IN THE UNITED REPUBLIC OF TANZANIA

THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL No. 1 OF 2020

(Originating from District Court of Temeke at Temeke in Criminal Case No. 1027 of 2018)

NASSORO MAHAMUDU ABDALLAH.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

17th August, – 2nd September, 2020

J. A. DE - MELLO J;

Nassoro Mahamudu Abdallah, stood charged before the **District Court of Temeke at Temeke** with offence of **Armed Robbery** contrary to **section 287A** of the **Penal Code Cap. 16 R.E 2002.** The offence, it is alleged, to have been committed on the **2nd December, 2018** at **Tandika Maguruwe Area,** within **Temeke District** in **Dar Es Salaam Region** of which the accused stole one mobile phone make **Tecno X-Pro** valued at **TShs. 650,000/=** together with cash money **TShs. 150,000/=** all totaling **TShs. 800,000/=** property of **Rabii Mohamed**. In course of that act he threatened the victim with a knife in order to forcefully obtain the said properties. Trial accomplished, he was found him guilty, convicted sentenced to thirty years (30) imprisonment. He is aggrieved with both conviction and,

sentence, and the reason now, for this Appeal with ten (10) grounds of appeal as hereunder;

1. **That, the learned Trial Resident Magistrate erred in law and, fact by convicting the appellant in defective charge sheet as;**
   i. **It is insufficient for lacking necessary particulars such as time of stealing so that to give reasonable information as to the nature of the offence charged contrary to section 132 of the Criminal Procedure Act, Cap. 20 R.E 2002.**
   ii. **It does not describe the amount of coin or bank currency which compose the sum of the alleged stolen cash money contrary to section 135 (c) (iv) of the Criminal Procedure Act, Cap. 20, R.E 2002.**
   iii. **There is disparity on the details at the particulars of the offence with what PW1 (the victim) expound before the court regarding with the actual crime.**
2. **That, the learned Trial Resident Magistrate erred in law and, fact by convicting the appellant relying in the weakest kind and most unreliable recognition visual identification evidence adduced by PW 1 while the prosecution fails to establish if the witness afford to name the appellant at the earliest opportunity before the alleged sungusungu and the alleged un testified passenger who was with the victim at the scene of crime yet the victim fails to expound on how he manage to identify the appellant considering the circumstances were not**

favorable for proper identification against unmentioned source and intensity of the light, distance, time position etc.

3. That, the learned Trial Resident Magistrate erred in law and fact for entertaining a trial against the appellant without furnishing him with a copy of complainant's statement contrary to mandatory provision of section 9(3) of the of the Criminal Procedure Act, Cap. 20, R.E 2002.
4. That, the learned Trial Resident Magistrate erred in law and fact by holding incredible and unreliable evidence of PW1 who contradict on his own testimony regarding on who told the culprits to leave motor cycle as he mention when examined in chief by the public prosecutor and change the story to be the first accused when cross examined by him.
5. That, the learned Trial Resident Magistrate erred in law and fact by convicting the appellant on armed robbery offence while PW1 identify /describe his stolen mobile phone on his evidence before court nor tendering of any exhibit to sustain if ever own the alleged stolen mobile phone so as to collaborate with the one described in the charge.
6. That, the learned Trial Resident Magistrate erred in law and fact by convicting the appellant while disregarding that he was illegally arrested and detained under police custody over the period of time prescribed in law with un explained reasonable cause of such delay.

7. **That, the learned Trial Resident Magistrate erred in law and fact by un procedural procuring PW 4's evidence on affirmation while he is a Christian contrary to provision of the Oath and Statutory Declaration Act.**
8. **That, the learned Trial Resident Magistrate erred in law and fact by convicting the appellant relying on a caution statement un procedural recorded by PW4 out of the period available for interviewing a suspect contrary to section 50 and 51 of the of the Criminal Procedure Act, Cap. 20, R.E 2002 yet never being read loud before the court after admissibility.**
9. **That, the learned Trial Resident Magistrate erred in law and fact by holding uncorroborated and contradicted prosecutions adduced evidence as the basis of the appellant's conviction.**
10. **That, the learned Trial Resident Magistrate erred in law and fact by holding that, the prosecution has managed to prove its case against the appellant beyond any reasonable doubt as charge.**

Thus, he prays for this Court to allow his appeal, quash the conviction, set aside the sentence and, order the release from the prison.

On **17th August, 2020** when the case was set for hearing, the Appellant was present unrepresented, whereas **Jacqueline Werema (S/A)** stood for the Republic, all alluding to oral submissions.

Submitting on the first ground, the Appellant contends that, the Trial Magistrate relied on adefective charge sheet, contravening **sections 132, 135 (c) of Cap. 20,** based on disparity on what a charge is, from PW1

testimony. On the second ground, he is of the view that, identification of **PW1** was weak, let alone missing the name of the culprit, but even worse fulfilling the identification ingredients that, of light and its intensity, distance and, proximity. It was wrong for the Trial Magistrate to disregard all this, vividly missing on page 11 of the proceedings. With respect to the third ground, the appellant stipulates that, no copy of the statement was furnished to the him, for reading and understanding fact which appellant believes to have contravened to **section 9 (3) of Cap. 20.** With regard to the fourth ground, is what he terms to be unreliable the PW1 statement, in relation to who between 1st and 2nd accused informed the other culprits. On the fifth ground, the phone allegedly to be stolen was not tendered as evidence as charged, which raises doubts. He is even challenging his arrest and, detention which in according to the sixth ground of appeal, finding it illegal. On the seventh ground, while referring to page 18 of the proceedings, PW4 a Christian witness was affirmed instead of being sworn. On the eighth ground, he questions the recording of his caution statement, terming it un procedural, for exceeding the time set by law, hence violating **sections 50** and **51** of **Cap. 20** but even not read loud in Court for his understanding and concede. The Appellant believes the evidence adduced against him was highly uncorroborated and, contradicting to implicate him with the charge, in as far as the ninth ground is concerned. Lastly and, by large, he concludes that, proof in accordance with the law governing criminal cases was not achieved, hence failure on the prosecution side. Conceding to the Appeal, State Counsel Jacquiline submitted that, true the case was wanting in terms of proof that Criminal matters demands ranging from poor and weak

identification, undefined light just to highlight a few that the case of **Waziri Amani** vs. **Republic [1980], 250** had settled for. She even found fault in the caution statement that the Trial Court admitted amidst the procedural irregularity. Time for recording, as well as failure to read it over to the appellant amongst the few issues, was vivid. True and as evidenced from the proceedings, **PW4,** a Christian but, affirmed as opposed to sworn. She found the Appeal with merit for it to sail through as prayed by the Appellant. Conceding to the Appeal by the Republic is not automatic for the Court to share the same. An extra effort needs to be taken with a view of ascertaining the position, which leads me to peruse what actually transpired during Trial. A thorough perusal from lower Court record and, precisely the proceedings, vividly reveals identification not to have met the standards set by law. In the case of **Dadu Sumano @ Kilagela** vs. **Republic, Criminal Appeal No. 222** of **2013 (unreported)** several factors had been laid down when identification is at stake, all in view of avoiding possibility of mistaken identity. It held;

"The Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused?

What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it".

In her testimony, **PW1** claimed to have known the Appellant before but, did not state further how he had recognized him to relate to the one who attacked her. This notwithstanding, the attack that lead to the robbery was not fully explained more so of the time it lasted, distance apart the two and the description of light intensity and the culprit whom she claimed to know. I am fully in one with what the case of **Amani Waziri** (supra) of the ingredients for identification in criminal matters and cumulatively so. With view of refreshing our memories I find it wise to import the ingredients wholesaly as follows;

1. **Time of the incident, broad light or dark night**
2. **Proximity**
3. **Time taken**
4. **Light intensity**
5. **Familiarity**

This case, a landmark one in our jurisdiction has set the above guidelines on visual identification which Courts have uninterruptedly followed.

In another case of **Anthony Kigodi** vs. **Republic, Criminal Appeal No. 94 of 2005 (Unreported)** fortifies the above as it held;

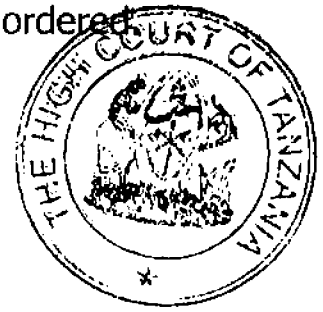
'We are aware of the cardinal principle laid down by the erstwhile Court of Appeal of Eastern Africa in Abdullah bin Wendo and another v REX (1953) 20 EACA 116 and followed by this Court in the celebrated case of Waziri Amani v Republic (1980) TLR 250 regarding evidence of visual identification, no Court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence before it is absolutely water tight".

Why water tight is in view of avoiding possibility of mistaken identity. Further that, and confirmed by records, is the fact that **PW4** one **D 1845 DC Samwel** a Christian but affirmed as show on **page 13** of the typed proceedings but worse even the one who recorded the caution statement subject of this Appeal under ground eight. The law, under **section 9 (3)** of the **Civil Procedure Code, Cap. 20, R.E 2019** makes it mandatory not only to read for understanding to the accused but, furnishing copy of information and, statement with regard to the offence. This was missed out too.

With the foregoing, I am satisfied that the Trial was coupled with many irregularities, legally and procedural, to cogently convict the Appellant as it did. It is sad that someone has been robbed but, proof lacking as observed, that criminal cases demands, beyond any shadow of doubt. I therefore allow

the Appeal, quash the conviction and, set aside the sentence passed that of thirty (30) years imprisonment. The appellant is released forthwith unless otherwise lawfully held.

It is ordered.



J. A. DE- MELLO

JUDGE

2nd September, 2020