

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

**TABORA DISTRICT REGISTRY**

**AT TABORA**

**DC. CRIMINAL CASE NO. 25 CF 26 CF 27 CF 28 CF 29 OF 2019**

*(Originating from Nzega District Court Criminal Case No. 432 of 2017)*

**1. EMMANUEL S/O JUMA**

**2. REUBEN RICHARD**

**3. MABULA MANOTA**

**4. NASSORO MKANDARA**

**5. LULANGILA NDAMA**

..... **APPELLANTS**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

*7/10/2020-11/12/2020.*

**BAHATI, J.:**

The five appellants namely **EMMANUEL S/O JUMA, REUBEN S/O RICHARD, MABULA S/O MANOTA, NASSORO S/O MKANDARA** and **LULANGILA S/O NDAMA** in this case as known first, second, third, fourth, and fifth respectively were arraigned to this court charged with two counts both were the allegation of committing the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16[R.E 2019].

The background of the matter is straight forward. It was alleged that the accused persons stole cash TZS 650,000 to Magambo Ngimba on the first count and TZS 100,000/= to Joseph Mlongwa @ Alexander on the second count and they used a gun to obtain and retain the said property. All accused persons denied the allegation and the prosecution paraded a total of six witnesses were called to prove. At the end of the trial, the appellants were convicted and sentenced 30 years.

Aggrieved with the decision of the trial court, the appellants appealed to this court on the following grounds;

- 1. I didn't commit the alleged serious offence as established by the prosecution side during the trial,*
- 2. That the RM erred both in law and fact in finding that PW1, PW2, PW3, and PW4 gave a true and credible testimony,*
- 3. That the learned magistrate wrongly convicted the appellant relying on the evidence of PW1, PW3, and PW4 to whom they alleged that they knew the appellant and they knew the appellant and they were not stranger although the fact that the witnesses were known to the appellant alone would itself not necessary be sufficient as it does eliminate mistaken identification. To buttress my point see in the case of **SWELU Maramoja v R Criminal Appeal No.43 of 1991 (unreported )***

**and the case of Mohamed Bin Allui (1947) 9 EACA 72 , Kulwa Makwajape v Republic, Cr. Appeal No.35 of 2005 CAT(UNR)**

4. *That the learned magistrate grossly erred both in law and fact in convicting me relied on the evidence of the complainant and his wife both of them were in a terrible condition and received serious injuries at the time they alleged they saw and recognized all five people. It was extremely unsafe for the magistrate to have relied on the evidence of complainants because they were in a panicked state of mind to buttress my point see the case of Eliya and other v R 1972 HCD No. 101. See also the case of Magwhisha Mzee and Another v R Criminal Appeal no. 465 of 2007 CAT Tabora (UNR)*

5. *That the resident magistrate wrongly convicted the appellant basically on the identification evidence which was highly questionable due to the following point of fact.*

*a. No police (witness) who received and recorded the detail of description of the accused (appellant) and tendered before the court of law in conformity vide the case of **JOSEPH SHAGEMBE V R 1982 TLR NO. 147** and in the case of **Warioba Malwanja v R 1991 TLR No. 39** also in the case of **REPUBLIC V ALLY [1970] HCD 306**. In the case of **WARIOBA MWALANJA V R**, the court stated that in identification there must be two conditions namely the*

*accused must be mentioned at the earliest opportunity. In the present case at hand, no witness mentioned the name of the appellant. In the case of **Marwa Wangiti Mwita and Another v R 2002 TLR No. 39**. See also the case of **JUMA MACHEMBA V REPUBLIC, CRIMINAL APPEAL NO. 102 '2015 CAT TBR**.*

- b. *The evidence of PW1 contradicted the evidence of PW2, PW3, and PW4 on the date of the commission of the offence because PW1 told the court that the offence was committed on the 20<sup>th</sup> day of November 2017 this creates a doubt and their evidence cannot be accorded any weight. in **SAHOVA BENJUDA V R 1989 CRIMINAL APPEAL NO 96 ARUSHA (UNREPORTED)** and in the case of **MICHAEL HAISHI VF R [1992] TLR NO 92**. Also **MAKELELE KULINDWA V R, CRIMINAL APPEAL NO 175'B" OF 2013 CAT TABORA**, and **JOSEPH SYPRI AND R, CRIMINAL APPEAL NO 158 OF 2011** (both unreported)*
- c. *The witness did not mention color, height, attire size of the room and distance at which the appellant stood in observation, to buttress his point vide the case **MOHAMED ALLUI V R**, in the case of **MOHAMED ALLUI** the court stated that the witness should give the details of the accused the way he was dressed. In the case at hand,*

*the witness did not comply with the above quoted law, their evidence ought not to be believable before the court of law.*

*6. That the learned trial resident totally erred in law and fact in convicting me relying on weakens of defence, it is trite law that an accused person he should not be convicted due to the weakness of his defence. To buttress his point in the case of **Christian Kale and another v R. 1992 TLR no 303** and the case of **Mwita and another v R 1994 TLR no. 54***

*7. That having regard to the evidence totality on record and circumstance of the case the guilty of the appellant had not been proved beyond all reasonable doubt the conviction of the appellant was unfair at all.*

When the matter was called up for hearing, the appellants appeared via video conference facility from prison unrepresented while Mr. Rwegira Deusdedit, the learned State Attorney for the Republic. In his submission, the learned State Attorney did not support the appeal. On the first ground of appeal, he submitted that the appellants were well identified at the scene of the crime according to the evidence of PW1 and other witnesses. The witnesses identified the accused and described how they were armed. PW1 and PW3 and PW4, PW5 explained that the 2<sup>nd</sup> accused person was armed with the gun, the 1<sup>st</sup>

accused was having a stone and others were having the clubs. He, therefore, submitted PW1 described the accused persons.

He further stated that there was enough electricity light and accused persons stayed with a victim for a long time and the accused persons were known to each other even before the event.

He advanced further that PW3, Maria Mayunga testified that she knew the accused persons before this case as she lived in the same community together. She mentioned their names by pointing and touching the accused persons in court. Although the circumstance of identification was not sufficient, she recognized the accused person because there was sufficient electrical light and the whole commotion inside the house took about 30 minutes.

He added that the witnesses were able to name the accused immediately after the incident. There was no fabrication. To bolster his point he referred to the case of **Mohamed Sekule Vs. Republic Criminal Appeal No. 131 of 2009**. This case is on the description of the suspects.

He contended that even in their defence the accused persons have not disputed the evidence proved by the prosecution witnesses. There is no contradiction; there is no reason why this court should not be believed. This evidence which is based on identification reveals that they were well identified and were properly convicted. He, therefore, prayed to this court to uphold the conviction.

In reply, the 1<sup>st</sup> appellant, Ruben Richard prayed to this court to adopt the petition of appeal as part of his submission. He submitted that it is true that the victim identified him but not on the alleged offence. He further submitted that the victim did not come to the court to identify him.

The 3<sup>rd</sup> appellant Mabula Manoti submitted that he had with another case of land, and he was at the grocery “Mgahawa” with this accused persons but he does not know the victim either.

The 4<sup>th</sup> Nassoro Nkandala prayed to this court to adopt the petition of appeal as part of his submission. He submitted that the identification evidence was a fabricated one. There was no witness who identified him neither the neighbors. He further submitted that the victim said to the court, he knew him and why didn't he go to his place. The one who came to prove came as a friend and not as a neighbor. Further, he submitted that there was no leader who came to testify before this court if the victim was invaded in that area. The witnesses were wife and husband but the dates are conflicting.

He further submitted that the case beforehand was presided with 2 magistrates and the court did not tell why this was so.

He submitted that PW1 when testified stated that the event occurred on 20/11/2017, and PW2 stated that the event happened on 21/11/2017. PW1 stated that after the event she called the police who

arrived and said that he was engulfed with rope. He wondered if he was tied with rope how did he manage to call the police.

He also submitted that in their evidence, they contradicted themselves on what was stolen. Therefore, he submitted that the allegation at the police is not correct since there was no leader who came to testify if there was committed robbery in that place. Only the victims with their friends testified No police corroborated that there was robbery committed at the place. Hence they prayed this court to set them free.

In rejoinder, the State Attorney reiterated his submission in chief.

Having heard the submissions made by both parties in determining this appeal, the issue is whether the appeal is meritorious. Although the respondent has not supported the appeal on all grounds, I find it appropriate to respond to each ground of appeal as raised by the appellant for the interest of justice.

On the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds which will be discussed jointly. I am of the considered opinion that the case against the appellants rested completely on the claimed visual identification. The trial court relied on the evidence by PW1, Magambo Ngimba, PW2, Joseph Mlogwa Alexander, PW3, Maria Mayunga, and PW4, Cecilia Alex which the court found to have been watertight. Before arriving at this conclusion the trial court found PW1, PW2, PW3, and PW4 to be



witnesses of truth and therefore their evidence was cogent enough to prove the charge.

In the light of the foregoing were the conditions favorable for correct identification? In **Raymond Francis VR [1994]** TLR 100 at page 103 this Court observed,

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

It is important to restate the guidelines set in the case of **Waziri Amani VR [1980]** TLR 250. The circumstances of each case, therefore, have to be born in mind. Relevant to the present case are the following guidelines:

- i. Whether the witness knew the accused person before the incident and if possible show for how long this has been.*
- ii. The amount of time the witness had the accused under observation.*
- iii. The distance between the two persons during the commission of the offence.*
- iv. The kind and intensity of light at the scene.*

All factors on identification considered, were there any material impediments or discrepancies affecting the correct identification of the accused persons by the witness.

The case at hand, according to the court's record the prosecution witnesses identified the appellants clearly. PW1, Magambo Ngimba stated that the appellants 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> accused person. The 2<sup>nd</sup> accused was armed with a gun and the 1<sup>st</sup> accused was having a stone which used to break the door and others were having clubs. He identified the accused person by using the electric light which was on. The accused persons stayed in his house for about 20 minutes.

PW2, Joseph Mlogwa Alexander stated that he was awakened by his wife Cecilia that there are people inside, and he peeped from his bedroom's toilet and saw two people who he identified as Emmanuel, DW1 and Reuben, DW2 who were armed. He, therefore, saw Mabula, DW3 and Nassoro, DW4. He did not see the fifth appellant. He recognized them as there was electrical tube lights.

PW3, Maria Mayunga testified that it was Mabula who hit his husband with a club. And they were still beating him so he felt pity for him, and she then went with DW4, Nassoro, and DW3, Mabula to get the money and at the gate, she saw DW2, Reuben carrying the firearm. She further testified that it was DW5, Lulangila who was left to watch his husband when the rest of the accused escorted her to steal from

the shop. She stated that she recognized the accused because there was sufficient electrical light and the whole commotion inside the house took about 30 minutes.

PW4, Cecilia Alex stated that the appellants managed to open the door and she saw DW1, Emmanuel first, then DW5, Lulangalila and later on DW4, Nassoro came. She also testified that at that time of invasion DW4, Nassoro had a machete which he used to beat her up, and DW3, Mabula started to look on for other properties and he found TZS 50,000/ in her purse and another TZS 50,000/= in the pocket of her husband's trousers. Then the appellants got the keys for the shop and started going to the shop were on the way before approaching them shop there was a car approaching them with full lights on. With the assistance of lights, he saw Reuben who had the firearm, who was left outside. Also, she identified DW1, Emmanuel's voice who pressurised them to leave as it was approaching morning.

PW5, Mashaka Issa testified to the court that when he went to help his neighbors, the first appellant, DW1, Emmanuel, and DW2, Reuben came outside of the house of Joseph and asked who he is, and one of them said, "*Huyo atakuwa ametufahamu malizeni*". It was DW1, Emmanuel who started hitting him with clubs on his head, he was able to recognize them as there was solar light with tube lights then he lost his conscious.

In my view, the trial court judicially arrived at the right finding of fact that Prosecution witnesses identified the appellants. I am saying so because of the following reasons; that there is no dispute on the fact that the appellant and the Prosecution Witnesses lived in the same village and as such had known each other for a long time, the witness had the accused under observation for 30 minutes, the distance at which the witness had the accused under observation, then the source and intensity of such light as explained by the witnesses, and also the witness knew the accused persons before the incident.

In short, the evidence of identification before the trial court which this court concurred falls under the guidelines outlined in the celebrated case of **Waziri Amani VR [1980] TLR 250**. Hence I agree with the learned State Attorney.

As to the 5<sup>th</sup> ground of appeal, the appellants submitted that *the evidence of PW1 contradicted the evidence of PW2, PW3, and PW4 on the date of the commission of the offence because PW1 told the court that the offence was committed on 20<sup>th</sup> day of November 2017 this creates a doubt and their evidence cannot be accorded any weight. in SAHOVA BENJUDA V R 1989 CRIMINAL APPEAL NO 96 ARUSHA (UNREPORTED) and the case of MICHAEL HAISHI VF R [1992] TLR NO 92 . also MAKELELE KULINDWA V R , CRIMINAL APPEAL NO 175'B" OF*

**2013 CAT TABORA, and JOSEPH SYPRI AND R, CRIMINAL APPEAL NO 158 OF 2011 (both unreported)**

It is true from the record that the court has noted the variance in evidence of PW1, Magambo Ngimba who submitted that it was on 20/11/2017 about 0130 hrs while PW2, Joseph Mlogwa stated that on 21/11/2017 at 2hrs, PW3 Maria Mayunga stated that on 21/11 /2017 at 01.30hrs and PW4 Cecilia Alex told the court that on 21/11/2017 at 02.15 hrs.

It is settled that, where there are contradictions in evidence the court is duty bound to reasonably consider and evaluate those inconsistencies and see whether they are minor or major ones that go to the root of the matter. This was held by the Court of Appeal of Tanzania in the case of **Lusungu Duwe v R, Criminal Appeal No.76 of 2014 (Unreported)**.

It is the opinion of this court as was that of the trial Magistrate the variation on the date was simply a human error; it did in no way affect the material facts that formed the ingredients of the offence.

In respect of the 7th ground that, the prosecution had not proved beyond reasonable doubt the conviction of the appellants.

To establish an offence of armed robbery the prosecution must prove the following;

1. *Proof of theft see Dickson Luvanga v R , Crim Appeal no 1 unreported ) 2005*
2. *Proof of the use of a dangerous or offensive weapon or robbery instrument against or immediately after the commission of an offence*
3. *Use of dangerous or offensive weapon must be directed against a person see Kashima v R , Crim Appeal no 78 of 2011 unreported*

In this case, I noted that the accused used weapons to harm the victims in the course of stealing. There is no dispute that the victim was harmed and was unconscious and something suggesting/ establishing that a dangerous weapon was used against the victims. Consequently, it is my finding that the offence of armed robbery was proved against the appellants beyond reasonable doubt.

In view of the above, the appeal has no merit; I hereby dismiss the appeal since the prosecution has proved the charge beyond reasonable doubt as to the guiltiness of the accused persons.

It is so ordered.



**A.A.BAHATI**

**JUDGE**

**11/12/2020**

Judgment delivered under my hand and seal of the court in chamber, this 11<sup>th</sup> day December, 2020 in the presence of both parties.

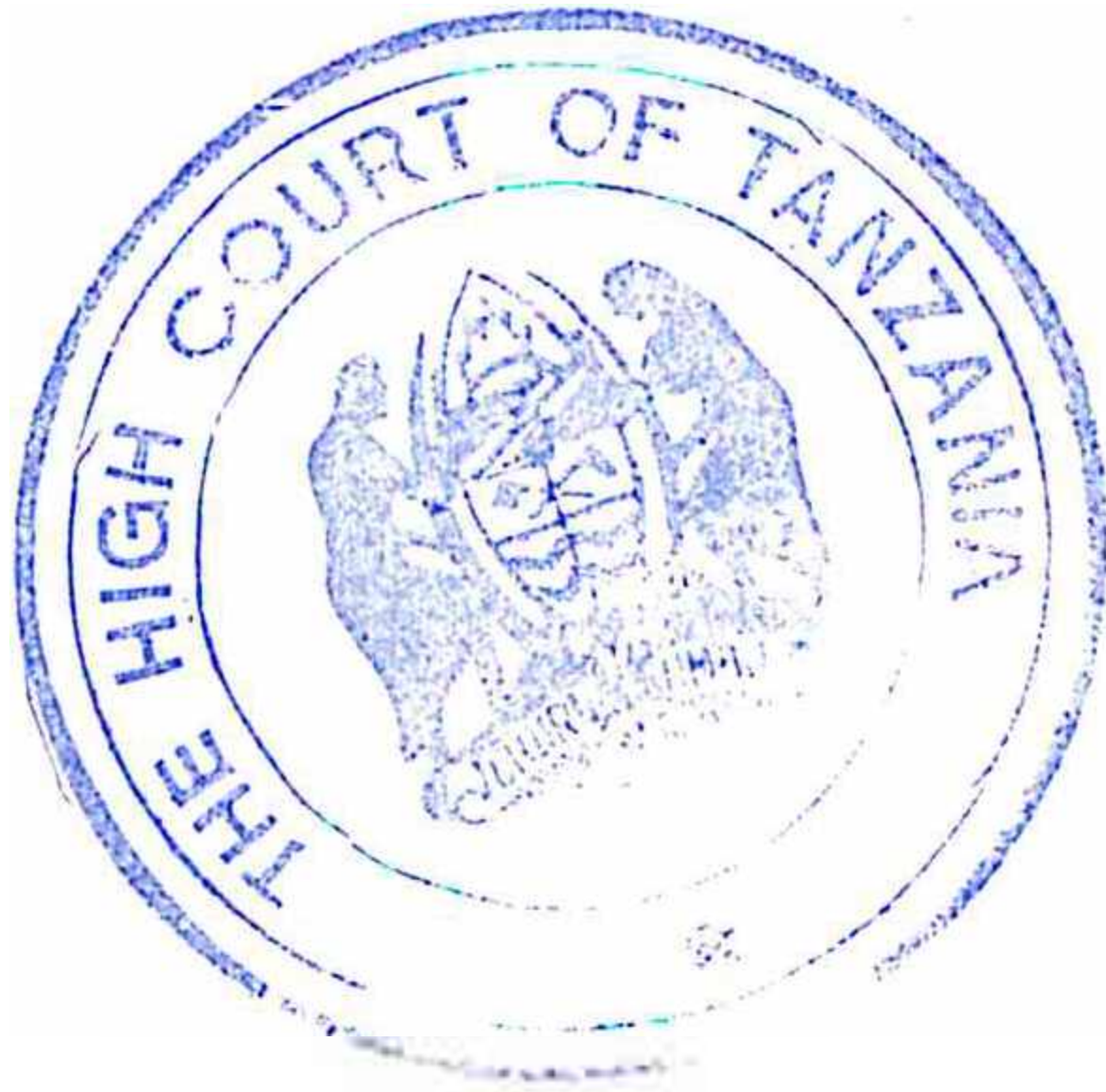
*Bahati*

**A. A. BAHATI**

**JUDGE**

**11/12/2020**

Right of appeal fully explained.



*Bahati*

**A. A. BAHATI**

**JUDGE**

**11/12/2020**