IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL N0. 54 OF 2023

(*Arising from Criminal case No. 125 of 2019 of the District Court of Kigamboni)*

KHALID ALLY@ MAKONYOLA ..... APPELLANT

HAIDARY RAMADHANI@ IDD@LONGOLA .....APPELLANT

VERSUS

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

JUDGMENT

23rd & 30th June 2023

MKWIZU J:

The appellants and another person (who was acquitted by the trial court) were in the District Court of Kigamboni at Kigamboni charged with the offence of Armed Robbery contrary to section 287A of the Penal Code, (Cap 16 R.E 2002). The particulars of the offence were that on the 13th day of August 2018 at Chdibwa Magogoni area within Kigamboni District in Dar es Salaam region, the accused stole a motorcycle with Registration No. MC 331 ATS make Boxer Valued at Tsh 1500,000/= the property of Juma Fadhili. It was further alleged that immediately after such stealing, they threatened one Juma Fadhili with a machete in order to obtain and retain the said property. The appellant and his colleague pleaded not guilty to the charge.

PW1 is a motorcycle rider doing his business between Ferry and Mjimwema Kigamboni area with a motorcycle No MC 331 ATS Make Boxer.

On 13/8/2018 at around 22.00hrs, he got a passenger who wanted to be taken to her home at the Chadibwa area. It was after the passenger had disembarked at Chadibwa that PW1 was invaded by two people who had a machete in their hands, they threatened him, and he ran to rescue himself. In that process, the two accused managed to flee with his motorcycle. Aided by the light from the motorcycle and the lights from the house at the scene he managed to identify the two accused person as people he had earlier on met at the Ferry area where he normally parks his motorcycle.

He shouted for help and was assisted by people around who managed to arrest the passenger he took to that area and realized that she was not a resident of that locality. Taken to the police, the said passenger named the two other culprits whom PW1 identified in the identification parade. This evidence was supported by Pw2, a police officer who drew the sketch map (exhibit P1) plan of the scene; the 3rd accused's cautioned statement (exhibit P2), 2nd accused's cautioned statement (exhibit P4) and PW6 who conducted the identification parade.

The appellant's defence was essentially a denial of the offence. Having heard both sides, the trial court was satisfied that the prosecution had proved the case against the appellant, convicted and sentenced them to 30 years imprisonment while the 3rd accused was acquitted. Aggrieved, the appellants have filed this appeal on eleven (11) grounds of appeal challenging the trial courts decision for (i)basing the conviction on the unsworn evidence by JUMA FADHILI BAKARI(PW1), (ii)Unreliable visual identification evidence, (iii) cautioned statements of the acquitted co-accused (3rd accused), (iv) Doctrine of common intention obtained from the co accused's repudiated cautioned statement (v) Contradictory

evidence by the prosecution (vi) exhibit P4 recorded outside the time prescribed by the law and (Vii) Weak evidence by the prosecution

The hearing of the appeal was conducted through written submissions. The appellant's submissions were limited to four grounds only one, that the trial court's decisions for basing on Pw1's evidence were recorded without being sworn or affirmed contrary to the law. A case in **Shida Lwands Aidan @ kaka and another V R**, Criminal Appeal No 166 of 20177(Unreported) was cited in support of this ground arguing the court to expunge Pw1's evidence from the records.

The second point was on visual identification. The appellant contends that PW1's evidence on identification lacked details on the intensity of the light, the position and the distance of the light from the scene to the source, and the directions of the invaders to gauge if there was any possibility of him identifying his assailants through the motorcycle lights. They submitted that even the allegation of familiarity with the appellants was left without descriptions of how PW1 managed to remember his assailants the persons he alleged to have seen at the Ferry area before the incident. They referred the court to the decisions in **Kassim Said and two others V R**, criminal Appeal No 208 of 2013(unreported). They also questioned the legality of the repudiated 3rd accused cautioned statements taken beyond the 4 hours prescribed by the law. They submitted that while 3rd accused's arrest was effected on 13/8/2018, her statement was recorded on 14/8/2018 contrary to sections 50 and 51 of the CPA.

They further complained that though the prosecution evidence was tending to connect all three accused persons with the offence, in the trial, the court used the same evidence to acquit the 3rd accused while convicting the rest without justification whatsoever. Reliance was made to the decision of **Dickson Joseph Luyana and Another V R**, Criminal Appeal Nob 1 of 2005

Submitting on the doctrine of common intention, the appellants said, it is the prosecution case that the 3rd accused was arrested at the scene a few minutes after the incident, but the trial court exonerated her from the offence while using her cautioned statement (exhibit P2) as the basis of proving common intention against all the appellants and the acquitted 3rd accused. They finally asked the court to allow the appeal.

The learned State Attorney was in support of the appeal. He was of the view that Section 198(1) of the Criminal Procedure Act and S. 4(a) and (b) of the Oath and Judicial Proceeding Act Cap 34 R.E 2019 read together with The Oath and Affirmation rule made under S. 8 of Oath and Judicial Proceeding Act require all witness in any judicial proceedings to be affirmed or sworn before their evidence is taken. He admitted that in this instant case, PW1 who is the key witness neither affirmed nor sworn in before his testimony was taken contrary to the law. He referred the court to the **Jafar Ramadhan v Republic,** Cr. Appeal no. 311 of 2017 and **Bundala Makoye Versus the Republic** Cr. Appeal no. 137 of 2018 (unreported) imploring the court to disregard the PW1 evidence taken without affirmation or oath.

The learned State Attorney was of the view that the proper procedure in an appropriate case would have been to order a retrial, but he advised the court not to so order because the evidence available on the records is insufficient to ground the appellant's conviction.

The rest of the State Attorney's submissions was an illumination to the court on how the visual identification evidence relied upon by the court is weak. He said, the incident occurred at night and therefore it was not enough for PW1 to simply say that he identified the Appellants with the aid of a bulb light from nearby houses and a motorcycle light without giving details of its intensity, how long the incident took and the distance at which he observed the Appellants. This failure, stated the learned State Attorney, renders the Identification Parade which was conducted of no value.

While arguing the court to disregard the complaint of late recording of the 3rd accused statement raised in ground three of the appeal for being so recorded under the exceptional circumstances stipulated under section 50(2) (a) of the Criminal Procedure Act Cap 20 R.E 2022, the learned State Attorney agreed with the appellant that the recording of the 3rd accused's caution statement in the presence of four police officers namely Cpl Denis, Cpl Khalid, Cpl Selpholoza and Sgt James was prejudicial to the 3rd accused. He supported his argument with the case of **Charles Issa @ Chale versus Republic**, Cr. Appeal No. 97 of 2019, saying that the situation created uncertainty if the 3rd accused was a free agent when recording the statement. He urged the court to expunge the 3rd statement from the records.

He lastly submitted that with the acquittal of the 3rd accused and the exclusion of the 3rd accused cautioned statements, the remaining evidence is not sufficient to ground the appellant's conviction. He generally prayed for the court to allow the appeal.

Absolutely, this appeal is deserved. It is apparent from the records that PW1's evidence was recorded without him swearing or affirming in violation of the provision of section 198(1) of the Criminal Procedure Act, Cap 20 R.E 2022 read together with S. 4(a) and (b) of the Oath and Judicial Proceeding Act Cap 34 R.E 2019 and Oath and Affirmation rule made under S. 8 of Oath and Judicial Proceeding Act. The introduction of PW1 on page 16 of the trial court's proceedings before recording his evidence goes thus:

> "*PROSECUTION CASE OPEN*
> *PW1: Juma Fadhili Bakari,26 yrs, kigamboni Muislam*
> *XD by Mr. Ulaya S/A…"*

There was no swearing or affirmation of this witness in both original and typed proceedings. This is fatal. In **Jafa**r **Ramadhan v Republic,** (Supra) cited by the State Attorney, the court held:

> *"It seems clear that the recording of the religion of the witness does not meet the threshold examination upon Oath and affirmation required under S. 198 (1) of the Criminal Procedure Act. Religion is but an indication of the type of oath or affirmation a witness of a given religion can take."*

As rightly stated by the State Attorney this kind of evidence is no evidence at all worth consideration by the court. There is no doubt that this mistake was committed by the court and therefore the proper procedure, in a fit case, would have been to order a retrial. However, as correctly stated by the State Attorney, the evidence on the records is not sufficient enough, and therefore a trial a re-trial order would be to allow the prosecution to fill in the gaps contrary to the well-established principle as pronounced in the celebrated decision of **Fatehal Manji** (supra) where the following observation was made:

> *"In general, a retrial will be ordered only when the original trial was illegal or defective it will not be ordered where the conviction is set aside because of insufficient evidence or for the purpose of enabling the prosecution to fill the gaps in its evidence. Even where the conviction is vitiated by mistake of a trial court for which the prosecution is not to blame, it does not necessarily follow that a trial shall be ordered, each case depends on its facts and circumstances an order for retrial should only be made where the interest of justice required."*

In convicting the appellants, the trial court largely relied on the visual identification evidence by PW1 and the 3rd accused's cautioned statements. The incident is reported to have happened during night hours. PW1's evidence was to the effect that the identification of the appellants was aided by the tube light from the houses near the scene and the light from his motorcycle without giving details of its intensity, how long the incident took, and the distance at which he observed the Appellants. It is settled law that, visual identification evidence is of the weakest character

and the court should not act on such evidence unless satisfied that all possibilities of mistaken identity are eliminated, and the evidence is absolutely watertight: See **Waziri Amani versus Republic** [1980] TLR 250. I understand that PW1 claimed to have been familiar with the appellants before the incident, this, however, was given in a blanket manner without clarification that would have enabled the court to ascertain the possibility of remembering the appellants in that incident. The visual identification evidence relied upon by the trial court is, in my view, weak to eliminate unmistakable identity.

It is also evident that the two appellants in court were arrested following the 3rd accused's cautioned statement. PW2 confirmed before the court that the appellant's co-accused (3rd accused) cautioned statement was recorded in the presence of other police officers namely Cpl Denis, Cpl Khalid, Cpl Selpholoza and Sgt James. I think this is not healthy. The 3rd accused's voluntariness in making the said statement is questionable. Faced with a similar situation, the Court of Appeal in **Charles Issa @ Chale versus Republic,** Cr. Appeal No. 97 of 2019(Unreported) said:

> *"Indeed PW1 and PW2 who recorded the statement of the 1st and 2nd Appellants did so while other police officers were also present in the same room, it is our firm conviction that, the action of recording the Appellant's statements in the presence of other police officers has prejudiced the Appellant in two ways; First it cannot be ruled out that the Appellant were not free agents when recording their statement. Secondly; the Appellant's right to privacy was infringed. The*

effect of both shortcomings is to have the respective statement expunged from the record."

Exhibit P2 is thus faulty, and liable to be expunged from the records, as I hereby do. Having so held, I find the prosecution evidence weak to score a retrial order.

In the upshot, I find that the appeal has merit. I allow the appeal, quash the conviction, and set aside the sentence meted against the appellants. The appellant should be released from custody unless he is held on some other lawful cause.

DATED at **DAR ES SALAAM** this 30th day of **JUNE 2023**.

E. Y Mkwizu
Judge
30/6/2023

COURT: Right of appeal explained

E. Y Mkwizu
Judge
30/6/2023