IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 98 OF 2021

MOHAMED MOKEA HAMIS @ TIGER .....1ST APPELLANT
MOHAMED OMARY @MADIZA ..... 2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the District Court of Kibaha at Kibaha in Criminal No.25 of 2020)

JUDGMENT

28th August & 19th September, 2022

KISANYA, J.:

At the District Court of Kibaha at Kibaha, the appellants, Mohamed Mokea Hamis @Tiger and Mohamed Omary @Madiza were charged with an offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16, R.E. 2002 [now R.E. 2022].

It was alleged by the prosecution that, on 23rd July, 2019, at Maili Moja area within Kibaha District in Coast Region, the appellants jointly did steal cash money Tshs. 60,000/= and one Samsung mobile phone valued at Tsh. 450,000/=, the properties of Grace Daudi Lumwecha (PW1) and that immediately before stealing, they used violence against the said Grace Daudi Lumwecha by cutting her hands using a bush knife in order to obtain the stolen properties.

The prosecution relied on oral testimonies given by six witness and three documentary evidence (Exhibit P1, P2 and P3). On the other hand, the appellants' defence was based on their own testimonies. They neither called witness nor tendered any exhibit to supplement their evidence.

It is gleaned from the evidence on record that, Grace Daudi (PW1) sells drinks at Maili Moja. On 23rd July, 2019 she arrived at her home place and detected to have left the mobile charge in the shop. She asked one Ibra to escort her. It was around 11:30 pm. On their way to the shop, the duo met the appellants who were armed with the knives. According to PW1, the appellants were known to her before the incident and she identified them with the aid of electricity light which was illuminating from her shop. She testified that the appellants cut her with the machete and knife and took her pocket which had Tshs. 60,000/= and mobile phone valued Tshs. 60,000/=, PW1 further stated to have been taken to the police station and later to the hospital by the people who gathered at the crime scene. At Tumbi Hospital, PW1 was attended by Jamal Hamis (PW4) who also tendered the PF3 (Exhibit P2).

At the same time, the investigation commenced under supervision of H3407 DC Ahmad (PW2). It turned out that the appellants fled after committing the offence. Pursuant to H6818 DC Sultan (PW5), the 1st appellant was arrested in February, 2020 while the 2nd appellant was arrested in March 2020. It was alleged that the 1st appellant recorded a cautioned statement before G1183 DC Omary (PW3) and confessed to have committed the offence. His cautioned statement

was admitted in evidence as Exhibit P1. On his part, DC Ahamed (PW6) recorded the statement of Ibrahim Eliaba who escorted the victim on the fateful day. Claiming that the whereabouts of the said Ibrahim Eliaba was not known, PW6 tendered his (Ibrahim) statement (Exhibit P3).

The appellants were found with a case to answer. They denied to have committed the offence laid against them. The 1st appellant claimed to have been forced to sign Exhibit P1.

Upon weighing the evidence adduced by both sides, the trial court was convinced that the prosecution had proved its case beyond all reasonable doubts. It went on convicting and sentencing the appellants to serve a sentence of thirty years imprisonment. In additional to custodial sentence, the appellants were ordered to pay the victim Tshs. 2,000,000/= as compensation.

Aggrieved, the appellants filed the present appeal on eleven grounds which can be paraphrased as follows:-

1. That the learned trial magistrate erred in law and fact by convicting the appellants relying on the evidence of PW2 and PW3.
2. That the learned trial magistrate erred in law and fact by convicting the appellants relying on identification evidence.

3. That the learned trial magistrate erred in law and fact by convicting the appellants while the identifying witness failed to state conditions for identification.
4. That the learned trial magistrate erred in law and fact by convicting the appellants basing on unreliable identification evidence.
5. That the learned trial magistrate erred in law and fact by convicting the appellants while there was variance between the charge sheet and evidence adduced on the value of the stolen phone.
6. That the learned trial magistrate erred in law and fact by convicting the appellants on contradictory and inconsistent evidence of PW2 who stated that he was called by PW1 to arrest the 1st appellant while PW5 claimed to arrest him while he was on patrol.
7. That the learned trial magistrate erred in law and fact by convicting the appellants based on 1st appellant repudiated confession statement.
8. That the learned trial magistrate erred in law and fact by convicting the appellants based on the cautioned statement (Exh.P1) of the 1st appellant while the same un-procedural tendered and admitted in evidence.

9. That the learned trial magistrate erred in law and fact by convicting the 2nd appellant based on Exhibit P1 made by the 1st appellant without according him chance to object its admission or to cross examine the witnesses called during inquiry.

10 That the learned trial magistrate erred in law and fact by convicting the appellants based on unjustified corroborated prosecution evidence.

11. That the learned trial magistrate grossly erred in law and fact by holding that the prosecution proved its case beyond all reasonable doubts.

At the hearing of this appeal, the appellants appeared in person, whilst the respondent was represented by Ms. Fidesta Uiso, learned State Attorney. By consensus, this appeal was heard by way of written submissions.

In their joint written submissions, the appellants submitted randomly, however in my analysis I will consider the grounds of appeal as presented in the petition of appeal.

On the first ground of appeal, the appellants submitted that PW2 and PW3 were not sworn or affirmed before adducing their evidence In that regard, the appellants contended that the evidence of PW2 and PW3 was taken in contravention of section 198 of the Criminal Procedure Act [Cap. 20, R.E.2022] (the CPA) and section 6 of the Oath and Statutory declaration Act, Cap. 34, R.E.

2019 which provides for mandatory requirement for the witness to be sworn or affirmed. Therefore, this Court was invited to disregard and expunged the evidence of PW2 and PW3.

Submitting in support of the second, third, fourth and fifth grounds of appeal altogether, the appellants contended that they were not identified. The appellants further contended that there is weakness on visual identification evidence relied upon by the prosecution. Their argument was based on the cases of **Waziri Amani vs Republic**, (1980) TLR 250, **Hassan Said & Another vs Republic**, Criminal Appeal No.44 of 2002 and **Nhembo Ndalu vs Republic**, Criminal Appeal No.174 of 2004. It was their argument that for the evidence in identification cases to be relied upon, the court must be satisfied that such evidence is watertight and that there is no possibility of mistaken identity. Although the appellant noted that PW1 testified that the crime scene had electricity light and they (appellants) were familiar to her, they submitted that her evidence was not sufficient to prove that they were properly identified. Their submission was based on the ground that the record is silent on the description of the clothes they wore at the crime scene and whether PW1 named them to the persons who gathered at the crime scene, immediately after the incident.

The appellants further pointed out that PW1 failed to disclose the distance between her and her assailants, the duration under which she kept them under her observation. They were of the considered view that, since the offence was committed during the night, the evidence on the said issues would have

eliminated the possibility of mistaken identity. To bolster their argument the appellants cited the case of **Oden Msongela & Others vs DPP**, Consolidated Criminal Appeals No.417 of 2015 and 223 of 2018.

Further to their submission, the appellants faulted PW1 for not stating the source and intensity of light of the crime scene. It was therefore, their contention that the trial court was not in a position of deciding whether the conditions were favourable for PW1 to identify the appellants.

Arguing on the fifth ground of appeal, the appellant submitted that the charge is at variance with evidence in respect of the type and value of the stolen property. The appellants stated that PW1 testified that the value of the stolen mobile phone was Tshs. 60,000/=, while the charge shows that value of stolen mobile is Tshs 450,000. The appellants also submitted PW1 neither stated the serial number of the stolen phone nor tendered the receipt to prove ownership. It was their further views that the prosecution's failure to produce the stolen property before the court weakened its case.

With regard to the seventh ground of appeal, the appellants faulted the trial court for basing their conviction on the repudiated confession of the 1st appellant. They submitted that the trial court was under obligation to conduct a trial within a trial to satisfy itself on the voluntariness of the 1st appellant's confession which was made before the police officer as per the provision of section 27(1) of the Evidence Act, Cap 6, R. E. 2022. Their argument was placed

on the reason that the caution statement (Exhibit P1) was the sole evidence which implicated the second appellant. Citing the case of **Elinema Kibo vs Republic**, Criminal Appeal No.138 of 2013 (unreported), the appellant submitted that there is danger in relying on the retracted or repudiated confession.

Further to the foregoing, the appellants contend that the caution statement was un-procedural recorded out of the prescribed time. They further submitted that PW3 was not affirmed or sworn as stated fore and that the caution statement was not admissible. In alternative, the appellants submitted that the trial magistrate ought to have considered whether Exhibit P1 was corroborated. They, therefore, urged this court to expunge Exhibit P1 from the record.

As regards the eighth ground of appeal, the appellants briefly argued that the witness statement of Ibrahim Eliaba (Exhibit P3) was tendered by PW6 contrary to the provisions of section 34B of the Evidence Act.

Lastly on the eleventh ground of appeal, the appellants submitted generally on the highlights of the other grounds of appeal. In conclusion, the appellants were of the firm view that the prosecution failed to prove its case beyond the required standard. They therefore urged this Court to allow the appeal and set them free.

Responding, Ms. Uisso resisted the appeal. With regard to the first ground of appeal, the learned State Attorney submitted that the evidence of PW2 and

PW3 was taken according to the provisions of section 198 of the CPA. Referring this Court to the original record, she contended that PW2 and PW3 affirmed before giving their respective testimonies.

As regards the second, third and fourth grounds of appeal, the learned State Attorney submitted that PW1 was able to identify the appellants immediately before the incidence. On the intensity of light, the learned state attorney submitted that PW1 testified how the crime scene had an electricity light. She went on submitting the issue of identification depends on the circumstances of each case. As far as this case is concerned, Ms Uisso pointed out that, PW1's evidence shows that the appellants were familiar to her before the incident and that she (PW1) identified and named them. The learned State Attorney cited the case of **Omary Majid vs Republic**, Criminal Appeal No.288 of 2002 CAT at Arusha (unreported). She also referred to the caution statement of the 1st appellant (Exhibit P1) which shows that the appellants and PW1 knew each other before the fateful day. It was her further submission, that the evidence of recognition has more weight than that of identification. To bolster her argument, the learned State Attorney cited the case of **Frank Joseph@Sengerema vs Republic**, Criminal Appeal No.378 of 2015 CAT at Tabora (unreported).

Countering the fifth ground of appeal, the learned State Attorney submitted that the variation between the charge sheet and evidence of PW1 on the stolen items is curable if the witness gives clear evidence to prove the charge.

On sixth ground of appeal, Ms. Uisso referred this Court to page 21 of the typed proceedings. She went on to submit that PW2 and PW5 did not contradict themselves on who arrested the appellants. It was her contention that the appellants were arrested by more than one police officer.

Reacting to the seventh and eighth grounds of appeal, the learned State Attorney argued that section 29 of the Evidence Act provides for the circumstances under which confession of the accused person should be rejected by the court. She submitted that the trial magistrate weighed the credibility of witness after conducting the inquiry. It was her argument that the caution statement is good evidence against the appellants. With regard to the witness statement (Exhibit P4), the learned state attorney contended that it was tendered and admitted in accordance with the provisions of section 34B of the Evidence Act.

Expounding on the nineth ground of appeal, the learned state attorney submitted that the procedure for tendering and admitting Exhibit P1 was properly adhered to by the trial court. She contended that since Exhibit P1 was the caution statement of the first appellant, the second appellant had the chance to cross examine PW3.

On the tenth and eleventh grounds of appeal, the learned State Attorney submitted that the prosecution proved its case beyond reasonable doubt. She further contended that the strength of evidence by the prosecution left no doubts

to favour the appellants. The learned state attorney was firm that the appellants were properly identified and that there was no room for mistaken identity. In the light of the foregoing submission, she invited this Court to dismiss the appeal for want of merits.

In their rejoinder, the appellants maintained their earlier submission on the evidence of visual identification. They added that the evidence of visual identification was weak and unreliable to warrant their conviction. On the issue of variance between the charge sheet and evidence, the appellants submitted that such defect ought to have been cured by amending the charge under section 234 of the CPA. They contended to have been prejudiced by the prosecution failure to amend the charge.

Having considered the petition of appeal and submissions of both parties and examined the record, the main issue which I am called upon to determine is whether the appeal is meritorious.

I will start my deliberation by addressing the first, eighth and ninth grounds of appeal in which the appellants has pointed illegalities in the proceedings of the trial court.

First for determination is the first ground of appeal. The appellants grieve that PW2 and PW3 gave evidence without taking oath. In terms of section 198 of the CPA, the trial judge or magistrate presiding over the proceedings is required to administer oath or accept affirmation from a witness. It is trite law

that, failure of the witness to take an oath or affirmation before giving his or her evidence is an incurable irregularity. [See for instance, **Catholic University of Health and Allied Sciences vs Ephiphania Mkunde Athanase**, Criminal, Civil Appeal No. 257 of 2020 (unreported).

Looking at the typed proceedings, one may be tempted to agree with the appellants that PW2 and PW3 did not take oath or affirm before adducing their testimonies. However, as rightly observed by the learned State Attorney, the original record (handwritten proceedings) shows clearly that both witnesses (PW2 and PW3) affirmed prior to adducing their evidence. Therefore, it is clear that section 198(1) of the CPA was not violated. On that account, the first ground is dismissed for want of merit.

Second for determination is a complaint that the witness statement of Ibrahim Eliaba (Exhibit P3) was admitted in contravention of the Evidence Act, as stated in the eighth ground. On her part, the learned State Attorney is of the view that the law was complied with. It is settled law that for the witness statement to be admitted under section 34B (2) of the Evidence Act, the conditions set out under the said provision must be met cumulatively. There is a list of authorities stating that position. One of them is the case of **Vicent Ilomo vs R,** Criminal Appeal No. 337, CAT at Iringa (unreported) where it was held that:

> *"Admissibility of statements under Section 34 B (2) of the Evidence Act was discussed at length in the case of* ***Elias***

***Melani Kivuyo V. Republic**, Criminal Appeal No. 40 of 2014 (unreported) in the course of which the Court observed that conditions (a) to (f) under Section 34 B (2) of that Act must be met cumulatively."*

In order to resolve the issue under consideration, I find it apposite to reproduce the said conditions, as hereunder:

a) *where its maker is not called as a witness, if he is dead or unfit by reason of bodily or mental condition to attend as a witness, or if he is outside Tanzania and it is not reasonably practicable to call him as a witness, or* ***if all reasonable steps have been taken to procure his attendance but he cannot be found or he cannot attend because he is not identifiable or by operation of any law he cannot attend;***
b) *if the statement is, or purports to be, signed by the person who made it;*
c) *if it contains a declaration by the person making it to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence, he would be liable to prosecution for perjury if he wilfully stated in it anything which he knew to be false or did not*
d) ***if, before the hearing at which the statement is to be tendered in evidence, a copy of the statement is served,*** *by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings;*
e) *if none of the other parties, within ten days from the service of the copy of the statement, serves a notice on the*

party proposing or objecting to the statement being so tendered in evidence:

Provided that, the court shall determine the relevance of any objection;

f) if, where the statement is made by a person who cannot read it, it is read to him before he signs it and it is accompanied by a declaration by the person who read it to the effect that it was so read" (Emphasize supplied)

In the instant case, there is nothing to suggest that the witness (Ibrahim Eliaba) was dead or outside Tanzania. In his evidence in chief, PW6 did not tell the court on the whereabouts of Ibrahim Eliaba. It was during cross-examination when PW6 stated to have been informed that Ibrahim Eliaba has transferred to another place. The person assigned to serve the witness did not give evidence. Further to this, the person who informed PW6 and the prosecuting attorney that Ibrahim Eliaba had transferred was not called to give evidence. In the circumstances, I find no evidence to prove the reasonable steps taken to procure attendance of Ibrahim Eliaba and that he could not be found. Thus, condition (a) above was not met. Furthermore, the record is silent on whether the appellants were served with a copy of statement tendered by PW6. This implies that condition (d) was not complied with as well. In the result, both appellants were not in a position of serving the prosecution with their notice of objection under section 34B (2)(e) of the Evidence Act.

Basing on the foresaid reasons, I agree with the appellant that the statement of Ibrahim Eliaba was improperly admitted in evidence. It is accordingly expunged from the record. In the absence of the evidence of Ibrahim Eliaba or his statement, evidence of PW6 is a mere hearsay. However, the Court will consider whether the remaining evidence incriminated the appellants.

Next for consideration is whether the cautioned statement of the first appellant (Exhibit P1) was tendered and admitted contrary to the established procedures. This issue stems from the 8th and 9th grounds of appeal. The appellants' complaints are that the 2nd appellant was not given the right to object its admission and that, he (2nd appellant) was not accorded the right to cross-examine the prosecution witness who testified during inquiry which led to admission of Exhibit P1. In his reply, Ms. Uisso was of the view that the 2nd appellant was given a chance to cross-examine PW3 who tendered the cautioned statement of the 1st appellant.

From the very outset, I find merit in the appellants' complaints. In terms of the record, when PW3 prayed to tender the cautioned statement of the 1st appellant (the then 1st accused), the 2nd appellant was not probed to state whether he (the 2nd appellant) had any objection against its admission. In terms of the settled law as underlined in the case of **Robinson Mwanjisi and Three Others vs R** [2003] TLR 218, a document is admitted in evidence after being cleared for admission. During clearance stage, the adverse party is entitled to

state whether he or she objects admission of the document sought to be tendered. Since this was not done, the cautioned statement was not cleared for admission and thus, admitted contrary to the settled law.

As if that was not enough, the 2nd appellant did not participate in the inquiry conducted to ascertain the validity and voluntariness of the cautioned statement of the 1st appellant. Although the document was implicating him, the 2nd appellant was not given a chance to cross-examine the witnesses for the prosecution and defence. The right to cross-examine a witness called by an adverse party or co-party is guaranteed under Article 13(6) (a) of the Constitution of the United Republic of Tanzania, 1977 (as amended) which provides for the right to a fair trial.

It is my considered view that, even if the inquiry was conducted to ascertain the validity of the cautioned statement of the 1st appellant, the 2nd appellant was entitled to cross-examine the witness called by the prosecution and the 1st appellant. This is so when it is considered that the cautioned statement was injurious to the 2nd appellant. I am fortified by the case of **Charles s/o Kidaha and 2 Others**, Criminal Appeal No. 395 of 2018 (unreported) in which the 2nd and 3rd accused person were not given a chance to put questions to the witnesses called by the prosecution and defence when the trial court held a trial within trial. On appeal to the Court of Appeal, this is what happened:-

"Thus, in this appeal, the learned Judge breached the basic rights of the 2nd and 3rd appellants when he proceeded to hear and determine on the admissibility of Exhibit P2 without giving an opportunity to the 2nd and 3rd appellants to cross-examine the witnesses for both the prosecution and the defence. Consequently, consistent with settled law, we are of the firm view that the decision of the trial court was reached in violation of the 2nd and 3rd appellant's constitutional right to be heard and it cannot be allowed to stand."

Similar stance was taken in the case of **Elias Mwaitambila and 3 Others vs R.**, Criminal Appeal No. 414 of 2013 (unreported), when the Court of Appeal had this to say after observing that the 2nd and 4th accused were not given the right to cross-examine witnesses marshaled during the trial within trial:-

"...as a rule of natural justice, they (the second and fourth appellants) should also have been given opportunity to cross-examine."

It is worth noting here that, in **Elias Mwaitambila** (supra) and **Charles s/o Kidaha** (supra) the Court of Appeal nullified the entire proceedings of the trial court. Indeed, the law is settled in this jurisdiction that, a decision premised on the proceedings in which the right to be heard was violated or infringed cannot be allowed to stand. See the cases of **The Director of Public Prosecutions vs Sabini Inyasi Tesha and Another** [1993] TLR 237, **Abbas Sherally and Another vs Abdul Sultan Haji Mohamed Faza lboy**, Civil Application No. 33 of 2002 (unreported) and **Dishon John Mtaita vs. The**

Director of Public Prosecutions, Criminal Appeal No. 132 of 2004 (both unreported)). Since the 2nd appellant's basis right was contravened by the trial court as stated afore, the decision reached by the trial court cannot be allowed to stand.

On the way forward, I am alive to the principle that a retrial would be ordered when the trial is found to be illegal or defective. However, the law is settled that the order for retrial cannot be made where the conviction is set aside due to insufficiency of evidence or for purpose of enabling the prosecution to fill up gaps in its evidence at the trial. (See the case of **Fatehali Manji vs. R** [1966] EA 343). In the circumstances of this case, I find it opportune to go through some grounds of appeal in which the appellants contend that the prosecution case was not proved.

As hinted earlier, the appellant's grievance in the fifth ground that the charge and evidence adduced by the prosecution are at variance. They pointed out that the variance is on the value of mobile phone alleged to have been stolen from PW1. The appellant further contends that it was not proved that the mobile phone was stolen. On her part, Ms. Uisso is of the view that the variation between the charge and evidence is curable if the witnesses gave evidence which proved the offence. Pursuant to section 287A of the Penal Code, stealing is one of the ingredients of the offence of armed robbery. The particulars of offence read to the appellants were to the effect that the

properties stolen from PW1 are "cash money Tshs 60,000/= and one mobile phone make SAMSUNG valued Tshs 450,000".

However, PW1 testified that her assailants robbed her pocket which had cash money (Tshs 60,000) and mobile phone valued at Tshs. 60,000. Now that the said pocket was not listed in the stolen properties and as the value of mobile phone stated by PW1 differ with the value featuring in the charge, I agree with the appellants that the charge and evidence are at variance.

Such defect is not proved by considering whether the adduced evidence proved the offence, as argued by Ms. Uisso. I agree with the appellants that the proper recourse was for the prosecution to amend its charge under section 234 of the CPA. It is trite law that failure to amend the renders the prosecution's case not proven. I am fortified, among other, by the decision of the Court of Appeal in the case of of **Issa Mwanjiku @ White vs Republic**, Criminal Appeal No. 175 of 2018 (all unreported) in which the Court of Appeal held as follows:

> *"We note that, other items mentioned by PW1 to be among those stolen like, ignition switches of tractor and Pajero were not indicated in the charge sheet. In the prevailing circumstances of this case, we find that the prosecution evidence is not compatible with the particulars in the charge sheet to prove the charge to the required standard"*

Considering that stealing is one of the ingredients of armed robbery, the variance on the properties and value of properties implies that the particulars of case laid against the appellants were not proved. This is also when it is considered that PW1 did not tender any evidence to prove that she was owning a mobile phone on the fateful day.

Last for consideration is the second, third and fourth grounds of appeal which give rise to the issue whether the appellants were properly identified. There is a plethora of legal authorities emphasizing that great caution should be taken into consideration before relying on the identification evidence. The most celebrated case of **Waziri Amani vs R**, (supra) laid the conditions upon which the court should consider should it rely on visual identification to include: *one,* source of light if any and the intensity of light, *two,* the distance within which the witness had observed the assailant, *three*, the time the witness had observed the assailant; and *four,* whether the accused was known by the witness before. It also settled law that, the court should not act on visual identification evidence unless all possibilities of mistaken identity are eliminated through the above laid conditions, and that such evidence must be watertight.

Having expunged Exhibit P3, the remaining evidence which implicate the appellant is that of PW1. Apart from stating that there was electricity light, PW1 stated to have known the appellants before the incident. However, I am of the view that such factors were not sufficient to conclude that PW1 identified the appellant. PW1 ought to have stated about the intensity of light which aided

her to identify the appellants, the distance at which she observed the appellants, the time under which the appellants remained under her observation and descriptions of the appellants on the fateful day. Further to this, the person to whom PW1 named and gave description of the appellants (her assailants) ought to have been paraded as witness. Since that was not done, it is not clear whether the appellants were named by PW1 immediately after the incident. I draw inspiration from the case of **Juma Jembu @ Issa vs Republic,** Criminal Appeal No.318 of 2019 (unreported) where the Court of Appeal observed:-

> *"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."*

Considering that the evidence of recognition is not a sole factor to conclude that the appellants were properly identified at the crime scene, I respectful disagree with the learned state attorney who was of the view that the appellants were identified by PW1. It is my considered opinion that, the prosecution failed to prove that all conditions were favourable for PW1 to identify the appellants. Given the variance between the charge and evidence on one hand and the weakness on the evidence of visual identification on the other hand, I hold the view that this is not a proper case for the Court to order retrial due.

In the final analysis, I proceed to nullify the proceedings, quash the conviction and set aside the sentence and compensation order meted out to the appellants. It further ordered that order that the appellants be released from the prison forthwith unless otherwise lawfully detained.

It is so ordered.

DATED at DAR ES SALAAM this 19th day of September, 2022.

S.E. Kisanya
JUDGE

COURT: Judgment delivered this 19th day of September, 2022 in the presence of the appellants, Ms. Lilian Rwetabura learned Senior State Attorney for the respondent and Ms. Bahati, court clerk.

Right of appeal explained.

S.E. Kisanya
JUDGE
19/09/2022