

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(Kigoma District Registry)**

**AT KIGOMA**

**APPELLATE JURISDICTION**

**(DC) CRIMINAL APPEAL NO. 50 OF 2019**

*(Consolidated with (DC) Criminal Appeal No. 62/2019)*

*(Original Criminal Case No. 143 of 2018 of the District Court of Kibondo at Kibondo before Hon. F. Y. Mbeiwa - RM)*

**MINANI S/O JOSEPH .....1<sup>ST</sup> APPELLANT**

**MANILAKIZA S/O FEROUZ.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**J U D G M E N T**

24/02/2020 & 02/03/2020

**I.C. MUGETA, J.**

The appellants were accused of attempting to rob a motorcycle at night on 8/5/2018. The users of the motorcycle defended themselves so well that the robbers surrendered and ran away. In the course, the victim who are Onesmo John (PW2) and Peter John (PW3) had injured the robbers. One had suffered a knife stab wound on the left hand and the other a spear stab wound on the left cheek. It is alleged that the first and the second appellants were the robbers which allegation they dispute. According to the evidence of PW2 and PW3, he who suffered the cheek wound inflicted

by PW3 is the second appellant while the first appellant suffered hand stab from PW2. The appellants were arrested on unstated date and on the identification parade held on 11/5/2018, PW2 and PW3 identified the 1<sup>st</sup> and 2<sup>nd</sup> appellants as the rogue who had attempted to steal their motorcycle. The appellants were charged, convicted and sentenced to serve fifteen (15) years jail imprisonment. They are aggrieved by both the conviction and sentence hence this appeal where they appeared in person.

Each of them filed a separate petition of appeal which were registered as (DC) Criminal Appeal No. 50/2019 for the first appellant and (DC) Criminal Appeal No. 62/2019 for the second appellant. The same were consolidated into this appeal. For reasons which shall be apparent soon, I do not intend to reproduce their grounds of appeal.

On the hearing date, Clement Masua, learned State Attorney, appeared for the Respondent. He supported the appeal on three grounds which are part of the complaints in the two petitions of appeal. These are firstly, that the appellants were not properly identified. Secondly, that the identification parade was irregularly conducted and thirdly, that the trial court erred to admit the caution statement recorded illegally. The learned State Attorney, with leave of the appellants who retained the right to rejoin, started to submit. Besides agreeing with the learned State Attorney, they presented nothing useful, understandably, for being lay persons.

On identification, the learned State Attorney submitted, and I agree, that it was not enough for the victim (PW2 and PW3) to attend the identification parade and later to testify in court on how they identified the culprits at the

crime scene using the motorcycle light. I have examined the record there is completely no recorded evidence on how PW2 and PW2 reported the incident to the relevant authorities after the incident where under normal circumstances, it is such information which ought to have led to the arresting of the appellants. Both PW2 and PW3 testified on how the incident took place and how they later identified the appellants in the identification parade on 11/5/2018. No single witness testified on how the appellants were arrested and the motive behind the arrest. In their defence, the appellants indeed, admitted to have the stab wound scars on the alleged parts. However, this is not conclusive evidence that they are the ones behind the incident where there is no evidence at all linking their arrest with the incident. Such assumption are dangerous as could lead to random arrests. There is no record to show that the appellants were arrested due to the description offered by PW2 and PW3 immediately after the incident. I, therefore, agree the appellants were not properly identified. There is merits in this ground of complaint.

The foregoing finding disposes of the appeal. However, for academic purposes, I shall proceed to discuss the last two complaints.

The learned State Attorney assaults the manner in which the identification parade was conducted in that the participants were easily distinguishable from the appellants in many aspects. They includes age and general physical appearance. He referred to the evidence of PW6 and PW7 who participated in the parade and they are aged 46 and 47 years respectively while the first and second appellants are aged 30 and 23 years respectively. Further, he referred to their general physical appearance

taking into account the defence of the appellants that they appeared too dirty at the parade having spent several days in custody unlike other participants. The learned State Attorney concluded that the parade violated the Police General Order No. 232 directions on the feature of the identification parade, therefore, the trial magistrate ought to have rejected this evidence. I cannot agree more with the learned State Attorney. This complaint has merits, I uphold it.

The complaint on the caution statement, even if it is true, is, however, without merits. The learned State Attorney argued that it is unknown if the statement were recorded within the prescribed four hours upon arrest as the prosecution did not testify on when the appellants were arrested. The record shows that the caution statements were recorded on 1/6/2018. Indeed, it is unknown when the appellants were arrested. Therefore, since the identification parade was held on 11/5/2018, then the statements were recorded long after the arrest which was illegal. Consequently, the same were, indeed, inadmissible for illegality. Despite this truth, after admitting them, the learned trial magistrate in the judgment appreciated the admission error and expunged the same from record. On this area, therefore, even if the trial magistrate can be faulted for admitting them, he cannot be validly faulted for considering illegal evidence as he expunge the same from the record.

In the event, I find merits in the appeal. It is accordingly allowed. Appellants to be released from custody unless otherwise lawfully held for another cause.



*Mugeta*  
**I.C. Mugeta**  
**Judge**  
**2/3/2020**

**Court:** Judgment delivered in the presence of the appellant and Shaban Masanja, State Attorney, for the respondent.

**Sgd: I.C. Mugeta**  
**Judge**  
**2/3/2020**