**IN THE HIGH COURT OF TANZANIA**

**MBEYA DISTRICT REGISTRY**

**AT MBEYA**

**CRIMINAL APPEAL NO. 158 OF 2022**

*(Originating from the District Court of Chunya at Chunya, Criminal Case No. 138 of 2021)*

**1. MAJALIWA ENOSY MWASHIUYA**
**2. MUGANYIZI VICTOR LEOPARD** ..... **APPELLANTS**

**VERSUS**

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

**JUDGMENT**

*Date of last order 13/3/2023*

*Date of Judgment 23/5/2023*

**Nongwa, J.**

The two appellants above named are challenging the decision of the District Court of Chunya before which they were charged and convicted of the offence of robbery with violence contrary to section 285 and 286 of the Penal Code [Cap 16 R.E 2019] and sentenced to serve a term of seven year's term of imprisonment.

It was prosecution case by PW3 that on 25/6/2021 at night met two persons at Mbiwe forest reserve who were in military combat and police uniform. They stopped him and asked what he was carrying. They took his two mobile phones, cash money Tsh. 390,000/= and a motorcycle with registration No MC 689CRM make Shineray white in colour. There after he was told to meet them at Chunya police station. The conversation

took almost fifty minutes and there was light from torch and motorcycle. He informed PW2 (Gerald Athanas Nyambala) his boss and owner the motorcycle. PW4 (Inspector Oscar Msangawale) was charged to interrogate the first appellant who was involved in robbery at Matundasi, in the course he admitted to have been also involved on the offence at Mbiwe forest on 25/6/2021 and the second appellant was mentioned. He was also told that motorcycle was sold at Tunduma to PW5 (Frank Bahamani Nzoa) who testified to have purchased the motorcycle from the appellants for TZS. 1,450,000.00/= but the Registration Card would be sent to him later. The sale agreement was reduced into writings before PW7 (Leonard Medson Mtambo) which was admitted in evidence. The said motorcycle was seized by PW6 (F4453 D/CPL Nyaga) at Tabora from PW5.

During defence the appellants denied each and every allegation of the prosecution. They also recited some parts of the prosecution evidence which they alleged it was not proved.

The appellants were convicted and sentenced to seven year's term of imprisonment. Aggrieved they filed joint petition of appeal consisting nine grounds and later on one additional ground thus making ten grounds, the same are reproduced as received inter alia;

1. *That the trial magistrate erred in law and fact when convicting and sentencing the appellants without resolving the issue of visual identification of the appellants done by PW3.*
2. *That the trial magistrate erred in law and fact when convicted and sentenced the appellants without taking into account that PW3 failed to give first description of the bandits as soon as he reported the matter to the Police Station.*

3. *That the trial magistrate erred in law and fact when convicted and sentenced the appellants without considering that PW3 (victim) gave the first description to the 1st accused on the court record but he was not punished, see the case of* ***MARWA WANGITI MWITA*** *and* ***ANOTHER vs. REPUBLIC,*** *CRIMINAL APPEAL NO. 06 OF 1995 (Unreported) where the CAT held that, "The ability of witness to name suspect at the earliest opportunity is an all important assurance of his reliability."*
4. *That the trial magistrate erred in law and fact when convicted and sentenced the appellants relying in dock identification of the appellants.*
5. *That the trial magistrate erred in law and fact when convicted the appellants based on the evidence of PW3 without considering that the said witness contradicted himself to his evidence on page 9, 10 and 11 which varies to page 28 of the typed proceeding.*
6. *That the trial magistrate erred in law and fact when convicted and sentenced the appellants relying on the evidence of PW4 that the appellants admitted to commit the offence without any cautioned statements of the appellants as an exhibit to prove their confessions.*
7. *That the trial magistrate erred in law and fact when convicted and sentenced the appellants without observing the demeanour of the prosecution witnesses.*
8. *That the trial magistrate erred in law and fact when convicting and sentencing the appellants on their weak defences adduced by them where is fatal.*

9. *That the trial magistrate erred in law and fact when convicted and sentenced the appellants regard that the prosecution side failed to prove the charge against the appellants by the standard required by law.*

10. *That the trial court erred in law when convicted and sentenced the appellant by violating section 214 of the Criminal Procedure Act, Cap. 20 R. E. 2019 as no anywhere the appellant admitted or objected the said addressed mentioned by the trial court.*

When the appeal was due for hearing, the appellants, unrepresented prayed for the court to adopt the grounds of appeal to form their submission. The responded, the republic has been represented by the learned State Attorney Mr. Lordgard Eliaman. The State Attorney did not support the appeal, he argued the 1st, 2nd, 3rd and 4th grounds at once as they relate to identification of accused persons at the crime scene.

Mr. Eliaman submitted that PW3 who was the victim did identify properly the appellants as seen in the proceedings of the lower court at page 29 of the typed proceedings. PW3 states how he managed to identify 2nd and 3rd accused persons who are now the appellants. That, the state of light from the appellants' torch, PW3 motorcycle lights were pointing to where the appellants were standing. The distance was also explained one-foot step from where PW3 was standing to where the appellants were standing while interrogating each other, PW3 and the appellants. Referring page 30 of the typed proceedings first lines, Mr. Eliaman stated that the time used for interrogation was one hour. PW3 also identified the appellants by explaining their appearance, saw them and what they were wearing one wearing JWTZ uniforms and another

Police Force uniforms which were green. Mr. Eliaman explained further that at page 32 of the proceedings, while on cross-examination, PW3 disclosed that the appellants were not hiding their faces and from that description, they were arrested. That PW3's testimony has also been corroborated by the evidence of PW4 where the appellants confessed orally to have committed the crime and explained as to where they send the motorcycle after robbing it, the act that led to the discovery of the motorcycle being sold to PW5 by the 2nd appellant, as such the four grounds are meritless hence they be dismissed.

Mr. Eliaman referred the case of **Athuman Idd and Ladislaus Onesmo vs. Republic,** Criminal Appeal no. 250 of 2015 dated 16th February, 2016 COA (unreported) at page 7 and 8 where one is found with an item that had been stolen under the doctrine of recent possession. PW5 explained that he bought the motorcycle from the appellant number 2 and the appellant did not explain as to how he came into possession to PW5.

As to the 5th ground of Appeal that the court based on contradictory evidence of PW3, Mr Eliaman argued that the reasons advanced by the appellants be dismissed for being baseless, there is no any contradiction and the appellants ought to have cross-examined the witness if they noted any during trial as they were represented by an advocate who is well conversant with procedures.

On the 6th ground which is on the evidence of PW4, that there was no any confession statement tendered. Mr. Eliaman argued that not every confession should be written, oral confession is acceptable so long as it has been made to a person who is trustworthy. That PW4 being a Police

Officer, he explained at page 35 – 36 of the typed proceedings as to how the appellants were brought to Police by civilians and how they confessed and sent PW4 to where they sold the motorcycle. That, during cross examination, nowhere the 2nd appellant asked PW4 on the confession stated by PW4, that, it is a trite law that oral confession is admissible and reliable. Mr. Eliaman referred this court to **Peter Didia @ Rumala vs. Republic**, Criminal Appeal No. 421 of 2019, dated November, 2022 (unreported), insisting that the appellants confessed orally before PW4 who is a Police Officer and directed the Police where they sold the motorcycle.

Submitting on the 7th ground, which is on demeanour of prosecution witness, Mr. Eliaman stated that since the demeanour of witness is observed by the court and where applicable is explained in the judgment by the court, nowhere on the trial court proceedings showing any recording of demeanour of witnesses. Therefore, there was nothing in relation to the witnesses' demeanour that affected the findings of the trial court.

On 8th grounds, Mr. Eliaman pointed out that the trial court based its decision basing on the evidence of both sides. The trial court analysed both sides evidence, at page 7 of the typed judgment where the court explained that the prosecution evidence was strong enough to enter conviction against the appellants, and that if the appellants think that the trial court based on the weakness of defence, then this court being first appellate court, it can step into the shoes of the trial court and re-evaluate the evidence and come up with its own findings.

As to the 9th ground that the prosecution did not prove the case beyond reasonable doubt; Mr. Eliaman referred this court on the trial court record showing that the case was proved beyond reasonable doubt that is why the court reached that verdict. That, seven prosecution witnesses and exhibits were brought before the court. PW3 evidence explained how the event took place, how he managed to identify them. That, PW4 the appellant confessed and assisted the Police to go find the exhibit where they sold. As such 9th ground to him was baseless.

As to the 10th ground (additional ground) on violation of section 214 of CPA Cap. 20 R. E. 2019 that at page 58 of the typed proceedings was referred. It concerns the change of Magistrates and that the appellants were not given chance to respond to as to whether they object or admit. No answers have been recorded. Mr. Eliaman went on insisting that the same have no merit too as nowhere the law requires that the accused persons be asked as whether they agree or not to change of Magistrate or the law gives mandate the trial magistrate who has received the matter on his opinion to decide whether to proceed from where his predecessor ended or to recall witness to start afresh. The appellants have not even explained as to how they have been prejudiced. Mr, Eliaman was of the position that there has been no prejudice to the appellants' rights. He prayed that the trial court decision be upheld, the appeal be disallowed.

On rejoinder, the first appellant argued that they had no lawyer on their part, that PW3 gave evidence in respect of 1st accused person and pointed him in court but nowhere in the proceedings he has explained concerning 2nd and 3rd accused. That, he came as PW3 at page 28, 29, 30 and 31 and gave a contradicting evidence from what he gave when he was PW1. The first appellant further argued on evidence of PW1 the,

investigator, that at page 22 explained properly on the 1st accused that the victim told him that the suspect was at Matundas, Chunya that is when PW1 and PW3 (who is the same person) went to show the person who invaded him as noted in complainant statement he had been served upon request and tendered as exhibit, where he named him as the person who evaded him but he did not explain about the 2nd and 3rd accused in his statement, so he prayed that the four grounds be accepted and the appeal be allowed.

The first appellant stated further that nowhere showing 2nd and 3rd accused were arrested save that the two were sent to Police by civilian for other issues, nowhere showing that the duo confessed, except for PW4 who stated about the said confession but on cross examination on how the confession was, he declined stating that he was not the investigator, and that nowhere in the proceedings showing that they assisted the discovery of the motorcycle.

Regarding, PW5 statement that the appellants sold the motorcycle to him, the first appellant argued that there was no document evidencing them selling to him the motorcycle and PW7 said that the price was Tshs. 1,450,000/= but the payment was Tshs. 800,000/= while the PW5 said payment cash 1,460,000/= that there was no evidence, and PW5 and PW7 were contradicting each other. The appellant prayed for all grounds of appeal to be accepted and they be set free.

All ten grounds of appeal will be disposed through the following four issues for the determination that;

i. *Whether noncompliance of section 214 of the Criminal Procedure Act prejudiced the appellants (ground 10)*

*ii. Whether defence evidence was considered. (Ground 8)*

*iii. Whether visual identification of the appellants was water tight. (Ground 1 to 7)*

*iv. Whether the prosecution proved the charge beyond reasonable doubt. (Ground 9)*

Starting with the first issue of whether noncompliance of section 214 of the Criminal Procedure Act prejudiced the appellants, from the records, proceedings of the trial court clearly shows that at times there was exchange of the trial magistrates, the reason for change was clearly stated in the proceedings. The appellants' claims that they were not addressed properly and their response was not recorded is of no doubt, however, did the omission bring any prejudice to the appellants, the answer is no, and for clarity, section 214of the criminal Procedure Act provides inter alia;

> *'**214**.-(1) Where any magistrate, after having heard and recorded the whole or any part of the evidence in any trial or conducted in whole or part any committal proceedings is for any reason unable to complete the trial or the committal proceedings or he is unable to complete the trial or committal proceedings within a reasonable time, another magistrate who has and who exercises jurisdiction may take over and continue the trial or committal proceedings, as the case may be, and the magistrate so*

*taking over may act on the evidence or proceeding recorded by his predecessor and may, in the case of a trial and if he considers it necessary, re-summon the witnesses and recommence the trial or the committal proceedings.*

*(2) Whenever the provisions of subsection (1) apply, the High Court may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the magistrate before the conviction was had, if it is of the opinion that the accused has been materially prejudiced thereby and may order a new trial.'*

The first issue is therefore negatively answered. The change of magistrates and non-recording of their response, did not prejudice any of the appellants, and they did not state how they have been affected by the said omission.

On whether defence evidence was considered, I rather agree with the appellant that it was not considered, after evidence of both parties was summarised, only that of the prosecution was singled to determine the issue. In **Leonard Mwanashoka vs Republic,** Criminal Appeal 226 of 2014, [2015] TZCA 294, tanzlii the court held that;

*'It is one thing to summarize the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in order to separate the chaff from the grain. Furthermore, it is one thing to consider evidence and*

*then disregard it after a proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis.'*

The prosecution evidence was not weighed against that of the appellants, nothing was said of the quality of the defence evidence and whether he dismissed the same and the reasons thereof. In short, the Magistrate did no employ objective analysis and evaluation of the evidence of both parties. Since the trial court abdicated its duty, being the first appellate court, it is open to step into its shoes and evaluate the evidence with a view to subjecting the prosecution evidence to the entire defence evidence.

In this case PW3 is the victim of the alleged robbery. From his testimony it is clear that the offence was committed at night and the appellants were stranger to him. He testified that the exercise took almost fifty minutes and there was abundant light from the torch of the appellants and the motorcycle which lit all over the exercise. There is no evidence if at all he described the accused to any person he first met and when the matter was reported to the police. The appellants in their first ground has complained that visual identification by PW3 was poor. The respondent republic submitted the identification was proper arguing that the light from the torch of the appellant, motorcycle, conversation they had, their attires and time taken was enough to recognise them.

It is trite law that for an effective and proper visual identification to stand, the laid down criteria articulated by the Court in **Waziri Amani [1980] TLR 280** have to be proved beyond reasonable doubt. The Court has reiterated in a number of cases that the evidence of visual

identification is of the weakest kind and most unreliable which cannot be acted upon solely to convict unless all the possibilities of mistaken identity are eliminated and the evidence before it is absolutely watertight. See also **Gervas Gervas Cosmas @ Chambi & 5 Othere vs Republic**, Criminal Appeal No. 557 of 2021, CAT at Mtwara (Unreported)

Upon re-evaluation of evidence nowhere PW3 described the appellants' physical features like complexion, colour, height, and so on until such time he testified in court. Descriptions of the appellants before arrest serve two crucial purposes; it assists the police to trace and arrest the culprits based on the descriptions and gives assurance that the victim had identified his assailants. In my view the failure to describe the appellants to PW2 and the police it cannot be held that the description he was giving in court was enough as that was dock identification which has been held to be worthless piece of evidence. In the case of **Gervas Gervas Cosmas @ Chambi** (supra) the court held that;

> *'PW1's failure to describe the 1st and 2nd appellants at the earliest opportunity lowered the credence of the prosecution case.* ***Therefore it cannot be said that PW1 identified them at the scene, except later in the dock, which is worthless form of identification and should be discounted in line with unbroken chain of authorities of the Court.'*** *[Emphasize supplied.]*

As if that was not enough, the appellants were stranger to PW3 and no identification parade was conducted to give assurance to the police and the court that indeed PW3 identified the assailants. In the case of **Hamis Mohamed @ Bilalai vs Republic**, Criminal Appeal No. 300 of

2021, CAT at Mtwara (Unreported) where facts are four squires with the present case, the court held that;

> *'It is evident that, not only PW1 delayed to describe the appellant whom he did not know before to PW5 who rescued him but also at a later stage to police. We are constrained to hold that, identification of the appellant by PW1 upon which the trial court solely founded conviction left a million questions unanswered for two main reasons. These are: one, no identification parade was subsequently mounted to eliminate possibilities of mistaken identity and two, absence of arrest warrant for the appellant apart, his arrest did not come out from the descriptions made by the victim. For all intents and purposes, the alleged visual identification was worthless rendering the prosecution case to be shaky and bound to fail.'*

Further from the above, how the appellants were arrested and connected with offence raises a lot of questions. It has to be noted that the appellants were not arrested at the scene of crime and a while I have just stated, no prior description was given by PW3 to PW2 who met first before relying the information to police. Although PW3 stated that one of the appellant wore police uniform but was unable to pick which among the three wore such uniform or ordered him to give his properties. Taking all the above, the evidence of identification of the appellants fell short of the required standards.

As for proof of the case beyond reasonable doubt in third issue, it is instructive that, the duty of the prosecution to prove the case beyond reasonable doubt is universal. This is a universal standard in criminal

trials and the duty never shifts to the accused. Beyond reasonable is not defined by statutes but case law has tried to define it, in the case of **Magendo Paul & Another vs Republic** [1993] TLR 219 the Court held that;

> *'For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed.'*

I have subjected the prosecution evidence against that of the defence. The prosecution case was built on sale agreement of motorcycle by appellants to PW7 before PW5, evidence of PW4 where it was alleged the appellants confessed and visual identification by PW3. The defence case similarly shaky the prosecution case on those aspects. Evidence of visual identification of the appellants coupled with non-description by PW3 to PW2 and the police officers where the matter was reported it cannot be said the prosecution discharged its duty. It may be right to argue that robbery took considerable time before the culprits disembarked, the fact that the offence was committed at night and the appellants were stranger to PW3 mistaken identity cannot be completely ruled out. This is coupled with failure by PW3 to mention who among the appellants wore police uniform or military combat. There is evidence of PW4 who was charged with recording statement of the first appellant concerning another case where it is alleged the first appellant admitted involvement in the commission of this offence. His evidence was just information and not supported by cautioned statement of the appellants taking into account they denied to be recorded statement. Evidence of PW1 and PW6 had no relation with the appellants.

Evidence of PW5 and PW7 connected the appellants with the motorcycle, unfortunately PW2 who alleged to be the owner of the motorcycle, his evidence differed with the registration card exhibit PE1 which show the owner is Tanzania China Trade and Tourism Development Ltd of Dar es Salaam. The appellants testified that the card did not belong to PW2 and has challenged that aspect in this appeal. The complaint has substance because no evidence was given why PW2 claimed to be owner while registration document had name of an entity. Although it may be true that PW3 was robbed but evidence has completely failed to link the appellants, worse enough there was no evidence that the matter was reported to police. As stated elsewhere all police witnesses in this case failed to connect the appellants with the offence let alone their arrest was in connection with another offence. Further reading the provision creating the offence, one of the elements is use or threat to use actual violence in obtaining the properties.

In the evidence of PW3 nowhere he mentioned to have been threatened that violence could be use or that they used actual violence in obtaining the properties. What is clear is that after the bandits asked him what he carried he surrendered money, phones and motorcycle to them. Evidence does not suggest any use or threat was used in the process of stealing. The trial magistrate had a view that because bandits were three PW3 was terrified. This was extraneous matter it did not come from PW3 who was better paced to tell the state he had after meeting the appellants.

From what I have endeavoured to analyse, it is my verdict that the prosecution evidence in record fell short of establishing the appellants' involvement in the commission of the offence, rendering the charge against the appellants therefore not proved beyond doubt. Appeal is

allowed, conviction and sentence meted upon appellants is set aside, the appellants be released forthwith from the prison unless held for other lawful cause. Right of appeal is fully explained.

Dated and Delivered at MBEYA this 23rd May, 2023


**V. M. NONGWA**
**JUDGE**