THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 74 OF 2023

(Originating from the District Court of Chunya at Chunya, Criminal Case No. 120 of 2022)

ABELINEGO KASHUMA ..... 1ST APPELLANTS

FRANK PATRICK ..... 2ND APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

Date of last order: 16/10/2023
Date of judgment: 12/12/2023

Ngunyale J.

The appellants were furiously discontented with custodian sentence rendered against them to serve for a period of thirty years imprisonment. At the trial before the subordinate court, the offence which was introduced at their door step was Armed Robbery contrary to section 287A of the Penal Code (Cap 16 R.E 2022). What is to be discerned and captured from the trial record generally is that; at an area known as Mkola located within Chunya District a crew of bandits stormed into a plant owned by one *Michael Madaha Mabula* on 26/7/2022. While there, armed with some offensive weapons or instruments wit; pick-axe, machete, sticks etc managed to threat and assault PW1 and PW2 respectively. Whereupon, they managed to part away with carbon material weighing 500 kilogram

which estimated to have catched 1.5 kilogram of Gold equivalent to Tzs 172,776,000/= the property of one Michael Mabula.

As per the record, the appellants were subsequently arraigned in the trial court and were charged accordingly simultaneously with other two persons who are not part to this appeal. They all denounced the charge, the prosecution fronted five witnesses coupled with four exhibits which constituted physical and documentary one. A fully hearing was conducted, wherein, the subordinate court was influenced by prosecution evidence consequently, found that, the Appellant's herein executed the crime consequently; they were incarcerated to serve a maximum term of thirty years imprisonment. The appellants in this appeal are fending for themselves; while Mr. *Rajabu Msemo* S/A appeared for the Republic.

To fault the findings of the trial court, the Appellant knocked the doors of this court armed with total number of six grounds. For convenient purpose, the respective ground of appeal seeking to impugn the trial court judgment can safely be determined by narrowing down into one ground which is the gist of 6th ground canvassed in the petition of Appeal to the effect that; *"The trial court erred in law when convicted and sentenced the Appellant's without regarding that the prosecution failed to prove its case as per law..."* This court is of the increasing view that, this ground suffices to swallow the remaining grounds and an extensive coverage to it will sufficiently dispose this appeal safe and dry.

Based on the peculiarity of this appeal, the approach which will be adopted by this court will be to determine the fate of one appellant after another. In the same premise therefore, this court shall embark to deal with the fate of the 1st Appellant. Essentially, the Appellants being lay

persons and unrepresented had nothing worth to submit as they only prayed before this court to adopt their ground of appeal.

On the other hand, *Mr. Msemo S/A* opposed the appeal. Commencing arguing, in cementing 1st appellant sentence, the S/A was of the view that, trial court findings could not be faulted because; 1st Appellant's was afforded all fundamental rights prior to extraction of cautioned statement. On top of that, the 1st appellant did not oppose tendering of the Cautioned Statement failure of which according to him, is equated into admission of those content. To buttress the position, he availed the case of **Jumanne and Another v Republic** Consolidated Criminal Appeal 54 & 55/2021. Additionally, *Mr. Rajabu* took issue that, failure to tender the weapon used was not fatal as it is not an ingredient to prove the offence of Armed Robbery. The same contentions was extended by the S/A to the ground that; the prosecution failed to establish ownership of business to be devoid of merit

The business upon which this court is invited to deal with at this juncture is whether, there was a sufficient evidence marshaled by prosecution franchise which could have inturn warranted the trial court to press conviction button. Much as this court appreciate the trial court approach in endorsing and going into the corner stone element of what entails regarding the offence of Armed Robbery.

It is inescapable for this court once again to reinstate the real DNA of this specie of an offence by underscoring the holding to be secured in **Nchanga Marwa Wambura v. Republic,** Criminal Appeal 44/2017, CAT, (Unreported), the court underscored the following;

> *"To prove Armed Robbery under section 287A of the Penal Code the prosecution had to establish that there was an act of stealing that at or*

immediately after the stealing ***the perpetrator was armed with any dangerous or offensive weapon or instrument and that, he used or threatened to use actual violence to obtain or to retain the said stolen property."*** See also the case of **Kashima Mnadi v. Republic,** Criminal Appeal No 78/2011, CAT, (unreported)

Discerning within the four corners of the trial court unleashed evidence particularly from the prosecution womb; the Coe-ingredients specified above were articulated from version of account of PW1 and PW2 collectively to constitute the offence of Armed Robbery. Nevertheless; the most pivotal issue would be whether, the appellants perpetuated the crime subject to the charge initiated at the trial court.

Been the 1st appellate court within the ladder, this is enjoined with requisite mandate to get into the bottom of the matter and thereby, succinctly re-evaluate or re-appraise the evidence in the records and whenever necessary, comes out with its own independent finding. If any authority would be required, then, this court will dash out to the case of **R.D Pandya v. R 1947 EA, Mapambano Michael @ Mayanga v. R** Criminal Appeal No. 268 of 2015 CAT, (Unreported), **M&M Food Processors Company Ltd v. CRDB Bank Ltd & Two Others,** Civil Appeal No. 273/2020, CAT, (Unreported) and **Kaimu Saidi v. R,** Criminal Appeal No. 391/2019, CAT, (unreported) where it was stated that;

"We understand that it is settled law that a first appeal is in the form of re-hearing as such the first appeal court has a duty to re-evaluate the entire evidence in an objective manner and arrive at its own findings of fact, if necessary"

In the foregoing, this court would spiritedly observe such requirement in the due course of navigating through this appeal. First and foremost, this court will commence pondering the fate of 1st Appellant. The situation on the grounds speaks in tons that, the reasoning of the trial court to find him guilty was pretty much influenced and solely confine on the Cautioned Statement which is the substance of the exhibit "PE3". According to the court decision; the fact that the appellant admitted to have committed the offence amounted into sufficient confession to have been responsible with the commission of the crime. Deriving strength from the Cautioned Statement, the trial court found him to be among of the culprits henceforth; was sentenced accordingly.

This court was able to pass through the records more particularly the testimonial account by PW1 and PW2 the eye witnesses of the allegedly crime of Armed Robbery. When they were subjected for cross examination session by the 1st Appellant, they readily conceded not to have seen the appellant at the crime scene. Even when PW3 (1st Appellant employer) was testifying, he endorsed that, when he made inquiry regarding the whereabouts of the 1st Appellant on the fateful date, he was told by some boys that, the appellant was all along within the vicinity of his guard area at Stamico. The immediate question to linger around is whether; the trial court could safely rely solely to the Cautioned Statement as a proper fertilizer to sustain 1st appellant conviction.

Generally, this Court is reminded well with a salutary principles that, the best evidence to ground conviction emanate from the accused person own confession of offence. However, it is as well a fortified stance that, each case has to be decided according to its prevailing facts. Been so, at the preface of this judgment; this court is unable to find a purchase with the conclusion given by the trial court. It is a trite law that, admission of exhibit is one thing but its reliability completely center on another realm all together.

This uncompromised requirement is gathered in **Ndalawa Shilanga and Another v. Republic**, Criminal Appeal No 247/2008, CAT, (unreported). A mere fact that, the exhibit found its way into a court proceedings does not ipso facto signify that, the same can be utilized as a weapon of massive destruction to slaughter accused welfare in a case down to the grave. Reasons for not sharing the same Sauna with the trial court premise of its judgment are not far to be fetched.

One, scanning the Cautioned Statement deep down, the same does not advance the actual footage on the ground, it patently contradict the material substance of the evidence so given by the prosecution witnesses who are considered to be the epicenter of the theme scripture by this court, that is to say, PW1 and PW2 respectively. According to PW1 and PW2 evidence, it was demonstrated that, the event occurred at around 01:00hrs. The Cautioned Statement purportedly from 1st appellant's yield into a contradictory version altogether. It shows that, according to the plan, the crime was to be executed at around 03:00 hours.

Two, the same Cautioned Statement materially diverge with the account of story by PW1 and PW2 on vital important aspect more particularly on

the exact guard present at the crime scene. According to Cautioned Statement, the appellant claimed that, one *John* was a security guard at the crime scene. Furthermore, they arranged on their syndicate by conspiring to permit the bandits to gain entrance following; 1st appellant abruptly changes to guard another place.

To the contrary, according to PW1 and PW2 narrations, the one who was guarding on the fateful date was *Lempse Kaputwa.* Following this sequence of event enumerated herein, the contradiction between the Cautioned Statement and the substance of the evidence is so incredible and phenomena. The variation is very huge and cannot be considered to be minor. It is difficult to tell which segment of the statement was authentic and which one was tainted with scheme of lies. It was very unsafe and unrealistic for the trial court to have placed much reliance to it. Besides, the same was not corroborated by independent evidence.

The trial court shelved into a shear error when accorded much weight to the Cautioned Statement without considering the fact that, during cross examination between PW5 and the 1st appellant, the credibility of the Cautioned Statement came into a spotlight consequently, questionable. This goes without saying that, 1st appellant defence disclosed to have been afflicted with torture, whereas, the cautioned statement was obtained involuntarily. Normally, the trial court ought to have objectively with a lot of circumspection raises an eyebrow to the respective Cautioned Statement before accepting it wholeheartedly. This is in line with the general perception from public which does not exonerate the Police from act of torturing suspect of crimes.

Had the trial court focused its attention on the issue regarding torture although it was belatedly canvassed by the 1st Appellant, yet, for the sake of perpetuating substantial justice, it was incumbent upon the trial court not to have lose its judicial eye with 1st appellant lamentation, no wonder, it would have in turn accorded no weight to the respective Cautioned Statement with its shortcoming explained above. I am fortified on this aspect from the case of **Stephen Jason and Others v. Republic,** Criminal Appeal No.79/1999, CAT (unreported) and **Hamis Chuma @Mhando Mhoja v. Republic**, Criminal Appeal No 36/2018, CAT (unreported).

The seeds of doubt regarding the Cautioned Statements gain more roots when align the prosecution version vis a vis defence theory. According to exhibit PE3 it shows that, the same was extracted at Makongolosi Police Station. Defence theme introduces a completely opposite scenario that; the interrogation was effected at Chunya Police Station before a Police officer known as Juma. It is to be noted that, according to 1st appellant defence, at Makongolosi Police Station nothing transpired apart from been gathered with his fellows accused and at around 13:00hrs they were ferried to Chunya Police Station. He continued to defend that, while at Chunya that when he was taken to investigation room for interrogation purpose by a Police officer known as Juma. And, upon posing his request to summon his relative during interrogation, the same was turned upside down by Juma.

The sequence of event above gives a clear picture that, the accused was painting a narrative that, the Cautioned Statement was taken at Chunya Police Station and not Makongolosi as it would appears in the exhibit "PE3". Been the case therefore, this matter ought to have formed a focal

and blue print provoking the subordinate court into discussion on the legality of the Cautioned Statement; by any means; the trial court could not have afforded to miss this crucial issue by thoroughly ascertaining it because; it was probing on a fundamental issue of time frame of four hours for extracting the Cautioned Statement from the moment the accused was arrested and put under Police custody.

Accordingly, it was not contested that, the 1st Appellant was arrested early in the morning at around 05:00hrs. Whereas, his Safari to Chunya commenced on 13:00hrs. Subsequent thereto, that is when the interrogation was conducted by one Juma. Mathematically, the usual time of four hrs had passed within the purview of section 50 and 51 of the Criminal Procedure Act (CAP 20 R.E 2022) since the time of arrest compared with the time when the cautioned statement was extracted. What catch more attention of this Court is that, the allegation made by the 1st Appellant that, he was interrogated at Chunya Police by one Juma remained unchallenged. One cannot out rightly reject the possibility of tempering with the cautioned statement from the surrounding fact obtained in this case.

If the trial court was properly guided by grasping well the gist of the 1st appellant wall of the defence, it could have obviously subjected the Cautioned Statement into a proper scrutiny. It is authenticity is very questionable and leaves a lot to be desired for. Been the situation, this court does not accede to Mr. *Rajabu Msemo* S/A that, trial court findings rest and derive a proper hedge within the parameters of the law. The evidence is so dent and marred with a lot of uncertainties to the extent that, it could be unrealistic to convict 1st appellant solely relying to the statement which is chaotic.

That been said and done, this court would venture directly to the fate of 2nd appellant, the trial court was convinced much that, he was properly identified by PW1 and PW2. The favorable environment that were revealed to have enabled proper identification largely emanated from three major sources, to wit, moon light, solar light illuminating abundantly as well as torch light. According to the evidence presented PW1 and PW2 they knew the 2nd appellant prior to the incident date as he was their fellow employee. PW1 specifically pointed out that, the 2nd appellant did not conceal his face. From the nature of evidence given, the trial court upheld that, the 2nd appellant was sufficiently identified at the crime scene and there was no any possibility of mistaken identity because; the assailant was known by his victims before the incidence.

It is a deeply rooted principle coined well in our law that, the evidence regarding visual identification during night is one the weakest kind, whereupon, the court should always stay vigilant to sustain conviction by predicating its conviction solely on evidence of visual identification during night time. Luckily, our jurisdiction is very wealth on this aspect ranging from **Kamonongwe Singiri v. R,** Criminal Appeal No 235 of 2015, CAT, (unreported). It is always a firm position that, such evidence must be overwhelming and watertight to leave only remote possibility.

It is instrumental as well to underscore that; the conditional precedent that constitutes key ingredients for visual identification according to the leading case laws in this country from forest of authorities including, **Waziri Aman v. Republic** [1980] TLR 250**, Raymond Francis v. Republic** [1994] TLR 100**, Masolwa Samweli v. Republic,** Criminal Appeal No 348/2016, CAT, (Unreported) and the case of **Geophrey Isidory Nyasio v. Republic,** Criminal Appeal No 270/2017, CAT,

(Unreported) gives a common glimpse concerning these ingredient hereunder as follows;

i. *If the offence was executed during night one should be able to explain the nature of the light and the extent of its illumination*
ii. *How long the witness kept the accused under the observation*
iii. *The distance between the accused and the witness*
iv. *Whether the witness was familiar to the accused prior to the incidence*
v. *Whether there was no any horrifying incidence or intimidation which could have distorted witness concentration.*

It is an irrevocable finding of this court that; the above prerequisite features must be cumulatively established to the hilt; lack of one ingredient triggers into a legal deficiency to the extreme level of watering down the probative value of the identification. Coming to the instant issue, the most crucial and pertinent question is whether it could have been said with certainties that, the 2nd appellant was positively identified at the crime scene as stand alleged. But before spreading the wings of this court into the real gravamen of this issue; it is very demanding at this juncture to revisit into what I will brand to be strange smuggling of extraneous matters featured in the subordinate court judgment which is irreconcilable to the records.

The crafted judgment by the trial court pointed that, among of the element aided PW1 and PW2 to have positive identification of the 2nd Appellant was present of a moon light. With respect, the present of moon light is not born out of record. This court painstakingly passed thorough PW1 and PW2 testimonial accounts and could not be able to glean any

iota of evidence showing that, these witnesses at any point in time stated anything concerning presence of moon light in the fatefully event.

The issue of moonlight was just haphazardly smuggled and introduced at the first time in the stage of judgment. Times without numbers it has been emphasized for justice administrators to be cautious from importing extraneous matter into court records. The tendency of unilaterally smuggling hypothetical and fictitious matters into court record that do not form integral part of witness testimonies do not only create an impression of biasness, but, may have a very detrimental legal implication to the extent of questioning the integrity of the judgment itself.

There is no way it could be explained that, the issue of moon light was not among of the criteria that influenced and satisfied the trial court to arrive into its decision to incriminate and suffocate the 2nd Appellant into a guilty chamber. The anomaly done was very prejudicial to the 2nd appellant as the analysis made stemmed out of typical fictitious and hypothetical theories which do not reflect the reality. Consequently; gravely prejudicial to the 2nd appellant fundamental rights. This basic principle finds an elucidation in **Mohamed Juma Naniye v. Republic,** Criminal Appeal No. 514/2020, CAT, (Unreported) and the case of **Matongo Mathayo @ Mgori & Another v. R,** Criminal Appeal No 271/2021, CAT, (unreported) **Amiri Mohamed v. Republic** [1994] TLR.

The above notwithstanding, what is to be tapped from PW1 and PW2 version is that, they were invaded by eight to ten bandits holding torch

which they illuminated towards them. According to their evidence they were aided by solar power light and torch light to identify only the 2nd appellant out of the crew of the bandits. They even mentioned his attire that, he was appearing in a jeans and green T-shirt.

After giving deserving consideration to this evidence, as alluded to earlier; the pre requisite ingredients for proper identification must cumulatively be met. This court is unable to gather anything from prosecution evidence especially from PW1 and PW2 taking into account on horrendous act done by using deadly and toxic weapon such as machete, pick-axe and sticks with colossal number of thugs who were attacking them they were not terrified to lose sight and concentrating on identifying their attacker. The evidence does not reveal the state of composure and calmness gripped PW1 and PW2 not to be withered by intimidation and horrifying act to have distorted proper identification. The silences of this key feature ingredient severely disqualify and sabotage proper identification.

It is from the above reasoning this court decline to share similar camp with Mr. Rajabu's argument that there was no any possibility of mistaken identity on a mere account that, the 2nd appellant was familiar to PW1 and PW2 before the incident date. Henceforth; the case of **Wilson Elisa @ Kiungai v. Republic,** Criminal Appeal No 449/2018, CAT, (unreported) does not have any legal relevance in the context under the discussion. That being said and done, the issue of identification is very fragile and cannot be deemed to be overwhelming and water tight.

A wrapped blanket statement given by a trial court that, there was no possibility of mistaken identity because; the allegedly assailant was known prior to the date of incident hence identification by recognition could have

sufficed to eliminate all reasonable doubt in implicating someone to appear guilty. Without assigning cogent reasons as on how the possibilities of mistaken identity were adequately removed, cannot be celebrated by this court. Tangible reasoning ought to have come out of the court to justify this, taken into account that, the offence was allegedly executed under the cover of darkness.

This Court is pretty aware that, even though PW1 and PW2 were familiar with the 2nd Appellant prior to the incidence as stand allegedly, consequently, identification by recognition. But the same should not be taken lightly that, the recognition was not trouble free as mistake in recognition of close relative and friends cannot be ruled out. See the case of **Issa Mgara @ Shuka v. Republic,** Criminal Appeal No 37/2005, CAT, (Unreported). That been the case, the trial court ought to have travelled further from the valleys to the mountain top in exhausting this issue.

What is very tormenting in mind and disturbing is the evidence coming out of PW1 and PW2 belly that, on the fateful event, 2nd appellant did not conceal his face; that is why they were able to identify him. With respect, such statements from these two witnesses if ascertained properly unceremoniously divorce and remarkably defeated under common sense alone. Ordinarily, if at all, the 2nd appellant was known to PW1 and PW2, he could not have taken a chance to risk it all by not concealing his face.

Heading into a such crime scene without masking his face while he knew for sure that, he was going into the familiar territory, well known by the victims subject to robbery scheme would have amounted into planting his own explosives as the act would have obviously backed fire in no time. The era which we live in recently, that is, in 21st century cannot support

PW1 and PW2 narratives as they would have wanted this court to believe. No any person as the fact portrays itself would dare volunteer risk to that extent and make it easier to the law enforcers to track him down hence make their job so soft. This is just indigestible and incomprehensible narrative to go along with it. Unless fighting for a Jihad war, no one in this universe can be able to volunteer or endure such risks.

The above in-depth analysis triggers this court into a settled and firm finding that, the evidence by the prosecution franchise was so inadequate and Shanky to have incubated into conviction premise. That, the outcome of the conviction emanated out of failure to analyze the evidence in a proper perspective and in tune with the law. Be as it may therefore, there was no scintilla of evidence to act as a catalyst pushing the trial court to convict and sentence the appellants as it did. In the event therefore, the only avenue this court shall follow is to quash and immediate set aside the conviction and sentence of thirty years so meted against the two appellants. In that regard, the appeal succeeds and the two appellants are hereby set at liberty forthwith, unless lawfully held for any other lawful cause. It is so ordered.

Dated at Mbeya this 12th day of December 2023.

D. P. Ngunyale
Judge

Judgment delivered this 12th day of December 2023 in presence of the appellant in person and Mr. George Ngwembe for the respondent Republic.

D. P. Ngunyale
Judge