

“ORIGINAL”

**IN THE HIGH COURT OF TANZANIA
DODOMA DISTRICT REGISTRY
AT DODOMA**

**CRIMINAL APPELLATE JURISDICTION
DC CRIMINAL APPEAL NO. 88 OF 2019**

*(Originating from the District Court of SINGIDA
CRIMINAL Case No. 7 of 2018)*

**KAUNDA SELEMAN KAUNDA.....1ST APPELLANT
HARUNA RAMADHAN MTINANGI.....2ND APPELLAN
RASHID RAMADHAN ALLY..... 3RD APPELLANT**

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Date of Judgement- 12TH AUGUST 2020

Mansoor, J:

The case of the prosecution, in brief, is that on 22 December, 2017, during night hours, the appellants along with the other two people who were acquitted at trial they placed stones logs in the middle of Dar- es Salaam – Mwanza Road in an area called Milade Village, Timuli Ward at

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Kinyangiri Division within Mkalama District in Singida Region with intention to commit robbery from the passing vehicles. A vehicle with the passengers who carried a coffin was stopped, a mob of people armed with machetes came from the roadside and asked the people in the vehicle to hand over their belongings to them. They robbed cash and mobile phones; total value of the items stolen plus cash money was Tshs 4,311,000. The passengers in the car were Robert Yombo @ Wanga, Grace Mathay, Mariam James, Elisha Benjamin, Edson Sylvester, Elizabeth Magina, Sundi Mojo, Amina Rajabu, Rose Robert, Witness Sospeter and James Ayubu Mwakijasi.

The accused were not apprehended on the spot. The machetes in their hands were not taken or recovered from them. No stolen items were recovered from the appellants. Haruna Ramadhani Mtinangi (2nd appellant) and Musa Yohana Mgoya (acquitted) were identified in the identification parade by Mariam James, the victim whose cash and phone were stolen in the

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incident. Mariam James testified as PW1. She said the lights in the car were not switched off, and so she was able to see the two accused. She also identified the 5th accused Iddi Hamisi Nkii who was also acquitted during trial, she identified the 1st accused who is the 1st appellant herein. She said Iddi Hamisi Nkii and the 1st appellant herein were standing outside the car, and she could see them because the lights of the car were still on. She said, the eight bandits had run away, they got back into the car and reported the incident at Iguguno Police Station. The identification parade was held on 28th and 29th December 2018, 6 days after the incident.

Another witness for the prosecution was Fred Martine (PW11). He is the driver, and he was there during the incident. He categorically said that it was extremely late at night around 02.30 to 3.00 o'clock at night, it was dark. He said that the lights were off since the bandits had ordered them to switch off the lights, thus it was totally dark, there was no lights from the

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car. The evidence of PW11 totally contradicted the evidence of PW1 on the issue of lights and identification.

The appellants gave their defense, they all denied the allegations against them and pleaded their false implication.

Relying on the testimony of prosecution witnesses, the appellants were convicted and sentenced by the trial Court. They were sentenced to 30 years Jail.

The testimony of prosecution witnesses in particular (PW1) find no independent corroboration. The other victims who were present at the scene were not examined, the only other witness who was examined was PW11, the driver, and he totally contradicted the evidence of PW1. While PW11 said it was dark as all the car lights were off, PW1 said the car lights were on, and therefore she was able to identify the four accused at the identification parade. No machete was recovered to satisfy the court that the appellants were armed to

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amount to a charge of armed robbery. The wood /logs and stones used to block the road, were also not taken into possession, or produced in Court. This is a criminal prosecution and the court must be satisfied beyond reasonable doubt that the persons arrested but not previously known to the witnesses were one of those who committed the crime, and that the accused persons were the real offenders. And so, identification proceedings are therefore as much in the interest of the prosecution as in the interest of the accused. From the testimonies of witnesses an identification parade was held by the police, , in the course of their investigation of an offence for the purpose of enabling the witnesses to identify the persons who are concerned with the robbery; it is obvious that PW1 and PW11 did not know the appellants before the incident, there was no lights at the incident , it was very late at night, the car lights were all switched off, the robbery took like 10 to 15 minutes, and they were all asked to lie down . It is quite possible that witness pointed to strangers and

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stated that they were the offenders, there would be no guarantee of the truth of PW1 assertion. Before the Court can accept such identification as sufficient to establish the identity of the accused it is very necessary that there be reliable corroborative evidence,

The evidence of identification of strangers by PW1 was based on a personal impression, who claims to have noted their distinctive features at night and with no lights, the Court should have approached the evidence of PW1 with caution, because a variety of conditions must be fulfilled before evidence based on the impression can become worthy of credence. It is not the evidence of PW1 that she had been familiar with the appellants prior to the crime, PW1 did not mention the distinctive features she noted on the accused persons while she was lying down under fear. The evidence of identity must be thoroughly scrutinized, giving benefit of all doubt to the accused as there is possibility that there could be honest though mistaken identification. PW1

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did not know the accused from before, she was in shock and so her state of mind should have been considered if indeed she was able to remember the people at the scheme, where there was no light.

The identification was poor, and it is extremely dangerous to enter conviction based on visual identification as identification is the weakest kind of evidence and the court must rule out the chances of mistaken identity. This was held in the celebrated case of **Waziri Amani V. R [1980] TLR 250** at page 252, “*in that visual identification is the weakest kind of evidence and the most unreliable, and that Courts should not act on it unless all the possibilities of mistaken identity are eliminated*”.

Having expunged the evidence of PW1 which was contradicted by the evidence of PW11, now the court remained with the confession of the appellants. All the appellants retracted their cautioned statement saying that these statements were not obtained voluntarily as

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they were tortured and brutally mistreated by the police officers forcing them to confess. On this I am aware of the holding in the case of **Tuamoi vs. Uganda EALR 1967 Vol. 1** , in which it was held that “ *a trial court should accept with caution a confession that was repudiated or retracted and must be satisfied that the confession was true.*”. Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The Court had conducted an enquiry and had satisfied itself that the confessions of the 1st and 2nd accused were voluntary as there was not any threat, torture, inducement, or promise. Now since the confessions were retracted, the truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. Retracted confession stands on a slightly different footing. The courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. As laid down in the case reported in **Subramania Gounden v. The**

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State of Madras (1958 SCR 428)." Thus "retracted confession must be looked upon with greater concern unless the reasons given for having made it in the first instance are on the face of them false.

Since the confessions were retracted, the court shall not base a conviction on such a confession without corroboration; as it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars." the retracted confessions as well finds no other corroborative evidence on record, thus the case for the prosecution was highly doubtful and based on suspicions.

Based on the above, the appeal succeeds, the conviction and sentence passed by the Trial Court is quashed and set aside, the appellants be released forthwith from imprisonments unless lawfully held for any other lawful cause.

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**PRONOUNCED IN OPEN COURT AT DODOMA THIS 12TH DAY
OF AUGUST 2020**


L. MANSOOR
JUDGE
12TH AUGUST 2020



Judgement delivered in Court today in the presence of the Appellants, Ms. Magili, State Attorney for the Respondent Republic and MRS. MARIKI the Court Clerk.


L. MANSOOR
JUDGE
12th AUGUST 2020

