THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
MBEYA DISTRICT REGISTRY
AT MBEYA
CRIMINAL APPEAL NO 105 OF 2020
(Originating from Criminal Case No. 66 of 2018
in the District Court of Momba at Chapwa)

LAZARO S/O VENANCE SINKAMBA.....1ST APPELLANT
IBRAHIM S/O ANYAWILE KIBONA.....2ND APPELLANT
AMBOKIWE S/O LUKAS KABUKA.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: *16/12/2020*
Date of judgment: *15/03/2021*

NDUNGURU, J.

Before the Momba District Court at Chapwa, the appellants Lazaro **s/o Venance Sinkamba, Ibrahim s/o Anyawile Kibona, Wilson s/o Joram Jason, Ambokiwe s/o Lukas Kabuka @ Ambokile, Nevas S/O Njela Mponda @ Evance and Jeniffer d/o Petro Kipiki** are jointly and together charged with the offence of Armed Robbery Contrary to Section 287 (A) of the Penal Code Chapter 16 of the Laws Revised Edition, 2002. The prosecution side alleged that on the 8th day

Revised Edition, 2002. The prosecution side alleged that on the 8th day of March, 2018 at about night time at Nyerere area at Tunduma Township within Momba District in Songwe Region did steal one **cerullar** phone make Sumsung Galax, A3. The property of one FESTO S/O MPANGALA SANGA and, immediately before and after such stealing did assault the victim one FESTO S/O MPANGALA SANGA by cutting him on different part of his body using machete in order to obtain and retain the said properties.

The charge when read over to the appellants were denied. The appellants when read over the charge were denied. Hence the prosecution side paraded thirteen (13) witnesses as to prove the charge against the appellants, including the victim as (PW1). Whereby the appellants were found guilty of the offence as charged, convicted and sentenced to serve thirty (30) years imprisonment. They aggrieved by conviction hence this appeal. The appellants jointly raised eight grounds of appeal which can be summarized as follows**; One,** the trial Magistrate erred in law and in fact in convicting the appellants while were not identified anywhere and they were not known as per case law of **Mussa Elias and Two Others vs. Republic [1993] Court of Appeal of Tanzania Mwanza**, Criminal Application No. 172 and the case of

ABUSHIRI AMIR vs. Republic [1992] TLR 62 – High Court. **Two,** the trial Magistrate erred in law and in fact in convicting the appellant on contradictory evidence of the PW1, PW2, PW3, PW6 and PW12 with their exhibits. **Three,** the trial Magistrate erred in law and in fact when convicted appellants relying on the admission of the hearsay evidence. **Four,** the trial Magistrate erred in law and fact by convicting appellants on mere believing that the chairman (Kawoasa) was with PW1 and PW2 when police met them but the same chairman was not summoned by the court as it alleged. **Five,** the trial Magistrate erred in law and fact when convicted appellants basing on cautioned / extra judicial statement while were recorded involuntary hence it was not completed. **Six,** the trial court did not consider the defence case during the judgment instead she based on the prosecution side only. **Seven,** the trial magistrate erred in law and in fact by convicting appellants on the offence of armed robbery while the case was not proved by the prosecution side beyond reasonable doubts and **Eight**, the trial court erred in law and fact for failure to observe the criminal procedure for proper administration of criminal justice where as the prosecution's evidence is highly complicated.

However, before going through the merits of the case, I will be in better position to give brief summary of the facts leading to the arrest and the subsequent charge, conviction and the sentence entered at trial court against the appellants. The victim (PW1) testified that on 08/03/2018 at around 2:00 PM while at his home at Tunduma Street, Chipaka Ward, he saw five people entering in his gate while wearing masks and three of them holdings machetes, when he saw them he told his wife PW2 and start making alarm as the result they entered in side by hitting the door with a kick (teke) while holding machetes force and start and cutting PW1 with that machetes after many people come they disappeared but one matchete was found at the scene and he discovered that the cellular phone make Sumsung Galax A3 it was taken by them. PW2 testified to collaborate the same. Further PW3 the medical one testified that he treated PW1 and tendered PF3 which was admitted and marked as an exhibit PE2. PW4 tendered the Extra Judicial Statement of the 2nd accused, 3rd accused person who was facing the charge of armed robbery and they were admitted and the same were admitted and marked as an exhibit PE3.

Another evidence to support the prosecution side was cautioned statement and extra judicial statement which were tendered by PW5, PW6, PW7, PW9, and 8th, 10th, for each accused as shown in the record as well as their exhibits.

In their defence, the appellants denied having committed the offence of armed robbery. They blamed the trial court to convict them without identification and admitted cautioned statement while they did not recorded and admitted hence those who tendered were improperly recorded against the law.

In this appeal, the appellants appear unrepresented, fending for each of them whereas, Ms. Zena James, the learned state attorney appeared for the Respondent Republic. After adopting the memorandum of appeal, the appellants opted to clarify them after the state attorney had responded to them if need arose.

According to the records of this court, Ms. Zena James argued the appeal on behalf of the Respondent Republic. Among other thing she did not support the appeal but she agrees with the appellant that they were not identified rather that their cautioned statement that each other admitted to commit the offence of armed robbery.

In turn, the appellants insisted that no identification was done and those even cautioned statements which were admitted before the trial court was objected and was not recorded properly therefore, was not voluntary recorded.

Now, having gone through the arguments from both parties the ball is now in the hands of this court to determine the merits or otherwise of the appellants grounds of appeal.

The appellants first ground is based on visual identification. The appellants collectively attacked the decision of the trial Magistrate that it failed to take into account that there was no proper identification that could support conviction. Indeed the trial Magistrate did not took her time to address on the question of identification. She was of the view that **PW1** correctly identified the five appellants due to the electricity which was blighting on the fateful day. However, **PW1** did not easily identify the appellants because; **first, PW1** did not knew the appellants prior to the incident; **second;** there was no close distance between **PW1** and the three appellants who were cutting him all over his body with a panga, **third;** the appellants did conduct a silent operation. They did not talk with **PW1** who did not managed to identify their voices. **Fourth; PW2** did not also identify the appellants.

It has already been settled that, this Court, being the first appellate court is duty bound to weigh and evaluate the evidence for both the appellants as against that for the respondent in order to come into a decision. (See: **Ruwala V. R; [1957] E.A 570** and **Dinkerai Ramkrishua Pandya V. R [1957] EA 336.**

In this case at hand, it is not disputed that, the entire prosecution evidence that led to the conviction and sentence of the accused persons was basically based on circumstances and visual identification of PW1 as well as cautioned statement of the appellants.

The crime with which the appellants were convicted of, took place at around 2:00 P.M, thus it was dark. It therefore required the removal of all possibilities of mistaken identity (See: **Anthony Kigodi vs. Republic**, Criminal Appeal No. 94 of 2005 (Unreported). This cardinal principle of law is reflected in other recent decisions of our Court of Appeal. In fact, there is a long, unbroken chain of authorities on this point. (See: **Waziri Amani vs. Republic (Supra)**, **Raymond Francis vs. Republic**, Criminal Appeal No. 207 of 2006 (Unreported), **Paschal Christopher and Others vs. Republic**, Criminal Appeal No. 106 of 2006 (Unreported) and others.

It is elementary that, in a criminal case where determination depends essentially on identification, evidence on conditions favouring correct identification is of utmost importance. In other words, the identification must be water tight. In my respected opinion, such water tight evidence may be said to exist when it leads to the exclusion of all other possibilities of mistaken identity. The court must consider the following factors: **First,** how long the witness did had the accused under his/ her observation. **Second,** what was the estimated distance between the two? **Third,** if it were at night, (as was the case herein), which kind of light did exist. **Fourth**- had the witness seen the accused before the day and time of crime? If so, when, and how often. **Fifth,** the whole evidence before the court considered, are there material impediments or discrepancies affecting the correct identification of the accused by the witness, and **Sixth**- in the course of observation of the accused by the witness, was there any obstruction experienced by the witness, obstruction which may have interrupted the latter's concentration.

It may not be repetitive if I say that, these salient features, or guidelines were also provided in a number of Court of Appeal decisions, which includes **Shamir John vs. Republic**, Criminal Appeal No. 166 of

2004 (Unreported), **Augusto Mahiyo vs. Republic [1993] T.L.R 117**, **Alex Kapinga & 3 Others vs. Republic**, Criminal Appeal No. 252 of 2005 (unreported) among many others.

Admittedly, in this particular case, during trial, the prosecution key identifying witness, **PW1** who was also the victim of the incident, adverted to the guidelines enunciated in **Waziri Amani's case (Supra)**. In his sworn testimony **PW1** testified that, he was invaded by the appellants, they cut him with a machete, and told the court that he did not knew them because they hided their face in which PW1 did not enable to watch and identify the appellants.

Reverting to the circumstances on record in the present case and considering the factors as enunciated in **Waziri Amani's case (Supra),** the following emerge:-

(i) **PW1** was not very clear in his testimony that it was the appellants who invaded him, armed with machetes which they used to inflict injuries upon him.

(ii) **PW1** did not know the appellants before the incident.

(iii) **PW1** gave a vivid account on how the appellants attacked him and how the scuffle took some time. In fact, while being attacked, he

did not managed to identified since they were hided their face and then disappeared.

(iv) At the end of it all, the appellants managed to rob **PW1's** cellular phone Sumsung Galax A3 and leaving him seriously injured.

(v) The testimony of **PW1** was corroborated with that of **PW2** who both testified that, it was the appellants who invaded the house of PW1 but did not identify their face and not known to them.

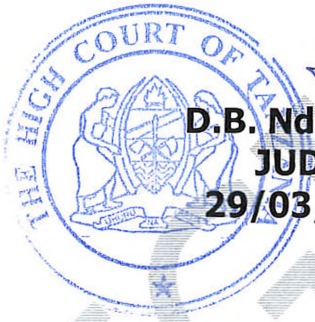
Taking into account the above factors and I, am of the considered view that, **PW1** was in a position not to identify his assailants without any doubt. Having not found the visual identification of the appellants at the scene to be impeccable, I hold that, it was all possibilities of mistaken identity. For that reason, this ground of appeal has merit.

Furthermore, *the central issue for determination at this juncture is whether the charges of armed robbery was proved by the prosecution beyond the reasonable doubt enough to warrant the conviction against the appellants.*

Moreover, the evidence adduced by the prosecution in support of the count of armed robbery is too contradicting and not directly connecting the appellants with the charged offences.

The only evidence which at least indicate how the appellants participated in the commission of the offence is that one extracted from the cautioned statements of the appellants which also were objected from the beginning by the appellants to the effect that were not voluntarily made. Additionally, the same were recorded contrary to the law even after its admission, was not read out to the accused so that they can understand its contents see case of **Joseph Maganga & another V. Republic, Criminal Appeal No. 536 of 2015, CAT, Robinson Mwanjisi & 3 others V. Republic [2003] TLR 218** hence deserve to be expunged. The appellants did not only object the cautioned statements when were tendered by the respondent but also even when adducing evidence in support of their defenses they rejected the same. If the learned trial magistrate had considered in her judgment the evidence adduced by the defense side she could have found out that the prosecution failed absolutely to prove the case beyond all reasonable doubts. It should be remembered that the trial court is duty bound to analyze and consider accordingly the evidence raised by defense side however, weak, foolish, unfounded, or improbable and where it may be found that the court below did not observe this principle, there is no better option but allow the appeal (see **Martin Swai vs. The**

As all stated above and pursuant to the arguments of both sides in record, I am of the same view that the appellants were illegally convicted and sentenced. In the light of the above analysis and findings I find merit in this appeal and satisfied that the guilty of the appellant was not proved beyond all reasonable doubt. I therefore quash the conviction, set aside sentence and set free the appellants from the prison forthwith unless otherwise lawfully detained.



D.B. Ndunguru
JUDGE
29/03/2021