IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 110 OF 2021

HAMAD RASHID @ MUSA MUDI WA TANGA.....1ST APPELLANT

MAULID ALLY MBONDE @ MAUGADO.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(*Originating from the judgment of District Court of Mkuranga Criminal Case No. 45 of 2020)*

JUDGMENT

Date of last order: 22/9/2021

Date of judgment: 03/11/2021

LALTAIKA, J.

The appellants, **HAMAD RASHID @ MUSA MUDI WA TANGA** and **MAULID ALLY MBONDE @MAUGADO** (hereinafter to be referred as 1st appellant and 2nd appellant or appellants) were charged before the District Court of Mkuranga with the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E.2019.

The particulars that were laid in a charge sheet disclosed that on the 5th day of February, 2020 at about 02:00 hours at Kilongoni Vikindu village

within Mkuranga District in Coast Region, the appellants, armed with machetes and pieces of wood did steal three cell phones make *infinix* blue in colour valued at Tshs.380,000/=, one *Iphone* silver in colour valued Tshs. 400,000/= *Samsung Galaxy* Note black in colour valued at Tshs.600,000/= one television flat screen make *Sony* black in colour 55 inches valued at Tshs.1,200,000/=, one laptop make *Lenovo* valued at Tshs.600,000/=, steel saucepans two dozen valued at Tshs.440,000/= one bag valued at Tshs.30,000/=, one hair cutting machine valued at Tshs.50,000/=, one National ID and cash money Tshs.900,000/=. The total value of the said stolen properties was Tshs.4,600,000/= belonging to Boniface Peter Chumi and his wife.

It was alleged further that in order to obtain the said properties the appellants threatened Mr. and Mrs Chumi with machetes and pieces of wood. Pursuant to the said allegation, a court trial was conducted at Mkuranga District Court. The prosecution side paraded five witnesses and three documentary exhibits in order to prove the case against the appellants. The appellants were found guilty. They were convicted and sentenced to 30 years' imprisonment. Aggrieved with both the conviction and sentence the appellants appealed to this court with six grounds of appeal. The grounds are reproduced as hereunder;

1. That the learned Resident Magistrate, misdirected herself in fact and in law by failing to make finding that the charge sheet was fatal defective as the evidence adduced was at variance with the charge sheet.
2. That the learned Resident Magistrate, erred in law and fact by convicting and sentence (sic!) the appellants whilst the essential ingredients necessary to constitute the offence of armed robbery

i.e. stealing was not proven by the claimed victim indicated in the charge sheet.

3. That the learned Resident Magistrate (sic) by convicting and sentencing the appellants by relying on improper voice and visual identification which was so unreliable and contradictory and was uncorroborated as identifying witnesses failed to describe the appellants during and after the incident, as for identification parade conducted did not conform to the statutory requirements which are contained in Police General Order (PGO) No.232. Also, the identification parade (Exhibit P.3) was not read aloud in court contrary to the procedural law.
4. That the trial Court record (proceedings) were not authentic hence a nullity for the Learned Resident Magistrate failure to append her signature after taking down the evidence of every witness contrary to section 210 (1) (a) of the Criminal Procedure Act, Cap 20 R.E.2019.
5. That the learned Resident Magistrate erred in law and fact in convicting and sentencing the appellants relying on Exhibit P.1 and Exhibit P.2 (Confessional statements of the appellants which were retracted and repudiated) while the same were taken out of time contrary to mandatory provisions of section 50(1) and 51(1) (a) (b) of the CPA, Cap 20, R.E.2019 and the trial learned Resident Magistrate shifted the burden of proving voluntariness of the confessional statement to the appellants contrary to section 27(2) of the Tanzania Evidence Act, Cap 6 R.E.2019.
6. That the learned Resident Magistrate erred in law and fact in convicting and sentencing the appellants while the prosecution case

was note proved beyond reasonable doubt and failure to consider the defence evidence adduced by the appellants.

On 22/9/2021 this matter was called up for hearing. Mr. Nehemia Nkoko, learned advocate, appeared for the appellant whereas Ms. Gladness Mchami, learned state attorney, appeared for the Respondent. Upon the invitation to address the court on the grounds of appeal, Mr. Nkoko opted to drop the sixth ground.

In his submission, the learned counsel Mr. Nkoko chose to argue on grounds one and two simultaneously. He stated that the charge being the foundation of the criminal trial, it is a requirement of law under section 132 and 135 of the CPA that essential elements of the offence must be mentioned in the charge sheet. In the instant matter, the learned counsel opined, this was not the case. Mr. Nkoko avers that according to the evidence adduced by PW1 Boniface Peter Chuma, the bandits had pointed a short gun to them and ordered them to lie down. However, the learned counsel went on to argue, the charge sheet shows that the appellants used pieces of woods.

Mr. Nkoko went on to submit that the variance between charge and evidence makes the charge fatally defective. He is of the firm view that the provisions of section 388 of the CPA cannot cure the mischief. The learned counsel opines further that this leads to nothing else but acquittal because the appellants were not fairly tried. To add on that Mr. Nkoko stated that the expression '*his wife'* is vague on the ground that the omission to state the name of the wife also renders the charge sheet defective. To buttress his submission Mr. Nkoko cited the case of **Emmanuel Magende & 3 Others vs Republic, Crim. Appeal**

No.35/2018 Court of Appeal at Shinyanga and **Hamisi Mohamed Mtou vs Republic**, **Crim. Appeal No.228/2019, Court of Appeal at Dar es Salaam.**

With regards to the third ground of appeal, Mr. Nkoko submitted on the aspect of identification. He contended that Exhibit P3 the identification parade was not read out aloud in court during trial. Mr. Nkoko vehemently argues that the remedy for that omission is to expunge the said exhibit from the court record. In support of his submission, Mr. Nkoko cited the case of **Frank John Libanga @ Rampad & Another vs Republic, Criminal Appeal No.55 of 2019, CAT at Dar es Salaam.**

Mr. Nkoko, moreover, faulted the trial court for relying on the testimony of PW2 who failed to address the trial court on the issue of intensity of light that would enable him to identify the appellants while the incidence occurred at 2AM. He is of the view that under normal circumstances when a person is attacked, he/she becomes terrified thus making it difficult under such a threatened condition, to properly identify the attacker. To strengthen his argument Mr. Nkoko cited the case of **Dyamtonza John@ Buyoya & Another vs Republic, Criminal Appeal No.289 of 2019 Court of Appeal** at **Bukoba** which, in his opinion, bears striking similarity with the instant matter.

Arguing on the fifth ground of appeal, Mr. Nkoko submitted that the cautioned statement of the first accused person, which was admitted as Exhibit P1 was not freely obtained. He contended that the cautioned statement was made in the presence of another police officer. He invited this court to consider that the presence of another police officer during the interrogation prejudiced the first accused. As for the second appellant's cautioned statement Mr. Nkoko submitted that the record of

the trial court does not indicate whether the same was read out aloud in court during trial. He opined that the remedy for such error is to expunge the statements from court records for they cannot be cured by the provisions of section 388 of the CPA. To buttress his argument Mr. Nkoko cited the case of **XD8656 Coplo Senga s/o Idd Nyengo & 7 Others vs Republic, Criminal Appeal No.16/2018 Court of Appeal** at **Dar es Salaam.**

Coming to the last ground namely ground six, Mr. Nkoko submitted that firstly the stolen goods were never recovered and brought to court and secondly the trial court's judgment failed to consider the defence of the accused persons. Consequently, the learned counsel opined that failure to consider the defence case in its judgement, the trial court's action prejudiced the appellant's fair trial. He urged this court to consider nullifying the trial court's judgment.

Opposing the appeal, Ms. Mchami started off with the first ground of appeal. She submitted that the elements of armed robbery as per section 287A of the Penal Code were included in the charge sheet. She agreed that PW1 testified that the appellants used a short gun to threaten them while PW4 stated that the appellants had used pangas and pieces of woods. Ms. Mchami vehemently argued that this variance notwithstanding, it does not change the fact that a dangerous weapon was used in the committing the offence. The learned state attorney thinks that the particulars of the offence were sufficiently described to enable the accused persons to understand the offence and prepare for their defence. In that regard, Ms. Mchami cited the case of **Musa Mwaikunda vs R,2006 TLR 387.** She opines that the ground lacks merit.

Arguing on the third ground, Ms. Mchami started by agreeing with her learned colleague Adv. Nkoko that the second accused person's cautioned statement was not read aloud. She in agreement with counsel for the Appellants that the same should be expunged from court record. Nevertheless, Ms. Mchami prays that the testimony of PW5 be retained in corroboration with the testimonies of PW1 and PW2 who were involved in the identification parade. To bolster her argument, the learned State Attorney cited the case of **Anania Clavary Betela vs Republic, Criminal Appeal No.335/2017 Court of Appeal at Dar es Salaam.** With regards to the assertion made by Mr. Nkoko on intensity of light during identification, Ms. Mchami opined that there was sufficient light for proper identification of the accused persons. She made reference to the case of **Waziri Amani vs R, 1980 TLR 250** which sets out the conditions that must be met for proper visual identification.

Arguing on the fifth ground, Ms. Mchami, while referring to page 20 of the proceedings, submitted that the trial magistrate conducted an inquiry following the second accused person's objection to tender his cautioned statement. She explained that the second accused person had claimed that the cautioned statement was taken out of time whereas the first accused claimed that he did not know the content of Exhibit P2. To this end, the learned counsel opines, the issue of threat was not shown or raised during the trial.

With regards to the omission to read out loud the cautioned statement, Ms. Mchami referred this court to page 25 of the trial court's proceedings. She opines that the same reveal that the prosecutor requested to read loud the content of the cautioned statement and the court went ahead to grant the same. The learned state attorney also cited the case of

Robinson Mwanjisi & Others vs R, TLR 2003 to substantiate her statement.

Coming to the sixth and final ground of appeal, Ms. Mchami was of the view that the defence case was considered in evaluating the evidence to the satisfaction that the first and second accused persons had committed the offence they were charged for.

Having considered the extensive submissions by both parties, I wish to begin with grounds one and two which relate to the issue of charge sheet. To this end, I am inclined to revisit the provisions of section 132 of the CPA. The same provides as quoted bellow:

> *"Every charge sheet or **information shall contain**, and shall be sufficient if it contains, a statement of the **specific offence or offences with which the accused person is charged,** together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged". (Emphasis* is added*)*

Similarly, the provisions of section 135(c)(i) of the CPA provides that;

> *"The description of the property in a charge or an information shall be in ordinary language and such as to indicate with reasonable clarity the property referred to, and if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property"*

It is from the above provision of the law that I am fortified to examine the complained charge sheet to see whether it complies with the

mandatory provisions of law. I find it necessary to reproduce it as shown below;

PARTICULARS OF THE OFFENCE

That HAMAD s/o RASHID MUSSA @ MUDI WA TANGA, MAULID ALLY MBONDE @ MAUGADO & KAISARI s/o RASHID MOHAMED @ K-THE GAME are jointly and together charged that on 05th day of February, 2020 at about 02:00 hrs at Kilongoni Vikindu Village within Mkuranga District in Coast Region being armed with machetes and pieces of wooods did steal three cellphone Make Infinix blue in colour valued Tshs.380,000/=, Iphone silver in colour valued at Tshs.400,000/=, Samsung Galaxy NOTES blck in colour valued at Tshs.600,000/=, one Television flat screen make SONY black in colour 55 inches valued at Tshs.1,200,000, one laptop make LENOVO valued at Tshs.600,000/= steel suspans two dozen valued at Tshs.440,000/= one bag valued at Tshs.30,000/=, one hair cutting machine valued at Tshs.50,000/=, one National ID, cash money Tshs.900,000/=, the total value of the said stolen properties was Tshs.4,600,000/= The properties of Boniface Peter Chumi and his wife, immediately before and after such stealing did threaten them by using machetes and pieces of wood in order to obtain and retain the properties.

It is Mr. Nkoko's submission that the evidence of PW1 on the weapon used to threaten them, recorded as a short gun varies from the weapon described in the charge as shown above. This description, Mr. Nkoko vehemently contends, indicates that the appellants had used machetes and pieces of wood and not a short gun. Mr. Nkoko's concern is that since the charge sheet is the basic foundation of any criminal

charge, it is supposed to be consistent with the evidence adduced before the court. Mr. Nkoko had gone to greater heights to try and explain that while in the instant matter the evidence of PW1 indicates that the appellants had used a short gun to threaten them, his (PW1's) evidence is in variation with the evidence of PW2 who testified that the appellants were armed with sticks and other local weapons like pangas.

I am in agreement with Mr. Nkoko. The variation pointed out makes the charge sheet incurably defective. On the other hand, I find it difficult to buy into Ms. Mchami's argument that what matters in establishing commission of the offence of armed robbery as per provisions of section 287A of the Penal Code is to establish that a dangerous weapon was involved. As I have indicated in the provisions of the law I have cited, appropriate particulars of the offence must be provided in line with the relevant provisions of the law. This practice in our criminal law is of paramount importance in affording fair trial to the accused person.

Going forward, I wish to emphasize that the prosecution had an option to amend the charge right after noticing that there is variation between the charge and the evidence. Section 234 of the CPA provides that:

> *Where at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case made under the provisions of this subsection shall be made upon such terms as to the court shall seem just.*

The trial court's failure to make use of the provisions of section 234 to amend the charge sheet is incurable at this stage. May it suffice to hold that the appellants were convicted with a defective charge. This is tantamount to being tried with a non-existing charge. It does not take much thought therefore to realise that, as a result of such omission, the appellants were not accorded with a fair trial.

As for the third ground of appeal, I have this to say: this court has repeatedly cautioned itself before relying on the evidence of visual identification. The court must be convinced that such evidence is water tight. This ensures that the court does not, due to mistaken identity, convict the innocent or acquit the guilty. In our instant matter, neither PW1 nor PW2 gave a description of the bandits. As to how the culprits were able to identify the appellants, the assertion by PW2 that she knew the first appellant as a *bodaboda* rider and that she had frequently been his pillion passenger is not enough to meet the conditions established by this court when it comes to identification. To this end, I am of a firm view that the evidence relied upon was not sufficiently free from mistaken identity.

In the case of **Juma Jembu @ Issa vs Republic, Criminal Appeal No.318 of 2019, CAT,** the court stated that:

> *"It is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give a detailed description of such suspect to a person whom he first reports the matter to him/her before such a person is arrested. The description should be on attire, worn by a suspect, his appearance, height, colour and/or any special mark on the body of such a suspect"*

Similarly, in the case of **Horombo Elikaria vs Republic, Criminal Appeal No.31 of 2004** the court quoted with approval the case of **Raymond Francis vs Republic (1994) TLR 100** which held that:

> *"In issues involving identification the identification must be water tight. This means that the evidence should exclude any possibility of mistaken identity.*

In the case of **Raymond Frances** (supra) it was stated as follows: -

> *"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"*

When all is said and done, I find the first, second and third grounds of appeal with merits to dispose this matter solely. I do not have to go on with the rest of the grounds. I hereby allow the appeal, quash the conviction and set aside the sentence. The appellants are to be set at liberty immediately unless otherwise held for any other lawful cause.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM DISTRICT REGISTRY

E.I. LALTAIKA

JUDGE

03/11/2021

Court: Judgement delivered in the Court Chambers in the presence of both the Appellant and Counsel for the Respondent

E.I. LALTAIKA

JUDGE

03/11/2021