IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM SUB REGISTRY

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 179 OF 2023

(Appeal from the decision of the District Court of Kibaha at Kibaha delivered by)

(Hon. F.L. Kibona – RM. Dated on the 12th Day of May, 2023 in Criminal Case No. 14 of 2023)

HAMIS JAFARI MOHAMED

ABDUL JUMA MOHAMEDI **.....APPELLANTS**

Versus

THE REPUBLIC.....RESPONDENT

JUDGEMENT

17th April, & 15th May, 2024

MWANGA, J.

The appellants, **Hamid Jafari Mohamed** and **Abdul Juma Mohamedi** were jointly charged in the District Court of Kibaha for Armed Robbery contrary to Section 287A of the Penal Code, Cap. 16 [R.E. 2022]. The particulars of the offense are that on the 9th day of February 2023 at Mlandizi Center area within Kibaha District in Coast Region jointly and together the appellant stole cash Tshs. 150,000/= being the property of the Magreth Hamis and immediately before stealing they were armed with

a knife and immediately after stealing strangled Magret Hamis on the neck to obtain the stolen money.

The prosecution brought four witnesses to prove the charge. After the conclusion of the trial, the appellants were sentenced to serve 30 years imprisonment each. Believing to be innocent, the appellants have filed their first appeal while armed with three main grounds including the additional ground filed on 06th December 2023 as follows;

1. That the trial Magistrate grossly misdirected himself and consequently erred in law and fact in holding that the appellants were positively identified at the alleged scene of the crime based on weak tenuous incredible and wholly unreliable evidence of PW1.
2. That the learned trial Magistrate erred by failure to observe that the case for the prosecution was not proved to the tilt.
3. That the learned trial Court grossly erred in law by relying on a witness statement in contravention of section 34B of the Evidence Act, Cap 6 R.E 2022

The appeal was heard by written submission. The appellant appeared in person whereas the respondent enjoyed the service of Clarence Muhoja, learned State Attorney.

Apart from the above grounds of appeal, I invited the parties to address me on issues relating to the age of the appellant. It appears on the trial court proceedings on pages 29 and 30 that the appellants testified as accused persons aged 17 years old. however, they were subjected to the trial as adults contrary to sections 113 and 114 of the Law of Child Act, Cap 13 R.E 2022.

Addressing the issue, Mr. Clarence told the court that under such circumstances and section 113(1) the trial court ought to make due inquiry as to the age of the appellant as the law requires, failure of which vitiate the proceedings. The appellants emphasized that they informed the trial court that they were 17 years old but were ignored. Section 113(1) of the Law of Child Act provides;

> ***"S. 113(1) Where a person, whether charged with an offense or not, is brought before any court otherwise than to give***

evidence, and it appears to the court that he is a child, the court shall make due inquiry as to the age of that person"

The subsequent provision of section 114(2) of the Act provides that, where the court has failed to establish the correct age of such person, then the age stated by that person shall be deemed to be the correct age of that person. The relevant section reads;

"114(2)- Without prejudice to the preceding provisions of this section, where the court has failed to establish the correct age of the person brought before it, then the age stated by that person, parent, guardian, relative, or social welfare officer shall be deemed to be the correct age of that person".

Given the above, the proceedings on pages 29 and 30 do not show if the trial court conducted an inquiry. Hence, the reading of the above provision gives us the insight that the age of the appellants was 17 years old.

That being said, the forum and procedures in dealing with the child accused of committing crimes are different from the ones dealing with

adults. That includes the punishment to be inflicted upon the child. For instance, section 119 of the Act, provides that a child shall not be sentenced to imprisonment. The remedies are provided under subsection (2).

In my considered view, the proceedings were conducted in violation of the laws, therefore, a nullity. With such a conclusion, I agree with the learned State Attorney that the appellants are entitled to be discharged for the period they have been imprisoned in violation of the law.

I further add that their release can be accelerated by the weak, tenuous incredible evidence of PW1. There is every reason to believe that PW1 did not know the appellant before nor were their neighbors. If at all PW1 is telling the truth that she was familiar to the appellants why did she fail to locate where the appellant resided until the said Salma (exhibit P1) directed the police to a certain distance accompanying the victim to the appellant's home? For ease of reference, in her statement, the said Salima said;

> "…*niliongozana nao hadi mtaa wa kanisa la wasabato* ***mbali kidogo*** *kutoka hapo waliponiamsha…"*

With such an expression, it is obvious that the appellants were not familiar with the appellants as she wanted the court to believe. It should be recalled that PW1 was even stranger to the said Salima. As such, the identification of the appellants is in doubt. In the case of **Athumani Hamis @ Athuman v. The Republic**, Criminal Appeal No. 288 of 2009 (unreported) the Court held that it is safe to say that there was no mistaken identity of the appellant where the appellant alleges that **he recognized the appellant** because of **knowing him before**; and **given the conditions** which made the complainant recognize the appellant.

The court in the cases of **Yohana Chibwingu Vs Republic**, Criminal Appeal No. 117 of 2015, and **Cosmas Chaula Vs Republic**, Criminal Appeal No. 6 of 2010 (both unreported) categorically stated that it is now certain that a witness who alleges to have identified a suspect at the scene of a crime ought to give a detailed description of such suspect to a person to whom he first reports the matter /before such a person is arrested. The description should be on the attire worn by a suspect, his appearance, height color, and/ or any special mark on the body of such a suspect. Therefore, it is not true that this is the case of recognition. Hence this ground of appeal lacks merit.

Again, the appellants are right in saying that it was sufficiently established that efforts were made to trace the said witness. Upon perusal of the prevailing records particularly on page 20 where the learned State Attorney is arguing that the requirement of section 34B of the Evidence Act was met.

For the avoidance of doubt, let me reproduce part of the record on page 20. First, it began with the learned State Attorney stating to the court that; I quote;

> "***STATE ATTORNEY:*** *Case for hearing the witness intended cannot be found under section 34B of the Evidence Act we pray to notify this court to tendered a statement of a witness intended* ***we pray to supply a copy to the accused person a witness statement*** *we pray to recall Dc Oritus.*
>
> ***Sgd: F.L.KIB0NA***
>
> ***RESIDENT MAGISTRATE***
>
> ***23.03.2023***
>
> ***ORDER:*** *Hearing on 06/04/2023*

Sgd: F.L. KIB0NA

RESIDENT MAGISTRATE

23.03.2023"

If the proceedings on the respective page are left to speak for themselves, one can note that the conditions stipulated in the above-cited case were not met. There is no single reason adduced why the statement of Salma was tendered under section 34B of the Evidence Act as it is required under the law. The prosecution, instead, gave a general statement that the intended witness could not be found.

As per the existing legal precedents, some of the reasons would be that the maker of the statement could not be called as a witness because he is dead, unfit because of bodily or mental condition or he was out of Tanzania. See the case of **Ramadhani s/o Hamisi Mwenda vs. R**(supra) which provided that for the statement to be admitted under section 34B of the Evidence Act the prosecution must shows the following; that the maker of the statement could not be called as a witness because he is dead, unfit because of bodily or mental condition, he was out of Tanzania, or reasonable steps were taken to secure his attendance but

failed, the prosecution must also show that the maker of the statement signed it, the statement must also contain a declaration of the person who made it, that it is true to his knowledge and belief, and that it was made while the maker knew that it would be tendered in court as exhibit and he would be liable for perjury if the maker willfully stated something in the statement which he knew to be false or he did not believe it to be true, a copy of the statement must be given to the accused person before it is produced in evidence, there should be no notice of objection served by the accused person to the prosecution within ten days after receipt of the copy of the statement, if the statement is made by a person who cannot read it must be proved that it was read to him before he signed it.

On perusal of the records on pages 20 to 25 of the trial court's proceedings, nowhere is shown that the appellants were even served with the said copy of the statement. What appears in the records is that immediately after the prayer to tender the statement, the trial magistrate ended in fixing another hearing date.

Having said that, I agreed with the appellants that the statement in exhibit P1 is liable to be expunged from the record as I hereby do. Therefore, this ground of appeal has succeeded.

With the two above grounds of appeal failing the prosecution and the procedural irregularities ascertained, I am confident that the appeal must succeed. Therefore, the appeal is allowed. I hereby direct the release of the appellants unless lawfully otherwise held.

Order accordingly.

H. R. MWANGA

JUDGE

15/05/2024