

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY OF SHINYANGA  
AT SHINYANGA**

**CONSOLIDATED CRIMINAL APPEALS NO.13 & 19 OF 2021**

<b>HAMISI RAMADHAN@NDIMO</b>	}	..... <b>APPELLANTS</b>
<b>MOSHI CHANDU@IMALAGOGCHA</b>		
<b>MASHAKA MBANDIKO</b>		

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

(Appeal from the Judgment of the District Court of Shinyanga)

**Mushi-RM**

**Dated the 7<sup>th</sup> of December, 2020**

**In Criminal Case No.91 of 2019**

.....

**REASONS FOR DECISION**

**14<sup>th</sup> July & 24<sup>th</sup> September, 2021**

**MDEMU, J.:**

The three Appellants were jointly charged and subsequently convicted and sentenced to thirty (30) years prison term for the offence of armed robbery contrary to the provisions of section 287A of the Penal Code, Cap.16. On 14<sup>th</sup> of July, 2021, I heard the three Appellants and the Respondent Republic under the service of Ms. Salome Mbughuni, learned Senior State

Attorney. I was satisfied that there is no evidence on record through which this court may sustain conviction and sentence met by the trial court. In consequence whereof, I allowed the appeal by quashing conviction and setting aside the sentence thereof. The Appellants were released but the reasons for the decision were reserved, which I am now prepared to give.

As said, in the District Court of Shinyanga, the three Appellants were arraigned for contravention of the provisions of section 287A of the Penal Code. According to the particulars of offence as contained in the charge, the armed robbery in question was committed in the night of 31<sup>st</sup> of March, 2021 within Kizumbi area in Shinyanga where by the Appellants did steal Tshs. 350,000/=, air time vouchers valued at Tshs 150,000/= and one cell phone make Bomay, all being the properties of Christina Peter and at or before such stealing, did use an iron bar and machete in order to steal the said properties.

On conclusion of trial after hearing six witnesses of the prosecution and three witnesses of the defence, the trial court found the prosecution case to have been proved beyond reasonable doubt thus convicted the Appellants as charged and sentenced them to thirty years' prison term. This was on 7<sup>th</sup> of July, 2020.

The three Appellants were not happy with the trial court's decision, thus the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants filed a joint appeal whereas the 1<sup>st</sup> Appellant appealed separately. The two appeals got consolidated and parties appeared for hearing to argue the appeal on 14<sup>th</sup> of July, 2021. In total, there are eight grounds of appeal which all add up to one ground of complaint that the prosecution case was not proved beyond reasonable doubt.

The three Appellants appeared in person whereas the Respondent Republic was represented by Ms. Salome Mbughuni, learned Senior State Attorney. When taken the floor, all the Appellants prayed their grounds of appeal be adopted to form part of their submissions and asked for their release.

Ms. Salome Mbughuni SSA, did not resist the appeal. On proof of the prosecution case, she submitted on visual identification, identification parade and confessions. In her view, these were the basis of conviction of the trial court. regarding visual identification, her view was that PW1 did not describe how the solar light assisted her in the identity and her evidence of recognition to the 1<sup>st</sup> Appellant is unreliable. She cited the case of **Emmanuel Chigonji vs R, Criminal Appeal No.355 of 2018** (unreported) insisting that, there are times of mistaken identity even in



evidence of recognition. He added by citing the case of **Ahamed Seluke and 9 Others vs R. Criminal Appeal No.131 of 2009** (unreported) and that of **Marwa Wangiti Mwita vs R (2002) TLR 39** that, PW1 did not name the Appellants to those responded to the alarm which, to her, ability to name or failure to is relevant in so far as admissibility of evidence of visual identification or recognition is concerned.

With respect to the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants, PW1 was not familiar to them and in fact, never described them thus violated the principles stated in **Hamis Abdallah @ Mgwali vs R, Criminal Appeal No. 184 of 2011**(unreported) at page 6 and 7.

Ms. Mbughuni also commented on the evidence of identification parade(P1) where PW1 identified the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. She stated that, the identification parade evidence has no evidential value for want of description of the evidence on visual identification by the prosecution witnesses. In this, she cited the case of **Gwisu Nkonoli and 3 Others vs R. Criminal Appeal No.359 of 2014** (unreported) at page 8.

As to confessions (P3), her view was that, much as the caution statement was admitted after inquiry, there is no evidence to corroborate

the repudiated confessions. The other caution statement was recorded out of time thus contravened the provisions of section 50 of the Criminal Procedure Act, Cap.20.

Her last submission was on the evidence of recent possession. In this evidence, she submitted that, the Appellant Moshi Chandu was arrested in possession of a mobile phone, exhibit P6. She however asked me to expunge the said exhibit because it was tendered by the prosecutor which was against the legal requirement. It was under those premises the learned Senior State Attorney refrained from supporting conviction and sentence.

From submissions of parties and the evidence on record which I duly considered, it is on record that, the basis of conviction by the learned trial magistrate was on evidence of visual identification, identification parade, confessions and the doctrine of recent possession.

Commencing with the evidence of visual identification, it is not disputed that, the offence took place in the night and that according to the evidence of PW1, solar light is what assisted him to identify the Appellants. As correctly submitted by the learned Senior State Attorney, this evidence is unreliable because PW1 neither described the intensity of the light that

assisted him in the said identification nor described the Appellant. It is clear therefore that, in absence of detailed description of the Appellants at the scene of crime, the possibility of mistaken identity could not be ruled out (see **Hamis Abdallah @ Mgwali vs R** (supra) at page 7)

With regard to the evidence of identification parade, it is my considered view that, as there is no evidence of visual identification basically for want of description of both the aiders and the identified, the evidence on identification parade may not be relied upon. The reason is simple that, identification parade is not substantive evidence. It is usually admitted for collateral purposes and mostly for corroboration. (see **Abdallah Ally vs DPP, Criminal Appeal No.300 of 2009** (unreported))

Having considered the evidence of visual identification and identification parade, which in this appeal have not found their way in evidence, the learned trial magistrate also deployed the evidence of recent possession. At page 14 of the proceedings in the testimony of PW1, this is what transpired with regard to receiving of the mobile phone (P2) in evidence:



*I also recognized my mobile phone which was hold by the police officer and I see it today. I will know it since it was broken on the screen and at the back cover was broken as well.*

***State Attorney-Shemkole:*** *we pray the mobile phone categorized by PW1 in her evidence be received as exhibit in case the accused will have no objection*

*1<sup>st</sup> Accused- I have no objection*

*2<sup>nd</sup> Accused- I have no objection*

*3<sup>rd</sup> Accused-I have no objection*

***Court:*** *the mobile phone Bomay white in colour received as exhibit P2 since there is no objection on the part of the three (3) accused's before this court*

*SGD; P.G. MUSHI-RM*


*25<sup>th</sup> /9/2019*

As submitted by the learned Senior State Attorney, it was unprocedural in the first place for the learned State Attorney to tender the said exhibits. Secondly, which appears to me more fatal is that the mobile phone so tendered which is white in color is not described in the charge sheet. What is in the charge is just mentioned as a mobile phone which, in my view, as the color is not mentioned in the charge, one may not be certain if it is the


same mobile phone so named or to the contrary view. What therefore follows for the variance between the evidence and the charge, then the charge of armed robbery has not been proved.

With this evidence, it is obvious that, the prosecution case was not proved beyond reasonable doubt as legally required by the law. This was the reason I allowed the appeal of the three Appellants by quashing conviction of the offence of armed robbery, setting aside the sentence of thirty (30) years imprisonment and ordered the release of the three Appellants from prison unless lawful held for some other causes.

It is so ordered

  
**Gerson J. Mdemu**  
**JUDGE**  
**24/9/2021**

**DATED at SHINYANGA** this 24<sup>th</sup> day of September, 2021

  
**Gerson J. Mdemu**  
**JUDGE**  
**24/9/2021**

