

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB-REGISTRY OF SONGEA**

AT SONGEA

CRIMINAL APPEAL NO. 12 OF 2023

MOHAMED HASSAN 1ST APPELLANT
RUJINGA SAID 2ND APPELLANT
SAID MOHAMED 3RD APPELLANT
MOHAMED ALLY 4TH APPELLANT
AJANA ALLY TIMAMU 5TH APPELLANT
ISSA ADAM NAMWEWE 6TH APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

**(Originating from the decision of the District Court of Tunduru
at Tunduru in Criminal Case No. 43 of 2022)**

JUDGMENT

10th July & 7th August, 2023

KISANYA, J.:

The appellants, Mohamed Hassan, Rujinga Said, Said Mohamed, Mohamed Ally, Ajana Ally Timamu and Issa Adam Namwewe (the 1st, 2nd, 3rd, 4th, 5th and 6th appellants respectively) were arraigned before the District Court of Tunduru at Tunduru for the offence of armed robbery contrary to section 287A of the Penal Code, [Cap. 16 R.E. 2019], now R.E. 2022 (the Penal Code).

It was stated in the charge sheet that, on 16th February, 2022 at Ligunga Village within Tunduru District in Ruvuma Region, the appellants did steal one bag with clothes and two mobile phones make Tecno, all valued at TZS 200,000 and immediately before and after such robbery, the appellant assaulted one, Desderia d/o Kilian (henceforth "the victim" or "PW3") with a *panga* and a piece of metal in order to retain the said properties.

Briefly, the factual background leading to the arraignment of the appellant is to the effect that: On 16/08/2022 around 8.30 pm, at Ligunga village within Tunduru District, armed robbers invaded a vehicle which was travelling from Njombe to Masasi. Having stopped the vehicle, the robbers got hold of the passenger therein namely, Desderia d/o Kilian (PW3). They robbed from her one bag with clothes and two mobile phones all valued at TZS 200,000, properties of PW3.

On the next day, the victim identified the 2nd accused person as among the persons who had robbed her. It is deduced from the evidence of PW1 G 1921 CPL Charles, PW2 G 2099 CPL Don Bosco and PW5 Iman Said Kipanda that, the 2nd appellant fled after being recognized by PW3.

They further testified that upon being arrested, the 2nd appellant confessed to have committed the offence and that he named the other appellants as his accomplices. Therefore, the appellants were charged with the offence of armed robbery to which they pleaded not guilty.

From the evidence on record, the offence was committed during the night. Further to this, the prosecution relied on the evidence of visual identification from the victim (PW3) and an oral confession of the 2nd appellant before PW1, PW2 and PW5.

As the prosecution closed its case, the trial court made a ruling in which the appellants were found with a case to answer requiring them to defend themselves. Each appellant opted to give evidence on oath in which he denied to have committed the offence.

In its decision, the trial court held the view that the appellants were identified by PW3 who testified that she identified the appellant with the aid of light illuminating from the bandits' torches and beam light from the vehicle. In addition, the trial court relied on an oral confession of the 2nd appellant. At the end of the day, the trial court found the appellants guilty

as charged, convicted them and sentenced them to thirty years' imprisonment.

Aggrieved, the appellants have preferred this appeal. In the petition of appeal, the appellants raised six (6) grounds of appeal which can be conveniently paraphrased into the following three complaints: *One*, that, the appellants' conviction was based on the evidence of visual identification of PW3 and PW4 which was weak and unreliable. *Two*, that, the charge laid against the appellants was not proved beyond all reasonable doubts. *Three*, that, the trial court's record is not fair in the eyes of law.

At the hearing of this appeal, all appellants appeared in persons without representation, while the respondent/Republic was represented by Mr. Elipid Tarimo and Gaston Mapunda, both learned State Attorney.

Upon being invited to argue the appeal, the appellants asked the court to consider the grounds of appeal. Each appellant contended that he did not commit the offence levelled against him.

In his reply, Mr. Tarimo was of the view that the grounds of appeal may be merged into three grounds of complaint as stated afore. He conceded to the first ground of complaint that the prosecution case was

not proved beyond reasonable doubt. His argument was based on the following reasons: *One*, PW3 did not state as to how she identified the appellants at the crime scene. Two, although PW3 claimed that the appellants were not known to her, an identification parade was not carried to enable her to identify them as held in the case of **Fred Mgaya vs R**, Criminal Appeal No. 77 of 2019 (unreported). Citing the case of **Jonas Nkize V. R** [1992] TLR 213, the learned State Attorney argued that the prosecution was duty bound to prove its case beyond all reasonable doubts.

On the second ground of complaint that the appellants' conviction was based on the confession of co-accused (2nd appellant), Mr. Tarimo referred the Court to case of **Janas Nkize** (*supra*) in which it was held that evidence of one accused person may be used to implicate the other accused person. He went on to submit that it was not established whether the appellant had grudges with the 2nd appellants. In that regard, the learned State Attorney was of the view that the appellants could be convicted on the confession of the 2nd appellant if the case was proved beyond all reasonable doubt.

As for the third ground of complaint, Mr. Tarimo submitted that court's record is presumed to be authentic and that it cannot be impeached lightly. To bolster his argument, he cited the case of **Salim Said Matumla vs Ecobank Tanzania Ltd**, Civil Appeal No. 370/16 of 2020 (unreported). Referring this court to the proceedings of the trial court, he submitted that the evidence of all appellants was duly recorded. It was also his contention that the answers in respect of the questions put to PW1 and PW2 were recorded. On that account, he submitted that this ground lacks merits as there is nothing to suggest that the recorded was improperly recorded. The learned State Attorney concluded his submission by moving this Court to allow the appeal basing on the first ground of complaint.

Having carefully considered the submission of the parties, the main issue for consideration is whether the appeal is meritorious or otherwise.

I prefer to start with the third ground of complaint in which the trial court record is being challenged. As rightly submitted by Mr. Tarimo, it is trite law that a court record is a serious document which cannot be impeached lightly. See for instance the case of **Salum Said Matumla** (*supra*) where it was held that:

"a court record is a serious document. Generally, it is always taken to be authentic because it tells what actually transpired in court and therefore, cannot be impeached lightly."

In the case at hand, the appellants have not substantiated how the trial court record does not reflect what transpired during the trial. It is on record that, the appellants' evidence was duly recorded. Also, the appellants were given an opportunity to cross-examine the prosecution witnesses and the answers in respect of the question put to the said witnesses were recorded. In the circumstances, I find no cogent reason to hold that the trial court record is not authentic. It follows that the third ground of complaint lacks merit. I accordingly dismissed it.

The first and second grounds of complaint rest on the issue whether the prosecution case was proved beyond all reasonable doubt. Having evaluated the evidence in record, I entirely agree with the appellants and the learned State Attorney that the prosecution's case was not proved on the required standard due to the following reasons.

First, one of the ingredients of the offence of armed robbery predicated under section 287A of the Penal Code is stealing. The charge

sheet was to the effect that the appellants did steal “one bag with clothes and two Phones make Tecno” all valued TZS 200,000/=”. However, PW3 stated on oath that the properties taken by the robbers were “cash money Tsh. 50,000/=, perfume, shoes and some other property (sic)” all valued at TZS 200,000=”. Since none of the properties listed in the charge sheet features in the evidence of PW3, the charge laid against the appellants was not proved.

Second, I have stated earlier on, the appellants were convicted basing on the evidence of identification of PW3 who testified to have recognized them (the appellants) at the scene of the crime. It is a settled position of law that evidence of visual identification is one of the weakest kind. Such evidence cannot be relied upon as the basis of convicting the accused person unless the court is satisfied the said evidence is watertight and all possibilities of mistaken identity have been eliminated. The conditions for watertight evidence of visual identification underlined in the case of **Waziri Amani vs R** [1980] TLR 250 and other cases must be met if the case is premised on identification. Some of the conditions include, particulars of the suspect and time under which the suspect remained under the observation of the identifying witness. If the suspect is not

known by the identifying witness before the incident, an identification parade must be conducted as held in the case of **Fred Mgaya**, (supra). Nothing to suggest that the said conditions were met in this case.

That aside, PW1, PW2 and PW5 stated that the 2nd appellant was arrested first after being identified by PW3 on the next day. However, the said evidence is not reflected in the evidence of PW3. To the contrary, PW3 testified to have heard that her culprits had been arrested. Her evidence on what happened on that day went as follows:

*"...we took the vehicle to the Ligunga village where they find (sic) shelter for me and I slept there until the following day in the morning. **In the morning, the police started to find the accused persons, and later I heard one accused person was arrested** they then allow (sic) me to go to Masasi."* (Emphasize supplied)

It is apparent from the above excerpt evidence of PW3 that she did not recognize the 2nd appellant as stated by PW1, PW2 and PW5. In that regard, it is not known as to how PW1, PW2 and PW3 arrested the 2nd appellant who is said to have named other appellants as his accomplices. If the 2nd appellant was arrested basing on the information reported to the

police officers by their informer, an identification parade ought to have been conducted. This was not done.

In the light of the foregoing, I find that the trial court did not take precaution before acting on the evidence of visual identification. Had the trial court considered the above factors, it would have noticed that the evidence of visual identification was not watertight.

Three, the remaining evidence is an oral confession of the 2nd appellant before PW1, PW2 and PW4. It has been held in a plethora of authorities including the case of **Posolo Wilson @ Mwalyengo vs. R**, Criminal Appeal No. 613 of 2015 (unreported)] that, for an oral confession to ground conviction, it must be made by a suspect before or in the presence of reliable witness. I have shown herein that, PW1, PW2 and PW5 on one hand and PW3 on the other hand contradicted each other on the issue of identification of the 2nd appellant. It is my considered view that the said contradiction goes to the root of the case thereby affecting the credibility of PW1, PW2 and PW5. In that regard, the alleged oral confession before or in the presence of PW1, PW2 and PW5 cannot ground conviction of all appellants.

To this end, I find merit in the first and second ground of complaints. Consequently, I allow the appeal, quash the convictions and set aside the appellants' sentences. I further order immediate release of the appellants from prison unless they are held there for other lawful cause.

DATED at **SONGEA** this 7th day of August, 2023.



S.E. KISANYA
JUDGE
07/08/2023

Judgment delivered through video conference this 7th day of August, 2023 in the presence of the appellants and Messrs Madundo Mhina and Alfred Maige, learned State Attorneys for the Respondent.

Right of appeal explained.



S.E. KISANYA
JUDGE
07/08/2023