

**IN THE HIGH COURT OF TANZANIA  
(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 95 OF 2021**

*(Originating from the decision of the District Court of Kinondoni at  
Kinondoni in Criminal Case No. 167 of 2019)*

**MOHAMED MZEE KAWINGA ----- 1<sup>ST</sup> APPELLANT**

**MOHAMED HASSAN KALABATILA.....2<sup>ND</sup> APPELLANT**

*VERSUS*

**THE REPUBLIC ----- RESPONDENT**

*Date of last Order: 29/11/2021*

*Date of Judgement: 30/11/2021*

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

**MGONYA, J.**

The Appellants herein **MOHAMED MZEE KAWINGA** and **MOHAMED HASSAN KALABATILA** before the District Court of Kinondoni at Kinondoni were charged and convicted of **Armed Robbery c/s 287A of the Penal Code, Cap. 16 [R. E. 2002]** and sentenced to **thirty (30) years imprisonment**. They are now appealing against both the conviction and the sentence of the decision of the trial court which was delivered on **27<sup>th</sup> January 2021**. Appellants had a total of 22 grounds of appeal,

however the Appellants decided to pick some to submit before the court as hereunder:

- 1. That, the learned trial PRM erred in law and fact by convicting the 1<sup>st</sup> appellant while the prosecution side failed to prove it's charge beyond any reasonable speak of doubt as PW4 stated that, an incident took place at the house of ATANAS a diamond seller at page 19 line 15, the complainants name is ATANAS at page 20 line 12-15 contrary to the charge sheet the property of ALPHAN NASSORO;**
- 2. That, the learned trial PRM erred in law and fact by convicting the 1<sup>st</sup> appellant relied on the discredited visual identification of PW1 and PW2 as PW1 stated that they use a towel to cover my face and they went out at page 7 line 7-8 while the trial court failed to determine that the circumstances and the conditions set forth at the locus in quo criminals were not conducive and favoured for proper identification;**
- 3. That, the learned trial PRM erred in law and fact by convicting the 1<sup>st</sup> appellant relied on exhibit PE2 [retracted and repudiated statement] which was unprocedurally recorded by PW5 E 7922 D/CPL SHABANI when interrogated the accused /appellant in a room while the other police officers were there**

*recording the caution statement at page 28 line 11 contrary to the procedure of law;*

4. *That, the learned trial PRM erred in law and fact by convicting the 2<sup>nd</sup> appellant relied on exhibit PE4 [three spent cartridge], exhibit PE6 [Ten ammunition and a magazine] and exhibit PE6 [pistol PX 196913] at page 37 last line to page 38 line 1-2 which were unprocedurally tendered by PW6 H4225 DC ELISHA TIMOTH while the prosecution side failure to prove the chain of custody on exhibit PE4, exhibit PE5 and exhibit PE6 as it failed as it was barely stated by PW7 A/INSP SALUM MAKIYA when cross-examined at page 41 line 2-8 contrary to the procedure of law;*

When the matter was called for hearing, the court granted the Appellants' prayer that the appeal be disposed off by way of written submissions. Appellants had no representation while the Republic enjoyed the service of Ms. Imelda Mushi learned State Attorney.

In support of an Appeal, the Appellants submitted that the charge sheet did not follow requirements as required by law, as **section 132 of the Criminal Procedure Act, Cap. 20 [R. E 2002]** requires the offence to be specified in the charge or

information with necessary particulars so as to give a reasonable substances and descriptions of the nature of the offence.

It has further been submitted by the Appellants that, there was variance between what was stated in the Charge Sheet and what transpired in the testimony of PW4 **INSP. BRUNO SELESTINE**. Further, PW4 stated that, an incident took place at the house of **ATANAS** a diamond seller and complainant's name is **ATANAS** contrary to the Charge Sheet where the property is revealed to be of **ALPHAN NASSORO**.

Furthermore, the Appellants maintained that, there was no sufficient evidence to prove that the Appellants were properly identified at the scene of crime due to the fact that the incident took place during night at 21:00 Hours and the source of light alleged to have illuminate the scene was never explained. Further, Respondents' witnesses PW1 and PW2 did not disclose the distance from the place they were vis-a-vis the assailants, neither they stated the duration of the incident and for how long they kept them under observation.

Furthermore, Appellants argued on the procedure laid down by the law on the caution statements that, **Exhibits PE2** and **PE7** which one is said to have been taken beyond the prescribed time of four hours as provided for under **Section 50 of the Criminal Procedure Act, Cap. 20 [R. E. 2002]** and no

extension of time was sought and granted as per **Section 51 of the law.**

Moreover, Appellants averred on the ground of improper account of chain of custody in connection with non procedural act of tendering **Exhibits PE4 [three spent cartridges], PE5 [ten ammunitions and a magazine]** and **PE6 [Pistol Px 196913]**. Further, Appellants maintained that the prosecution failed to document in each stage of holding the exhibits led to the violation of laws.

From the above averrements, Appellants claimed that the Prosecutions failed to prove their case to the required standard set in criminal cases and therefore they could benefit from the above legal shortcomings. Hence the Appellants prayed the court to set them at liberty by quashing the conviction and set aside the sentence.

The Respondent's counsel, via Ms. Imelda Mushi the learned State Attorney declared that the Republic is not in support of the Appeal rather the Counsel is in support of the conviction and sentences as far as the record of the trial court is concerned. And it is her further concern that, the case against the Appellants was proved beyond reasonable doubt.

Further, the Respondent's Counsel submitted that the Charge Sheet by the Prosecution side is enough for accused persons to be convicted for offence of **Armed Robbery** which they were charged, under **Section 135 of the Criminal Procedure Act, Cap. 20 [R. E. 2019]** which provides for guidelines of preparing Charge Sheet and contains necessary information to the accused persons to understand nature and seriousness of the offence charged.

Ms. Imelda Mushi further submitted that, the contradictions caused by **PW4** that the complainant's name is **ATANAS** contrary to the Charge Sheet, while the complainant is **ALPHAN NASSORO**; which have been made by **PW4** is a minor, which does not go to the root of the Prosecution's case. This is because the charge was properly constructed as per **Section 135 of the Criminal Procedure Act, Cap. 20 [R. E. 2019]**.

The Respondent's Counsel further submitting on the prosecution's failure to prove their case on the ground of identification and credibility of prosecution witnesses; It is the Counsel's views that the trial Magistrate didn't see any good reason for believing the appellants' evidence as the evidence of **PW1 and PW2** centred on visual identification of Appellants through the electric light.

Additionally, the Respondent's counsel asserted that the trial court employed proper procedure to admit Exhibit PE2 (caution statement of first Appellant) and Exhibit PE7 (caution statement of second Appellant) which were properly recorded by both PW5 and PW8. Further, is the counsel's submission that the caution statements were voluntarily made before the trial court as it was admitted in the ruling for inquiry and the trial magistrate was satisfied that the accused was the one who wrote and signed caution statement within the legal requirement.

Moreover, the Respondent's Counsel argued that the Prosecution did not fail on the procedure employed to prove the chain of the custody by the trial court to admit **Exhibits PE4 (three spent cartridges), PE5 (ten ammunitions and magazine) and PE6 (Pistol Px 19693)**. The said Exhibits are said to have been taken from the scene of crime and sent to Forensic Bureau for examination to prove the offence with Appellants and later on tendered before the court as Exhibits.

Further, the Respondent's counsel submitted that, it is not fatal for the charge not to be read over to Appellants when the defence case marked open. The Counsel further insisted that the Appellants were all present during the prosecution case. Further, they understood and defended themselves related to the Charge Sheet. Moreover, it is the Respondent's counsel concern that, if

at all there were that shortcoming, the same under the circumstances did not occasion any miscarriage of justice to Appellants.

Lastly, it is the Respondent's Counsel averments that the trial magistrate has considered both parties' evidences adduced and on contrary the prosecution side managed to prove their case beyond all reasonable doubts in connection with the offence charged. From that averment Ms Mushi prayed the court to dismiss the appeal.

It is at this stage; this Court is invited to intervene on both parties' submissions. Initially, Appellants had listed 22 grounds of appeal but discussed only few of them and in general way without following the sequence as outlined in the Memorandum of Appeal of which the Respondent applied the same. Therefore, this court too adopt the style.

In determination of the Appeal, I have carefully gone through both parties' submissions. Starting with the ground that the record shows that there is variance between the Charge Sheet and what transpired in the testimony of **PW4 INSP. BRUNO SELESTINE**. I admit to see such contradictions. The question to ask ourselves as to whether such contradictions renders the Charge Sheet defective. Under **Sections 132 and 135 of the Criminal Procedure Act, Cap. 20 [R. E. 2019]**



provides for guidelines of preparing Charge Sheet and the aim of the section is to insure that the Charge contains necessary information which are enough for accused persons to be convicted for the offence. In this case, the offence of armed robbery as they were charged upon.

It is trite law that not every contradiction affects the Prosecution case. Only material and relevant contradictions adversely affect the credence of the witnesses hence caused the Prosecution case to flop. This Court, in the case of ***SAID ALLY ISMAIL VS. R, CRIMINAL APPEAL NO. 249 OF 2008 (unreported)***, categorically it was observed that:

*"It is not every discrepancy in the prosecution case that will cause the prosecution case to flop. It is only where the gist of the evidence is contradictory then the prosecution case will be dismantled."*

In regards of the trial court's records and the Charge Sheet, the corroboration evidences of the Prosecution witnesses and Exhibits admitted; I find nothing but the clear Charge Sheet where the Prosecution based upon and the contradictions made by PW4 were minor and cured. The Charge was properly and legally drawn as per **section 135 of the Criminal Procedure Act** and the Prosecution evidences were enough to the court's satisfaction to convict the accused persons for armed robbery

the offence charged. From the above explanation, the instant **ground of appeal is meritless.**

Considering the ground of identification and credibility of Prosecution witnesses, the trial court's record depicts that PW1 and PW2 were in the house at the time of incident. With the aid of electrical light bulbs and the fact that the accused were uncovered while attacking and forcing the victims to show where the money were kept taking into consideration the duration of time they took, it was enough for the victims to catch their images for identify. Further, finally the first Appellant was caught by citizens when they were trying to escape. From the above it is court's firm view that, Prosecution evidence eliminated the possibility of mistaken identity under the circumstances of this case. Hence, there was enough and sufficient evidence to prove that the Appellants were properly identified at the scene of crime. **This ground too fails.**

Further, on the fact that trial court did not employ proper procedure to admit **Exhibits PE2** and **PE7** which were recorded by both **PW5** and **PW8**, this fact is proved in the records on **page 33** and **52** of trial court's typed proceedings where the trial court came up with findings that the caution statements were voluntarily made and the same admitted in the ruling for inquiry. The trial courts' records further speaks louder by

following proper procedure of law for admitting exhibits and bar this court to interfere with the same. **This ground of appeal also fails.**

On the ground of improper account of chain of custody in connection with the **Exhibits PE4 [three spent cartridges], PE5 [ten ammunitions and a magazine] and PE6 [Pistol Px 196913]** respectively; the records of the court depicts that after the arrest of the second Appellant, the same was interviewed and showed a pistol had magazine with twelve (12) ammunitions. Thereafter, weapons were sent to the Forensic Bureau for examination the results were that **PE4, PE5 and PE6** were used in house breaking and stealing. Additionally, all Exhibits tendered by PW6, the Forensic Bureau all that he dealt with and, therefore he had knowledge that all those exhibits were in his possession in one point of time. Under the above circumstances, **this ground of appeal is baseless.**

Moreover, on the ground that the charge has not read over when the defence case marked open, the courts' records show on page 58 of typed proceedings that, after the court had the view that the *prima facie* case has been established by the Prosecution on **14/12/2020**, both Appellants were asked on their rights on defence if will have taken on oath or not. Either, calling of witnesses and whether they were ready for the defence.

The willingness of Appellants for defence, is an inference that they understood the charge and that they were ready for defence. From the above there, is convincing circumstance that the trial was fair and did not occasion any miscarriage of justice to Appellants. **This ground is also declared meritless.**

Furthermore, on the ground that the trial Magistrate did not consider the defence testimony of **DW1 and DW2**, From the trial courts' records it is prove that the learned trial Magistrate summarized the evidences from both sides and found to be sufficient to convict the Appellants. The offence charged of **Armed Robbery** was duly proved by the testimonies'/evidences of **PW1** and **PW2** and corroborated by other prosecution witnesses **PW4, PW5** and **PW6** and **six (6)** admitted **Exhibits**. PW1 and PW2 were eye witnesses, identified clearly when Appellants forcibly stolen property by using a dangerous and offensive weapon and threaten to use violence to PW1 and PW2 at the scene of crime further, **PW4** is the one who actually received the second Appellant at Mburahati Police Station after the commission of an offence. Also during trial, the defence evidence was also considered and regarded but did not cast any doubt to shake the Prosecution evidence. **Hence this ground too is meritless.**


I am conversant with the principle of law that in criminal cases, it is the duty of the Prosecution to prove its case beyond all reasonable doubts. This is provided under **section 3(2) (a) of the Evidence Act, Cap. 6 [R. E. 2002]**. This court has considered all grounds of appeal and both parties' submissions in respect of this Appeal and finds that prosecution indeed proved their case beyond all reasonable doubt during trial.

Consequently, as all grounds of appeal are meritless, the conviction and sentence are hereby sustained and further, I proceed to **dismiss the appeal in its entirety.**

It is so ordered.

Right of Appeal explained.



  
**L. E. MGONYA**  
**JUDGE**  
**30/11/2021**

**Court:**

Judgment delivered in chamber in the presence of both Appellants, State Attorney Imelda Mushi for the Respondent, and Ms. Veronica RMA in this 30<sup>th</sup> day of November 2021.



  
**L. E. MGONYA**  
**JUDGE**  
**30/11/2021**