IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

AT BUKOBA

CRIMINAL APPEAL NO. 83 OF 2021

(Arising from D.C. Criminal Case No. 91 of 2019 of District Court of Muleba at Muleba)

LINUS PIUS..1ST APPELLANT

DEOGRATIUS DANIEL...2ND APPELLANT

RWEKAZA SIMON..3RD APPELLANT

CHRISANT SIMON..4TH APPELLANT

RWEYEMAMU JEREMIAH..5TH APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

JUDGMENT

DATE OF LAST ORDER: 08-02-2022

DATE OF JUDGMENT: 18-02-2022

HON. AE. MWIPOPO, J.

Linus Pius, Deogratius Daniel, Rwekaza Simon, Chrisant Simon and Rweyemamu Jeremiah have filed the present appeal against the decision of the Muleba District Court in D.C. Criminal Case No. 91 of 2019. All of them were convicted by the District Court and were sentenced to serve 30 years imprisonment after the Court find them guilty of the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap. 16, R.E. 2002. Their petition of appeal contains 11 grounds of appeal as follows:-

1. *That, the Hon. Trial Court erred in law and facts to convict the appellants without reading out the charge to the four appellants where by the substituted charge was only read out to one appellant and the rest were left stranded without a charge explained to them.*
2. *That, the hon. Trial Court prejudiced the appellants to substitute a charge without any mandatory provision of the law depriving the appellants their rights described in section 234 of the Criminal Procedure Act, Cap. 20, R.E. 2019.*
3. *That, the hon. trial magistrate erred in law and facts to convict the appellants on the wrong mistaken visual identification whereby the witness failed to clarify which light was used to identify the appellants, intensity of light was not described, the distance between the witness and the bandits was not stated and the time taken to observe the bandits was not mentioned as it was underscored in the case of* ***Phinias Alexander and Others V. Republic****, Criminal Appeal No. 276 of 2019 by the Court of Appeal of Tanzania at Bukoba.*
4. *That, the identification parade conducted to identify the appellants was fatally defective and vague for not complying to the statutory provision of*

order 232(2) of the Police General Order (P.G.O.) whereby the law requires not more than two suspects to be lined up in one parade as it was emphasized in the case of ***Francis Majaliwa and Two Others V. Republic,*** *Criminal Appeal No. 139 of 2005 by Court of Appeal of Tanzania, at Mwanza.*

5. *That, the victim did not mention the appellants to any witness whom he came across at his first earliest time after the incident and failure to do so is an incurable omission as it was underscored by the Court of Appeal of Tanzania in the case of* ***Phinias Alexander V. Republic, (Supra).***
6. *That, the evidence adduced by Alex Mwijage Alphonce - PW1 and Deogratias Nestory - PW2 was filled by lies only where PW1 never mentioned PW2 as a member of his family.*
7. *That, the hon. trial magistrate fatally misdirected himself to convict the appellants on such weak evidence without any exhibit found in possession of appellants so as to implicate them of the said robbery.*
8. *That, the principal witness who claim to have been invaded by the bandits did not appear in Court to prove allegations and no documents including PF 3 was tendered to prove the allegations that the so called Judith was really in the Ndorage hospital at Mwanza.*

9. *That, the judgment against the appellants is totally vague for failure to specify the charges which the appellants were charged with thus violating section 312(2) of Criminal Procedure Act, Cap. 20, R.E 2019.*

10. *That, the trial Court grossly erred in law and facts to convict the appellants without taking regard to their defence evidence and for relying on the prosecution evidence only contrary to section 294(1) and (2) of the Criminal Procedure Act.*

11. *That, the prosecution failed to prove the case against the appellants to the required standard of the law which is beyond reasonable doubt.*

When the appeal came for hearing, the appellants being lay persons prayed for the Court to consider all of their grounds of appeal and release them from prison. The Respondent who was represented by Ms. Happiness Makungu, State Attorney, supported the appeal. Her reason for supporting the appeal is the appellants' 3rd ground of appeal that the trial court convicted the appellants relying on unreliable visual identification which was not water tight. She said that the testimony of PW1 as seen at page 20, PW2 at page 22 of the proceedings and PW4 at page 30 is that they identified the appellants by their clothes. These witnesses stated that they know the 5th Appellant. But, they did not testify on the intensity of right, the distance between them and the bandits, the time the incident took place, or the description or physical appearance of the appellants. All of these are contrary to the decision of the Court of Appeal in the case of **Samson Samwel v. Republic**, Criminal Appeal No. 253 of 2021, CAT at Shinyanga, (Unreported). In this case the Court of Appeal pointed things to be considered before convicting the accused person based on visual identification. The court said that to the known suspect the witness was supposed to say how he was able to identify the known person. All of these are not present in this case and the trial court convicted the appellants relying on the visual identification which was not watertight.

The burden of proof in criminal cases is always on the shoulder of the prosecution unless the law otherwise directs and the standard of proof is beyond reasonable doubt. As it was submitted by the Respondent's Counsel, it is a settled law that the person can only be convicted on evidence of identification if the Court is satisfied that such evidence is watertight and leaves no possibility of error. This position was stated by the Court of Appeal in several cases including **Waziri Amani V. Republic [1980] T.L.R. 280,** where it held that:

> *"The evidence of visual identification is of the weakest kind and most unreliable. As such, courts must not act on visual identification unless and until all possibilities of mistaken identity are eliminated and the court is satisfied that such evidence is watertight."*

In the case whose determination depends on identification, it is very important to scrutinize the evidence on conditions favouring a correct identification as it was held by Court of Appeal in the case of **Raymond Francis V. Republic [1994] T.L.R. 100.**

A number of factors have to be considered by the Court to ensure that the evidence is watertight. The Court of Appeal has provided these factors in several of its decision. In **Samson Samwel v. Republic**, (Supra), the Court of Appeal provided these factors which includes the time the witness had the accused under observation, the distance at which he observed him, the conditions in which the observation occurred, for instance whether it was day or night time, whether there was good or poor lighting at the scene and whether the witness knew or had seen the accused before.

The similar factors were stated in **Sostenes Myazagiro @ Nyarushasi V. Republic**, Criminal Appeal No. 276 of 2014, Court of Appeal of Tanzania, at Tabora, (Unreported), where the Court held that:-

"Watertight identification in our considered view, entails among other things the following:

- *How long the witness had the accused under observation.*
- *What was the estimated distance between the two?*
- *If the offence occurred at night which kind of light existed and what was its 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."*

The same position in the case of **Chacha Jeremiah Murimi and 3 Others Vs. The Republic**, Criminal Appeal No. 551 of 2015, Court of Appeal of Tanzania, at Mwanza, (Unreported), where the Court held that, I quote:

"Admittedly, evidence of visual identification is of the weakest kind, and no court should base a conviction on such evidence unless it is absolutely watertight; and that every possibility of a mistaken identity has been eliminated. To guard against that possibility the Court has prescribed several factors to be considered in deciding whether a witness has identified the suspect in question. The most commonly fronted are: How long did the witness have the accused under observation? At what distance? What was the source and intensity of the light if it was at night? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally had he any special reason for remembering the accused? What interval has lapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witnesses, when first seen by them and his actual appearance? Did the witness name or describe the accused to the next person he saw? Did that/those other person/s give evidence to confirm it."

The Court in above cited case went on to state that even in cases where witnesses have claimed to have recognised the accused, mistakes are sometimes made, although by any degree, evidence of recognition may be more reliable that identification of a stranger.

It is a settled principle that ability of a witness to name a suspect at the earliest opportunity possible is another important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry. However, the same is not as decisive factor. In **Jaribu Abdallah v. Republic [2003] TLR 271,** the Court observed:

> *"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identification might appear ideal. But that is not guarantee against untruthful evidence. The ability of the witness to name the offender at the earliest possible moment is in our view reassuring though not a decisive factor."*

The trial Court in the case at hand convicted the appellants based on their identification at the scene of incident by PW1, PW2 and PW4. The trial Magistrate relied on the testimony of these witnesses that they identified the five bandits who committed the offence of armed robbery.

In this matter, there is no dispute that the incident took place at night. As result, the factors favouring accurate identification at night are important to be established by witnesses. Unfortunately, PW1, PW2 and PW4 did not establish any of the factors favouring correct identification in their testimony. These witnesses did not state for how long they observed the accused and at what distance. They said that there was solar and electricity lights at the place of incident, but they did not testify on the intensity of the light. The witnesses said that it was their first time to see the appellants save for the 5th appellant whom they stated to know him before the incident as their neighbour. There is no description of the bandits identified during the incident which was provided for the purpose of comparing it to actual appearance of the suspects. This means the factors favouring accurate identification at night were not established by witnesses and the same could not be assumed. In absence of such evidence, the possibility of mistaken identity is not eliminated.

Further, PW1, PW2 and PW4 stated that they recognized the 5th appellant as they know him before the incident that he was their neighbour living in the same village. But, these witnesses never mentioned the 5th appellant to the first person who visited the scene after the incident. PW3 who was investigator of the case in his testimony he said that they visited the scene of crime on the same date and he drew sketch map. This witness never testified that PW1, PW2 and PW4 informed the police who visited the scene of crime that 5th appellant is among the suspects. PW4 testified that he named 5th appellant to the police at police station. There is no evidence in record which shows that PW1, PW2 and PW4 named the 5th appellant whom they alleged to have recognized him during the incident or any other witness to support their story. Naming the suspect at the earliest possible opportunity reassures that the witness recognized the suspect even though it is not a decisive factor. But, the opportunity presented itself to PW1, PW2 and PW4 when PW3 visited the scene. These witnesses did not name the 5th appellant as among the suspects to PW3.

I looked at Identification Parade Register – Exhibit P2 which shows that on 9th May, 2019 identification parade was conducted by PW5 at Muleba Police Station. PW1 testified to identify the 1st, 2nd, 3rd and 4th appellants in the parade. PW4 said that she identified the 1st Appellant during the incident and in the identification parade. Nevertheless, PW2 did not say in his testimony that he identify the 1st appellant in the identification parade. It was during cross examination when PW2 said that he was able to identify 1st appellant in the parade as he saw him at the scene of crime and he had the same clothes he wore during the incident. They stated that they recognized them by the clothes they were wearing. Exhibit P2 reveals that PW1, PW2 and PW4 were witnesses in the parade where 1st, 2nd, 3rd and 4th appellants were suspects lined in the parade to be identified. The Exhibit P2 states that all the suspects were identified by witnesses, but it does not say among the suspects who was identified by each witness.

These shortfalls in the prosecution evidence in the visual identification of the appellants' means that the possibility of mistaken identity was not eliminated.

For that reason, I find the prosecution case was not proved beyond reasonable doubts as it was stated by the learned State Attorney. As this ground has disposed of the matter, there is no need to determine the remaining grounds of appeal.

Therefore, the appeal is allowed. The conviction of all appellants by the trial District Court for the offences of conspiracy to commit offence and armed robbery are hereby quashed and its sentence is set aside. The appellants to be released from prison forthwith unless they are held for another lawful cause. It is so ordered.

A.E. Mwipopo

Judge

18.02.2022

The Judgment was delivered today, this 18.02.2022 in chamber under the seal of this court in the presence of the 2nd, 3rd, 4th and 5th Appellants and the counsel for the Respondent. The 1st appellant as absent.

A. E. Mwipopo

Judge

18.02.2022