THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY OF MBEYA

AT MBEYA

CRIMINAL APPEAL NO. 79 OF 2020

(Arising from the District Court of Mbozi at Vwawa, Criminal Case No. 37/2016)

1. SYLIVANUS s/o HASHIMU@NGOSHA
2. MATESO s/o MWASENGA **.....APPELLANTS**

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of Judgment: 23/11/2020

Dr. Mambi, J.

In the District Court, of Mbeya, the appellants were found guilty and convicted on various counts namely armed robbery and unlawful possession of Arms and ammunition. With regard to the 10th and 15th counts (armed robbery) the first accused was sentenced to 30 years and five for the 16th count (unlawful possession of Arms and ammunition). On the other hand, the second accused was found guilty sentenced for 30 tears on 10th and

15th (armed robbery). The second accused was also sentenced to four years on the 17th and 18th (unlawful possession of Arms and ammunition) years.

Aggrieved, the appellants appalled to this court preferring eleven grounds of appeal.

During hearing, the appellants who were unrepresented adopted their grounds of appeal and they had nothing to add. The Republic was represented by the Learned State Attorney Ms. Xaveria. The appellants preferred eleven related grounds. In brief, the appellants in their grounds of appeal contended that they were not identified at the scene since it was night. They argued that the prosecution did not prove their charges beyond reasonable doubt since no any witness who testified them at the scene.

The Republic through the Learned State Attorney Ms. Xaveria briefly submitted that the Republic doesn't support all the appellant's grounds since the prosecution proved the charges beyond reasonable doubt. She argued that the charges against the accused person at the Trial Court were clearly proved beyond reasonable doubt since the appellant were identified at the scene and were arrested red-handed with the firearms and ammunition without permit. The Learned State Attorney further submitted the first appellant was found in unlawful possession of firearm that was alleged to be used at the scene to steal various properties.

The learned state attorney insisted that, the evidence of PW1 was very clear that all the appellants were properly identified. She

accused beyond reasonable doubt. My perusal from the records shows that the witnesses for the prosecution testified that they identified the appellants at night using moonlight and light from the car. However, the witnesses did not tell the court at what direction of the car the appellant were facing. This explanation on the position of the car was crucial on the identification of the appellant since the car can only light properly on one side that is in front of the car where the car bulbs are located. If the appellants were not in front of the car it could be hard to identify them. The prosecution neither explained the intensity of the moonlight nor car lights.

In addressing the issue of identification, the Court has stated in numerous decisions, the most celebrated one being ***Waziri Amani v The Republic [1980] TLR 250***. The Court in this case at page 251-252 while determining and deciding on the question of identification said:

> *"that the evidence of visual identification is easily* ***susceptible to error****. "The evidence of visual identification is of the weakest kind and most unreliable. It follows therefore, that no Court should act* ***on evidence of visual identification unless all possibilities of mistaken identity*** *are eliminated and the Court is fully satisfied that the evidence before it is absolutely water tight." (emphasis supplied with).*

Underscoring what conditions should be considered the court in Court in ***Waziri Amani v The Republic*** observed that:

> *"We would for example, expect to find on record questions such as the following posed and resolve by him:* ***the time the***

> ***witness had the accused under observation; the distance at which he observed him;*** *the conditions in which such observation occurred, for instance,* ***whether it was day or night-time****, whether there was good or poor lightning at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters which the trial judge should direct his mind before coming to a definite conclusion on the issue of identity".(emphasis supplied with).*

In addressing the importance of the intensity of light, the Court in ***Waziri Amani v The Republic*** further stated that: *"On the other hand, where* ***the quality of identification evidence is poor****, for example, where it depended on a fleeting glance or on a longer observation made in* ***difficult conditions such as visual identification made in poorly lighted street****, we are of the considered view that in such cases the judge would be perfectly entitled to acquit." (emphasis supplied with).*

It is on the records that the witnesses asserted that they saw and identified the appellants robing properties from various people while armed during night. The witnesses relied on the light from the moon and car to identify the appellants. Now the question is, was the condition favourable to identify the appellants at forest while it was night?. Looking at the trial proceedings it is clear that key identifying witnesses did not advert to the guidelines enunciated by the Court in Waziri Amani and other cases I have cited. It is not even known if the witnesses knew the appellants before and there was no any explanation as the appearances of the appellants and

their dress. This indeed creates more doubts if the appellants were properly identified. I wish to quote paragraph two of the trial court judgment which reads as follows:

> *"Although the* ***condition for identification was not favourable*** *for correction identification, I am confident to hold that DC Katani Managed to identify the 2nd accused person at the scene of the crime. This is due to the fact that the 2nd accused person was the one who tried to test the knowledge of DC Katani over what happened to the scene of the crime. As what he expected DC Katani mentioned the name which he alleged to have been told by the 2nd accused person who alleged the same name to be of his grandfather.*
>
> *I am confident that all those happened as DC Katani would have no guessed or predicted the names of the grandfather of the 2nd accused person. On the basis of those reasons the court finds the 2nd accused person being properly and correctly identified".*

The court in **Chokera *Mwita vs. The Republic, Criminal Appeal no 17 of 2010 at Mwanza*** at pg 9 and 10 observed that:

> *.....the issue is whether voice identification is reliable in law. In considerable opinion, voice identification is one of the weakest kind of evidence and at care and caution must be taken before acting on it....* There is always a possibility that a person may imitate another person's voice.

It is clear from the evidence available from the trial court proceedings that the prosecution failed to meet the standards required under the law. This is a case where a determination was wholly depended on the evidence on the identity of the accused

persons at night. The Court of in ***Christian s/o Kaale and Rwekiza s/o Bernard Vs R [1992] TLR 302*** stated that the prosecution has a duty to prove the charge against the accused beyond all reasonable doubt and an accused ought to be convicted on the strength of the prosecution case. Worth also considering the decision of the court in **Raymond Francis v R [1994] TLR 100**. The court in this case at page 103 stated that:-

> *"...It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring identification is of the utmost importance."*

Conversely, taking into account it is the settled position of the law as underscored by the Court of Appeal in ***ISSA NGWALI VERSUS THE REPUBLIC CRIMINAL APPEAL NO. 215 OF 2005***, I can certainly hold the same position that the evidence of identification at the trial court as given by the prosecution witnesses cannot be said to have met the legal requirements by any standard. I am therefore of the considered view that the identification evidence was of the weakest character and did not justify the trail court conclusion that the accused persons/appellants were properly identified. Applying the above principles to the appeal at hand, in my considered view the conditions of identification pertaining at the material time were not conducive for positive identification of the appellants at the scene. See also ***AIDAN MWALULENGA VERSUS THE REPUBLIC CRIMINAL APPEAL NO. 207 OF 2006***

In the circumstance, since the condition were not favourable for a correct identification for the reasons I have already stated above, it is my holding that, the accused persons/appellants were not properly identified. I thus agree with the appellants and even the trial that the condition for identification of the appellants were not favourable.

It also on the records that the trial magistrate did not properly analyze the evidence with regard to the charges on armed robbery before reaching into his conclusive decision. It is also the settled principle of law that the judgment must show how the evidence has been evaluated with reasons. The record such as the Judgment does not show the point of evaluating evidence on identification and giving reasons on the judgment.

Basing on my observation and reason, I find the appellant were not identified at the scene. I agree with the appellants that the charges on armed robbery case against the appellants were not proved beyond reasonable doubt. The general rule in criminal cases is that the burden of proof rests throughout with the prosecution, usually the state. Indeed the prosecution has the burden of proof in criminal cases. This includes the burden to prove facts which justify the drawing of the inference from the facts proved to the exclusion of any reasonable hypothesis of innocence. Since the burden is proof of most of the issues in the case beyond reasonable doubt, the guilt of the accused must be established beyond reasonable doubt.Therefore the prosecution had to establish beyond

any reasonable doubt that the appellants committed the offence they were charged. This is in line with the trite principle of law that in a criminal charge, it is always the duty of the prosecution to prove its case beyond all reasonable doubt (See ***ABEL MWANAKATWE VERSUS THE REPUBLIC, CRIMINAL APPEAL NO 68 OF 2005.***

Failure to do so left a lot of questions to be desired. That should benefit the appellant. It is trait law that that in criminal law the guilt of the accused is never gauged on the weakness of his defence, rather conviction shall be based on the strength of the prosecution's case. The standard of proof is neither shifted nor reduced. It remains, according to our law, the prosecution's duty to establish the case against the accused beyond reasonable doubts. From the evidence explained and testified by the prosecution witnesses, one may observe that there is no clear evidence to show if the witnesses properly identified the accused persons/appellants. The trial records reveal that the witnesses did not give any description of all two accused persons/appellants nor did they state what they were wearing. This creates likelihood of mistaken identity since the environment and time was not favourable. I entirely agree with the appellants that since it was night and the circumstance of the scene of crime, the witnesses could not be able identify the accused persons/appellants. Reference can also be made to the decision of the court in ***RAYMOND FRANSIS V. R (1994) TLR***. It is true and the fact that the Court in this case observed that 'It is elementary that in criminal case whose determination depends entirely on

identification, evidence on conditions favouring a correct identification is of utmost importance". Worth also considering the case of **Raymond Francis v R [1994] TLR 100**. The court at 103 stated that:-

> *"...It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring identification is of the utmost importance."*

Conversely, taking into account the settled position of the law as underscored by the Court of Appeal in ***ISSA NGWALI VERSUS THE REPUBLIC CRIMINAL APPEAL NO. 215 OF 2005***, I can certainly hold the same position that the evidence of identification in our case as given by the prosecution witnesses cannot be said to have met the legal requirements by any standard. I am therefore of the considered view that the identification evidence by prosecution witnesses is of the weakest character and did not justify the conclusion that accused persons were properly identified. In the circumstance, since the condition were not favourable for a correct identification for the reasons I have already stated above, it is my holding that, the accused persons were not properly identified. It has been a tradition and practice of this court to refer some celebrated court decisions when it comes to determination of accused person at night. One of those land mark authorities which similarly clarified the position was ***Jumapili Msyete versus the Republic Criminal Appeal No 110 of 2014 (unreported).***

The court of appeal in in this case at page 14 noted that "for the purpose of analysis and the experience enriched from case law,

cases of identification may be identified into three broad categories namely visual identification, identification by recognition, and voice identification". The court went on by stating that "but for each type of identification, evidence could be classified as foundational, complementary, assistive and corroborative". A foundational evidence is that which lays down **how** a victim was able to identify the suspect.

Having established that the accused persons were not properly identified by any witness that has eventually led to the conclusion that the prosecution did not prove the charges on armed robbery against all the accused persons/appellants beyond reasonable doubt. In this regard, all the appellants are exonerated from an offence of armed robbery.

Coming to the other counts that are which relates to unlawful possession of firearms and ammunition, my analysis and observation have revealed that the prosecution proved the charges against the second appellant beyond reasonable doubt. The evidence from the prosecution witnesses is clear that the second appellant was arrested while in possession of the firearm ("gobori") and ammunition and charged with counts 17th and 18th where he was sentenced to four years. From what I have observed from the trial records I am of the settled view that the prosecution evidence clearly shows that the second appellant was found in unlawfully possession of ammunitions. If we look at the evidence and the sequence of events, until the appellant was arrested while in possession of the firearm and ammunitions and the fact that the

same gun was tendered at the trial court this court can draw the reasonable hypothesis that; the appellant was responsible for the offence (17th and 18th counts) he was charged and convicted at the trial court. In this regard I uphold the decision of the trail court which sentenced the second appellant to serve four years imprisonment.

For the reasons, I am of the settled view that the guilt of the first appellant was not proved beyond reasonable doubt, thus this court finds him not guilty. I thus basing on my reasoning above acquit the first appellant on all charges.

In the circumstances, I find it more prudent to quash conviction and set aside any sentence made by the trail court resulting in the immediate release of the first appellant and the appeal is thus allowed. I order that the first appellant be released from prison unless he is otherwise continuously held for some other lawful cause.

With regard to the second appellant, I have no reason to fault the decision of the trail court on the sentence of four years imprisonment. I thus upheld the sentence imposed by the trial court against second appellant and the second appellant shall serve four years imprisonment as ordered by the trial court.

A.J. MAMBI

JUDGE

23/11/2020

Judgment delivered in Chambers this 23th day of November 2020 in presence of both parties.

A.J. MAMBI

JUDGE

23/11/2020

Right of Appeal explained.

A.J. MAMBI

JUDGE

23/11/2020