IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 81 OF 2021

(Originating from Criminal Case No. 93 of 2021 of Mkuranga District Court, at Mkuranga before Hon. H.I. Mwailolo -RM)

RAJABU SAID KINONGO @ WAKUPEKECHA.....1ST APPELLANT

NASIR HAMIS MBWANA.....2ND APPELLANT

AYUBU HAMIS MWINYIMKUU.....3RD APPELLANT

ABDALLAH IDDI MWALIMU.....4TH APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last Order: 05th Dec, 2022

Date of Judgment: 10th Feb, 2023

E.E. KAKOLAKI, J.

Before the District Court of Mkuranga at Mkuranga, the appellants together with another fellow **Abdallah Bakari Mgongo** who was later on acquitted, were arraigned facing a charge of Armed Robbery contrary to section 287A of the Penal Code, [Cap 16 R.E 2002] Now R.E 2022. It was prosecution case that, on 28th day of January, 2021 at Mwajasi - Vikindu Village within Mkuranga District in Coast Region, the appellants armed with machete jointly and together with the one acquitted did steal one cellular mobile phone make

TECNO F1 valued at Tshs. 150,000 and cash money Tshs. 300,000 the property of Linda Emmanuel Gwaleh, and immediately before and after such stealing did threaten her by using machete in order to obtain and retain such properties.

When called to answer the charge, all appellant flatly denied the accusation, the fact which forced the prosecution to bring in court four (4) witnesses while relying on one (1) documentary the identification parade register (exhibit P1), while the accused/appellants fending themselves without tendering any exhibit. After full trial, the trial court was satisfied that, the prosecution had proved its case to the required standard of proof, thus convicted the appellants as charged and awarded them the statutory sentence of 30 years imprisonment while acquitting **Abdallah Bakari Mgongo** who stood as the 2nd accused person for want of evidence.

In quest to assail the conviction and sentence, the appellants lodged this appeal armed with seventeen (17) grounds of appeal in which during the hearing which proceeded by way of written submission they concentrated and argued four (4) grounds of appeal hence by inference dropped the rest. Mainly their grievances hinge on the following grounds:

(1) That, the charge was in contravention of the provisions of section 132 of CPA for failure to disclose to who the machete was directed to when the offence was committed.

(2) That, the visual identification evidence relied on by the trial Court to convict them was unreliable and dented with irregularities as the circumstances for proper identification is questionable and the unprocedurally tendered identification parade register exhibit P1 was not read aloud in Court.

(3) That, the trial court erred in law and fact to base its conviction on discredited testimonies of PW1 and PW2 tainted with contradictions raising doubts to the prosecution case.

(4) That, the prosecution case was not proved beyond reasonable doubt as appellants' defence was not considered.

On the basis of the above grounds of appeal, the appellants are praying this Court to allow the appeal, quash the conviction, set aside the sentence and set them free.

Briefly on the 28/01/2021 at Mwajasi –Vikindu Village within Mkuranga District n Coast Region, at about 03.00 hours PW1 while asleep with his wife Linda Emmanuel Gwaleh (PW2) were awaken by the big bhang before

witnessing a group of bandits armed with machete invading their room, assaulting PW1 on several parts of the body and doing away with PW2's mobile phone make TECNO F1 and her Tshs. 300,000. To rescue himself PW1 ran to the nearest church and took refuge there before he got assistance from the neighbours while the robbers remaining with PW2 in the room whom she allegedly put them under observation when were demanding money and conducting search in the room hence able to identify them. The incident is alleged to have been reported to the village authority and later on to the police station where PW1 was issued with PF3 for medical attention. It transpired that five (5) accused persons were arrested and identification parade conducted on 1st February, 2021 by Insp. Jaka (PW3) where allegedly 3rd and 4th appellants were identified by PW2 before all accused persons stood their charge on 11/05/2021 while flatly denying the accusations. During the trial PW1 and PW2 testified to have identified all the appellants the testimony which was believed by the trial court hence proceeded to convict and sentence alluded to above, the decision which is now assailed by the appellants.

As already intimated above, the appeal was disposed by way of written submission, and during the hearing the appellants appeared in person, while

respondent was represented by Ms. Elizabeth Olomi, learned State Attorney. The scheduled orders for filing the submissions were followed religiously by the parties. In this judgment for the reasons to be apparent soon I have chosen to consider first the second ground of appeal.

In the second ground the appellants are complaining that, the visual identification evidence relied on by the trial Court to convict them was unreliable and dented with irregularities as the circumstances for proper identification is questionable and the unprocedurally admitted identification parade register exhibit P1 was not read aloud in Court. In support of this ground of appeal and relying on cases of **Waziri Amani Vs. R** [1980) TLR 250 at page 252, **Matola Kajuni and 2 Others Vs. R**, Consolidated Appeal No. 145,146 and 147 of 2011 (CAT-unreported) and **Raymond Francis Vs. R [1994] TLR 100**, the appellants submitted that, evidence of visual identification being the weakest kind and most unreliable courts should only rely on it to convict upon satisfaction that all possibilities of mistaken identity of the suspect are eliminated. That, the conditions at the scene of crime was favourable for correct identification such as the intensity of light and its source, the size of the room, the time spent by the identifier under observation, distance from the observation point and whether the identifier

was known to the suspects before. In this case they submitted as per PW1 and PW2's evidence when the bandits stormed in the same were under state of terror or stressful circumstances and there was no sufficient light for them to properly identify their assailants. As regard to the injuries sustained they argued there was no PF3 tendered by the prosecution witness to prove that PW1 sustained the same. On the complaint of unreliable identification parade register exhibit P1 the appellant reiterated that, the same was unprocedurally tendered as the PW2 did not describe her assailants before its conduction and that after its admission the same was not read aloud for them to understand its content before martialing their defence. They relied on the cases of **Flano Alphonce Masalu @ Singu Vs. R**, Criminal Appeal No. 366 of 2018 and **Emilian Aidan Fungo @ Alex and Another Vs. R**, Criminal Appeal No. 278 of 2008 (both CAT-unreported) to fortify their stance that PW2 ought to have given a detailed description of the suspect before taken to the identification parade, the omission which according to them in this matter vitiated prosecution evidence on identification parade. It was their submission that, with that weak evidence on visual identification prosecution case was not proved to the hilt against them, hence invited this

Court to so find and proceed to quash their conviction and set aside the sentence meted on them.

Responding to this ground of appeal, Ms. Olomi while admitting that the law is settled that, evidence of visual identification is of the weakest kind and most unreliable and courts should always be satisfied that the same is water tight and all possibilities of mistaken identity is eliminated, she was of the submission that in this case all appellants were properly identified by PW1 and PW2, hence this ground is destitute of merit. She argued that, as depicted in pages 6,7,8,9 and 13 of the typed proceedings the appellants were known to the witnesses before the incidence for being customers of sweets and cigarettes at PW2's shop. She said, PW1 identified the 4th appellant (5th accused) as they both fell down while PW1 trying to defend himself during the invasion and were lighted by the appellants torch and further that there was also solar bulbs that assisted both PW1 and PW2 to properly identify them as were not strangers to them. With regard to the distance during PW1 and PW2's observation to the appellants, she stated they were very close to each other at first in the room hence easily identified and recognized by the aid of solar bulbs with enough light. In addition she argued the 4th appellant was put under close observation by PW2 when

asked her for the trouser which PW1 had put on lastly. On the complaint that no appellants' description was given before PW2 purportedly identified them Ms. Olomi viewed the omission as not prejudicial to the appellants since were known to her (PW2) before. And on the non-tendering of PF3 to prove the offence she submitted the same was not a prerequisite ingredient for proof of Armed Robbery offence under section 287A of the Penal Code. And lastly on the omission to read aloud the admitted identification parade register exhibit P1, while admitting that the record was silent on that fact, she urged the court expunge the same since witness evidence could be sufficiently relied on to sustain appellants' conviction as it was held in the case of **Wambura Kiginga Vs. R**, Criminal Appeal No. 301 of 2018 (CAT-unreported) at pages 23-24. In view of the above submission Ms. Olomi implored this Court to dismiss this ground of appeal. In rejoinder submission appellants had nothing new to add apart from reiterating on their submission in chief.

Having dispassionately considered both parties submission and accorded it with the deserving weight, it is undisputed fact that this case hinges of visual identification evidence. With that bare fact, it is true and I embrace both parties' submission that, visual identification being the weakest and most

unreliable evidence, the court has to satisfy itself that all possibilities of mistaken identity are eliminated and the evidence before it is watertight before basing conviction on the same. And that in so doing the court has to consider the circumstances that prevailed during commission of the offence were favourable enough for proper identification of the suspect such as the size of the room or place in which the identification took place, position or point of the identifier and closeness to the suspect, source of light and its intensity, time in which the identifier was under observation and whether he/she was known to the assailant(s) before. See the cases of **Godfrey Waziri Aman** (supra), **August Mahiyo Vs. R**, [1993] TLR 117, **Gabinus @ Ndimba and 3 Others Vs. R**, Criminal Appeal No. 273 of 2017 (CAT-unreported) and **Matola Kajuni** (supra). I also agree with the appellants version that, for the identification parade to be considered as properly conducted the identifier has to describe the assailant(s) physical descriptions before going into the exercise. This includes mentioning the suspect(s) at the earliest possible time to the police or any other person so as to give assurance to the Court that the identifier indeed and truly was known before and identified the suspect hence credence of his testimony. Any failure to so do subjects the witness's testimony to question by the court. See the cases

of **Raymond Francis** (supra), **Minani Evarist Vs. R**, Criminal Appeal No. 124 of 2007 (CAT-unreported), **Marwa Wangiti Mwita and Another Vs. R** [2002] TLR 39 and **Jaribu Abdallah Vs. R** [2003] TLR 271. In **Marwa Wangiti Mwita** (supra), the Court of Appeal observed thus:

> *"The ability of a witness to name a suspect at the earliest opportunity is an 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".*

Having the above principles of the law in mind and to properly attend appellant's complaint on this ground I took effort to revisit the lower courts both hand written record which genuinely reflects what transpired as well as the typed proceedings. It is noted in both PW1 and PW2's testimonies at pages 5 to 9 and 11 to 15 of the typed proceedings respectively that, the incident took place on 28/01/2021 during mid-night time at 3.00 hours and the two identified the appellants by aid of torch light as well as the solar bulb light which as submitted by Ms. Olomi was enough to illuminate and enable them enter unmistaken identification of the appellants. It is learnt further from PW2's evidence that she made a report to the village authority and police the information which led to arrest of the appellants before she identified them during the identification parade duly conducted on

01/02/2021. Having scrutinized their evidence it is apparent to me and I am satisfied that, the circumstances that prevailed at the time of invasion was not favourable for unmistaken identity of the appellants. I will tell why. When invaded as per PW1 it was dark and the bandits lighted him using a torch when he had fallen down together with the 4th appellant (5th accused) struggling to rescue himself, the light which assisted him to recognise the 4th appellant. One would wonder as to how he managed to clear his vision while the torch light is directed in the situation that light ought to have blurred his vision. Even if he is to be believed that the torch light was directed toward another angle in the room which fact is not disclosed PW1 did not disclose the intensity of that torch light proving to the Court that its light was bright enough to assist him make a clear and unmistaken identity.

Similarly PW2 who is claiming to have been aided by the solar bulbs light did not as well give description of the intensity of light coming from those bulbs to assist her identifying the appellants as claimed. Further to that, both PW1 and PW2 were under tense situation accompanied with assault of PW1 by machete in possession of bandits, the circumstances which in my considered opinion was unfavourable could not have let them make clear and unmistaken identity of their assailants. I so find as even their version that

the incident was reported and the appellants named or described to the village authority and police station leading to their arrest before the same were identified by PW2 during the identification parade is not backed up with any evidence from either the local leader or neighbour or the police officer. Since there is no assurance that the appellant were either named or described to the village leaders or police officers before their arrest and conduction of the identification parade even their mentioning in court during the trial by PW1 and PW2 is questionable and affected the whole exercise of identification parade. I so conclude as the importance of the witness describing the assailants before the identification parade is conducted is well settled in a number of cases. See for instance the case of **Omary Hussein @ Ludanga and Another Vs. R**, Criminal Appeal No. 527 of 2017 (CAT-unreported) where the Court of Appeal had this to say:

> *"It is now settled principle that before one can identify a suspect in the identification parade, he must give description of such person prior to identifying him. This was clearly stated in the case of* ***Francis Majaliwa Deus and 2 Others*** *(supra) while citing with approval the case of* ***Mohamed bin Allui*** *(supra) where the Court emphasized the importance of the witness to give a description on physical appearance, clothes worn by the suspect and any other peculiar mark or identity."*

The above discussed aside I also side with the appellants' submission that the identification parade register was unprocedurally tendered as after its admission the same was not read out aloud as required by the law which was settled that failure to read aloud the document after its admission is prejudicial to the accused's right of fair hearing for denying him with an opportunity to know the nature and content of the document tendered against him so as to prepare his defence. There is a number of decisions of this Court and Court of Appeal clarifying that stance. For stance, In the case of **Robinson Mwanjisi Vs. R**, [2003] TLR 218, the Court of Appeal explained that:

> *"…whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out."*

The consequences of the omission to read aloud the admitted documentary exhibit are well explained in various cases including the cases of **Robert P Mayunga & Another Vs. R,** Criminal Appeal No. 514 of 2016, **Hussein Said Said @baba Karimu @ white and Another Vs. Republic,** Criminal Appeal No. 298 of 2017 Cat AT Dar es Salaam and **Kifaru Juma Kifaru and Others Vs. R**, Criminal Appeal No. 126 of 2018 (All CAT-Unreported). In the

case of In **Robert P Mayunga & Another Vs. Republic** (supra) on the same point the Court stated that:

> *"Failure to read out to the appellant a document admitted as exhibit denies the appellant the right to know the information contained in the document and therefore puts him in the dark not only on what to cross examine but also to effectively align or arrange his defence. The denial, therefore, abrogates the appellants right to fair trial…"*

From the above cited authority, rationale behind reading out a document after admission is to make the other party be aware of the content of the said document so admitted so as to enable him to prepare an informed and rational defence.

The essence of reading out exhibits immediately after being cleared for admission was overemphasized in the case of **Shabani Hussein Makora v Republic**, Criminal Appeal No. 287 of 2019, where the Court of Appeal had this to say:

> *"It is settled law that, whenever it is intended to introduce any document in evidence, it should be admitted before it can be read out. Failure to read out documentary exhibits is fatal as it denies an accused person opportunity of knowing or understanding the contents of the exhibits because each party*

to a trial be it criminal or civil, must in principle have the opportunity to have knowledge of and comment on all evidences adduced or observations filed or made with a view to influencing the court's decision."

In this matter as alluded to above Ms. Olomi does not dispute the same to have been unprocedurally tendered by PW2 as she prayed the Court to expunge the same from the Court record. With due respect, I see no reason to deny her prayer hence proceed to expunge exhibit P1 from the trial Court proceedings. Now is there any other tangible evidence to prove the charge of armed robbery against the appellants after expunging that exhibit P1? In response to this question, Ms. Olomi invited the Court to consider oral evidence of PW1 and PW2 on visual identification which exercise no doubt I have already religiously discharged and found to be insufficient to sustain appellants' conviction as the prosecution case was not proved against them beyond reasonable doubts. I therefore find this ground to be meritorious and disposing of the appeal, hence see no reason to venture much efforts on the rest of the grounds of appeal.

In the circumstances and for the fore stated reason the appellants' appeal is allowed as their conviction is quashed and the sentence of 30 years

imprisonment imposed on them set aside. I order their immediate release from prison unless otherwise lawful held.

It is so ordered.

Dated at Dar es Salaam this 10th day of February, 2023.

E. E. KAKOLAKI

JUDGE

10/02/2023.

The Judgment has been delivered at Dar es Salaam today 10th day of February, 2023 in the presence of the appellants in person, Mr. Paul Kimweri, Senior State Attorney for the Respondent and Ms. Tumaini Kisanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

10/02/2023.