IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 93 OF 2021

GIMBA S/O PAULO ..... 1st APPELLANT

PETRO S/O MWANALINZE ..... 2nd APPELLANT

PASCHAL S/O THOMAS ..... 3rd APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Conviction and Sentence of the District Court of Nkasi at Namanyere)
(B. B. Nkomola, RM)
Dated 5th day of November 2020
In
Criminal Case No. 126 of 2019

JUDGMENT

20/06 & 25/07/2022

NKWABI, J.:

There is no dispute that in the night of 13th day of September, 2019, the house of Mayala s/o Shija was invaded by bandits who were armed with a bush knife and stick. PW1 Mayala and some of his family members were beaten up by the bandits. The bandits took some time to break down the box in which he had kept his money. When PW1 was threatened with a bush knife, he ran away and informed his neighbours including Dudu Burugu.

When he went back to his house, he found some of the family members injured namely Aron Mahona and Savi Lunguya. They sustained injuries from blows inflicted to them by the bandits. The bandits made away with some money and some properties apart from the money.

It was also PW1's evidence that they arrested the 2nd appellant though he attempted to escape. He also informed Matunda Thomas a brother of the 3rd appellant that his young brother was involved in the armed robbery. The 3rd appellant had fled to Katavi, he was later arrested in possession of T.shs 192,000, and a mobile phone make ONE AFRICA. The 2nd appellant broke down the box in which the stolen money was kept. PW1 was able to identify him properly. The 3rd appellant was holding the bush knife and he is his neighbour. PW1 identified the 1st appellant by using torch light which was illuminating brightly.

The appellants were charged with armed robbery offence. They entered their defence and each of them disputed to have committed the offence. After evaluating the evidence of both the prosecution and the defence, the trial

court was satisfied that the evidence on the prosecution side proved the offence against the appellants beyond reasonable doubt, it convicted the appellants and were sentenced to 30 years imprisonment. The 4th accused person was acquitted as the trial court was satisfied that there was no evidence to convict him.

Aggrieved with both conviction and sentence, the appellants lodged this appeal to this Court against both conviction and the sentence. By four grounds of appeal, they are moving this Court to quash the conviction and set aside the sentence which ultimately entails to release them from prison. The grounds of appeal are that:

1. That, the evidence of PW1 (Mayala Shija) was not enough to convince the trial magistrate in reaching conviction of the appellants.
2. That, the evidence of PW2, 3 and 4 should not be considered as they are just relatives of PW1 and they were not in the said incident, they just heard from PW1.

3. That, exhibits of PW5, 6 and 7 were the properties of the accused No. 3 which was one mobile phone and T.shs 192,000/=, so the trial court erred to include them as exhibits.
4. That, no proper evaluation and analysis of evidence of witnesses and of the republic, as they are not proved beyond reasonable doubt.

When the appeal came up for hearing, which was conducted through oral submissions, the appellants appeared in person without legal representation while the respondent was duly represented by Mr. Simon Peres, learned Senior State Attorney.

To elaborate their appeal in submission in chief, all appellants adopted the grounds of appeal as their submissions.

On his side, Mr. Peres seriously resisted the appeal urging this court to find that there was not only unmistaken identification but also clear recognition of the appellants as the culprits of the armed robbery offence. He thus prayed I dismiss the appeal and uphold both the conviction and sentence against the appellants.

I will start my decision with the 2nd ground of appeal which goes that the evidence of PW2, 3 and 4 should not be considered as they are just relatives of PW1 and they were not in the said incident, they just heard from PW1. Truly, as stated by Mr. Peres, there is no law that precludes relatives to testify in favour of their relative. See **Mahamudu Mbeta v. Republic**, Criminal Appeal No. 154 of 1978 (Unreported) (HC) (MBEYA). Samatta, J as he then was held:

> *"There is no principle of law which says that evidence of relatives only cannot support conviction."*

Further, PW2 Savius testified clearly that he was also a victim of the offence as he was beaten up by the bandits and his mobile phone was stolen by the bandits. All the appellants did not cross examine PW2 even when he claimed to identify the mobile phone. This is what he said in evidence:

> *"... the bandits were almost six, we were beaten by the said bandits, I was beaten using club, they took my phone (mobile phone) make One Africa, ..."*

His evidence therefore about the incidence and that he had his mobile phone stolen stands unchallenged. In this approach I am guided by the decision of

the Court of Appeal in **Shamir John v. Republic Criminal Appeal no. 166 of 2004** (CAT) at Mwanza (Unreported) where it was held:

> *".... The appellant never challenged this evidence at all in his defence. .... Indeed, their evidence which was not disputed by the appellant, ... The appellant has not attempted to show why these independent witnesses chose to align themselves with PW2 Zacharia to victimize him. We think the appellant was drawing a red herring in his defence."*

PW4 was informed about the incidence, went there and found PW1 injured. He said PW1 mentioned the culprits one of them being the 1st appellant, 2nd appellant, 3rd appellant and one Mwarabu. So, PW4 corroborated the evidence of PW1 to the effect that he reported not only the matter but also mentioned the culprits to neighbours at the earliest possible opportunity. PW4's evidence is therefore relevant. The 2nd appellant was arrested by villagers. It is also PW5 Matunda, a relative of the 3rd appellant, who confirmed to be told by PW1 of the invasion and that the 3rd appellant is his relative (young brother). PW5 corroborated the evidence of PW1 that he

identified the some of the culprits and mentioned them at the earliest possible time. For those reasons, the 2nd ground of appeal is unmerited, it is dismissed.

The 1st ground of appeal to the effect that the evidence of PW1 (Mayala Shija) was not enough to convince the trial magistrate in reaching conviction of the appellants may be disposed of in conjunction with the 4th ground of appeal in which the appellant complains that no proper evaluation and analysis of evidence of witnesses and of the republic, as they are not proved beyond reasonable doubt.

On my careful consideration of these grounds of appeal, I am of the considered view that the same are unmerited. I will give my reasons for that position. The identification by use of torch light which he beamed at the appellants and recognition of the appellants by PW1 as they were his neighbours and used to know them is cogent. See **Ezra Mkota & Another v Republic,** Criminal Appeal No. 115/2015 CAT at Dodoma (Unreported) and **Crospery Gabriel & Another v. Republic,** Criminal Appeal No. 232

and 233 of 2014 (CAT) at Bukoba (unreported) which was cited by Mr. Peres. One can also have reference to the case of **Philip Rukaiza v. Republic,** Criminal Appeal No. 215 of 1994 (Unreported) (CAT) (Mwanza) where the Court of Appeal of Tanzania held:

> *"We wish to say that it is not always impossible to identify assailants even at night and even where victims are terrorized and terrified. It is because of this truth that even bandits who scatter terror and indulge in barbaric acts sometimes take the precaution of disguising themselves by various artifices. The evidence in every case where visual identification is what is relied on must be subjected to careful scrutiny, due regard being paid to all the prevailing conditions to see if, in all the circumstances, there was really sure opportunity and convincing ability to identify the person correctly and that every reasonably possibility of error has been dispelled. There could be a mistake in the identification notwithstanding the honest belief of an otherwise truthful identifying witness."*

The recognition and identification evidence by PW1 is corroborated by the caution statement of the 3rd appellant who clearly confessed to have committed the offence and named his co-culprits including the 1st appellant. In this approach, I am backed by the decision in **Nyanjige Mahenga v. Republic,** Criminal Appeal No. 214 of 1994 (Unreported) (CAT) (Mwanza) to the effect that:

> *"The repudiated confession of his co-appellant had implicated the appellant."*

PW1 mentioned the appellants at the earliest possible opportunity, hence his recognition cannot be doubted in the circumstances of this case. In my view, the defences by the appellants that they did not commit the offence they were charged with are fanciful possibilities which ought to be dismissed as per **Capt. Lamu and Another v. Republic,** Criminal Appeal No. 145 of 1991 (CAT) at Mwanza (Unreported) which quoted with approval the case of Miller v. Minister of Pensions (1947)2 All ER 372 where it was observed that:

> *"The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of Justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with*

the sentence of course it is possible but not in the least possible the case is proved beyond reasonable doubt but nothing short of that will suffice."

In the end, I find that the trial magistrate correctly evaluated the evidence on record and convicted the appellants based on clear evidence on the respondent side. The trial magistrate analyzed the defence that was mounted by the appellants and dismissed the same. I am satisfied that he correctly dismissed the appellants' defences.

Lastly, I revert to consider and determine the 3rd ground of appeal which is that, exhibits of PW5, 6 and 7 was the property of the accused No. 3 which was one mobile phone and T.shs 192,000/=, so the trial court erred to include them as exhibits.

Honestly, though PW2 Savius Lunguya said the bandits robbed his mobile phones during the incidence, and mentioned it to be of make **One Africa** he did not give any description. All what he said is, "*Yes, this is my mobile phone of which was taken by bandits from me.*". The 3rd appellant did not

cross examine PW2 on this evidence. Though PW2 did not describe it, the 3rd appellant is deemed to have admitted that fact since he did not cross-examine on it. However, I note that the T.shs 192,000/= seized from the 3rd appellant was ordered by the trial court to be returned to him. Be that as it may, this ground of appeal is also dismissed.

The culmination of the above deliberation, the appeal is dismissed in its entirety. The conviction and sentence against the appellants are upheld.

It is so ordered.

DATED at **SUMBAWANGA** this 25th day of July 2022.

J. F. NKWABI

JUDGE