IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CRIMINAL APPEAL NO. 64 OF 2022

(*Originating from the Judgment of District Court of Rombo at Mkuu dated on 30th August 2022 in Criminal Case No. 301 of 2021)*

ROGASIAN JOHN ..... 1ST APPELLANT

RUPI FAUSTINE .....2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

22nd August & 12th September, 2023

A.P.KILIMI, J.:

On 20/12/2021 at about 01:00 hours, was the night unforgettable to one Angela Michael Hamaro (PW1) who is a wife of Michael John Hamaro (PW2) and a mother of Lilian Michael (PW3). PW1 who was asleep by that time, heard screaming for help from her husband's house who was in a separate house which is very close to her house. She then raised an alarm to support her husband, this caused the alleged bandits to counter attack her home instead of, they did break house door and entered her room. She and her child PW3 screamed helplessly. According to their testimonies at the trial court, they said, they managed to identify the bandits to be the

appellants hereinabove who were armed with bush knife and axe via the aid of solar bulb which was illuminating in her room.

Through struggle to serve herself, PW1 sustained cuts from the appellants on her heard and waist, seeing her days in this world is over, she hidden herself under the bed and remained silence as a dead body. The alleged bandits left the crime scene believing that PW1 was dead. Surprisingly, her husband attended the scene in the morning unbelievable that his wife was still alive. The incident was reported to local leaders, who caused the victims PW1 and PW2 to reach Police Post and later at Hospital for further examination and treatment.

Upon investigation conducted by Police officers, they managed to arrest four accused persons including the appellants in this case. Both were charged at the District Court of Rombo for three counts, firstly; burglary c/s 294 (1)(a) and (2) of the Penal Code Cap 16 R.E 2019; second count, causing grievous harm c/s 225 of the Penal Code (supra) and one count for second appellant only of providing services as traditional healer without license c/s 4 (2) of Traditional Healers and Alternative Medicine Act No. 23 of 2019.

The particulars of the above offence stated at the trial were to the effect that, on the 20th day of December, 2021 at about 01hrs at Kirongo Juu Village within Rombo District in Kilimanjaro Region the appellants and other two persons did break and enter into the dwelling house of one Angela Michael Hamaro with intent to commit an offence therein; also on the same date, time and place the four accused persons did unlawfully cause grievous harm to one Angela Michael Hamaro by cutting her on her head and waist by using sharp object and caused her to suffer grievous harm; also four accused persons did cause grievous harm to Lilian Michael Hamaro by beating her on her head using a blunt object and cutting her on her left hand using sharp object and caused her to suffer grievous harm; In respect to the fourth count, the prosecution alleged that one Rupi Faustine Hamaro (second appellant) on the same day he was found unlawfully providing services as a traditional healer without licence. All accused persons denied to commit the alleged offence.

To prove the alleged offence the prosecution paraded five witnesses to prove their case, while in respect to the appellants at the trial court defended themselves, the first appellant despite denying to commit the alleged offence admitted to know the victims very close, while the second

appellant said the first appellant is his uncle and denied also to commit the offence charged.

The trial court in conclusion of the alleged offences found the appellants guilty for first, second and third count as stated above, while the other two were found not guilty and acquitted. Consequently, the trial court proceeded to sentence the appellants for first count that they should serve five years imprisonment and for the second and third count each to serve seven years imprisonment.

Aggrieved by the said conviction and sentence, the appellants have knocked the door of this court by way of appeal basing on the following grounds, **One**; That, the learned trial Magistrate erred in both law and fact by holding and making findings that appellants were identified at the scene without noting that the evidence of identification was very weak and was not enough to warrant conviction against the appellants as witnesses they failed to mention intensity of the light. **Two**; That, the learned trial Magistrate erred in the law and fact by failing to note that there was lack of inconsistency evidence from prosecution side. And **three**; That, the trial court failed to note that the prosecution failed to prove their case to the standard as required by law.

When this appeal was before me for hearing, all appellant stood themselves while the Republic was represented by Ms. Edith Msenga learned State Attorney. The first appellant prayed this court to consider grounds of appeal and further said he was not identified due to weakness of light. The second appellant also prayed all grounds be considered by this court, but for him, he added that the witnesses contradicted themselves on exactly time for commission of the offence.

Responding to this appeal Ms. Msenga in respect to ground number one contended that there were no contradiction and invited this court to pass through the record from page 9 to 18. She further said PW2 and PW3 told the court the same time that it was 01:00 hours, is PW2 who said 00:00 hours but from midnight, therefore she said the contradiction did not occasioned injustice and is cured under section 338 of CPA Cap 20 R.E 2022.

Ms. Msenga further argued that PW1, PW2 and PW3 knew the appellant since they lived together, thus they recognized the appellants and mentioned one to be the traditional healer, also she submitted PW2 recognized the voice of the first appellant which was corroborated by evidence of PW1, she buttresses her stance by referring the case of **Ngalu**

Joseph and Another vs. Republic Criminal Appeal No. 172 of 2019 CAT at Mbeya (unreported).

Responding in respect to third ground, the learned State Attorney stated that appellants were convicted due to strong evidence of PW1, PW2 and PW3. Also, she said the offence of grievous harm was proved by a medical Practitioner (PW4) who tendered PF3 of PW1 and PW2.

I have considered the trial court record and the grounds raised above by the appellants, this appeal is centered to the point cutting across all grounds, and that is whether the appellants were properly identified committing the offence convicted with.

It is undisputed that the incident in this matter happened at the midnight, it is obvious at that time the conditions for reliable identification were unfavorable. It is a trite law evidence of visual identification is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight. (See **Waziri Amani vs. Republic** [1980] TLR 250, at page 251)

Therefore, general factors that should be considered in determining whether visual identification evidence is water tight or not include; the time the witness had the accused under observation, the distance at which he observed the accused, the conditions on which such observation occurred, if it was day or night time, whether there was good or poor lighting at the scene, whether the witness knew or had seen the accused before.

According to the evidence of the victims PW1 and PW3 said they knew the appellants since they were close relatives to them, thus this means their evidence are of visual evidence by recognition. It true that evidence of recognition is more reliable than identification of a stranger because such evidence depended upon the person knowledge of the victim to the assailants, but still the said evidence must be watertight and all possibilities of mistaken identity must be eliminated despite of being evidence of visual identification by recognition as it is in the instant case (see **Issa s/ Ngara @ Shuka vs. Republic,** Criminal Appeal, **Shamir s/o John vs. Republic,** Criminal Appeal No. 166 of 2004, and **Philimon Jumanne Agala @ J4 v. Republic,** Criminal Appeal No. 187 of 2015 (all unreported). In the case of **Shamir s/o John vs. Republic,** (supra) the court observed that;

> *"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."*

From the excerpt of the above legal principles and pronouncements, I now proceed to evaluate the evidence of PW1 and PW3 whether met the threshold of the above to the satisfaction that the evidence they tendered was watertight to justify that are the appellants committed the offence charged.

Starting with the first witness weather she identified appellants hereinabove, at page 9 of the trial court proceeding PW1 testified as hereunder;

> *"they broke the window and come to broke the door and entered the room, I was screaming and I was with my child Lilian aged 13years. They found us in, I saw two people one was Rogasian had an axe wanted to hit my head I escaped; Rupi had bush knife; I identified them through a Solar bulb which was in my room, I asked them why do you want to kill me? They said "unatuharibia dawa unasema umefanyaje" their faces were necked,"*

Here the witness said she identified the appellants through the aid of the solar bulb, no further explanation said in respect to the intensity of the light from that solar bulb. In my view explanation of the sufficiency of light at the scene of crime is of dominant importance for enabling a witness to see and identify properly a person under observation. To fortify my view, in the case of **Juma Hamad vs Republic,** Criminal Appeal No.141 of 2014 (unreported), the Court observed that:-

> *"When it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable identifying witness to see and positively identify the accused persons. Bare assertions that "there was light" would not suffice."*

Although I entirely agree with the learned State Attorney that the nature of identification relied on is recognition, but as said above, this is not a guarantee because there are possibilities that mistakes in recognition of even close relatives and friends may sometimes be made (see **Shamir John vs Republic,** (supra)

In the circumstances of this matter, one could expect the prosecution to ask on the intensity of the said solar bulb and the descriptions of the appellants at the scene of the crime. There was nothing but a bare assertion by PW1 that there was light from the solar bulb which in my view is insufficient. Therefore, it is my considered opinion this wanting of extent of brightness and other test stated above causes me to believe that PW1 did not eliminated all possibilities of mistaken identity to the appellants.

Another evidence the learned state Attorney this court to consider is the evidence of voice identification, which she said was corroborated. I find convenient to extract the part of the said evidence of PW1 in such respect which is at page 10 of the trial proceeding;

> *"Outside I heard their voice talking Mama Elia (4th accused) and mama Bosi (2nd accused) 4th accused asked the two if they finished me and mama Bosi supported that if you didn't, kill her "itakula kwenu" Rupi told them it is over and Rogasian said we did it."*

First and foremost, I must state sound evidence is weakest and unreliable which require greatest care before acting on it, there is a possibility of imitating the other voice so as to misguide the identity (see

Hekima Madawa Mbunda and Onesmo Kumburu v. Republic Criminal Appeal No. 566 of 2019 CAT at Iringa. (unreported). PW1 only said to that extent, I think it could have been correct for the prosecution to lead her to explain properly how she identified the sound of the appellants different from other sound of others without making mistake, how familiarity she is with the voice of appellants, the extent of time used in hearing their conversation. Therefore, the facts that she knows the appellant before is not enough due to the principle of imitation above. Thus, it is my considered view this evidence is wanting hence cannot suffice to apprehend the appellants unmistaken.

Back to the evidence of another eye witness who is PW3, at page 18 of the trial court typed proceeding, when she was cross examined by the second appellant who was the third accused at the trial had this to say;

> *"You hit my head with an axe; I didn't hear the door broke;* ***you wore an orange shirt, I saw your face through solar light.*** *My mother was under the bed. I saw your face; father was in his room; I and mama saw you. I was asleep I screamed but nobody came I and my mother we are only witnesses."*
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> [Emphasis supplied]

I have thought of the above evidence, in my view the fact that PW3 managed to apprehend the colour of the shirt of the second appellant at the scene of the crime, this means the light of the said solar bulb enabled her to identify the second appellant at the scene of the crime, take regard she knows him before as relative and they lived in one locality. This seems different to the evidence of the PW1 above, be it as it may, here the issue depends on the situation and circumstances witness is under observation taking regard the incident was strange and horrific, but she managed to describe the second appellant.

In the case of **Mabula Makoye and Another vs. R,** Criminal Appeal No. 227 of 2017 (unreported) the court observed that;

> *"Though familiarity is one of the factors to be taken into consideration in deciding whether or not a witness identified the assailant, we are of the considered opinion that where it is shown that the conditions for identification were not conducive, then familiarity alone is not enough to rely on to ground a conviction. **The witness must give details as to how he identified the assailant at the scene of the crime as the witness might be honest but mistaken.**"*
>
> [Emphasis added]

For the reasons that I have given hereinabove, I am of considered view that PW3 identification in respect to the second appellant was absolute watertight to support the conviction at the trial court. Therefore, the first ground is answered to that extent.

Also, the appellant complained about inconsistence of mentioning the time of incidence, In my view I think this contradiction does not affect the credence of witnesses, because despite the fact that PW2 was not the victim and eye witness, the circumstances of the incident apprehended by PW1 and PW3 is of terror and horror, it is unusual to grasp the exactly time of the incident to be the same in the mind of all witnesses.

Having observed so, I now proceed with the second and third ground together which in essence base on the same perspective, the evidence of PW3 above brings in that it is undisputed that the second appellant could not enter the said room where the victim with her mother were asleep. Nonetheless, being there it is when PW3 as observed above clearly identified the second appellant causing to her grievous harm until she lost conscious, this was corroborated by the evidence of PW4 one Wibroad Kyejo, a medical practitioner. Therefore, in view of the above I am satisfied that the second

appellant committed the offence of burglary and causing grievous harm to the victims as he was charged.

The next point which I discern it in this matter, is the sentence meted to the appellants. According to the record the appellants were convicted with three counts being, one is the offence of burglary c/s **294 (1) (a), (2)** of the Penal Code and two counts of offenses of causing grievous harm c/s **225** of the Penal Code. At page 9 of the typed Judgment of the trial court, it stated as follows when sentenced the appellants;

> *"For first count of burglary the two accused persons are sentences to serve five years in jail.*
> *For second count and third count the two accused persons are hereby sentenced to serve each seven years in jail."*

In view of the above, the trial court sentenced them for second and third count cumulatively and imposed a sentence of seven years imprisonment without specifying which count was it for. This type of sentence amount to omnibus sentence, which is not allowed under penology. (See **Republic vs. Athanas** [2006] TZCA 75 (TANZLII) and the Tanzania Sentencing Guidelines 2023 at Page 11). Since it is illegal to pass an omnibus sentence where the

accused person is convicted on two or more counts in a trial, and this is because the sentence must be passed on each count separately.

In the premises, I invoke my revisionary powers under section 373 (1) (b) of the Criminal Procedure Act Cap. 20 R.E. 2022 and nullify the trial court's sentence of seven (7) years imprisonment.

In the circumstances and on account of what I have endeavored to discuss hereinabove, I find this appeal has merit in respect only to the first appellant, consequently I order him immediately release unless held by another lawful cause. For the second appellant his appeal failed but since the sentence in respect to second and third count is nullified above. To remain in prison serving the sentence on first count of five years already started.

It is so ordered.

DATED at **MOSHI** this day 12th September 2023.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
MOSHI DISTRICT REGISTRY

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JUDGE
Signed by: A. P. KILIMI

Court: Ruling delivered today on 12th day of September 2023 in the presence of Ms. Edith Msenga, learned State Attorney for Respondent and also all appellants present.

Sgd: A. P. KILIMI
JUDGE
12/09/2023

Court: Right of Appeal fully explained

Sgd: A. P. KILIMI
JUDGE
12/09/2023