

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL No.119 OF 2020

(Originating from the judgment of the District Court of Geita in Criminal Case No. 140 of 2018,)

WILSON KASANDIKO @ MGEMA1ST APPELLANT

LEONARD MBULIKA2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

17th March & 27th April, 2021.

TIGANGA, J.

The appellants herein namely Wilson Kasandiko @ Mgema and Leonard Mbulika, hereinafter referred to as the 1st and 2nd appellants respectively, stood charged before the District Court of Geita with an offence of Armed Robbery contrary to section 287A of the Penal Code Cap 16 of the laws [now R.E 2019]

The particulars of the offence are that, on 12th day of April 2018, at around 19.54hrs at Mwatulole area in the District and Region of Geita, the

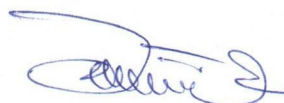


two appellants together with another accused, one Samwel Obari, who did not appeal, stole one motor tricycle Make TVS KING with registration number MC 790 BXQ valued at Tshs. 7,500,000/= the property of one **Hellen Ernest Kahindi**, immediately before stealing they used iron bar and machete to hit and cut, one **Renatus David Machimu** and roped his hands and legs in order to obtain the said property.

After full trial before the trial court, which involved eight prosecution witnesses, three defence witnesses, and fifteen prosecution exhibits the appellants was found guilty and convicted as charged, and consequently sentenced to the mandatory sentence of 30 years jail imprisonment.

Dissatisfied by the findings and sentence the appellants filed seven grounds of appeal as follows;

- (i) That the conviction was wrongly based on unfairly evidence of identification parade and that of the visual identification which was not supported by prior description of the identified suspects.
- (ii) That the identification parade in both first and second instances were conducted out of the terms prescribed under rules and



procedure specified in the PGO No. 232 and Police Auxilliary Act,

- (iii) That the trial court did not perceive the fatal defects and improcedural in recording those extrajudicial statements exhibits P3 and P4 under control of single justice of the peace thus cast doubt on admission/confession under intimidation, made out of time limitation.
- (iv) That the trial court did not detect and resolve upon the fact that the charge sheet is at variance to the evidence adduced in referring to whom threat and violence was directed and inflicted to, between Renatus David@ machimu and Ayoub Ryoba thus destroy the whole case
- (v) That the conviction was wrongly based on the doctrine of recent possession of the stolen articles in exhibits P1 and P2 which was predicted on contrived and incredible evidence adduced,
- (vi) That the trial Court did not subject the entire evidence to an objective scrutiny and in thus ended up by not considering the appellant's defence adequately and or at all.

- (vii) That the prosecution case was not only uncorroborated one but also was too shaky is in contrast to the strong defence thus unsafe to base a conviction.

In the end, they asked for their appeal to be allowed and they be set free from custody.

When this appeal was called for hearing, the appellant appeared in person and unrepresented, but through audio teleconference, while the respondent was represented Miss. Rehema Mbuya, learned Senior State Attorney.

Called upon to argue their appeal, the appellant opted to adopt their grounds of appeal and asked the court to consider them as their submissions; they asked the State Attorney to respond, and reserved their right to rejoinder, should there be anything to rejoinder.

The learned Senior State Attorney for the respondent did not support the appeal, she instead supported the conviction and the sentence meted out against the appellants. In her submission against the first ground of appeal, she submitted that the victim had ample time and favourable environment to identify the appellants, as at page 20 of the proceedings,



he testified that, 3rd accused hired him to take him to Nguzo mbili, when he took him there, there was an electric light from the nearby house and they stood there for a while negotiating, before the robbers robbed him. The learned State Attorney submitted that, in her opinion, considering the time spent together by the victim and the accused, and by the assistance of light, the victim was able to identify the appellant.

On the second ground which raises the complaint that, the identification parade did comply with the law, she submitted that looking at page 41 of the proceedings, PW8 a police officer who conducted the identification parade, said that he followed all the procedures and filled in the identification parade registers exhibits P14 and P15 which were admitted without objection. In support of the argument she cited the case of **Daniel Muhere vs The Republic**, Criminal Appeal No.501 of 2007 CAT which held to the effect that, failure to cross examine on, or object the exhibit when it is being tendered is tantamount to admission of the content thereat.

Regarding the third ground of appeal that the extra judicial statements were recorded unwillingly and without following the procedure. She argued that, the statements were recorded in compliance with the law.



She submitted that although the time had already passed, but it was within a week from the arrest. She further reminded the court that there is no time limit provided by law within which to record the statement, though it is as soon as practicable. Last but not least on that ground, she submitted that the statement was admitted without objection. In her opinion, the ground has no merit, he asked for its dismissal.

Regarding the fourth ground of Appeal, which raises a complaint that the evidence is at variance with the charge, she submitted that looking at the evidence of PW1 and PW3 proved the case beyond reasonable doubt, as they narrated the story which was supported by the cautioned statement and extra judicial statement as well as the evidence of PW7 who testified that the victim was cut, for these reasons the evidence are not at variance with the charge.

Regarding the fifth ground of appeal, which raises the complaint that that the decision was based on the doctrine of recent possession of the property, the evidence of PW5 said they arrested the accused at Mkombozi Ferry and found them with Bajaji at Kamanga. According to her, that evidence was not seriously disputed; therefore, she submitted that the evidence proved the case beyond reasonable doubt.



Regarding ground 6 and 7 of appeal, she submitted further that, the court considered all the evidence, by the prosecution and defence, and subjected the same to scrutiny before arriving at the conclusion that the case was proved beyond reasonable doubt. To stress on the strength of the evidence she reminded the court of the evidence of the confession statement and cited the authority in the case of **Patrick Sanga vs The Republic**, Criminal Appeal No. 213 of 2008 in which according to her, the confession may be made before any person provided the person confessing is not forced to do so.

In rejoinder the 1st appellant asked the court to adopt his grounds of appeal, he insisted that when he was arrested, he had no any stolen property, he said he was just a passenger in Mkombozi Bus and had no any property and that even the evidence of the PW5 proves that he did not find him with any property.

He also challenged the identification parade that it was not properly conducted and that the victim identified him via slippers which he was forced to wear at the police station. He in the end asked to be acquitted.

The second appellant in his rejoinder submitted that, it is not true that he committed the offence, and prayed to this court to adopt his grounds of appeal and find him not guilty and acquit him.

Now having summarised the record and the submission made in support and opposition of appeal, for easy flow of the idea I will deal with the grounds of appeal in the manner adopted by the learned Senior State Attorney in her submission.

The first ground raises a complaint that, the conviction was wrongly based on unfairly evidence of identification parade and that of the visual identification which was not supported by prior description of the identified suspects. The learned Senior State Attorney submitted that, the victim had ample time to identify the 3rd accused as he hired him to take him to Nguzo mbili and when he took him there, he stopped at a place where there was an electric light from the nearby house which assisted victim to identify the accused as, they stood there for a while negotiating. She submitted that, in her opinion, considering the time spent together, and the assistance of the light, the victim was able to identify the appellant.

As earlier on pointed out, the appellants said nothing on this ground, I will rely on the ground of appeal and the submission made by the learned Senior State Attorney. In so doing I will be guided by the principle governing the evidence of visual identification is well articulated in the case of **Waziri Amani vs Republic**, [1980] T.L.R 250 In that case, the Court of Appeal of Tanzania held *inter alia* that;

"The evidence of visual identification is of the weakest kind and no court should act on it unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely water tight. Before relying on such evidence, the trial court should put into consideration the time the witness had the accused under observation, the distance at which the witness had the accused under observation, if there is any light, then the source of light and intensity of light and whether the witness knew the accused person before"

Also see **Gozibert Henerico Vs Republic**, Crim. Appeal No. 114 of 2015. To be precise, the prosecution needs to bring evidence stating the following factors before the court has relied upon the evidence of identification;

- (i) *The time the witness had the accused under observation*



- (ii) *The distance at which he observed him,*
- (iii) *The condition in which such observation occurred, for instances whether it was day or night (whether it was dark, if so was there moon light or hurricane lamp etc) (the source and intensity of light),*
- (iv) *Whether the witness knew or had seen the Accused person before or not.*

From the testimony of PW1, no evidence was lead to explain the distance from which the victim observed the appellants, the time taken and more important the intensity of light, which assisted the victim to identify the appellant, first at where the victim was hired and at where he was robbed. It is important that all ingredients in **Waziri Aman vs The Republic** (supra), must be fulfilled before the court is satisfied that the evidence of visual identification is watertight. In this case, the requirement in **Waziri Aman (supra)** was not met therefore the first ground of appeal is meritorious; it is thus allowed on the ground that the evidence of visual identification relied upon by the trial court was not water tight.

Regarding the second ground of appeal, which raises the complaint that, the identification parade in both first and second instances were conducted out of the terms prescribed under rules and procedure specified in the PGO No. 232 and Police Force and Auxilliary Services Act. For the



purposes of enlightenment, I, find it appropriate to reproduce here the basic rules as listed in PGO232:

a) The officer-in-charge of the case will make the preliminary arrangements for the parade and shall enter the number of persons attending the parade and the suspects in the space provided under Head NO.3 in the Identification Parade Register (P.F. 186). He will enter the names of the witnesses under Head No. 4 of the register in the order in which they are to be called. A supPLICATE copy of all entries in the register will be made by inserting a sheet of carbon paper between the original and duplicate pages.

b) Although the officer-in-charge of the case may be present; he will take no part in conducting the parade. The officer conducting the parade must be an officer unconnected with the case and, whenever possible, a Gazetted Officer, Officer below the rank of Assistant Inspector are not permitted to conduct Identification Parade.

c) At a reasonable time prior to the parade, the officer-in-charge of the case will inform the suspect that he will be put up for identification. Any objections raised by the suspect will be noted and



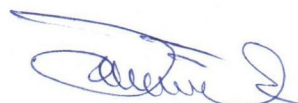
communicated by the officer-in-charge of the case to be officer conducting the parade before it is held.

d) If the suspect desires the attendance of a solicitor or friend, arrangements must be made for him to attend the parade if he wishes to do so. The person so attending will be required to remain in the background, observing only and saying nothing.

e) The place selected for the parade should have a good light. No unauthorized persons will be permitted to attend or witness the parade.

f) The witnesses will be assembled under the charge of a Police Officer who has no connection with the case in a room or place out of sight and hearing of the parade, from which they can be called to the parade by the officer conducting it.

g) The witnesses will not be allowed to see or hear the suspect before he is put up for identification, nor should they be assisted by any description or photograph of him, or in any other way.



h) Officers who made the arrest or who took part in the investigation will not be sent to bring or notify witnesses to attend the parade and will not communicate with them before the parade is held.

i) Arrangements will be made to ensure that witnesses have no opportunity to see, or be seen by; any of the persons to be paraded.

j) There is no objection to the suspect being put up for identification in the clothing he was wearing when the offence was committed (providing that such clothing does not show stains, marks, or tears which patently distinguish his clothing from that of other persons on the parade). Alternatively, the suspect may be put up for identification in the clothing he was wearing when arrested.

k) Persons selected to make up the parade should be of similar age, height, general appearance and class of life. Their clothing should be in a general way similar. The persons selected for the parade must not be known to the complainant or the identifying witnesses as identification would then have little value.

l) Police Officers will not be used to make up the parade unless the case is one in which a Police Officer is concerned as a suspect.



n) There should be eight or more persons on the parade for one suspect: ten or more for two suspects. If there are more than two suspects, more than one parade will normally be held, with different personnel being used to form each parade.

o) When the officer conducting the parade has arrived and has taken charge of the proceedings, the suspect will be brought on to the parade. The officer conducting the parade will explain the purpose of the parade and will ask the suspect if he has any objection to any person participating in the parade. Any objection raised by the suspect will be noted in the Identification Parade Register and immediate steps taken to replace those persons to whom the suspect objects. The suspect will then be invited to stand where he please in the line. The position he selects will be noted in the Register.

p) Great care must be taken that the suspect is not wearing handcuffs or anything else that might distinguish him from the others. No attempts at disguise will be permitted.

q) The first witness will be called to the parade by the officer conducting it, who will explain the purpose of the parade in the



hearing of those on parade and invite him or her to point out by touching any persons he or she identifies. Under no circumstances shall the witness be touched or led during his or her examination of the parade.

r) If the witness requires any person on the parade to walk, tstk, see him with his hat on or off; this may be done but the whole parade must be asked to do likewise. The officer conducting the parade will not carefully in his Identification Parade Register any identification or degree of identification made and any material circumstances connected therewith including any wrong identification/ and any remark or objection made by the suspect. He shall ask the witness who makes the identification "In what connection do you identify this person? and shall similarly record precise details of the witnesses reply. No other questions are permissible.

t) On leaving the parade, the witness will be conducted to a place where he or she is out of sight and hearing of the parade and cannot communicate in any way with other witnesses waiting or members of the Force and will remain there under the charge of a Police Officer, who has no connection with the case, until the parade is finished.



u) Subsequent witnesses will be brought into the parade and handled in accordance with the same procedure set out in sub paras (a) - (t) above.

Looking at the requirement provided by the law, it goes without saying that, in the present case, the rules on conducting identification parade were flouted in some material particulars. **First**, the officer conducting the parade (PW8) did not explain, in his evidence, whether those people on the parade had similar (alike) features with the suspects so as to ensure that the parade was conducted in a fair and just manner. Surprisingly as well, none of those people on the parade was called as a witness to clear doubts and lender the credence to the case for the prosecution side.

Second, throughout evidence of PW1 and the investigator, as well as PW8, no where the in evidence where it is said that, witnesses gave prior description of the suspects before the parade.

On the point, the defunct Eastern Africa Court of Appeal held in **Republic v. Mohamed Bin Allui** (1942) 9 EACA 72 that:



"in every case in which there is a question as to the identity of the accused. the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence always ought to be given; first of all, of course, by the person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."

Although the identification parade registers were not the sole evidence which the trial court relied on in its decision, but to the extent relied upon, the irregularity I have just mentioned above reduces the probative value of the identification parade. The second ground of appeal is meritorious and upheld.

Regarding the third ground of appeal, which raises the complaint that, the trial court did not perceive the fatal defects and impropriety in recording the extrajudicial statements exhibits P3 and P4 under control of single justice of the peace thus cast doubt on admission/confession under intimidation, made out of time limitation. I agree that the exhibits P3 and P4 were recorded by the single justice of the peace, and that this may be prejudicial to the accused from whom the statements were recorded.



However the said prejudice is perceived than being real. I hold so because I have passed through the said extra judicial statements, **first**, I find that they were recorded in accordance with the Chief Justice Guide to the Justice of the Peace, as directed in the case of **Hatibu Gandhi & Others v. The Republic**, [1996] T.L.R. 12, **Japheth Thadei Msigwa v. The Republic** Criminal Appeal No. 367 of 2008 (unreported) and **Joseph Kafuka & Another v. The Republic**, Criminal Appeal No. 87 of 2014 (unreported).

Second, both extra judicial were admitted without any objection from the accused. In our law **Martin Misara versus The Republic**, Criminal Appeal No. 428 of 2016, (Unreported) in which he relied on the cases decided earlier namely **Damian Ruhele v. The Republic**, Criminal, Appeal No. 501 of 2007, **Cyprian Athanas Kibogoyo v. The Republic**, Criminal Appeal No. 88 of 1992, **George Maili Kemboge v. The Republic**, Criminal Appeal No. 327 of 2013, **Nyerere Nyague v. The Republic**, Criminal Appeal No. 67 of 2010 and **Ismail Ally v. The Republic**, Criminal Appeal No. 212 of 2016 (all unreported).

"It is the law in this jurisdiction founded upon prudence that failure to cross-examine on a vital point, ordinarily, implies the



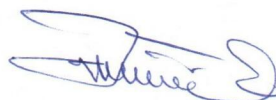
acceptance of the truth of the witness evidence; and any alarm to the contrary is taken as an afterthought if raised thereafter –

Further to that, the more elaborate the Court of Appeal insisted in Nyerere Nyegue (supra):

"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

Having not objected the admission of the extra judicial statements i.e exhibit P4 and P5, and having not cross examined the witness who recorded them and tendered them, they are estopped at this stage to question the legality and regularity of the same. The ground there fore lacks merit, and it is hereby dismissed.

Regarding to the fourth ground of appeal, which raises a complaint that, the trial court did not detect and resolve upon the fact that the charge sheet is at variance to the evidence adduced in referring to whom threat and violence was directed and inflicted to, between **Renatus David@Machimu** and **Ayoub Ryoba** thus destroy the whole case. It is true that the charge sheet in its particulars of the offence indicated that violence



was directed to one **Renatus David Machimu** as the person from whom the alleged stolen motor tricycle was stolen, but on record the said **Renatus David Machimu** testified as PW3 and said his role was to record the extra judicial statement as the justice of the peace. From the evidence on record he was therefore not robbed, while the evidence of PW1 **Ayoub Ryoba** shows that he was the one robbed. Looking at the evidence and the charge, it goes without saying that the evidence is at variance with the charge. In the case of **Kishima Mnadi vs The Republic**, Criminal Appeal No. 78 of 2011 which was relied in the case of **Bariki Lugazira & Another vs The Republic**, Criminal Appeal No. 510 of 2015 it was held inter alia that;

*"Strictly speaking for a charge of any kind of Robbery to be proper it must contain or indicate actual personal violence or **threat to a person on whom robbery was committed.** Robbery as an offence cannot be committed the use of violence or threat to the person targeted to be robbed. **So the particulars of the offence must not only contain the violence or threat but also the person on whom the actual violence or threat was directed.**" [Emphasis added]*



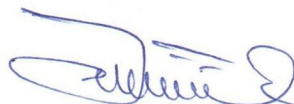
As indicated above the particulars of the offence mentioned a person who was not robbed but the person who was the justice of the peace. While the evidence shows that the person who was robbed was another.

Now what are the consequences of that? In the case of **Vumi Liapenda Mushi Versus The Republic**, Criminal Appeal No. 327 of 2016, CAT –Arusha

"It is clear that there is variance in the charge and the evidence of PW3 which should be resolved in favour of the appellant."

For that reason, it is instructive to find that as the evidence upon which the appellant was found guilty and convicted, was at variance with the charge, the trial court was not justified to find the accused person guilty and convict him basing on that evidence.

That said, I find that without even going to the merit of the rest of the remaining grounds of appeal that the trial court was supposed either to order amendment of the charge in terms of section 234 of The Criminal Procedure Act, [Cap. 20 R.E 2019] or resolve that variance between the charge and evidence in the favour of the appellants. I therefore allow the appeal, quash the conviction and set aside the sentence passed against the



appellants. They are acquitted and an order for their release is hereby made unless otherwise lawfully withheld.

It is so ordered.

DATED at MWANZA this 27th day of April, 2021

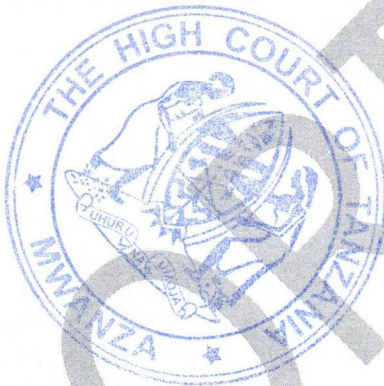


J.C. Tiganga

Judge

27/04/2021

Judgment delivered in the presence of the appellant on line via audio conference and Miss Mbuya learned Senior State Attorney for the respondent. Right of Appeal explained and guaranteed.



J.C. TIGANGA

JUDGE

27/04/2021