

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY  
AT MWANZA**

**CRIMINAL APPEAL NO. 47 OF 2021**

*(Original Criminal Case No. 43 of 2019 of the District Court of Geita at Geita, Hon K.  
Sosthenes R.M)*

**PETRO MALONGO .....1<sup>st</sup> APPELLANT**

**MASUMBUKO SAKUMI.....2<sup>nd</sup> APPELLANT**

**JACKSON MASUMBUKO.....3<sup>rd</sup> APPELLANT**

**VERSUS**

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

**JUDGMENT**

*28<sup>th</sup> March & 2<sup>nd</sup> May, 2022*

**ITEMBA, J**

In the District Court of Geita, the three appellants Petro Malongo, Masumbuko Sakumi, and Jackson Masumbuko were charged and convicted of the offence of armed robbery contrary to section 287 A of the Penal Code [Cap. 16 R.E 2002]. The three were sentenced to thirty (30) years imprisonment.

Facts leading to this matter are that Zwiyo Mpemba (PW5) and Pauline Edward (PW6), are husband and wife respectively who used to live at Msasa

Village within Busanda in Geita Region. The couple planned to move to Segese in Kahama therefore, they sold some of their properties including a cow and plot of land. After the said sale, on 14.7.2019 at night hours between 2200hrs and 0100hrs, the two were invaded by a trio of bandits, armed with clubs and a machete. They banged the door, stormed in and attacked PW5 on his shoulder thereafter they beat and dragged him outside the house. PW5 managed to escape the scene, however, he had already identified the 1<sup>st</sup> and 3<sup>rd</sup> accused by the aid of solar lights. According to PW5, the 1<sup>st</sup> accused had a black coat while the 3<sup>rd</sup> had wrapped himself in a green "maasai cloth". The bandits returned, inside the house and assaulted PW6 with a machete on her head and kept asking for money. PW6 explained that she did not have any money as she had already bought another plot. The bandits asked for a sale agreement and PW6 did not have any. The bandits kept on searching and under the mattress they found and stole TZS 500,000/= . They also stole 3 mobile phones make Itel, Nokia and Techno.

PW6 identified the bandits by their names to be the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> accused respectively as she has been neighboring the 1<sup>st</sup> and 3<sup>rd</sup> appellants. She added that a day before the incident the 1<sup>st</sup> and 3<sup>rd</sup> appellants had visited her and asked for PW5 whereabouts. The appellants were arrested and later

recorded caution statements whereas they confessed to have committed the offence of armed robbery. The court thus convicted the appellants on that evidence.

Being aggrieved with the conviction and sentence they filed the present appeal with the following four (4) grounds.

- 1. That, the trial court erred in law and facts by convicting the Appellants herein while their identification on the crime scene by the victims was improper, uncertainties, and with reasonable doubts.*
- 2. That, the court erred in law and facts by admitting a cautioned statement (exhibit P1) of the 2<sup>nd</sup> Appellant herein while the same was recorded in contravention of the law.*
- 3. That, the court erred in law and facts by admitting Certificate of Seizure (Exhibit P3) while the whole process of searching the 1<sup>st</sup> accused was improper.*
- 4. That, the trial magistrate erred in law and facts by failure to consider the facts raised by the 1<sup>st</sup> and 3<sup>rd</sup> Appellants herein that they were implicated in the offence due to persistent conflict between their father and the village chairman who is the relative of the victims.*

At hearing of the appeal, all the appellants were present and were represented by Mr. Laurent Bugoti learned advocate while Ms. Maryasinta Lazaro Senior State Attorney appeared for the respondent Republic. Arguing for the appeal, Mr Bugoti first prayed to abandon the 3<sup>rd</sup> and 4<sup>th</sup> grounds. He submitted that the identification of the appellants at the scene was poor, incorrect and doubtful. He referred the court at page 53 of typed proceedings where PW5 states that the identification was done by the aid of the two solar lights, one at the sitting room and another in the bedroom. According to Mr. Bugoti, this visual identification was weakest and unreliable especially because PW5 and PW6 did not explain the intensity of the said lights. He relied to the case of **Bakari Abdallah Masusi Vs Republic** Criminal Appeal 2120/2015 where the court stated the importance of visual identification and how the court should contemplate it.

Mr. Bugoti explained further that PW5 did not state how he identified the appellants and that PW5 and PW6 did not reveal the appellant's names at the earliest possible opportunity. He submitted that PW6 had stated that all the accused ran away before the neighbours arrived at the scene and it is not shown if PW5 and PW6 did mention the appellants even to the

neighbours when they arrived. He also referred the court to the case of **Marwa Wangiti and others Vs Republic** [2003] TLR 39 which stated *inter alia* that mentioning the accused at earlier stage proves assurance of the victim reliability otherwise the court will question the credibility of witness.

Mr Bugoti also challenged the contradiction of the time when the incident had occurred between PW5 who stated it was 2200hrs and PW6 who stated 0100 hrs. That, it is not possible for two people, both of them victims, to have different versions of the time of the incident. Lastly, he questioned as to why would the solar lights be on, when the victims were asleep, he argued that usually the lights are off at midnight, otherwise, the evidence would have shown who switched on the lights.

Submitting for the second ground the learned counsel stated that at page 17 of typed proceedings PW1 stated that he recorded the statement of DW2 but he did not caution him and therefore DW2 did not understand the meaning of the cautioned statement and if he would have understood, probably his admission would not have been as it appears in exhibit P1. He referred the case of **Seko Samwel Vs Republic** (2005) TLR 375 where the court stated that the appellant should be cautioned before recording a

cautioned statement. Based on these two grounds he prayed for an appeal to be allowed and all appellants be set free.

In rebuttal, Ms. Lazaro submitted that she supports conviction and sentence against the appellants. Regarding the 1<sup>st</sup> ground of appeal, she stated that the court, in convicting the appellants relied in two pieces of evidence that of identification and of accused's cautioned statement.

She explained that the evidence of identification was from PW5 and PW6 who were victims of crime and were invaded in their bedroom. That, PW5 identified Petro Malongo 1<sup>st</sup> appellant and Jackson Masumbuko 3<sup>rd</sup> appellant at the scene as the two broke the door and entered. There was a solar light in the bedroom and in the sitting room. PW5 was attacked with a machete and was moved outside. She added that PW5 knew the appellants before as they lived in the same village and PW5 went further and described their clothes that the 1<sup>st</sup> appellant had a black shuka and 3<sup>rd</sup> had maasai cloth (kikoi) with green colour. She narrated what transpired at the scene and added that PW5 knew all of the appellants except the 2<sup>nd</sup> appellant who does not live in the same village of Busanda. That the 3<sup>rd</sup> appellant's nickname is Mzinga. As regards who reported the incident to the police the learned state attorney stated that it was PW6.

She submitted that on the same evening, on 13.7.2019 the appellants went to the victims' home and asked PW6 for the whereabouts of PW5. She stated that the 1<sup>st</sup> and 3<sup>rd</sup> appellants were well known to PW6 and she even gave the appellants her phone to trace PW5's number. Ms. Lazaro argued that in the trial court proceedings, there was no cross examination of issues of PW6 identification of the 1<sup>st</sup> and 3<sup>rd</sup> appellants. As regard the witnesses not mentioning the appellants at the earliest opportunity, she stated that according to DW3 he was arrested on 14.7.2019 when watering tomatoes. DW2 does not state when he was arrested, they were therefore mentioned early that is why they were arrested. In respect of time discrepancy, Ms Lazaro argued that it cannot weaken identification because both 2200 hours and 01.00 hours prove the matter occurred at night and such a variation does not go to the root of the matter. As for the solar light being on at midnight, she contended that it is not material issue because switching on or off the lights at night depend on family practice; after all, during trial, no one objected on the light having left on.

As regards the 2<sup>nd</sup> ground the learned state attorney submitted that page 16 of proceedings shows that when the cautioned statement of 2<sup>nd</sup>

appellant was admitted as exhibit P1, PW1 explained how he gave his rights to the 2<sup>nd</sup> appellant. That the 2<sup>nd</sup> appellant was warned for the offence of armed robbery and the statement was read. The 1<sup>st</sup> appellant did not object anything and he was given an opportunity to cross examine PW1 but he did not ask these questions. That, if the second appellant wished, he would have objected when his statement was tendered, otherwise, raising complaints at an appellate stage is just an afterthought. The learned state attorney finalized by praying for the court to dismiss the appeal and sustain conviction and sentence against the appellants.

These being the facts of the case, the issue to ponder is whether the appeal has merit, that is whether the trial court was justified in convicting and sentencing the appellants.

Starting with the 1<sup>st</sup> ground, the appellants are challenging their visual identification at the scene of crime stating that the evidence in proceedings does not show who was the arresting officer and how the victims PW5 & PW6 described the appellants after the incidence.

It is not indicated who arrested the appellants and what led to their arrest, however, as clearly explained by the learned state attorney what



transpired at the scene enabled the PW5 and PW6 to identify the appellants by their names and this would enable their arrest. The learned Senior State Attorney correctly submitted that the incident occurred on 14.7.2019 and just by the following morning the 2<sup>nd</sup> appellant was arrested which means a report of the incident was made immediately.

I should add that, the law on visual identification is settled. A landmark case of **Waziri Amani v R** [1980] TLR 250, had long established the principle of identification. The same principle has been reiterated and expounded in several cases including **Scapu John and another vs. Republic**, Criminal Appeal No. 197 of 2008 (Unreported) the supreme Court of the land among other things, mentioned the said conditions which have to be complied for exclusion of all possibilities of mistaken identity. The court stated the following: -

*"Water tight identification, in our considered view, entails the exclusion of all possibilities of mistaken identity. The court should, inter alia, consider the following;*

*How long the witness had the accused under observation,*

*What was the estimated distance between the two,*

*If the offence took place at night which kind of light did exist and what was it's intensity,*

*Whether the accused was known to the witness before the incident,*

*Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like, which may have interrupted the latter's concentration."*

Based on these criteria and the facts of this case, PW6 observed the appellants for a long time as they attacked PW5, dragged him outside, returned inside, exchanged some words including the bandits asking for money and making a thorough search in the house. It was such a small distance because it all happened inside the victim's house. The kind of light was explained to be 2 solar lights. Its intensity was not explained but being 2 solar lights cannot be compared to the moonlight or of a torch for example; and yes, as correctly stated by the learned state attorney, the tradition of sleeping with lights on or off differs from one family to another. I find the issue of time variation PW5 stating 2200hrs and PW6 stating 0100hrs not fatal because both times are still within the same night, besides when it is night hours and dark one cannot easily know the exact time. As well, all these particular issues about light intensity were not raised during trial, hence they remain after thoughts. All the appellants were known to PW5 and

PW6, by their names, as the 1<sup>st</sup> and 3<sup>rd</sup> appellants lived in the same village and are close neighbors with PW5 and PW6 and the 2<sup>nd</sup> appellant lived the nearby village. Hence, I do not see any reason to question the identification of the three appellants by PW5 and PW6 at the scene of crime. Thus, the 1<sup>st</sup> ground lacks merit.

The second ground, refers to the appellants cautioned statements. That there is noncompliance with section 57(2)(1) CPA as the appellants were not cautioned, had they been cautioned, they would have understood the meaning and probably not admit. I have revisited the proceedings and cautioned statements; and there is nowhere PW1 stating that he did not caution the second respondent, the said cautioned statement was admitted without facing any objection from the second respondent. Further, the contents of the statement on the first page shows that a caution was given to the second respondent.

Therefore, the said cautioned statement of Masumbuko Sakumi is lawful, correctly recorded and properly admitted. I see no reason to fault it.

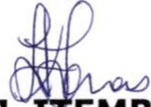
That being said both grounds of appeal have no legs to stand. The appeal is hereby dismissed in its entirety. It is so ordered.

Dated at MWANZA this 2<sup>nd</sup> day of May 2022.



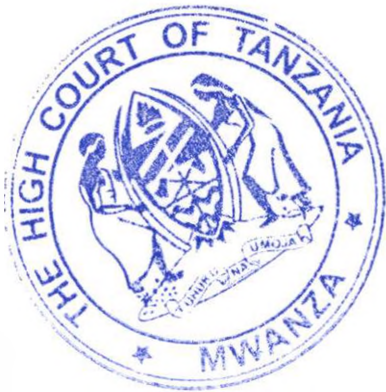
**L. J. ITEMBA  
JUDGE  
2.5.2022**

**DATED at MWANZA this 2<sup>nd</sup> May, 2022**



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JUDGE  
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Judgement delivered this 2<sup>nd</sup> day of May 2022 in the presence of all the appellants, Ms. Rehema Mbuya, State Attorney and Ms. J Mhina, RMA



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