IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

CRIMINAL APPEAL NO. 84 OF 2019

(Originating from Criminal case No. 135 of 2018, in the District Court of Kiteto at Kibaya)

MORINGE NGEREE.....1ST APPELLANT

MOLLEL NGEREE .....2ND APPELLANT

SANAKI NDOROSI .....3RD APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT OF THE COURT

18/08/2020 & 02/10/2020

GWAE, J

In the District Court of Kiteto at Kibaya ("the trial court") the appellants, **Moringe Ngeree, Mollel Ngeree** and **Sanaki Ndorosi (**hereinafter to be referred to as 1st, 2nd and 3rd appellant) respectively were jointly and together charged with an offence termed "armed robbery" contrary to section 287A of the Penal Code Cap 16, Revised Edition, 2002. All appellants named herein were finally sentenced to a minimum statutory sentence of the term of **thirty (30)** years imprisonment.

The basis of the prosecution evidence relied and believed by the trial court and which ultimately led to the appellants' conviction and sentence is as follows; that, the appellants and one Mepukoo Molan, complainant who appeared before the trial court for testimonial purpose as PW1 knew each other. Sometimes prior to the material date (11/9/2018) at about 19:30 hrs, the PW1 lent the 1st appellant some money (Tshs.900, 000/=) and a civil case was opened to that effect where principal sum plus costs were ordered to be paid to PW1 (Tshs.1, 370, 000/=). On the 11th September 2018 the PW1 went to Mwanya Village within Kiteto District in Manyara Regionn with a view of searching the 1st appellant so that he could be given his money back. He was allegedly assisted by the 2nd and 3rd appellant to trace the 1st appellant.

Upon the 1st appellant being traced, the 1st appellant led the 2nd, 3rd and PW1 to his residence in order to give the PW1 his money however while on the way to the 1st appellant's residence, at the jungle forest, the 1st appellant and his co-appellants invaded the PW1, threatened him by a bush knife and eventually stole from him Tshs. 730, 000/=, a cap, clothes, mobile phone made TEKNO valued at shs.75, 000/=as well as a bag containing various items. PW1 lost his consciousness till when he found himself to be at Kiteto District Hospital where he was admitted for a week. The complainant also underwent further medical

treatments in Dodoma Regional Hospital after his discharge from Kiteto District Hospital. That, the 1st and appellant were arrested on 12/9/2018 following the letter given to the PW2, Logirisime by the victim.

The appellants unequivocally pleaded not guilty to the offence of armed robbery leveled against them. The 1st appellant admitted to have been indebted to the PW1 however he refuted having met the PW1, victim on the material date. Equally, the 2nd appellant who contended that two days before the incident he met the victim at place other than where the incident occurred and promised him to assist him (victim) tracing the 1st appellant but the victim did not come as agreed till when he went at Mrijo Police station and where he was told that the victim was robbed. On his part, the 3rd appellant absolutely denied to have met the victim and his co-appellants adding that, the charge against him was nothing except mere suspicion.

Aggrieved with both conviction and sentence, the appellant preferred this appeal armed with three grounds, namely:

1. That, the trial court erred in law and in holding that the appellants were properly identified at the scene of crime.
2. That, the trial court erred in law and in fact by shifting the burden of proof from the prosecution evidence to the accused persons (appellants) to prove their innocence contrary to the settled law

3. That, the trial court erred in law and in fact for failing to consider the appellants' defence.

On the hearing date of this appeal, the appellants appeared in person, hence they were unrepresented whereas the respondent was duly represented by **Ms. Adelaide Kasala** Senior State Attorney.

In their oral submissions in support of this appeal, the 1st and 2nd appellants merely sought adoption and judicial consideration of their grounds of appeal contained in their joint petition of appeal whereas the 3rd appellant verbally argued that, the offence of armed robbery against them might have been manufactured due to the 1st appellant's indebtedness to the victim. He further resisted familiarity with the PW1

Opposing this appeal, the learned counsel for the Republic supported both conviction and sentence meted against the appellants on the ground that the charge against them was proved beyond reasonable doubt. She added that there was no mistaken identity since the appellants and the victim were familiar to each other and that the PW1, victim had been able to mention his assailants immediately after the incident. Ms. Kasala also argued that, the evidence of the victim was sufficiently corroborated with that of the 2nd and 3rd appellants.

Responding to the 3rd ground, the respondent's counsel admittedly argued that the 1st and 2nd appellant's defence was not considered as complained, but the evidence of the 2nd appellant was considered

In their rejoinder, the 2nd appellant stated that the case at hand was fabricated and the 3rd appellant stated that there are contradictions in the prosecution evidence for instance the place of incidence between La Mwanya-Kiteto-La Mwaya Kondoa.

As to the **1st ground** of appeal hereinabove on identification, it is settled principle that where persons alleging to have properly identified his or her assailant whom he or she is familiar, in that situation there will be no legal requirement to conduct an identification parade (See a decision of the Court of Appeal of Tanzania in **Jaribu Abdallah v, Republic** (2003) TLR 271). In our case, the appellants and the victim undoubtedly knew each other even before the incident as they were working together as security guards pursuant to their testimonies as rightly argued by the counsel for the Republic.

Furthermore, if it was undoubtedly testified that, the victim (PW1) immediately after the incidence named the appellants to be his assailants, the appellants' complaints would inevitably be rejected. I hold this view simply because an act of mentioning a suspect at the earliest moment would guarantee that the identifying person properly and unmistakenly identified the culprit (See

Marwa Wangiti and another v. Republic (2002) TLR 39. This ground is thus dismissed.

In determining the **2nd and 3rd** grounds of appeal, I would like to determine them jointly since both grounds question the trial court's evaluation of evidence adduced before it before it arrived at its conclusion. It is trite law that a court of law or quasi-judicial body must objectively analyze the evidence in its totality and not in isolation so that justice in a particular case may be conveniently dispensed with. That being the position, as first appellate court judge, I would perhaps find it pertinent to re-evaluate the evidence adduced during trial particularly on whether the appellants were immediately named and whether the victim-PW1 credibly and undoubtedly incriminated the appellants.

The victim glaringly testified that, the appellants robbed him and seriously assaulted him as a result he lost his consciousness only to find himself being admitted at hospital whereas the PW2 told the trial court that it was the victim to whom he talked while in village office and the one who gave him a paper with the names of the appellants as his assailants. For the sake of clarity parts of their testimonies are reproduced herein under;

PW1

" I came on 19:00 hrs whereby I found them at Mwanya...They used that bush knife which was in possession of the 2nd and 3rd accused person to beat me in various parts of my bod, I then lost my conscious only to be found at Kiteto District Hospital. I spent one week there whereby I was discharged"

PW2

"I went to our village office and reached them (sic). I found village chairman there. Ndwata VEO and the injured person. They told me if I can manage to identify him because he was my fellow Masai. I talked to him whereby he told me what happened to him and told me to take his letter and read it. I had details of what made him to come there. We took it and read whereby we found three names of the accused persons. As the accused persons were known to me and I was told that they are the ones who injured the victim..."

Carefully looking at this piece of evidence, it is uncertain if the PW1 was unconscious while at the Mwanya village office, if it was as alleged by him, then the credence of evidence of the PW2 is questionable. How can it be possible for a person who became unconscious to the extent that he came to find himself while being admitted to be able to name his assailants while other version is that he talked to PW2 and narrated what precisely happened to him. The prosecution

evidence in this aspect is very contradictory as PW1 and PW2 gave quite contradictory versions.

Since the prosecution did not have other independent pieces of evidence such as the appellants' confessions, the appellants' being found with recently stolen properties of the victim (PW1), the one who rescued the victim at the scene of crime (village chairperson) was not called by the prosecution to testify in court and above all no evidence whatsoever if the appellants were searched immediately after being apprehended or not. Frankly speaking this case was not properly investigated and prosecuted in the required standard. Hence this court, in the light of the evidence on record, is left with serious doubts as to the appellants' guilt. That being so, the appellants would have been entitled to the benefits of doubts if the trial court had carefully scrutinized the evidence before it. I would like to borrow the wisdom of the foreign judgment of South African court in **State v. Van Der Meyden** 1999 (2) SA (WLD) at 80H-81C, it was held that:

> "The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent".

(See also Tanzanian judicial jurisprudence in **Joseph John Makune vs. Republic** [1986] TLR 44, and **Nathaniel Alphonce Mapunda and Benjamini Alphonce Mapunda vs. Republic** [2006] T.L.R 395).

In this criminal case, it goes without saying that, if the PW2 was given a piece of paper with the names of the appellants, the names must have been there even before the incident since according to PW1, he became unconscious immediately after being robbed. If the names were in the paper before the commission of the offence. It follows that, the victim might have been suddenly attacked by unknown persons but due to the fact that he was not in good terms with the appellants, he therefore highly suspected them as prime suspects. I am not unsound of the principle that, mere suspicion or prime suspicion alone cannot be a basis for conviction of an accused person

In these circumstances and evidence on record, I am of the view that, in this particular criminal case, it is therefore not safe to sustain the appellants' conviction and sentence thereof taking into account of the different versions given by the PW1 and PW2 as depicted in the quoted parts of their evidence and as explained herein above which plainly comprise the appellants' quilt with their innocence.

For the foregoing reasons, the appellants' appeal succeeds. It is ordered that, the appellants' conviction and sentence are quashed and set aside

respectively. I further order for an immediate release of the appellants forthwith unless they are therein for other different lawful cause.

It is so ordered.

M.R. GWAE
JUDGE
02/10/2020

Right of Appeal fully explained.

M.R. GWAE
JUDGE
02/10/2020