IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

CRIMINAL APPEAL NO 155 OF 2020
(Appeal from the Decision of the District Court of Ilala in Criminal Case No.279 of 2017)

ABDALLAH SHAHA @ DULLA MBAVU .....APPELLANT
VERSUS
THE REPUBLIC.....RESPONDENT

JUDGEMENT

Last Order 13/10/2021
Date Of Judgement 17/11/2021

MASABO, J.:-

The appellant, Abdallah Shaha @ Dulla Mbavu, was convicted by the District Court of Ilala at Samora of the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E 2019] and sentenced to thirty (30) years imprisonment. Disgruntled by the conviction and sentence, he has come to this court with a first appeal. The appellant memorandum of appeal contains the following eight grounds: **One,** identification against the appellant by PW1 was non credible and un-reliable as he failed to mention the source and intensity of light that enabled him to positively to identify the perpetrators; **Two** identification parade was un procedurally conducted as it offended the provision of the PGO No.232 rule 1, 2(c), (d), (o), (s) &4; **Three,** the trial court could have drawn adverse inference against the victim who failed to

tender the properties allegedly left by the robbers; **Four** the victim failed to describe the bandits; **Five.** the crucial witness were not called to testify; **Six** the victim evidence were not corroborated; **Seven** the prosecution evidence was not credible and **eight** the case against the appellant was not proved beyond reasonable doubt.

During hearing, the appellant who appeared unrepresented stated that he is lay and ignorant of the law and prayed that this court find merit in his grounds of appeal, set aside the conviction and sentence and discharge him from prison. Ms. Jacqueline Werema, the learned State Attorney, who appeared for the Republic supported the appeal. She was of the view that, the identification of the appellant which done by PW1 was not reliable. Exemplifying this point further, she submitted that the main prosecution evidence was PW1's evidence who testified before the trial court that the incident happened at around 2am. Ms. Werema argued that, since the incident happened at night, the court ought to have satisfied itself of the credibility of the identification.

She also referred the court to the decision of the Court of Appeal in **Fulano Alphonce Masalu@ Sirgu &4 others** vs R Criminal Appeal No 366 0f 2018

(unreported) and **Waziri Aman vs R** [1980] TLR 250 in which it was held that, in evidence of visual identification the court must be satisfied that the possibility of mistaken identity is eliminated by looking at among other things, the distance between the accused and victim at the scene and description of the source of light. She argued that in this case, the evidence of PW1 was silent as to the source of light when analyzing the identification. Thus, his evidence was insufficient. She was of the view that, much as the identification parade was conducted, the same was not of much help as stated in **Hassan Manoa v R,** Criminal Appeal No.264 of 2005, Court of Appeal (unreported) where it was held that, identification parade evidence is for only purpose of corroborating the evidence of another witness which as a rule need to be credible.

She further submitted that since in this case the witness did not figuratively describe the appellant there is no explanation as to the source of light and appellant was not arrested at the scene, the identification evidence cannot sustain conviction. Lastly, on this point, she added that, PW4 who participated in the identification parade did not comply with PGO Rules (supra). She underscored that, it was important for PW4 to state and comply

with the rules of the identification parade including notifying the appellant of his rights but the evidence of PW4 is silent.

Ms. Werema also supported the third ground of appeal. She argued that, this ground of appeal has merit because the items mention was not brought before the trial court. She also conceded to the 4th ground of appeal and submitted that it a crucial requirement for the witness to describe the culprits. Regarding the 5th ground Ms. Werema submitted that, although it is not necessary to call every witness, the person who arrested the appellant was a crucial witness. In support, she cited the case of **Samuel Japheth Kahaya v R,** Criminal Appeal No.40 of 2017, Court of Appeal (unreported) where it was held that, in spite of section 143 of the Evidence Act, Cap 6 RE 2019, every case must be adjudged on its own fact. Thus, in this case, it was crucial to call the arresting officer. She then amalgamated the 6th, 7th and 8th grounds and briefly stated that she has nothing to add as all have been argued in the foregoing.

The facts are fairly and mostly uncontroverted that on the night of 16th day of May 2017 (at around 2am) at Lubakaya Chanika area within Ilala District

in Dar es Salaam Region, the Appellant together with other persons whose whereabouts was unknown, broke into the house of PW1, Twalibu Musa Magasa and stole several articles belonging to him. Before and after such stealing, the appellant and his co-offenders, allegedly threatened the said Twalibu Musa Magasa with machetes in order to obtain and retain the said stolen properties. They also used explosives to break into the house. After the incident, the appellant and his co-offenders had left the scene, a few minutes later, PW1 in the company of militia and policemen followed up and managed to recover some of the items which had been left in a half-built house. The accussed was later o arrested with the assistant of good Samaritan. An identification parade was conducted whereby the victim recognized the accussed.

A trite law applicable in first appeal, is that, the main duty of the first appellate court is to evaluate the evidence on record and form an opinion whether the prosecution's case was proved. In the light of this principle, I have carefully considered the submission above and the lower court placed before me. In my scrutiny of the evidence, I have observed that in the trial court the prosecution had five witnesses who were Twalibu Musa Magasa

(the victim), Mariam Khalid Athuman, Shukuru Ramadhan, A/Insp. Dotto and E7655 D/SSgt Nyangete. In brevity, the evidence adduced by these witnesses were as follows. PW1 was the victim. He contended that on 16/05/2017 at 02:00 hrs the robbers who were many in number, invaded his home. Using explosives, they managed to broke into his house. Three of the robbers, the appellant herein inclusive, entered into his bedroom where they tied him, scratched him with machette/sword and managed to take Tshs 4,500,000/=, a laptop make Toshiba valued @ Tsh 850,000/=; water pump valued at Tshs 500,000/=, mobile phone make Techno valued at Tshs 450,000/=; one trousers; one pair of shoes, silver earrings valued at Tshs 60,000/=; hand bag valued at Tshs 45,000/= and two belts. The incident happened in a span of 20 minutes during which all the light in the room were on. In all this time, the robbers were beating him with a machette. He however managed to recognize the appellant owing to three factors: he was called by name during the incident, he was the one who had put a leg on his neck, he was the last person to leave his room and he saw him carrying his laptop. At all the material time when the appellant was beating him, he was seated down and all the lights were still on.

The court was told further that having ransomed the house, the appellant and his co offenders absconded. Later, in a span of five minutes after they have left, militia (walinzi shirikishi) arrived and together with the victim, they decided to follow up the bandits to a half finished building where one of the robbers shouted "Dulla wapige risasi." On hearing this, the militia and the victim retreated and as they were running, they met policemen who were on patrol and together they went back to the half-finished house. The robbers had already left but they left behind an identification card for PW1's wife, a reflector and rings. After the appellant was arrested, PW1 was called at identification parade and ably identified the appellant.

PW2 was Mariam Khalid, PW1's wife. This told the trial court how the incident happened but she denied to have recognised the robbers. Another witness was PW3: Shukuru Ramadhan. This testified that the incident happened at around 2:00hrs on 16th day 2017. He testified to have heard the explosion and was among those who went with the militia to the house where they found some of the stolen properties which belongs to PW1. PW4 was the police officer who prepared the identification parade. He told the trial court how the parade involving 9 people was conducted and that, the appellant

Abdulla Shaha was identified. When asked whether the appellants relatives were present at the identification parade, he admitted that they were not and said it was up to the accused to say whether or not he wanted his relative present during identification parade. PW5. E7655 D/SST Nyangete testified that the accused was brought at police station by good citizen, then he called the victim (PW1) and that was the good citizen who told him that it was the appellant who committed robbery at PW1's house.

Having gone through both submissions, the appellant grounds of appeal and the lower court placed before me, it is common that the incident leading to the present case was committed in the mid of the night. It is also common that, much as there were 5 witnesses, the crucial evidence implicating the appellant is the oral account of PW1. Since the evidence adduced by him was substantially based on visual identification, the main question to be answered is whether PW1 sufficiently identified the appellant or put otherwise, whether the evidence of PW1 sufficiently warranted the conviction and sentence.

It is trite law in our country that, evidence of identification should be cautiously applied as it is susceptible to mistakes. Courts have always been reminded to exercise utmost care when dealing with such evidence more so in cases where, like in the instant case, the incident happened in the mid of the night. This is, however, not to suggest that, the prosecution case in all incidents that happened at midnight will ill flop as it is always possible to identify assailant at night and in frightening environment (**Philip Rukuza Vs R,** Criminal Appeal No.215 of 1994(Mwanza)(un reported).The settled position of law applicable in similar cases is as accurately articulated in **Mussa Hassan Barie & Albert Peter @ John** v R, Criminal Appeal No 292 of 2011 CAT at Arusha (unreported) where, citing with approval its decision in **Waziri Amani v. Republic** [1980] TLR 250, the Court of Appeal held thus:

> The law on visual identification is, we think, now fairly settled. It is of the weakest kind, especially if the conditions of identification are unfavourable. So, no court should base a conviction on such evidence unless, the evidence is absolutely watertight. (See **Waziri Amani vs R** (*supra*). Although, no hard and fast rules can be laid down as to what constitute favourable conditions (as those would vary according to the circumstance of each case) factors such

> as whether or not it was day time or at night if at night, the type and intensity of light; the closeness of the encounter at the scene of crime; whether there were any obstructions to clear vision, whether or not the suspect(s) were known to the identifier previously; the time taken in the whole incident; and many others, have always featured in considering whether or not identification of suspects is favourable (See **WAZIRI AMANI vs R** (*supra*).

Applying the checklist to the evidence on record, it is undisputed that the event not only happened at night but also the facts are silent on whether the appellant was known to PW1 prior to the incident hence an assumption that he was a stranger. Thus, a heightened risk of mistaken identity. Regarding the source of light, PW1 vaguely stated that the light was on without divulging any details as to the source/type of the said light and its intensity. The court is thus left to speculate on the source of the light which is lucidly wrong as speculation is not the duty of court. Court decisions are borne out of evidence and not speculations. The Court of Appeal was confronted with a similar situation in **Flano Alphonce Masalu @ Singu vs Republic** (supra). In that case, just like in the instant case, the victim vaguely stated that the lights were on without providing any specificity as to

actual source of light and its intensity. Much as there was a consensus finding by the lower courts that the possibilities of mistaken identity had been eliminated, the Court was of the view that, the possibility of a mistaken identification was not completely eliminated as the prosecution witnesses gave a vague account on the light that aided their identification of the raiders who were all strangers to them. The omission was found to be a short fall and the appeal was consequently allowed.

Another shortfall was the failure by PW1 describes the appellant. Nowhere in the record did PW1 describe the appellant. The fact that he spent about 20 minutes with the appellant was, in my view sufficient enough to have noted some notable features to assist in the identification but none was divulged. Thus, it is not clear as to how PW1 identified the appellant during the identification parade. As held in **Flano Alphonce Masalu @ Singu vs Republic(supra**), the failure to identify the appellant prior to the identification parade implied that "*there was no factual basis for the witnesses to purport identifying the assailants in the identification parade* conducted by PW4.

The next question to be answered is whether in the absence of any anomaly in the identification parade would the identification parade suffice to sustain the conviction against the appellant? The answer is certainly in the negative. The law on identification parade leans heavily towards the view expressed by the learned State Attorney in her submission that all what an identification parade offers is corroborative evidence. This was stated in **Flano Alphonce Masalu @ Singu vs Republic** (supra), where the Court held thus;

> ...in view of our above conclusion that the visual evidence was insufficient, we need not deal with the grounds of appeal assailing the propriety of the identification parade and the validity of the parade register extracts. An identification parade presupposes that the person to be identified on it was identified at the scene of the crime, which is not the case in the instant case. In this regard, we find it apt to look back at our holding in **Ahmad Hassan Marwa** (supra) thus;
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> > "We wish to restate the law that an identification parade, is itself not substantive evidence, but only admitted for collateral purposes. It derives its corroborative value from section 166 of the Tanzania Evidence Act. So, if well conducted, its value is only to corroborate the evidence of the identifying witness (see **Moses Deo v. Republic** [1987] TLR 134 (CAT), **Dennis**

> **Nyakonda v. Republic,** Criminal Appeal No. 155 of 1990 (unreported)). But the purpose of corroboration is only to confirm or support evidence which is sufficient satisfactory and credible and not to give validity or credence to evidence which is deficient suspect or incredible (See **Aziz Abdatiah v. Republic** [1991] TLR 7). It is further the law that for any identification parade to be of any value, the identifying witness(es) must have earlier given a detailed description of the suspect before being taken to the identification parade (See **Emffian Aidart Fungo @ Alex & Another v. Republic**, Criminal Appeal No. 278 of 2008 (unreported))." [Underlining added]

Cementing this position in **Ambros Elias vs Republic**, (Criminal Appeal No.368 of 2018, CAT (unreported), the Court of Appeal held thus, the law on identification parade is fairly settled that it is by itself not substantive evidence. In view of the above I'm constrained to hold that, the identification parade was not of any value as there was no cogent evidence for the identification parade to corroborate. The first two ground of appeal are, therefore, sustained.

As the appellant's conviction was grounded on the evidence of visual identification and the identification parade, the findings above naturally dispose of the appeal. For this reason, I see no need to proceed to the remaining grounds of appeal. Accordingly, the appeal is allowed. The conviction and sentence imposed by the trial court is consequently quashed and set aside. Moreover, it is ordered that the appellant be discharged from prison with immediate effect unless he is held for another lawful cause not connected with the matter at hand.

Dated at Dar es Salaam this 17th day of November, 2021

X _____

Signed by: J.L.MASABO

J.L.MASABO

JUDGE