

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 282 OF 2020

(Arising from Criminal Case No. 763 5 of 2018 Temeke District Court)

IDDY ALLY.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order: 19/8/2021

Date of Judgment: 12/04/2022

S.M. KULITA J;

This is an appeal from Temeke District Court. The Appellant herein, namely IDDY ALLY was convicted and sentenced to 30 (thirty) years imprisonment by that said court for Armed Robbery, contrary to section 287A of the Penal Code [Cap 16 RE 2002], for each of the four counts he was charged with. Aggrieved with both, conviction and sentence, the appellant preferred this appeal relying on ten grounds of which can be summarized into the following five grounds;

1. That, the trial Magistrate erred in law to convict the appellant on the 4th count while the victim herself nor any person appeared to court to prove that the crime was committed against her.
2. That, the trial Magistrate erred in law to convict the appellant while there was variance in terms of monies alleged to have been stolen between those read in the charge sheet and those mentioned by PW1, PW2 and PW3.
3. That, the trial Magistrate erred in law and in fact to convict the appellant basing on the Identification Parade which was un-procedural conducted.
4. That, the trial Magistrate erred in law and in fact to convict the appellant basing on the Visual Identification without explanation on the intensity and colour of the bulb, and the distance from which it was illuminating.
5. That, the trial Magistrate erred in law and in fact to convict the appellant while the prosecution case was not proved at the required standard.

The appellant appeared in person while the Respondent (Republic) was represented by Ms. Monica Ndakidemu, State Attorney. In making summary of what was submitted and their respective

analysis, I will be picking the grounds randomly without regarding the series in which they have been listed.

In his oral submission in respect of Identification; starting with the Visual Identification, the Appellant stated that the trial Magistrate erred in law and in fact to convict him basing on the Visual Identification without explanation on the intensity and colour of the bulb, and the distance from which it was illuminating.

As for the Identification Parade, the appellant alleged that the trial Magistrate erred in law and in fact to convict him basing on the Identification Parade which was un-procedurally conducted. He submitted that there was no prior statements by the identifiers as to how they did manage to identify him through the light visibility available at the scene during the incident.

In the reply to the Appellant's submission in respect of Visual Identification the State Attorney submitted that the trial court records transpire that the scene of crime had an ample light which enabled the witnesses (victims) to identify the appellant who was known to the said witnesses as they used to hire him for their minor works at their homes.

As for the Identification Parade the State Attorney argued that the Appellant never clarified as to how illegal it was. She further

submitted that the parade was lawfully conducted. She said that it comprised 11 people and that the same involved change of positions by the paraded persons. She said that the Appellant was successfully identified by the witnesses.

Having heard the parties in respect of identification, here is my observation; In their evidence in respect of **Visual Identification** the witnesses (PW1 and PW2) who purported to have identified the Appellant at the scene, contended that, they successfully identified him with the help of bulb lights, but the source whether it was electricity or solar was not mentioned, however they alleged that the light was sufficient. The doubt that persists in my mind is failure of the said eye witnesses to explain in their testimonies as to how the bandit was looked like on the date he was committing the crime. As the eye witnesses and the victims of the incident I expected them to give the trial court the physical descriptions and attire of the appellant as among the persons who had invaded them. Description by each of those witnesses in relation to the bandit's physique and attire could have given the trial court an opportunity to assess as to whether what had been testified against the appellant on visual identification was true.

Another thing that I wish to comment on the reliability of the visual identification on this matter is that the record transpires that the

bandits spent about 20-30 minutes to accomplish their mission against all four victims. That is an approximation of about 5-6 minutes for each victim, but it was not specified by any witness as to how long the said bandits stayed in his/her room during the mission. Even if we approximate it being 5-6 minutes for each room, still I find it not convincing, the records transpire that the bandits were many, about 9 in number, which means that it could not be easy for any of the victims, within that short period of time (5 to 6 minutes) to turn his/her eyes on all those invaders for the purpose of identifying them, while under tension of being invaded. Under that circumstance mistaken identity on the invaders is higher than the proper identification. It is doubtful if the witnesses managed to use such duration of time to observe the invaders. With that situation, possibility of mistaken identity is obvious.

In **FIKIRI JOSEPH PANTALEO @ USTADHI v. THE REPUBLIC, Criminal Appeal No. 323 of 2015, CAT AT DSM** it was held; -

"Beginning with the first issue of identification the position of this Court is well established that trial courts, and by extension courts sitting on first appeals must take great caution before relying on the evidence of visual identification when conditions for positive identification are difficult: see- Waziri

*Amani v. R. [1980] T.L.R. 250. **Visual identification evidence was in Yustin Adam Mkamla vs. R., Criminal Appeal No. 206 of 2011 (unreported) described to be the weakest kind and most unreliable evidence, requiring great care before being acted upon” (emphasis is mine).***

From the above analysis, it is my view that the possibility of a mistaken identification was not completely eliminated. I therefore find the visual identification was unreliable.

As for the submissions in respect of the **Identification Parade**, I have this to say; I have noticed another shortfall on the Prosecution case at the trial court, that is failure of the witnesses to describe the bandit/appellant. There is nowhere in the record did the identifiers (PW1 and PW2) described the appellant. If the witnesses, successfully identified the Appellant at the scene, I expected them to have noted some notable features that assisted them in the visual identification, but none was divulged. Thus, it is not clear as to how PW1 and PW2 identified the appellant during the identification parade.

As it was so held in **Flano Alphonse Masalu @ Singu V. Republic, Criminal Appeal No. 366 of 2018, CAT at DSM,**

that failure to identify the appellant prior to the identification parade implied that “there was no factual basis for the witnesses to purport identifying the assailants in the identification parade conducted”. That fact shakes the credibility of the identifying witness.

The next question to be answered is whether in the absence of any anomaly in the identification parade, would itself suffice to sustain the conviction against the appellant while the visual identification is fatal? The answer is certainly in the negative. The law on identification parade leans heavily towards the fact that it just offers corroborative evidence. This was also stated in the said case of **Flano Alphonse Masalu @ Singu (supra)** in which it was held that if the visual evidence was insufficient, there was no need of dealing with the grounds of appeal assailing the propriety of the identification parade and the validity of the parade register extracts. An identification parade presupposes that the person to be identified on it was identified at the scene of the crime, which is not the case in the instant case.

Generally, the identification parade, is itself not substantive evidence, but only admitted for collateral purposes. It derives its corroborative value from section 166 of the Tanzania Evidence Act. So, if well conducted, its value is only to corroborate the evidence

of the identifying witness. See **Moses Deo V. Republic [1987] TLR 134 (CAT)**. See also **Dennis Nyakonda v. Republic, Criminal Appeal No. 155 of 1990 (unreported)**.

The purpose of corroboration is only to confirm or support evidence which is sufficient satisfactory and credible, and not to give validity or credence to evidence which is deficient, suspect or incredible. See **Aziz v. Republic [1991] TLR 7**.

Therefore, for the identification parade to be of any value, the identifying witness(es) must have earlier given a detailed description of the suspect before being taken to the identification parade (See **Emilian Aidan Fungo @ Alex & Another V. Republic, Criminal Appeal No. 278 of 2008 (unreported)**). Cementing this position in **Ambros Elias V. Republic, Criminal Appeal No. 368 of 2018, CAT at DSM (unreported)**, the Court of Appeal held thus, the law on identification parade is fairly settled that it is by itself not substantive evidence.

In view of the above I'm constrained to hold that, the identification parade was not of any value as there was no cogent evidence for the identification parade to corroborate.

Moreover, be it noted that the Identification Parade is used to be conducted in the incident where the person to be identified

(Accused) is not known to the witness (identifier). That the Accused is stranger to the witness, but the said witness is capable to identify him/her, as he/she saw and managed to identify him/her at the time he/she was committing the crime. As for the matter at hand, I find the Identification Parade was unnecessary, as the witnesses (SM1 and SM2) who alleged to have identified the accused in the Identification Parade stated in their testimonies that they have been knowing the Appellant before, that they used to hire him for their minor works at their homes. In that sense, there was no need of Identification Parade.

Among the evidence that led to the conviction of the appellant at the trial court was the **caution statement**, that the appellant had confessed before a Police Officer (PW5) and his Caution Statement (exh. PII) was accordingly noted down. That is the only evidence the prosecution has remained with for determination, after the evidence of visual identification and identification parade being proved failure.

The record transpire that the caution statement was not challenged at all by the Appellant during trial and it was not complained of as among the ground of appeal, but can this alone be solely used to convict the Accused without corroboration? The answer is, no, as it basically needs corroboration. It is dangerous to convict the

Accused relying solely on the retracted/repudiated confession without corroboration. See, **Dickson Elia Nsamba Shapwata and Another v. Republic, Criminal Appeal No. 92 of 2007, CAT at Mbeya** in which it was held;

"With respect, we agree with Mr. Mkumbe that, it is always desirable to look for corroboration in support of a confession which has been retracted/repudiated before acting on it to the detriment of the appellant."

However, I am also alive with the position of the law that, a court may convict on retracted/repudiated confession even without corroboration. See, **Tuwamoi v. Uganda (1967) EA 84** in which it was held;

*"The present rule then as applied in East Africa, is regard to retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement that has been retracted in the absence of corroboration in some material particular, but that the court might do so **if it is fully satisfied that in some circumstances of the case that the***

confession must be true. See also Hemed Abdallah v. Republic (1995) TLR 172"
(Emphasis supplied)

With the above reasoning, it follows therefore that, to act on the retracted/repudiated confession of the accused persons in Exhibit P II, the court must be fully satisfied, while basing on some circumstances of the case that, those confessions must be true.

The question is, are there some circumstances in this matter that can make this court fully satisfied that the Appellant's confession is nothing but the truth? Here I must admit that, in the records, there are no circumstances to convince this court that the confession must be true. The reason behind is that the visual identification of the appellant at the scene was unreliable, let alone the Identification Parade being valueless. Had the trial court noticed these doubts on the Prosecution case it could have not relied on the caution statement to convict the appellant.

As the appellant's conviction was grounded on the evidence of visual identification, identification parade and the appellant's caution statement, the findings above naturally dispose of the appeal. For this reason, I find no need to analyze the remaining grounds of appeal.

In upshot, the above analysis sustain the appeal. Accordingly, it is hereby allowed. The conviction and sentence imposed by the trial court are consequently quashed and set aside. Moreover, it is ordered that the appellant be immediately released from prison, unless he is held for any other lawful cause not connected with the matter at hand.



S.M. KULITA

JUDGE

12/04/2022

