IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 210 OF 2021

(Originating from Criminal Case No. 852 of 2019 in the District Court of Ilala at Ilala)

SAID RAMADHAN ISSA@KESHIA.....1ST APPELLANT

RAMADHANI HADI RASHID.....2ND APPELLANT

BUNDA RASHID.....3RD APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 03/09/2022

Date of Judgment: 10/102022

Kamana, J:

The Appellants Said Ramadhan Issa @Keshia, Ramadhani Hadi Rashid and Bunda Rashid were charged with before and convicted by the District Court of Ilala of an offence of armed robbery contrary to section 287A of the Penal Code, Cap.16 [RE.2002]. It was alleged by the Prosecution that on 23rd day of September, 2019 at Ukonga Mazizini within Ilala District in Dar es Salaam Region, the Appellants did steal one mobile phone valued at Tshs.150,000/- and Tshs.50,000/- in cash, the

properties of one Imani Athumani Chalamila. It was further alleged that the Appellants immediately before and after such stealing caused injuries by attacking the victim with a machete with a view to obtaining and retaining the said properties.

The Appellants pleaded not guilty and after a full trial, they were convicted of the charged offence and consequently sentenced to serve thirty years behind bars. Aggrieved by that decision, they preferred this appeal armed with eight grounds of appeal. In essence, the grounds of appeal were focused on establishing that the trial Court convicted the Appellants based on the evidence of the Prosecution which failed to prove the case against them beyond reasonable doubts. The grounds are reproduced hereunder as follows:

1. The trial Magistrate erred in law and facts in convicting and sentencing the Appellants while the available evidence failed to establish the case against the Appellants beyond reasonable doubt.
2. The learned trial Magistrate erred in law and facts by convicting and sentencing the Appellant based on contradictory testimony of Prosecution's witness.

3. The trial Magistrate erred in law and facts by convicting and sentencing the Appellants without regarding their evidence.
4. The trial Magistrate erred in law and facts in convicting and sentencing the Appellants relied on unaffirmed testimony of PW1 Iman Athuman Chalamila contrary to the procedural requirements and provisions of the Oaths and Statutory Declaration Act, Cap. 34 [RE.2019].
5. The trial Magistrate erred in law and facts by convicting and sentencing the Appellants based on exhibit P3 (PF3) which was unprocedurally tendered before and admitted by the Court.
6. The trial Magistrate erred in law and facts by convicting and sentencing the Appellants relied on discredited visual identification of PW1, PW2 and PW3.
7. The trial Magistrate erred in law and facts by convicting and sentencing the 1st Appellant relying on exhibit 4 (Cautioned Statement) which was unprocedurally recorded by PW7 D/SGT Mkombozi.

8. The trial Magistrate erred in law and facts by convicting and sentencing the Appellants without conducting trial within trial before admitting exhibit P4 since it was objected by the 1st Appellant.

Succinctly, the facts that led to this appeal are to the effect that on 23rd day of September, 2019 around 0015 hrs, Imani Athumani Chalamila (PW1) received a call from one of the auxiliary policemen who informed him in his capacity as a ten cell leader that he (the caller) and others were close to his home and they wanted him to come out and discuss some issues relating to security at their street.

While discussing the issue, they saw a group of persons entering in one of the houses. They suspected that those persons are associating themselves with criminal activities. PW1 then decided to go to that house to find out what was going on. When he knocked the door, the same was opened for him and he entered inside the house. Therein, he found seven men who were smoking bhangi on a mattress. He asked them what they were doing. The owner of that room one Abdul told him to leave the place.

Before he took his flight, he was suddenly attacked by the persons he found in that room with a machete. Thereafter, his hosts ran away and

he found himself without his mobile phone and a wallet. He raised an alarm and his company he left along the street responded and took him to police and to the hospital. PW1 alleged to have identified the robbers as they were living in the same street with him and he managed to identify them in the identification parade which was conducted at the Central Police Station.

On the other hand, the Appellants denied to have been involved in the alleged offence.

Reverting to the appeal, during the hearing, the Appellants were ably advocated by Mr. Paskas Alexander, learned Counsel. On the opposite side, Ms. Dhamiri Masinde, learned State Attorney appeared for the Respondent.

While appreciating the long submission of the learned Counsel for the Appellant, in determining this appeal, I will be very selective with regard to the grounds of appeal as I will deal with those that determine the appeal.

Starting with fourth ground, the learned Counsel for the Appellant contended that the evidence of PW1 was recorded without such witness be subjected to an oath or affirmation. This to Mr. Alexander, learned

Counsel, was a clear contravention of section 198(1) of the Criminal Procedure Act, Cap.20 [RE.2019]. In that case, he prayed this Court to allow the appeal on that ground.

Responding to the fourth ground, the learned State Attorney was quick to point out that the Respondent supports the appeal. She contended that the evidence of PW1 ought to be expunged from the records for contravening the provisions of section 198(1) of the Criminal Procedure Act, Cap. 20. She further submitted that the trial Magistrate failed to append his signature after taking the evidence of PW1 which in essence offends the provisions of section 210(1)(a) of the Criminal Procedure Act which puts as mandatory for the Magistrate to append signature after recording a testimony. The learned State Attorney was of the view that since the taking of the evidence of PW1 contravened the provisions of section 198(1) and 210(1)(a), such evidence was valueless and could not be used to convict the Appellants. He prayed the Court to expunge such evidence from the records. In summing up, she submitted that in the absence of the evidence of PW1 the remaining evidence does not support the Prosecution's case and hence pleaded that the appeal be allowed.

Regarding the sixth ground, the learned Counsel for the Appellants contended that since the incident took place at midnight, the trial Court was required to warn itself before convicting the Appellants basing on the evidence of visual identification. In this regard, the learned Counsel submitted that PW1 during his testification, he did not tell the Court the intensity of light and what the Appellants wore on that particular day. To buttress his arguments, the learned Counsel for the Applicant referred this Court to the celebrated case of **Waziri Amani v. Republic**, [1980], TLR 250.

The learned State Attorney was in agreement with her counter part's arguments and conceded that the appeal be allowed on this ground.

Having heard both learned Counsel, the issue for determination is whether in the presence of incongruities as elucidated in the fourth and six grounds of appeal, the conviction and sentencing against the Appellants is warranted.

It is trite law in this country that any person who testifies before the court of law should take an oath or affirm before testification. Section 198(1) of the Criminal Procedure Act stipulates that requirement of the law as follows:

'(1) Every witness in a criminal cause or matter shall, subject to any other written law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act.'

In view of section 198(1) of the Act, every witness who is testifying in criminal proceedings of whatever nature is required to swear or affirm except otherwise provided by a written law. A good example of the exemption to this rule is provided in section 127(2) of the Tanzania Evidence Act, Cap. 6 [RE.2019] which allows children of tender age to testify without swearing or affirming. The rationale behind section 198(1) of the Criminal Procedure Act is to ensure that witnesses who testify before the Court are adducing true evidence and not otherwise.

Upon perusal of the Proceedings of the trial Court, as rightly contended by the legal minds before me, PW1 did not testify under oath or affirmation. This means that the evidence of PW1 was valueless in the eyes of the law and could not be applied to enter conviction against the Appellant. In holding this view, I am fortified by the decision of the Court of Appeal in the case of **Bundala Makoye v. Republic**, Criminal Appeal No. 137 of 2018 in which the Court quoted with approval its

decision in the case of **Mwami Ngura v. Republic,** Criminal Appeal No. 63 of 2014 as follows:

> *`... in several cases; this court has held if in a criminal case, evidence is given without oath or affirmation, in violation of S. 198(1) of the CPA, such testimony amounts to no evidence in law. (see:* ***Mwita Sigore @ Ogorea vs. Republic****, Criminal Appeal No. 54 o f2004 (unreported). (Emphasis added)'*

Since it is clear from the record that the evidence was PW1 was taken without complying with the provisions of section 198(1) of the Criminal Procedure Act, I do expunge such evidence from the records.

With regard to the evidence of visual identification, the evidence of PW1 which has already been expunged herein, Miraji Mohamed PW2 and John Francis PW3 were relied on by the Court to convict the Appellants. From the records, PW 2 and PW3 contended to have identified the Appellants at the scene of crime since there was an electricity light.

However, from the records, these witnesses did not testify the intensity of that electricity light. Further, they did not tell the Court the time they

spent to watch the Appellant so that they can be able to identify the Appellants in the given circumstances and time.

In this regard, I am minded that it is dangerous to convict a person on the basis of visual identification. In the case of **Waziri Amani (Supra**), the Court of Appeal observed that the evidence of visual identification is weak and when it is necessary to apply it the Court should be warned as to the likelihood of mistaken identification. The Court stated:

> *'The first point we wish to make is an elementary one and this is that evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.'*

In this regard there are several factors which the Court should observe before convicting an accused basing of visual identification. In the case of **Said Chaly Scania Versus the Republic, Criminal Appeal No. 65 of 2005 (Unreported)**. The Court of Appeal held that:

We think that where a witness is testifying identifying another person in unfavourable circumstances like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light, its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger.'

As elucidated hereinabove that the evidence of both PW2 and PW3 is short of necessary ingredients to warrant conviction on the ground of visual identification, I am of the settled view that the trial Magistrate misdirected himself for relying on the evidence of visual identification. By the way, this Court asked itself, if the Appellants were known to the witnesses prior to the incident why the identification parade was mounted?

Having expunged the witness of PW1 and discarded the evidence of visual identification, the remaining evidence cannot prove the offence of armed robbery beyond reasonable doubt. In that case, I allow this appeal in its entirety.

I consequently quash the conviction of both Appellants and set aside the prison sentence meted out by the trial Court against both Appellants. The Appellants are to be released forthwith from the prison unless they are otherwise lawfully held.

It is so ordered.

Right to appeal explained.

DATED at **DAR ES SALAAM** this 7th day of October, 2022.

KS KAMANA

JUDGE

This Judgment delivered this 7th day of October, 2022 in the presence of the Appellants and their Advocate Mr. Paskas Alexander and Ms. Dhamiri Masinde, learned State Attorney for the Respondent.