IN THE HIGH COURT OF THE UNITED REPUBLIC TANZANIA

BUKOBA DISTRICT REGISTRY

CONSOLIDATED CRIMINAL APPEALS NO. 39, 40, 41 AND 42 OF 2023

(Originating from Criminal Case No.148 of 2021 of the Resident Magistrates' Court of Bukoba (Masesa -PRM)

JACKSON S/O MAJALIWA.....1ST APPELLANT

JUMA S/O RAMADHANI @ BAYONO.....2ND APPELLANT

MWIDINI S/O ABDU.....3RD APPELLANT

MURSHID S/O ATHUMAN @USTADHI.....4TH APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

17/01/2024 & 05/02/2024

E. L. NGIGWANA, J

The appellants herein were arraigned before the Resident Magistrates' Court of Bukoba for two counts; Armed Robbery contrary to section 287A of the Penal Code, Cap 16 R: E 2019 (Now Cap. 16 R: E 2022) (The penal Code) and Kidnapping with intent to harm contrary to section 250 of the Penal Code, Cap 16 R.E 2019 (Now Cap. 16 R.E 2022).

In the first count, it was alleged by the prosecution that, on 08/10/2020, at Bubale Village within Misenyi District in Kagera Region, the appellants did steal cash **Tshs.500,000/=,**one mobile phone make

Nokia valued at **Tshs.40,000/=** and one Motor vehicle with registration No.T780 DRW make Toyota Premio valued at **Tshs.15,000,000/=** all valued at **Tshs. 16,040,000/=** the properties of one Calist s/o Misigiro@ Mwiga and immediately before such time of stealing, did shoot the said Calist s/o Misigiro @Mwiga in order to obtain and retain the said properties.

In the 2nd count, it was alleged by the prosecution that, on 08/10/2020, at Bubale Village within Misenyi District in Kagera Region, the appellants unlawfully kidnapped one Calist s/o Misigiro @ Mwiga.

The appellants denied the charges. After a full trial at which the prosecution relied on the evidence of nine (9) witnesses and five (5) documentary exhibits while the appellants depended on their own evidence in defense, the trial court was satisfied that the case was proven beyond reasonable doubt. Each appellant was consequently convicted on both counts and sentenced accordingly. In the 1st count, each appellant was sentenced to serve a jail term of thirty (30) years while in the 2nd count; each appellant was sentenced to serve a jail term of four (4) years.

Aggrieved by the trial court decision, each appellant appealed to this court through a separate Memorandum of Appeal. Prior to the hearing,

parties agreed and the four appeals were consolidated into one owing to the reason that they emanate from the same trial proceedings and judgment.

At the hearing of this consolidated appeal, the appellants appeared in person, unrepresented while Mr. Elias subi learned State Attorney, appeared for the respondent Republic.

Following the consolidation of the appeals, appellants herein fronted three points of grievance as follows; **one,** that, the trial Magistrate erred in law and misdirected herself to convict and sentence the appellants basing on incredible and unreliable visual identification. **Two;** that, the trial Magistrate erred in law and facts in holding that the prosecution case was proved beyond reasonable doubt as against the appellants. **Three;** that, the trial Magistrate erred in law and fact to convict and sentence the appellants basing on contradictory evidence of the prosecution witnesses. Apart from the hereinabove three common points of grievance, the 4th appellant raised the **fourth** point of grievance that his defence was not considered by the trial Magistrate.

On the first point of grievance, each appellant submitted that the evidence of visual identification which was relied upon by the trial court to convict him was not watertight. To support his stance, the 1st

appellant referred this court to the case of **Chokera Mwita versus Republic**, Criminal Appeal No.17 of 2010 where the Court of Appeal stressed that the court should not act on the evidence of visual identification unless all the possibilities of mistaken identity are eliminated and the court is satisfied that that the evidence before it is absolutely watertight. He added that, in the case at hand, PW7 did not give description on how he identified him including the attire he wore on the alleged night.

The first appellant further argued that, his cautioned statement was obtained through torture; therefore it was not proper for the trial court to rely upon the same to rule out that offences were committed and that he was identified.

The 2nd appellant argued that, the evidence of the identifying witnesses (PW4 and PW7) was very weak since they gave no description on how they identified him. He added that failure of an identifying witness to mention the culprits to persons who immediately attended at the scene of crime shows clearly that the PW4 and PW7 did not identify the culprits on the material night. According to him, such evidence was extremely weak to ground conviction. To support his stance, the 4th appellant referred this court to these cases; **R V. Ally** (1971) H.C.D

No.306, **Phinias Alexander & 2 others versus Republic,** Criminal Appeal No.276 of 2019 (CAT) and **Francis Majaliwa Deus & 2 others versus Republic,** Criminal Appeal No.139 of 2005 (CAT) (Both unreported).

On his side, learned State Attorney Mr. Subi strongly opposed the appeal on the ground that they have overwhelmingly proven their case beyond reasonable doubt. According to him, the evidence adduced in the trial court which grounded the conviction of the appellants is rested on the evidence of visual identification and the cautioned statement of the 1st appellant. On the evidence of visual identification, he argued that as a matter of law, the evidence of visual identification can only ground conviction if it is absolutely watertight. To bolster his stance, the learned State Attorney referred this court to the case of **Waziri Amani v. R** [1980] T. L. R 250.

He further submitted that the evidence of PW7 from page 80-88 of the trial court typed proceedings is to the effect that the incident occurred on 8/10/2020 around 1:00hours (night hours), and he identified the culprits since there was sufficient solar light in his bed room and the sitting room. Mr. Subi went on submitting that, PW7 testified that he was robbed Tshs 500,000/= and then, his face was covered with a piece

of cloth and taken to the Sugar plantation, using his own motor vehicle. He went on submitting that the evidence of PW7 was very strong to the effect that during noon time, while at the said Sugar plantation, he asked the culprits to give him some water to drink and when one of the culprits who was referred by his fellows by the name of Afande, removed the piece of cloth from his face, he saw and identified the appellants clearly.

However, on the other hand, Mr. Subi conceded that no descriptions given by PW7 on the attire put on by the appellants, but according to him, failure to give descriptions on the attire does not mean that the appellants were not correctly identified.

Mr. Subi further submitted that the evidence of PW7 was corroborated by the evidence of PW1 who confirmed in his evidence that PW7's house had solar light. He added that the evidence of PW2 and PW5 is to the effect that there was telephone communications between the appellants and PW5 whereby the appellants were using PW7's phone which finally led to the arrest of the 1st appellant.

According to Mr. Subi, the 1st appellant in his cautioned statement which was admitted without objection, the 1st appellant narrated how the two offences were committed. He added that, the 1st appellant further

mentioned the 2nd, 3rd and 4th appellants and explained their involvement in the commission of the two offences.

Mr. Subi further argued that since there was no objection raised by the 1st appellant in the trial court that his cautioned statement was obtained through torture, he cannot raise the said objection at the appellate stage. To support his stance, the learned State Attorney referred this court to the case of **Mashimba Dotto @Lukabaneja versus Republic** [2014] T.L.R 440 (CA) and section 169 (1) of the Criminal Procedure Act, [Cap. 20 R. E 2022].

Having heard submissions of the appellants and the learned State Attorney, I find it pertinent at this juncture to determine whether the evidence of visual identification adduced before the trial court was absolutely water tight to ground conviction.

It should be clear from the outset that the determination of the case at hand substantially depended on the evidence of visual identification. As a matter of law, 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. In **Waziri Amani v. Republic (Supra)**, it was held that;

"Evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, 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"

The Court further stated that,

"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems dear to that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not"

Similarly, in **Shamir John versus Republic,** Criminal Appeal No. 166 of 2004 (unreported) this Court stated that:-

"There is no gainsaying that evidence in identification cases can bring about miscarriage of justice. In our judgment whenever the case against an accused depends wholly or substantially on identification of the accused which the defence alleges to be mistaken, the courts should warn themselves of the special need for caution before convicting the accused in reliance in the correctness of the identification or identification.... This is because it often happens that there is always a possibility that a mistaken witness can be a convincing one."

As mentioned earlier, in the trial court, the appellants stood charged with the offence of armed Robbery and Kidnapping. According to the victim (PW7), he was invaded by four men on 08/10/2020 during night hours. PW7 told the trial court that identification was possible because his room had enough solar light. It was also his evidence that when the bandits took him to the sugar plantations and he requested them to uncover his face so that he can drink some water; and at that point, he saw them clearly before his face was covered again since it was noon time. However, as submitted by the appellants and conceded by Mr.

Subi, learned State Attorney, no descriptions given by PW7 as to the attire of the appellants or their physical appearances.

The records reveal that when cross examined by the 1st and 3rd appellants, PW7 said that prior to the incident, he did not know them. He further told the trial court that he did not identify who among the appellants gave him water to drink. He added that, he identified them at the police station.

By saying that he identified the appellants at the police station while he (PW7) has already said he identified them at his home place and in the sugar plantations, is a contradiction which cannot be taken lightly because it casts doubt on the prosecution evidence on identification taking into account that an identification parade was un-procedurally conducted as we shall see soon, though identification parade is in itself not substantive evidence.

It is trite law that whenever the testimony by a witness or witnesses contain inconsistencies or contradictions, it is the duty of the trial court to resolve them where possible, or else the court has to decide whether the inconsistencies and contradictions are minor or whether they go to the root of the matter. See **Mohamed Said Matula versus Republic**

[1995] T.L.R 3 and **Rashid Kazimoto & Another versus Republic,** Criminal Appeal No.458 of 2016 CAT (Unreported).

In the case at hand, two identification parade were conducted whereas PW7 and PW4 (husband and wife) were called upon to identify the appellants. Identification parade registers were admitted as Exhibit P6 collectively, but in its judgment, the trial court expunged them on the ground that the identification parades were un-procedurally conducted.

Since identification parade registers were admitted and marked Exhibit P6 collectively, after the trial court had overruled the objection challenging its admissibility, the trial magistrate had no mandate to expunge them in the judgment, as she was already *functus officio* in the matter. What she did is usually done in the appellate court. See **Jumanne Ramdhani Gange versus Republic,** (DC) Criminal Appeal No.01 of 2022 HC-at Kigoma (Unreported). Her order expunging the said document was a nullity.

Basically, identification parade is in itself not substantive evidence. See **Ambros Elias v. Republic,** Criminal Appeal No. 368 of 2018, CAT at DSM (unreported). It derives its corroborative value from section 166 of the Evidence Act, [Cap.6 R.E 2022]. Therefore, if well conducted, its

value is only to corroborate the evidence of the identifying witness. See **Moses v. R** [1987] T.L.R 134 (CAT).

In our jurisdiction, for the identification parade to be of any value, it must be conducted as per prescribed rules and procedure specified in the PGO No.232. In other words, a lawful identification parade must conform to the statutory requirements which are contained in the Police General Order.

As far as the case at hand is concerned, the trial court record reveals that an identification parade was un- procedurally conducted. For instance; the identifying witnesses (PW4 and PW7) did not give a detailed description of the appellants before being taken to the identification parade. See **Emilian Aidan Fungo @Alex & Another versus Republic,** Criminal Appeal No.278 of 2008, **Omari Iddi Mbezi & 3 others versus Republic,** Criminal Appeal No.227 of 2009 CAT (unreported) and **Republic versus Mohamed Bin Allui** (1942) 9 EACA 72.

Moreover, the officer conducted the parade (PW8) did not explain in his evidence whether the persons on the parade had similar (alike) features with the suspects so as to ensure that the parade is conducted in a fair

and just manner. Without much ado, I hold that the non-compliance of the law renders the two identification parades as of no evidential value.

Again, it is an elementary principle of law that, evidence to be acted upon by any court must come from a competent witness and unless a witness is exempted under written law such as section 127 (1) of the Evidence Act, [Cap 6 R.E 2022], any other witness in any judicial proceedings must be sworn or affirmed as section 198 (1) of the Criminal Procedure Act, [Cap.20 R.E 2022] which states that:

"Every witness in a criminal cause or matter shall, subject to the provisions of any other law to the contrary, be examined upon oath or affirmation in accordance with the provisions of the Oaths and Statutory Declaration Act."

The compliance of the herein above provision of law was emphasized by the Court of Appeal in the case of **Mwazo Mohamed Nyoni @Pengo and 2 others versus Republic,** Criminal Appeal No.2018 CAT (Unreported) where it was held that;

"The spirit of the above provision is to the effect that no witness in any criminal case or matter will be examined without oath or affirmation and

that any evidence recorded without oath or affirmation will have no value before any court of law and therefore will be disregarded"

In the case at hand, the evidence of the first identifying witness (PW4) was recorded without affirmation or oath. Let the trial court record (both typed and hand written) speak for itself;

"PW4 Nora Calist, 40 years, Nyambo, peasant and Pastoralist, resident bof Bubale Village, Christian.

PW4 XD by Mr.Kahigi: S/A

My name is Nora Calist. I reside at Bubale Village. I recall on 08/10/2020....."

Guided by the herein above Court of Appeal decision, since the evidence of PW4 was recorded without oath or affirmation, the same have no any evidential value, thus could not have been relied upon to convict the appellants.

Indeed, the only identifying witness in this case was PW7. As pointed out earlier, evidence of visual identification is of the weakest kind, therefore just bare assertions of identification of a culprit/ suspect would not suffice as a ground of conviction unless it is accompanied by a detail

description of the person allegedly identified. The accused's identification must not be a matter of conjecture or guessing.

The law relating to a single identifying witness is that, courts can convict on such evidence after warning itself before convicting on reliance of the correctness of the identification. The reason for special need for caution is that there is a possibility that the witness might be mistaken.

Taking into account the fact that PW7 gave no descriptions of the appellants on what attire did they put on the alleged night and the alleged daytime, but also his response to questions put to him during cross- examination especially on identification of the appellants and his response that he identified them at the police station, it is my considered view that it cannot be concluded that the evidence of visual identification by PW7 was absolutely watertight to ground conviction of the appellants.

As a matter of law, an accused person can only be convicted on the strength of the prosecution case and not on the weakness of the defence. See **Mohamed Haruna @ Mtupeni & Another,** Criminal Appeal No.25 of 2007, CAT (Unreported). It is very important to note that in criminal cases, the prosecution needs to prove beyond

reasonable doubt that not only the offence or offences were committed but also that the said offence/offences were committed by the Accused person/persons. In the case at hand, the evidence of visual identification available on the trial court record is extremely weak to link the appellants with the offences they stood charged.

According to Mr. Subi, the learned State Attorney, the evidence of PW7 was corroborated by the evidence of PW3, PW5 and the cautioned statement of the 1st appellant. However, it is worth noting that the purpose of corroboration is only to confirm or support the evidence which is sufficient satisfactory and credible, and not to give validity or credence to evidence which is deficient, suspect or incredible. See **Aziz v. R** [1991] TLR 7. As the case at hand is concerned, there is no such credible and satisfactory evidence in relation to identification of the appellants.

It is also clear that in the cautioned statement of the 1st accused now 1st appellant which was admitted by the trial court as exhibit P4, nowhere the 1st appellant mentioned **Juma Ramadhani@Bayono** (2nd appellant), **Mwidini s/o Abdu** (3rd appellant) and **Murshid s/o Athumani@ Ustadhi** (4th respondent). The names appearing in Exhibit P4 are **Juma, Khamis** and **Ustadhi/Mwalimu**.

Basically, there is no cogent evidence on record linking the 2nd, 3rd and 4th appellants with such names. It is worth noting that nothing on record showing that the 2nd, 3rd and 4th appellants admitted in court that the said names are their names. Also there is no evidence on record to the effect that the 1st appellant testified in court that his cautioned statement was voluntarily recorded and that he mentioned names of the 2nd , 3rd and 4th appellants to the recording officer (PW3).

As per trial court record, PW3, when cross examined by the 4th accused (4th appellant) he said that the persons who were mentioned to him by the 1st accused (1st appellant) were **Hamis, Raymond and Ustadhi**, but the said persons were not arraigned in court.

In those circumstances, I cannot shake hands with the learned State Attorney that the evidence of PW7 on identification of the appellants was corroborated by exhibit P4.

Furthermore, the evidence of PW5 is to the effect that on 8/10/2020, he was communicating with the appellants who had PW7's phone whereby the rests of the appellants informed him that he would meet the 1st appellant and give him the money they needed in order to release the victim (PW7). PW5 further told the trial court that he reported the

matter to the police whereby the police set a trap and finally managed to arrest the 1st accused (1st appellant) and searched.

However, it is surprising that PW5 did not even mention his phone number or the phone number of PW7 or tender any document to show that he really received any call from PW7's number. In addition to that, certificate of seizure (Exhibit p1) bears the name PW5 but it was not signed by him to show that he was present during the arrest and search of the 1st appellant. On the other hand, the arresting officer (PW2) did not state in his evidence that during the arrest of 1st appellant, PW5 was present. In that respect, it cannot be said that the evidence of PW5 was free from doubt.

Basically, in absence of cogent evidence that there was communication between the 2nd, 3rd and the 4th accused persons (Appellants) on the one hand and PW5 on the other hand which led to the arrest of the 1st accused (1st appellant), it is my considered view that it cannot be said that the evidence of identification by PW7 was corroborated by the evidence of PW2 and PW5.

According to Mr. Subi, the prosecution case also rested on the cautioned statement of the 1st accused now appellant. It is worth noting that a confession is a criminal suspect's acknowledgment of guilty. Therefore, a

free and voluntary confession deserves a highest credit because it is presumed to flow from the strongest sense of guilt, therefore, in law the evidence of an accused person who confess is the best evidence if it is made voluntarily and a conviction can be based on it.

However, in the case at hand, reading the trial court judgment from page 1 up to page 15, nothing showing that the accused persons/ appellants were convicted basing on the cautioned statement of the 1st appellant or that the 1st appellant was convicted basing on his own confession.

As correctly stated by Mr. Subi, learned State Attorney, there was no objection raised by the 1st appellant during admissibility of his cautioned statement, and as per the law, he cannot raise such objection at this stage. However, as I have said earlier, the 2nd, 3rd and 4th appellants were not named in Exhibit P4. Furthermore, the trial court judgment is silent on the weight attached to Exhibit P4. Though no objection was raised by the 1st accused (1st appellant) during admission of his cautioned statement, during cross –examination, he asked the recording officer (PW3) questions challenging voluntariness of the same. The trial court record reveals the 1st appellant tendered in evidence PF3 which was issued to him on 26/10/2020 by PW3 despite the fact that he was

arrested on 08/10/2020. The same was admitted as Exhibit DW1. Exhibit DW1 revealed that the 1st appellant was assaulted using a blunt object. The record is silent as to why the 1st appellant was sent to court on 27/10/2020 while he was arrested on 8/10/2020 and then issued with PF3 on 26/10/2020. The record is also silent as to who assaulted him while he was already under police custody.

At the same time, Exhibit P4 had no police case number to show that before being called to give his statement, there was a complaint made to the police against the 1st appellant. Under the circumstances, though the trial court is silent, the answer is not far to fetch as to why no evidential weight was attached to Exhibit P4 by the trial court.

As pointed out earlier, the trial court relied on the evidence of the identifying witnesses (PW7 and PW4) to convict the appellants of the two offences. As I said earlier, PW4 gave her evidence without oath or affirmation, therefore, her evidence is of no evidential value. The only identifying witness is PW7 whose evidence was also not absolutely watertight. In the circumstances the appellants ought to have been acquitted by the trial court for want strong evidence of identification linking them with the two offences.

According to the case of **France Michael Nyoni versus Republic,** Criminal Appeal No.505 of 2020, CAT at Iringa (Unreported), an appellate court is bound to consider the grounds of appeal presented before it, address and resolve the complaints of the appellant either separately or jointly depending on the circumstances of each case. However, the appellate court needs not discuss all the grounds presented before it where only few will be sufficient to dispose of the appeal.

Guided by the herein above authority, I found the first two points of grievance raised by the appellants have sufficed to dispose of this appeal. That being the case, dealing with those other grounds will be just an academic exercise, the course into which I cannot venture.

In the up short, I find merit in this appeal and I allow it, quash the conviction and set aside the sentence of thirty (30) years in respect of the 1st count and four (4) years in respect of the 2nd count, meted out against each appellant. Furthermore, I order an immediate release of the appellants; **JACKSON S/O MAJALIWA, JUMA S/O RAMADHANI @ BAYONO, MWIDINI S/O ABDU and MURSHID S/O ATHUMAN @USTADHI** from prison unless they are held for other lawful purpose. It is so ordered.

Dated at Bukoba this 5th day of February 2024

E.L. NGIGWANA

JUDGE

05/02/2024

Court: Judgment delivered this 5th day of February, 2024 in the presence of all appellants in person, Mr. Subi Elias, learned State Attorney for the Republic/Respondent, Hon. E. M. Kamaleki, Judge's Law Assistant and Ms. Queen Koba, B/C.

E. L. NGIGWANA

JUDGE

05/02/2024