. In her testimony, she alleged that she was able to identify two people out of the invaders. However, she did not state their description. Further, she said that they were using torch to see them. From that fact, it was Ms. George's assertion that, if the invaders were using the torch towards the victims, it was then not easy for the victims to see the invaders.

Therefore, from the above submission Ms. George the learned State Attorney, declared that identification of the accused persons by the witnesses was not reliable of which did not follow necessary procedure/elements of identification especially at night as it has been stated on various cases. It is from the above stated facts which emanates from the victims'

testimony during trial, the learned State Attorney affirmed that **the Appellants' third ground has merit.**

Still, the learned State Attorney admitted, to have also seen some discrepancies on our Prosecution case during trial. She averred that, according to PW4, it seems that the 2nd Appellant, was caught with some stolen items as seen in see pg. 11 - 12 of the proceedings. Further, those items were identified by the victims (PW1 and PW2) to have been the stolen properties taken from their home.

Moreover, these parties on admission before the court did not adhere to the law; since the person who tendered those properties for admission before the court was PW1 and no one else. The question here comes as to where did PW1 acquired those properties. Further, there was no certificate of seizure in that respect. Ms. George asserted that the matter of seizure is of utmost important as the same is well dictated under section **36 (2) of the Criminal Procedure Act. Cap. 20 [R. E. 2002]** where requires the person who has been searched, at the end of the search exercise, there must be certificate of seizure signed by witnesses so as to seize the stolen properties. However, in the event, where the victim himself is the one who brought the stolen items in court by himself, that brings uncertainty and doubt.

Submitting further, the learned State Attorney affirmed that there is also PW5 one Abdul Mohamed Mkapila's testimony on pg. 12, who alleged that, on that fatal date, he went to the scene of event and see one person arrested for theft. From the same, it is the learned State Attorney's view that the said testimony was not corroborated at all. Further, the witness did not say who was caught ready handed. In the event, the learned State Attorney prayed that, the Appeal be allowed.

In their short rejoinder, all the Appellants supported the submission of the learned State and prayed that the appeal be granted.

I have carefully considered and re-evaluate the records before the trial court. As the learned State Attorney said earlier, it has also come to my knowledge that, the proper identification in favor of the Appellant was not conducted.

Out of that, I will focus on with the issue of visual identification whether the Appellants were identified. In this respect, the case for the prosecution depended on the evidence of PW1 the victim who said that he identified the Appellants from the torch despite the event took place at night; the witness claimed that he identified the Appellants.

Unfortunately, as said by the learned State Attorney is that the light which was used is only that from the torch. Further to that, we are not told any other type of light which

identification. In this case also the court referred to the case of ***OMAR IDDI MBEZI AND THREE OTHERS VS. REPUBLIC, Criminal Appeal No. 227 of 2009 (Unreported)*** which pointed out the guidelines to be followed in order to avoid mistaken identity of the suspect, to mention just a few, as follows:

(i) If the witness is relying on some light as an aid of visual identification he must describe the source and intensity of that light.

(ii) The witness should explain how close he was to the culprit(s) and the time spent on the encounter.

(iii) The witness should describe the culprit or culprits in terms of body build, complexion, size, attire, or any peculiar body features, to the next person that he comes across and should repeat those descriptions at his first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence.

(iv) Ideally, upon receiving the description of the suspect(s) the police should mount an identification parade to test the witness's memory, and then at the trial the witness should be led to identify him again.

Apart from the above guidelines, it is the fact that in the case before this appeal, had many other identification discrepancies surrounding it. In the above stated circumstances, I join hands with the learned State Attorney that the issue of identification was not proved beyond reasonable doubt in trial court.

From the above, this mistake should be resolved to the benefit of the Appellants and that the ground on identification indeed has merits.

I further support the appeal that there was also irregularity of non-compliance with the law in respect of tendering of the stolen properties for evidence before the court. In the event of the same, as well stated by the learned State Attorney, and in the event that I have endorsed that there was noncompliance of law in that respect, I am of the view that those properties since were stolen, had a chain of custody from where they were discovered after the theft, where they were kept and under whose custody, before the same were brought to court

as evidence. By the same to be tendered by the victim himself, this indicates the clear case of break of the chain of the custody to the same. What is going to happen if someone says that the said properties were not stolen at all in the first place?; and claim that it is the victim himself who framed the Appellants into the theft case? Under the given circumstances, one can believe the story on the contrary.

From what happened and especially in admission of the stolen properties before the court by the victim himself instead of the even police who apprehended the same and kept the same, the admission is said to be inappropriate under the law.

In the case of ***CARNAL SAMSON V. R. [1972] HCD No. 184*** it was held that:

> ***"A threat is of a highest value when it corroborates some other evidence in order to link the accused with the offence charged. It is weakest when in its own, for it is then reduced to mere circumstantial evidence in the form of a disconnected chain."***

From the above, it is my considered opinion that, the Republic at the trial court did not prove the Appellants' guilt in connection with the stolen properties.

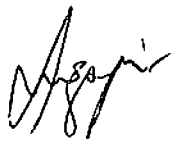
From the above grounds of appeal, it is obvious that the court didn't do justice to the Appellants. The Appellants were to be legally and properly identified to command conviction.

From the above, it is my conviction that the Appellants did not get credible trial. Out of the above legal errors, I see that the benefit should lie onto the Appellants.

As the trial court proceedings were nullity, there was no conviction. For the same reason, the sentence is also set aside. In the event therefore, I allow the appeal. Further, I proceed to order that the Appellants should be released from prison forthwith unless he is held on some other lawful cause.

It is so ordered.

Right of Appeal explained.



L. E. MGONYA
JUDGE
21/10/2019

COURT: Judgment delivered in the presence of Ms. Faraja George, State Attorney for the Respondent, the Appellants and Ms. Veronica Bench Clarke in my chamber today 21st October, 2019.

L. E. MGONYA
JUDGE
21/10/2019