IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)
AT DODOMA

DC CRIMINAL APPEAL NO. 92 OF 2020

(Originating from District Court of Singida at Singida Criminal Case No. 203/2019 Ally Said @ Abubakar Mdudu)

ALLY SAID @ABUBAKARI MDUDU AND 5 OTHERS....APPELLANT
VERSUS
THE REPUBLIC .....RESPONDENT

JUDGMENT

14/12/2022 & 22/03/2022

KAGOMBA, J

The appellants ALLY SAID@ABUBAKARI MDUDU, MOHAMED MUSA@ AMAS, ABDALLAH HASSANI@DULA, OMARY ABDALLAH@JUMA, ALFAN RAJAB @HUSSEIN and REGINALD SAMWEL SENKURUTO who were charged in the District Court of Singida as 2nd, 3rd, 6th, 7th, 8th and 9th accused persons respectively, for the offence of armed robbery under section 287A of the Penal Code [Cap 16 R.E 2002] as amended, and were convicted of that offence and sentenced accordingly, came to this Court to challenge both the conviction and sentence of thirty (30) years meted out by the trial District Court.

Their Petition of Appeal listed fourteen (14) items as grounds of appeal but three of which are not, as they are mere information and prayers to the Court. The remaining eleven (11) items boil down to one ground of appeal, which the Court has rephased it as to read "The prosecution did not prove their case beyond reasonable doubt". The appellant's specific concerns were as follows:

1. The trial Courts proceedings are full of contractions such as the date of commission of the offence which was stated as 08/02/2019 while prosecution witness said it was 09/02/2020.
2. Nothing was recovered from the appellants in connection with alleged crime.
3. Prosecution's key witness PW2 Selemani Ibrahim, who is the victim, did not tell the Court how he managed to identify the culprits at night under moon light.
4. PF3 tendered in Court was questionable regarding the time it was filled in.
5. The trial Court accepted the testimony of PW3 Ibrahim S/O Mohamed, which was hearsay.
6. A key prosecution witness, a sheikh from Morogoro who had a religious gathering at Ilongero area where the speakers are alleged to have been stolen was not called to testify.
7. Recording of cautioned statements of 1st, 2nd and 3rd accused by PW4 F 1928 D/CPL Masululi did not observe requirements of the law.
8. The trial Court wrongly accepted the testimony of PW5 (sic) F. 1928 who produced the statement of Amina D/O Zacharia while Amina D/O Zacharia has not been found, and

9. The accused persons were convicted not on the strength of prosecution evidence but the weakness in their defence.

It was alleged during trial at the District Court of Singida that Ntandu Joshua and 9 others on 08/02/2019 at Ilongero village, Ilongero Division within the District and Region of Singida did steal two (2) speakers each valued at Tsh. 350,000/= the properties of BAKWATA Morogoro Region and immediately before and after such stealing, they used screwdriver to stab and assault one Seleman S/O Ibrahim on different parts of the body in order to obtain and retain the said properties. The accused persons, now appellant's pleaded not guilty, but after trial they were found guilty convicted and sentenced accordingly. Hence this appeal.

On the date of hearing of the appeal, the five appellants appeared in persons, unrepresented and being laymen, they had nothing to add to the contents of their Petition of Appeal.

Mr. Meshack Lyabonga, learned State Attorney who appeared for the respondent, rose to support the appeal. He cited the following reasons.

Firstly, on page 5 of the typed proceedings of the trial Court, PW1 Pride D/O Mrema gave her testimony without taking an oath. She also tendered a PF3 an as exhibit but the same was not read in Court after admission as required by law. It was Mr. Lyabonga's views that without PF3, the prosecution case becomes baseless especially for the fact that PW1 didn't take an oath.

Secondly, on page 7 of the typed proceedings, PW2 Selemani Ibrahimu, who adduced evidence on how the offence was committed told the trial Court that the incident occurred at 21:00hrs and he was able to recognize the appellants because there was electricity light. It was Mr. Lyabonga's view that such testimony on identification did not satisfy the criteria for proper identification set out in the case of **WAZIRI AMANI V. REPUBLIC (1980) TRL 250** as the issue of intensity of light, time for observation and physical description of the accused persons were to be explained. Mr. Lyabonga added that PW2 did not do that while he was the victim and a key witness.

Thirdly, on page 13 of the proceedings PW4 F 1928 D/CPL Masululi tendered the cautioned statements of the 1st, 2nd and 3rd accused persons. The accused persons, (now appellants) objected to the admission of those statements for a reason that the same were not made willingly. The Court proceeded to admit the statement without carrying out an inquiry as required by the law. It was Mr. Lyabonga's views that the admission of such cautioned statements was contrary to the law and the statements cannot be used in evidence.

Fourth and lastly, on page 15 of the proceeding, PW5 F. 1928 D/CPL Masululi (sic) tendered the statement of Amina d/o Zacharia under section 34B of the Evidence Act, [Cap 6 R. E 2019] but a copy of that statement was not served on the appellants prior to its tendering in Court as required by the provision of section 34B(2)(d) of the Act. It was Mr. Lyabonga's view that the statement ought to be expunged from Court's records.

Such are the realities observed in the proceedings of the trial Court, and the Court can not agree more with the views of both the appellants and the respondent's State Attorney that the case against the appellants was not proved beyond reasonable doubts during trial. In so saying, this Court answers the sole issue available for determination which is, whether the case against the accused person (now the appellants) was proved beyond reasonable doubt.

In concurring with the parties, the Court shares the views that the trial Court committed serious irregularities in the conduct of the trial. Mr. Lyabonga has cited some of those irregularities in his submission as recorded above. All of the cited irregularities boil down to one conclusion, that the prosecution case is seriously dented if all the testimonies taken in contravention of the law are expunged from record, as I hereby do.

What is most serious, is the improper identification of the appellants by PW2 Seleman S/O Ibrahimu. PW2 was a person who was guarding the stolen properties. On page 7 of the typed proceedings, he is on record to be telling the trial Court that he was invaded by the 2nd accused, 1st accused, 5th accused, 9th accused and one Loya who was not in Court. He testified that the attackers were ten. Others were 4th, 3rd, 6th and 7th accused persons. He said, they caught him by handling his hand and they were using small knife to cut his legs. He also told the Court that there was electricity light, that is why he identified the accused persons. It was at 21:00hrs and there was also moon light.

PW2 further testified that the distance was five steps from where the speakers were put, near the office he was guarding. He added that the accused persons are children of his neighbours and the offence took place within a short time.

As correctly submitted by Mr. Lyabonga, the criteria for proper visual identification set in the case of **WAZIRI ALLY V. REPUBLIC** (supra) were not met. It was important for the trial Court to seek to establish not only that there was bulb light, but whether the intensity of the bulb light was enough for proper visual identification.

The PW2 testified that the invaders came in three groups of three people, two people etc. Since the accused persons came in groups it was important for the trial Court to be satisfied with the distance between each accused person and the observer (PW2). To say that it was just five steps was not enough. Lastly, it was important for the trial Court to evaluate the time duration of observation. PW2 said the incident took short time without describing how short it was to enable him (PW2) identify all the appellants accurately.

While the other criteria for identification is previous knowledge, it was not enough for PW2 to state that "the accused are children of our neighbours". This is too general to establish previous knowledge of the accused person persons. PW2 was expected to say how he knew each of the accused by mentioning the neighbour concerned or some other type of particular details such as the residence of the accused person, names or description of other relatives of the accused, the school each studied (if any)

and such other specific details. By trial Court accepting the general statement that the accused persons were children of PW2's neighbours, there existed a very high possibility of misidentification of the appellants.

For the above shortfalls in the testimonies of PW2 Seleman S/O Ibrahim, this Court holds that the appellants were not properly identified. As such their conviction based on such doubtful identification was not proper.

Another eye-catching irregularity in the proceedings of the trial Court is the way the cautioned statements of the 1st, 2nd and 3rd accused persons were admitted in evidence. PW4 F 1928 D/CPL Masululi who recorded the said cautioned statements prayed to tender the same in Court, if there would be no objection from the accused. All the accused persons concerned objected the admission of those exhibits for reasons that they were illiterate and the statements were made under duress.

The prosecutors prayed the Court to dismiss the objection for a reason that the accused persons had not disputed they were student. Surprisingly, the Court decided that the objection is disallowed for lack of merit and proceeded to admit the statements. This was a serious irregularity. It is trite law that once such an objection is raised, as the trial Court was not seating with assessor, it should have made an inquiry as to whether the accused persons recorded their cautioned statements as free agents. Failure to follow this procedure, obviously, renders the admission of the said cautioned statements unlawful and the same cannot form part of the evidence. Its only remedy is for the evidence so unlawfully admitted to be expunged from records. That remedy being ordered as I hereby do, the prosecution case

automatically collapses in the backdrop of improper identification of all the appellants.

For the above reasons, the appeal is allowed. The conviction entered by the trial District Court is quashed, the sentence meted out to the appellants are set aside and all the appellants are set free forthwith, unless they are otherwise held for another lawful cause.

It is so ordered.

DATED at DODOMA this 22nd day of March, 2022

ABDI S. KAGOMBA

JUDGE