

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(SUMBAWANGA DISTRICT REGISTRY)**

**AT SUMBAWANGA**

**DC. CRIMINAL APPEAL NO. 28 OF 2023**

(Originating from Sumbawanga District Court in Criminal Case No. 23 of 2021)

**ALKADO S/O MNYEMA ..... 1<sup>ST</sup> APPELLANT**

**CHRISANT S/O VELERIANO ..... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

**MWENEMPAZI, J.**

The appellants herein named were arraigned in the trial court together with one Juma s/o Sengerema and Said s/o Talala @Simba as 1<sup>st</sup> and 2<sup>nd</sup> accused persons respectively (the appellants herein as 3<sup>rd</sup> and 4<sup>th</sup> accused persons respectively), and charged with the offence of Armed Robbery contrary to section 287A of the Penal code, Cap. 16 R.E. 2019. It was

alleged that the accused persons on the 14<sup>th</sup> day of January, 2021 at Msia Village within Sumbawanga District in Rukwa Region did steal cash money Tshs. 10,000,000/= the property of one SABAS S/O MWAKALEBELA and immediately before and after such stealing did use sticks, stones and machetes(panga)to beat, stone and threaten the said SABAS S/O MWKALEBELA in order to obtain and retain the said property.

When the charges were read over to the accused persons, they distanced themselves from the commission of the offence and upon hearing of the case, the trial Magistrate found the accused were guilty and convicted them with the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap. 16 R.E. 2022.

The appellants were aggrieved with the findings, conviction and sentence meted to them. They filed a petition of appeal with six grounds of appeal listed in it. The main among which is the first ground of appeal that the prosecution failed to prove the case against them to the required standard.

At the hearing of this appeal, the appellants were fending for themselves and the Respondent was being represented by Ms. Atupele Makoga and Mr. Jackson Komba, learned State Attorneys. Hearing of the appeal

proceeded orally, and the appellant briefly, prayed that this court considers the grounds of appeal and allows the appeal, quashes the Judgment and conviction by the trial court and sets aside the sentence. Then releases them from prison.

Ms. Atupele Makoga, learned State Attorney submitted on behalf of the respondent. She took off in her submission by informing this court that the respondents are supporting the appeal by the appellant, but not based on the grounds raised. She submitted that they have discovered that the evidence was adduced in court by the prosecution was scant especially on identification of the appellants at the scene of event.

In resolving the issue of identification, she relied on the case of **Ndaro Sumuni Mabuse @ Amiri Ronaldo and two others Vs. Republic**, Criminal Appeal No. 117 of 2023 Court of Appeal of Tanzania at Mwanza. The cited case referred with approval to the decision in the case of **Waziri Amani Vs. Republic [1980] TLR 250**. In the latter case the criteria for visual identification were discussed. Factors such as whether the victim or witness did show the distance from which he/she was observing, time within which he/she was observing, extent of light and whether he/she knew the suspect before the date of the event.

The witnesses especially PW1 testified that he knew the appellant without describing how he knew them. It is a legal position that to know the suspect is not enough, he must show how he was able to identify the suspect at the scene of event.

Since the witnesses said they recognized the appellants by names, they ought to have explained how they knew the suspect by describing the kind of attire they had. The deficiency vitiated the proof of the offence and therefore the appeal has merit, she prayed that the appeal be allowed.

I have read the proceedings in particular the evidence adduced by the prosecution. The case at hand emanates from the process of witch hunting commonly known as 'lambalamba' activities. By the accounts in the evidence, it involve many people and it can rightly to categorized as a mob activity and usually people involved are many and taken up emotionally. The circumstances of the events appearing in the 'lambalamba' activities are usually difficult to point out with certainty who has done what. The counsel for the respondent has submitted that the identification of the accused person was not clearly testified as to do away with the possible mistaken identity of the real culprit. She cited the case of ***Ndaro Sumuni***

***Mabuse@ Amiri Ronaldo and Two others vs. The Republic(supra)***

where the court held that:

*"Visual Identification has been covered thoroughly and widely in our Jurisdiction. Such evidence is considered to be of the weakest kind and most unreliable. Therefore, as settled principle, courts can only act upon it after eliminating all possibilities of mistaken identity and satisfying itself that the evidence is absolutely watertight."*

The court went on to emphasize the need to consider all the factors necessary to eliminate possible mistakes in identification of the suspect. Such factors were listed and considered in the case of **Waziri Amani vs. Republic[1980]T.L.R. 250**. The guidelines for the watertight visual identification are:(i) light used in the identification process, (ii) if the person was known before, (iii) time taken under observation of the person being identified, (iv) distance between the identifier and the identified, (v)

size of the room or area and (vi) naming or mentioning of the suspect at the earliest available opportunity.

In the proceedings, the prosecution witness, Sabas s/o Mwakalebela (PW1) testified that a group of people holding clubs, stones and machete went to his home. He was able to identify the accused persons; he pointed out at the 1<sup>st</sup> to the 4<sup>th</sup> accused person at the dock. Then he also testified that the 2<sup>nd</sup> accused told people that that thing fell there; *at the time other people* were throwing stones at him. In my opinion, the learned counsel for the respondent is right. The identification fell short of being watertight. The circumstances were not conducive to have a clear and accurate identification. Instinctively, if people were throwing stones to the witness, he must have been busy protecting himself from injury or trying to save his life.

Under the circumstances, it is difficult to say with certainty that the appellants were positively identified at the scene of event. That being the case, I allow the appeal, quash the Judgment and conviction of the appellants with the offence of armed robbery and set aside sentence meted on them. I hereby order that the appellants be released forthwith

unless otherwise they are being held for other lawful cause. It is ordered accordingly.

Dated and signed at Sumbawanga this 27<sup>th</sup> day of May, 2024



**T. M. MWENEMPAZI**

**JUDGE**

Judgment delivered in court in the Judge's Chamber in the presence of the appellants in person and Mr. Jackson Komba and Ms. Ashura Pazi, learned State Attorneys. Right of further appeal explained.



**T. M. MWENEMPAZI**

**JUDGE**