

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**  
**AT DAR ES SALAAM**  
**CRIMINAL APPEAL NO. 58 OF 2021**

*(Originating from Criminal Case No. 869 of 2019 of Ilala District Court at  
Ilala)*

**EZEKIEL CHRISTOPHER MUSTAPHA.....APPELLANT**

***VERSUS***

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

**JUDGMENT**

*15/12/2021 and 17/8/2022*

**LALTAIKA, J.**

At the District Court of Ilala, the appellant Ezekiel Christopher Mustapha was charged for an offence of Armed Robbery contrary to section 287A of the Penal Code, [Cap 16 R.E. 2019] now the Revised Edition 2022.

When the charge read over and explained to the appellant, he pleaded not guilty thus, the matter went to full trial. At the hearing the prosecution paraded three witnesses, namely, Mwamtoro Ally (PW1), Chacha Augustino Momba (PW2), and F8132D/C Gaspar (PW3). The prosecution also tendered two (2) exhibits; cautioned statement of accused person and a sketch map of the scene of crime. In defense, the appellant

protested the allegation and contended that, the charge was fabricated against him. He relied on his own testimonial account. Having been convinced that the prosecution had proved their case at the required standard namely beyond reasonable doubt, the learned trial Magistrate found the appellant guilty of the offence of armed robbery contrary to section 287A of the Penal Code and sentenced him to serve thirty (30) years imprisonment. Dissatisfied, he has filed the present appeal raising four grounds namely:

- 1. That, the trial court erred in law and in facts in convicting the appellant of armed robbery basing on mere suspicion.*
- 2. That the trial court erred in law and in facts by regarding mere evidences in favour of the respondent.*
- 3. That the conviction of appellant was against the weight of the evidence which was in favour of the respondent.*
- 4. That the case against the appellant was not proved beyond reasonable doubt.*

The appellant also filed other 4 additional grounds of appeal as articulated in the supplementary grounds of appeal. However, in my opinion, there is no need to reproduce them as they all tally with the original grounds. At the hearing of this appeal, the appellant appeared in person, while the respondent was represented by Ms. Christine Joas, Senior State Attorney.

In his oral submission, the appellant argued very briefly that, he was arrested by "**sungu sungu**" while he was on the way to his home at Kitunda Mwanagati around midnight. He was taken to Kitunda police station where he stayed until morning where he was transferred to

Sitakishari police station. On 24/05/2018 he was taken to the District Court of Ilala at Kinyerezi where he was charged of an offence of armed robbery. He argued further that, the trial court erred in law and facts by failure to tender any exhibits than appellant's cautioned statement and sketch map of the scene of crime. He insisted that the caution statement was recorded beyond the required time limit.

In response, counsel for the respondent supported the conviction and sentence meted by the trial court. She argued that for an offence of armed robbery to be completed three elements must be exists, **first**, stealing, **second**, use of offensive weapon, and **third**, use of threat. She argued further that, according to the evidence on records the victim was threatened by the appellant. The learned counsel averred that the appellant had stolen PW1's phone and money and that he used a screwdriver to threatened the victim. The learned counsel for the respondent argued further that, the incidence occurred during the night and that the victim who was the eye witness managed to identify the appellant.

It is Ms. Joas' submission that there was enough light to aid the victim to identify the appellant and that the victim had known the appellant for one year before the incidence as a "**bodaboda**" rider. The victim described in detail how the appellant dressed on the incidence, he dressed on jeans trouser, court(pullover) and undershirt.

On the complaint that the caution statement was recoded out of the prescribed time. Counsel for the respondent argued that the cautioned statement was recorded within time.

To support her argument, Ms. Joas referred this court to page 30 of the trial court proceedings where PW3 had testified that the appellant was arrested on 03/05/2018 between 23: 00 to 24:00hrs, then he interviewed the appellant at 8:12 to 9:00. To that end, the learned Senior State Attorney is of the view that the cautioned statement was recorded within time. To support her argument, she invited this court to the case of **JACOB ASEGELILE KAKUNE vs D.P.P** (Criminal Appeal 178 of 2017) [2020] TZCA 75.

Having carefully gone through the evidence on records, grounds of appeal and parties' submissions, I am inclined to focus on deciding whether this appeal has merit.

I find that only two issues will suffice to dispose off this appeal; **One**, whether the appellant was properly identified at the scene of crime, **two**, whether the cautioned statement was properly recorded and procedurally admitted.

Starting with the first issue whether the appellant was properly identified at the scene of crime, I have carefully reviewed the evidence on record. PW1 (the victim) had testified that on 03/05/2018 at 22:00 hrs she was at Mwanagati bus stand whereupon, DW1 (the appellant) appeared riding a motorcycle commonly referred to as "**bodaboda**". When he approached the area where the victim was, he announced that he was going to Mwanagati Kwamfipa. PW1 then hired his motorcycle as she was going to the same place.

Although the learned counsel for the respondent argued convincingly that PW1 had identified the appellant through light powered

by electricity, it is my settled mind that, the appellant was not properly identified due to the following reasons: - **one**, the offence took place between 22:00hrs and midnight. It was not enough to say that there was light from electricity without describing its intensity. PW1 did not explain the intensity of the light for her to identify the accused. To this end, her evidence on visual identification is not water tight. **Two**, PW1 said she knew the appellant one year before the incident but she did not provide his physical description. **Three**, PW1 did not even explain the color of the clothes the appellant (then accused) was on. She simply stated that the appellant dressed on jeans trouser, court, and undershirt. I am especially doubtful with lack of description of the jeans because any one can easily mention jeans as the most common cloth preferred by the youths. **Four**, PW1, did not explain how many times she saw the accused person during the past year of knowing each other and where.

The position of the law in our jurisdiction when it comes to identification of an accused person was stated by the Court of Appeal in the famous case of **Waziri Amani v Republic [1980] TLR 250** in which it was held at pages 251 – 252:

*"Although no hard and fast rules can be laid down as to the manner a trial judge should determine questions of identity. It seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect, to find in the record questions such as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred for instance,*

*whether it was day or night- time whether there was good or poor light at the scene; and further whether the witness knows or had seen the accused before or not."*

The Apex Court insisted on identification in the case of **Shamir John v Republic, Court of Appeal, Criminal Appeal No. 166 of 2004** (unreported) Mwanza Registry, it was observed:

*"It is now trite law that courts should closely examine the circumstances in which the identification by each witness was made. The court has already prescribed in sufficient details the most salient factors to be considered. These may be summarized as follows: how long did the witness have the accused under observation? At what distance? In what light.? Had the witness ever seen the accused before? How often?"*

This court followed the tests in the case of **Republic v Ally Rajabu & Others, Criminal Sessions Case No. 30 of 2008** (unreported) Mosh. The court held:

*"PW1 identified the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused with the aid of the light of a hurricane lamp; they were at a close range, he had ample time to have a careful and clear look at them all, and that it is not in dispute that he knew them prior to this incidence. The same applies to PW2 who identified the 2<sup>nd</sup> and 3<sup>d</sup> accused. The only difference is that PW2 identified the two accused persons outside the house using a torch containing three batteries while PW1 identified the three accused persons inside his room with the aid of hurricane lamp light. This case meets the standards set in Waziri Amani's case and the subsequent decisions."*

In the present case, as already observed, there is no account of how PW1 identified the appellant during night at 24:00 (midnight). There is no evidence to prove whether PW1 knew the appellant before the incidence or not. The intensity of light sufficient to identify the appellant was not stated. Amidst all these deficiencies in the prosecution evidence regarding

identification of the appellant, it cannot undoubtedly be concluded that the appellant is the one who committed the offence of which he was charged. The prosecution did not discharge its duty of proving beyond reasonable doubt that the appellant robbed PW1.

Coming to the second issue, whether the cautioned statement was properly recorded and procedurally admitted, the appellant claim that, the caution statement was wrongly admitted into the evidence. At page 30 to 34 of the trial court typed proceedings, the appellant objected the admissibility of the statement (exhibit P.1), the trial court was supposed to conduct trial within trial, but the trial court proceeded to admit the cautioned statement without regards to objection by the appellant. Under section 27(2) of Evidence Act, the law provides that: -

*"The onus of proving that any confession made by an accused person was voluntarily made by him shall lie on the prosecution."*

This was insisted in the case of **Nyerere Nyague v The Republic**, Criminal Appeal No. 67 of 2010 (unreported) Arusha Registry, underscored that: -

*"..... objections to the admissibility of confessional statements may be taken on two grounds. First, under s. 27 of the Evidence Act that, it was not made voluntarily or not made at all. Second, under section 169 of the Criminal Procedure Act: that it was taken in violation of the provisions of the CPA, such as section 50, 51 etc. where objection is taken under the Evidence Act, the trial court, has to conduct a trial within trial (in a trial with assessors) or an inquiry (in a subordinate court to determine its admissibility). There the trial court only determines at all, or whether he made it voluntarily."*

In the light of the position of the law, whenever a cautioned statement is objected, a trial court is duty bound to conduct either 'a trial within trial' or 'an inquiry' depending on circumstances of the case. The consequences of failure to conduct 'trial within trial' or an inquiry, endangers such statement to expunged from the court record as observed by the Court of Appeal of Tanzania in the case of **Nelson George @ Mandela and Five Others vs The Republic**, Criminal Appeal No. 31, 93 and 94 of 2010 (unreported). The Court of Appeal observed that, since the confession statement were admitted in to evidence, the remedy is to expunge it from the records. Therefore, in this case also exhibit P.1 are expunged from the records.

All said and done, I find the appeal merited and I hereby allow. I quash the proceeding, judgment and set aside the sentence meted out to the appellant. I order that the appellant Ezekiel Christopher Mustapha be released forthwith from custody unless otherwise held for other lawful reasons. It is so ordered.



**E. I. LALTAIKA**

**JUDGE  
17/8/2022**