IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

HIGH COURT CRIMINAL APPEAL No. 162 OF 2019

(Original Criminal Case No. 45 of 2019 of Sengerema District Court)

SWEETBERT VICENT MATATA .....1ST APPELLANT

PETER CHALOMOLA ..... 2ND APPELLANT

KELVIN NKWAYA ..... 3RD APPELLANT

SHIDA JOSEPH @ MACHIBYA ..... 4TH APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

04th May & 20th July, 2020

TIGANGA, J.

Before the District Court of Sengerema the appellants stood charged with five counts all of Armed Robbery contrary to section 287A of the Penal Code Cap 16 of the Laws as amended by Act No. 4 of 2004.

According to the particulars of the offence as reflected in the charge sheet and evidence, all offences were alleged to have been committed at different time on the same date of 19th day of January, 2019. The offence according to the particulars involved so many properties and were committed against different persons all of Majengo Irenza Village in

Sengerema District Mwanza Region. The victim of the offences in the respective counts are Ndalahwa Kisusi, Boniphace Moti, Chausiku Kimoga, Marwa Mwenge and Mnege Mavina, in the 1st, 2nd, 3rd, 4th and 5th counts respectively. In all counts the weapons used were a panga and club, to obtain the properties listed in the charge sheet.

The appellants pleaded not guilty to the charge before the trial District Court. All facts constituting the offence were disputed during the preliminary hearing. At the end of the trial, the trial magistrate found the offence of Armed Robbery to have been proved at the required standard; consequently they were convicted and sentenced to thirty years imprisonment for each count, which were to run concurrently.

Aggrieved by the findings and the sentence, the appellants appealed to this court by filing a total of seven grounds of appeal, that was before the counsel representing them had asked to file the amended grounds of appeal which was filed with a total of eleven grounds.

For the purpose of clarity, I will reproduce them all before making a summary of the submissions in support or against the grounds of appeal, as follows:-

1. That the trial magistrate erred in law and facts in convicting the accused persons relying on insufficient evidence of identification which was again not analysed by the trial court.
2. That the leaned trial magistrate erred in law and facts for wrongly relying on the evidence of PW10 which was taken contrary to

section 127(2) of the Evidence Act as amended by Act No. 4 of 2016.

3. That the learned trial magistrate erred in law and fact for allowing additional evidence of one G.1249 DC Aloyce PW11 without affording a right to be heard to accused/appellant.
4. That the learned trial magistrate erred in law and fact for not asking the accused persons whether they/he wishes to put any question to witness or make any statement as required under section 229(3) of the Criminal Procedure Code Cap 20 R.E. 2002 (sic).
5. That the trial magistrate erred in law by admitting exhibit PF3 that is P1, P2 and P3 without adhering to section 240(3) of Criminal Procedure Code Cap 20 R.E. 2002 and jurisprudence of law (sic).
6. That the alleged offence was committed on the 19/01/2019 and the accused being arrested on 11/02/2019 and 13/02/2019, without any claim to flight against and no naming of the suspect at the scene, the magistrate erred to convict the accused person as he did.
7. That the trial magistrate erred in law to convict the accused persons basing on prosecution's case coupled with serious contradictions and inconsistencies which resulted into the case not to be proved beyond reasonable doubt.
8. That the trial magistrate erred in law to convict the accused persons without considering the appellants evidence.

9. That the trial magistrate erred in law for failure to comply with Section 192(1) (2) (3) of the Criminal Procedure Act (Cap 20 R.E. 2002).
10. That the trial magistrate erred in law to convict the accused persons on the defective charge.
11. That the whole decision was against the law and evidence on record.

The amended grounds of appeal were served to the defending State Attorney who opted not to file any reply, but to argue the appeal viva voce.

The appeal was argued orally by the parties. The appellants were represented by Mr. Emmanuel John while the respondent Republic was represented by Miss. Rehema Mbuya learned Senior State Attorney.

Mr. Emmanuel John started with the fifth ground of appeal, which raises a complaint that the trial magistrate erred in law by admitting PF3 in a total disregard of section 240(3) CPA [Cap 20 R.E. 2019] and the jurisprudence of law.

That the magistrate erred in law by not informing the accused persons of their right to demand the person who prepared the said medical report for cross examination, he referred me at page 26 and 27 of the proceedings and that by failure so to inform the accused persons, their right to hearing was violated.

Further to that he said the PF3 were tendered collectively the procedure which has already been condemned by the Court of Appeal of Tanzania in the case of **Anthony Masanga Vs. Penina (mama Mgesi)**

and Another Civil Appeal No. 118/2014 (CAT) (Unreported) at page 7 of the judgment, that exhibits should not be tendered collectively.

He also submitted that the other issue is non reading of the exhibit after the same has been admitted, He cited the case of **Lista Chello vs. Republic,** Criminal Appeal No. 220 of 2017, at page 12 CAT, that failure to read the exhibit is fatal, he prayed the PF3 to be expunged from the record.

That was followed by the first ground of appeal, on which the counsel complained of the conviction basing on the identification which was insufficient with the un-analysed evidence. He cited the authority in the case of **Waziri Amani vs. The Republic** (1980) TLR 250 he said four criteria laid in the case of **Waziri Amani** which are:

(i) Time for observation of the accused.

(ii) Distance at which he was observed.

(iii) The condition in which the observation occurred

  (a) Light and its intensity.

(iv) Whether the witness knew the accused person before.

To cement on that argument, he cited the authority in the case of **Geofrey Isdory Nyashio vs. Republic,** Criminal Appeal No. 270/2017 CAT-Dar es Salaam page 12 of the judgment that the issue of intensity of light must be shown in the proceedings. In this case PW1 said that he identified the appellant but did not tell the intensity of light. That is so in the evidence of PW3 at page 10 where he said he identified the 3rd Appellant without mentioning the criteria for identification.

Also at page 16, PW6 said he identified the 4th appellant without giving the criteria of intensity of light.

He submitted further that, PW7 at page 17 said he identified the 2nd appellant without telling the criteria, so at page 20 of the proceedings that PW8 identified the 1st and 2nd appellant but the criteria was not shown as well.

Last on that point, he said that PW10 said he identified the 1st appellant but without giving the criteria. He concluded that the identification is not proper at all, despite the facts that the prosecution witnesses knew the accused persons before.

In respect to the second ground of appeal, that at page 25 of the proceedings that PW10 was child of tender age i.e 12 years old, he is in the Evidence Act Section 127(2) the child of tendered age, so he was required to give promise that he would speak the truth before his evidence was recorded. He cited the authority in the case of **Shaibu Naringa Vs. Republic,** Criminal Appeal No. 34/2019 at page 7, he prayed the evidence of this witness to be disregarded.

On the 3rd ground of appeal is that one of the principles of fair trial is that both parties must participate in the proceedings.

He submitted that, when the prosecution asked to add one witness, the appellants were not asked. Therefore DC Aloyce was added without the Appellants being asked. According to him that was contrary to the principle of Natural Justice. He cited the case of **The Judge in charge – High Court Arusha vs. Munuo Ng'uni** [2006] TLR 44 in which the Court of

Appeal held *inter alia* that, failure to observe the right to be heard vitiates the whole proceedings.

On ground 6, the complaint was that, the appellants were not mentioned by the witnesses who alleged to have identified them at the earliest opportunity after the commission of the offence. he submitted that is contrary to the principle in the case of **Peter Johnson Irenge and 2 Others vs. Republic,** Criminal Appeal No. 13/2008 at page 14 (CAT).

He submitted that in this case all prosecution witnesses who alleged to have identified the accused persons did not mention them to the person who attended at the scene immediately after the offences were committed.

He asked the court to rely on the principle of **Mniko Iranda @ Mniko Mwita Vs. The Republic,** Criminal Appeal No. 137 and 138 of 2007 at page 17.

With regard to ground number 7 and 11 which were argued together, in these grounds the complaint was that the prosecution evidence was contradictory and had a lot of discrepancies and inconsistencies, therefore the case was not proved beyond reasonable doubt.

He cited a number of contradictions, in the first count while the charge sheet shows that the robbers were four but the witness PW2 said he identified only one, but did not mention him, while in court he said he knew them all. It was his submission that was a dock identification which is illegal in the case of **Mniko Iranda @ Mniko Mwita Vs. Republic** (supra).

He said the charge mentioned the make of the stolen phone to be Nokia and the value to be T.shs. 45,000/=, but the witness just said two phone without mentioning the make and value.

That is so to PW4 where he said he was beaten with panga and failed to mention the value of the phone, while the charge sheet did not mention the beating with a panga and mentioned the value of the phone.

Also that in the 3rd count the witness PW1 said he identified the 1st appellant only, he did not know where other witnesses came from that his testimony is different from that of other witnesses. He submitted that in 4th count PW6 said that he identified Machibya only, but the 4th count involved all accused persons. However we are not told who mentioned them, while the items alleged to be stolen are different from those reflected in the charge sheet.

In the 5th count PW9 was not at the scene but PW8 was, and said he identified only two accused persons; however we are not told where other accused persons in that counts come from. He submitted that the witness said the motorcycle was stolen, however, the charge did not mention the knife and motorcycle. All these are contradictions which affect the evidence and shake the credibility of the prosecution case.

In ground No. 9, he complained that the court did not comply with section 192(1), (2) and (3) of the Criminal Procedure Act (supra). He cited the case of **Felista Thobias vs. The Republic,** Criminal Appeal No. 02/2007. He submitted that the preliminary hearing was not conducted in accordance with the law.

Last but one is ground of appeal No. 4 which is built on the complaint that section 229(3) which require that the accused person who is not represented must be told what is supposed to be done. He submitted that the appellants did not cross examine, he submitted probably they did not cross examine because they were not told of such right.

Last is ground of appeal No. 10, on that he raised a complaint that the fact that the trial magistrate convicted the appellants basing on the defective charge sheet, makes the conviction un sustainable. He submitted that the charge sheet does not show whether it was original or amended.

He said it is not known which charge sheet was read over to the accused persons. He cited the authority in the case of **Geofrey Isdory** (supra) at page 11, where their lordships had extensive discussion about that problem, he believed that the accused persons were charged under wrong provision of the law, and when the prosecution became aware, they attempted to amend but forgot to put a date. The counsel asked in the end that the Appeal be allowed.

Miss Rehema Mbuya learned Senior State Attorney, who was representing the respondent, in her submission in reply she objected the appeal. Starting with the 1st ground of identification, she submitted that the appellants were properly identified.

She recited the case of **Waziri Amani Vs. The Republic,** (supra) and submitted that the source of light in the case at hand was mentioned in every count, she submitted that PW4, said there was light but did not mention the source of light, even the Republic doubts him, but the rest of witnesses mentioned the source.

She submitted that at page 16 of the proceedings, PW5 said that there was a shining light which assisted him to identify the accused, while PW6 said that he identified the 4th appellant by using solar power light.

Further to that, she submitted that at page 20 of the proceedings, PW8 said he identified the 1st and 2nd appellants and that there was light which assisted his identification, while on the other hand PW10 said in his evidence that he identified Sweetbert through the light of electricity.

She cited the authority in the case of **Frank Christopher @ Mally vs. The Republic,** Criminal Appeal No. 182/2017 CAT where the court held *inter alia* that giving descriptions is important if the accused is a stranger to the witness. He also cited the case of **Lameck Bazil Pameras Mango Vs. The Republic** Criminal Appeal No. 476/2016 CAT – It was also held that description was necessary. She submitted further that at police station the witnesses mentioned the accused persons whom they identified and that, according to her, was the assurance that they identified the appellants.

On the second ground of appeal, she submitted that the child PW10 promised to speak the truth therefore she complied with section 127(2) of the Evidence Act. However, even if the court finds that it was not complied with and decides to expunge the evidence of that witness, then she was of the opinion that the remaining evidence from other witnesses can sustain the conviction.

Regarding the 3rd ground of appeal, that the addition of PW11 was against the principle of natural justice, Miss Mbuya submitted that, there was no such omission, and if there is one, then did not occasion any

injustice to the appellant. She submitted that the ground there lacks merits.

With regard to the 4th ground of appeal, that the trial magistrate did not inform the appellants the rights to cross examine, she submitted that, that omission did not occasion any injustice as it was not all the time that the appellant failed to cross examine, as at some point they cross examined. She submitted that, that means that when they did not cross examine, they forsake that right or had no question to ask, but they were aware of the right.

On ground No. 5, that the magistrate admitted exhibit P1, P2 and P3 which are the PF3's of the victims without complying with section 240(3) CPA (supra), she submitted that the said exhibits were tendered without objection, as had the appellant objected, they would have said and demanded the person who prepared those documents to be called for cross examination on the said documents.

On ground No. 6th and 7th she submitted that there is no any contradiction and the suspects were mentioned at the earliest opportunity possible. She further submitted that as the offence were committed on the same date but at different times and places and against different people, the difference in evidence is inevitable.

Regarding the submission that the trial magistrate did not comply with section 192 of the Criminal Procedure Act, (supra) she submitted that though not fully complied with, but it is not fatal to the proceedings as the same intends to accelerate trial, therefore the same did not cause any injustice.

On the ground that the charge was defective she submitted that as the charge was accepted by the court. She submitted further that as the Accused persons understood their charge and were able to stand trial and properly follow the proceedings, there is no injustice caused and the charge was clear, that is why they pleaded to the charge and managed to defend themselves. She cited the authority in the case of **Jamal Ally @ Salum Vs. The Republic** Criminal Appeal No. 52/2017 (CAT) (Unreported) where it was held that wrongful citation is fatal only if it causes injustice to the parties. He asked the court to cure the defect under Section 388(1) (a) of Criminal Procedure Act (supra), in the end; she submitted that having assessed the evidence on record she concluded that the offence against the appellants was proved beyond reasonable doubt.

In his rejoinder Mr. Emmanuel submitted that their problem was not the description but the intensity of light and that the magistrate did not analyse the criteria.

He further submitted on ground 4 that there was injustice, while on ground 5 he submitted that it was the duty of the court not of the parties, while on ground No. 7, the admitted that there are contractions.

On ground No. 9 he insisted that the accused persons did not understand the nature of the offence. On ground No. 10, he insisted that the accused persons were charged under the repealed law.

In the end he submitted that the prosecution failed to prove the case beyond reasonable doubt.

Having summarized the grounds and arguments by the counsel for parties extensively, I now turn to address the grounds of appeal that calls for determination.

Given the nature of this case, the circumstances in which the offence was allegedly committed and the nature of evidence relied up on by the prosecution as well as the grounds of appeal, I find it important to deal with the grounds of appeal in the manner they were arranged and argued by the counsel for appellants and the State Attorney for the respondent.

The first ground is that, there was no concrete evidence to prove that the Appellants were identified. In the argument the appellant's counsel submitted that the conditions laid down in the case of **Waziri Amani vs Republic** (supra) were not analysed especially on aspect of the intensity of light.

The authority in the case of **Waziri Amani, (supra)** as rightly cited by the trial magistrate in her judgment and referred to by the counsel for the appellants, properly analysed, requires that whenever, the evidence basis on visual identification, in the condition which is a bit unfavourable by nature, the court needs to prove that the evidence meets the followings as held hereunder;

> *"The evidence of visual identification is of the weakest kind and no count should act on it unless all possibilities of mistaken identity are eliminated, and the court is fully satisfied that the evidence before it is absolutely water tight. Before relying on such evidence, the trial court should put into consideration the time the witness had the accused person under observation,*

the distance at which the witness had the accused person under observation, if there is any light, then the source of light, and intensity of light and whether the witness knew the accused person before".

This is also the position in the case of **Gozibert Henerico vs. The Republic,** Criminal Appeal No. 114 of 2015 (CAT) (Unreported).

Analytically, where the evidence to be relied upon is of visual identification, the courts need to satisfy itself on the following factors before relying on such evidence.

(i) The time the witness had the accused under observation,

(ii) The distance at which he observed hi,

(iii) The condition in which observation occurred for distance, whether it is day or night (If it was night). Whether it was dark, if so was there moon light or hurricane lamp etc., Here the source of light, and intensity of that light.

(iv) *Whether the witness knew or had seen the accused before.*

Now, in this case before trial court, a total of nine prosecution witnesses gave evidence of identification as they alleged to be present at the scene where the offence was allegedly committed in every respective counts, while two witnesses namely PW9 and PW11 were not present when the offence was committed.

This means, the evidence of PW1, PW2, PW3, PW4, PW5, PW6, PW7, PW8 and PW10 must meet the above mentioned criteria's.

In their evidence, they all testified that the offence was committed at night. They did not however describe the condition, as to whether it was

dark or there was a moon light. They all mentioned that they were able to identify the appellant because there was light; they mentioned the source of light to be either electricity or solar power source.

However, all did not mention the time they spent observing the accused persons, neither did they mention the distance from where they observed the accused person, and lastly they did not mention the intensity of light which they actually used to observe and identify the Accused persons now the appellants.

This means, three aspects or criteria mentioned in the case of **Waziri Amani vs. The Republic,** (supra) were not mentioned by the prosecution witnesses who alleged to have identified the appellant at the scene.

That being the case, there is no way it can be said that the evidence by all above listed witnesses are clear from all the possibilities of mistaken identity, and that the evidence is absolutely water tight.

That said, I find the first ground of appeal to have merit, and therefore allowed.

Regarding the 2nd ground of appeal, that while receiving the evidence of PW10, the court did not comply on the directives contained in section 127(2) of the Evidence Act (Cap 6 R.E. 2019). As amended by Act No. 4/2016. This provision provides as follows:

> *"(2) A child of tender age may give evidence without taking an oath or making an affirmation but, shall before giving evidence, promise to tell the truth to the court and not to tell lies".*

This provision has been interpreted by a number of authorities by the Court of Appeal, one of them being **Shaibu Nalinga vs. Republic,** Criminal Appeal No. 34/2019 CAT – Mtwara (unreported). In that case, at page 8 of the judgment, it was held *inter alia* that;

> *".....after the court was satisfied that PW1 did not understand the nature of oath, it ought to have required her to promise to all the truth and not to tell lies.* ***That promises should have been reflected in the proceedings .....,if not, this is a fatal irregularity which vitiate PW1's evidence"*** (Emphasis supplied).

While in the case of **Godfrey Wilson vs. The Republic,** Criminal Appeal No. 168 of 2018 (unreported) which is quoted in **Shaibu Nalinga Vs. Republic** (supra) it was held inter alia that:-

> *"In the absence of promise by PW1, we think that her evidence was not properly admitted in terms of section 127(2) of the Evidence Act as amended by Act No. 4/2016. Hence the same has no evidential value"*

In **Shaibu Naringa vs. Republic** it was held by way of conclusion on the issue that;

> *"the evidence of PW1 which was taken contrary to the law lacks evidential value and it is here by discarded from the record".*

In this case, the trial magistrate indicated in the proceedings of 09/07/2019, when PW10 testified, having realized that PW10 was 12 years old, the court recorded the following findings:

"Court:

After the witness examined, it is noted that she is a child under tender age therefore this court requires her to promise that she is going to state the truth as required by section 127 of TEA as amended.

Sgd –RM

09/07/2019

PW10 – promise and states."

The proceedings do not indicate and reflect the promise by PW10, this in against the law as held in the case of **Shaban Nalinga's** case, as we cannot know, and there is no evidence on record to prove that, the promise was made. That being the case, I find the evidence by PW10 to have been recorded without complying with section 127(2) of the Evidence Act as amended by Act No. 4/2016, the said evidence lacks evidential value and therefore it is hereby expunged from the record.

With regard to ground No. 3 of appeal, that allowing additional witness without asking the appellants violates the principle of natural justice. This ground, should not detain me much, as I find no merit in it, the law gives the duty to the prosecution to call witness to prove the case at the required standard, the law allows the court at its discretion to allow the prosecution to add witness, since the evidence of witness is subjected to scrutiny, I find allowing the prayers to be not in violation of the principle of natural justice.

Grounds No. 4 and 10 will be dealt with and resolved together, that the court did not inform the appellant the right to cross examine as required by section 229(3) CPA and that the charge was defective. These grounds also will not retain me much, as rightly submitted by Miss Rehema, SSA, the omission in the fourth ground did not cause any injustice as the accused persons, in some instances, to some witnesses they cross examined while to others they did not, this means, they were informed of the right, it was that either they had no questions to ask, or decided on their own to forsake their right to cross examine. That being the reasoning, this ground lacks merit, it is consequently dismissed.

In ground No. 10, also the Appellant as they pleaded to the charge and stood trial and were following the proceedings, then that did not cause or occasion any injustice to the appellants. This means the complaints are nothing but speculation and imaginary. The same have no merit and are dismissed.

Ground No. 5, raised a complaint that exhibit P1, P2 and P3 were admitted without adhering to the provision of section 240(3) of the Criminal Procedure Act (Cap 20 R.E. 2019).

This provision provides as follows:

"240(3)

When a report referred to in this section is received in evidence the court if it thinks fit, and shall, if so requested by the accused person or his advocate summon and examine or make available for cross examination the person who made the report, ***and the court shall inform the accused***

person of his right to require the person who made the report to be summoned in accordance with the provision of this subsection". (Emphasize supplied).

The report referred to in this section is found on the title of the section and it is captioned as "statements by medical witnesses". PF3's which were tendered as exhibit P1, P2 and P3 in these proceedings are one of the "medical report" referred to under subsection (3) above.

This provision has been interpreted by the Court of Appeal in a plethora of cases few of which; I am going to refer here. In the case of **Syprian Justice Tarimo vs. The Republic,** Criminal Appeal No. 226 of 2007 CAT – Arusha (unreported) at page 9 of the judgment, the Court of Appeal of Tanzania, faced the similar situation and while interpreting section 240(3) it held inter alia that;

> *"This court has held on numerous occasions that once the medical report as a PF3 has been received in evidence under section 240(1) of the Act, it becomes imperative on the trial court to inform the accused of his right of cross examining the medical witness who prepared it; See* ***Kashana Buyoka Vs. Republic,*** *Criminal Appeal No. 176 of 2004 (unreported) and* ***Sultan s/o Mohamed Vs. Republic,*** *Criminal Appeal No. 176 of 2003 (unreported). The court has as a result, held that if such a report is received without complying with the provision of section 240(3) of the Act it should not be acted upon".*

The issue is whether the trial court complied with this mandatory requirement? My thorough visit of the proceedings reveals that the provision was not complied with by the learned trial magistrate.

On that ground, the counsel for the appellant also complained that, even after the Exhibit P1, P2 and P3 were admitted, they were not read over, to the appellants, he cited the authority in **Lista Chalo vs. The Republic;** Criminal Appeal No. 220 of 2017, in which according to him the authority condemned the non reading of the exhibit to be fatal;

It is true in the case cited by the counsel other cases were cited. In that case the court held *inter alia* that;

> *"The law is settled on this aspect that failure to read out an exhibited document denies the accused an opportunity to know its content and therefore vitiates the trial'.*

As part of emphasise on that point, they referred the authority in the case of **Joseph Maganga and Dotto Salum Butwa vs. The Republic,** Criminal Appeal No. 536 of 2015 (unreported) in which it was held *inter alia* that;

> *"The essence of reading out the document is to enable the accused person to understand the nature and substance of the facts contained in order to make an informed defence. Failure to readout the contents of the cautioned statement after it is admitted in evidence is fatal irregularity".*

Also see **Syprian Justine Tarimo vs. Republic** (supra) at page 10. In this case, the records reveal nothing but the facts that, not only that the provision of section 240(3) of the Criminal Procedure Act [Cap 20 R.E.

2019] was not complied with, but also that, the exhibits P1, P2 and P3 were even not read out after their irregular admission in evidence. That said, I find the ground to be meritorious and accordingly allow it.

Basically grounds No. 6 and No. 7 which talks about failure to mention the suspect at the earliest opportunity possible and on contradictions in the evidence impute that the evidence upon which the appellant were convicted were incredible.

It is a principle of law as held in **Jaribu Abdalla Vs. The Republic;** Criminal Appeal No. 220 of 1994 (CAT) (Unreported) it was held inter alia that;

> *"Delay in naming a suspect at the earliest opportunity dents a witnesses credibility, especially where the identification of the suspect is in issue".*

In all the evidence by the prosecution witnesses no one seems to have mentioned the suspect at the earliest opportunity possible to the police and the person who responded to the alarm. There is no explanation as to why they did not mention them, that dents or rather affects the credibility of the witnesses.

Regarding the complaint in ground No. 7 on the contradictions and inconsistencies, the alleged contradiction as pointed out by the counsel for the appellant do not, in my opinion, amount to actual contradiction likely to affect the case.

In the case of **Marano Slaa Hofu and 3 others vs. The Republic,** Criminal Appeal No. 246/2011 CAT – Arusha it was held *inter alia* that;

> *"It is only major contradictions which affects the evidence of the prosecution, those which are minor and do not go to the root can be ignored."*

This decision bases on the philosophy in criminal law that the general view is that contradiction by any particular witness or among witnesses cannot be escaped or avoided in any particulars case, as witnesses do not make a blow by blow mental recording of the incidents. See **Chrisant John Vs. The Republic,** This ground has no merit and is hereby dismissed.

Now having resolved the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th grounds of Appeal as I did, I find these grounds capable of terminating the appeal. I find dealing with the 8th, 9th ground will be endeavoring into academic exercise which I am not prepared to do for the interest of time, this means, I will, for the reasons given, not deal with these grounds.

Having so found, I find from the above findings in the 1st, 2nd, 5th, 6th grounds, it cannot be concluded that the case was proved beyond reasonable doubt against the appellants. The right and proper conclusion to reach, is that the appellants were convicted on the evidence which did not prove the case beyond reasonable doubt.

That said, I allow the appeal, quash the conviction "which in fact was not properly entered" and set aside the sentence. The appellants are ordered to be released forthwith.

It is so ordered.

DATED at MWANZA on this 20th day of July 2020.

J. C. Tiganga

Judge

20/07/2020

Judgment delivered in open chambers in the presence of the accused appellants and Mr. Emmanuel John his Advocate and Miss Mwaseba State Attorney for the Republic. Right of Appeal explained and fully guaranteed.

THE HIGH COURT OF TANZANIA
MWANZA

J. C. Tiganga

Judge

20/07/2020