IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF MOSHI

AT MOSHI

CRIMINAL APPEAL NO. 65 OF 2023

(Appeal from the Judgment of District Court at Moshi at Moshi dated 24th May, 2023 in Criminal Case no. 267 of 2021)

LINUS MARSELI LYAKURWA ..... 1ST APPELLANT

ALBERT RICHARD MMBANDO @KABABAA..... 2ND APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

JUDGMENT

12th & 19thMarch 2024.

A.P.KILIMI, J.:

The appellants hereinabove were jointly and together charged in the District Court of Moshi at Moshi in Criminal Case No. 267 of 2021 with four counts both of the same offence of armed robbery contrary to section 287A of the Penal Code [CAP. 16 R.E. 2019] (now R.E. 2022) "penal code". At the end of the trial, the two appellants were convicted for all counts and sentenced to imprisonment of thirty years respectively for each count, which were ordered to run concurrently.

The details on how the robbery happened were given by three eyewitnesses: **PW1** Octavian Jovin Mushi, **PW2**. Juliana August Kombe and **PW3** Gudila Augustino Kombe who endeavoured to prove the particulars of the charge to the effect that appellant did steal a motor cycle with Registration No. MC 882 ADG make SKY GO valued at Tshs. 2,000,000/=, one laptop bag valued at Tshs. 25,000/=, Veterinary Medicine valued at Tshs. 100,000/=, one Laptop make Asus valued at Tshs. 700,000/=, and one bag valued at Tshs. 25,000/= all in total valued at Tshs. 2,850,000/= the properties of one Octavian Jovin Moshi and immediately before or after such an act accused did threaten Juliana August Kombe with bush knife and clubs in order to obtain and retain the said properties.

In second count they did steal cash money Tshs. 800,000/= the property Juliana August Kombe , whereas in third counts accused persons also did steal Cash money Tshs. 2,500,000/= the properties Octavian Jovin Moshi , and lastly in fourth counts on the same date accused persons did steal one mobile phone make infinix valued at Tshs. 280,000/= and one mobile phone make Itel valued at Tshs. 25,000/= all total valued at Tshs. 305,000/= the properties of Gudila August Kombe, in both counts stated

the appellants immediately before or after such an act did threaten the possessor said above with bush knife and clubs in order to obtain and retain the said properties.

The tale behind the appellant's arraignment and his ultimate conviction is told by four witnesses for the prosecution mentioned above, whom according to the circumstances of this matter, I find pertinent to expose their evidence albeit in brief as follows; PW1 Octavian Jovin Mushi testified that he lives in the same compound with his mother, sister and young brother. On the material day at mid night hours while at his house he heard noises coming from his mother's house. He decided to take torch and a machete and went to see what was happening. When he reached at the scene, he found his mother and young brother were invaded by the appellants who had bush knives and clubs. He then helped his young brother by fighting the bandits whereas two of them escaped but he managed to hold the 1st appellant for a while and in the process, he injured him on his left arm using the machete, but the 1st appellant managed to escape and ran away. He told the trial court that although it was night he was able to identify the bandits because the houses had electric lights and he recognized the bandits as they were living in the same village.

PW2 Juliana August Kombe testified that on the fateful day around mid-night she was at home sleeping when her house was broken, she saw people who carried weapons make bush knives, she decided to keep quiet. She was able to identify the people who invaded her house because the lights in her room were on, PW2 testified further that the bandits stole her money amounting 800,000/= which she had gotten from SACCOS. She also mentioned other items which were stolen that night including a laptop, a motorcycle and a veteran bag belonging to his son (PW1).

PW3 Godleav Augustino Kombe testified that she was leaving with her mother and on the fateful night she was in her room sleeping when she heard the door being banged by a heavy object followed by two men who entered the room. She described the two men as Yona and Kababaa. She said that after they had entered the room they searched and took some money Tshs. 2,500,000/= and a mobile phone make infinix and airtel which were on bed. She could not raise an alarm since the two men started beating her using bush knife and sticks and warned her not to shout otherwise, they would kill her. Luckily, her brother (PW1) who lived very close heard voices and went there to help.

PW4 who is police officer at Himo Police station, told the trial court that on 14/6/2021 being at his duty station attended PW1 who complained of being robbed. PW1 mentioned to him the names of the culprits to be Kababaa @ Linus Marcel Lyakurwa and another person commonly known as Nderingo who invaded them armed with traditions weapons, also PW1 reported that during the said fracas he managed to injure the first accused on the left arm. He further told the trial court things that were stolen to include cash money, a motor cycle and two mobile phones belonging to her sister.

The appellants denied committing the offence or even being around at the crime scene during the commission of the crime. The 1st appellant who introduced himself as Linus Marcel Lyakurwa told the court that he was arrested on 12/6/2021 around 4:00 a.m. while on his way to the place where he parks his daladala. Whereas, the 2nd appellant one Albert Richard Mbando told the trial court that he was arrested together with another person at Kilima chini Kilema for the offence of being found with Narcotic drugs but at the police station he ended up being charged with an armed robbery case.

As hinted above, the trial court found the appellants guilty on both counts of armed robbery charged. The trial court finding was premised on the visual identification evidence given by PW1, PW2 and PW3 at the scene of crime.

Upon being aggrieved by the trial court, the appellant has moved this court basing on the following grounds;

1. That the learned trial magistrate erred in law and factual analysis when he believed that the appellants were positively identified at the scene of crime while the circumstances and conditions favouring a proper and correct identification were not conducive.
2. That the learned trial magistrate erred in law and factual analysis when he failed to note that the question of familiarity will only hold if the conditions prevailing at the scene of crime were conducive for correct and proper identification, if the conditions are not conducive for correct identification, then the question of familiarity does not arise.
3. That the learned trial magistrate erred in law and factual analysis when he failed to appreciate that unexplained failure by the prosecution to bring relevant witnesses to testify, the court ought to have drawn an inference adverse against the prosecution.
4. That the learned trial magistrate strayed into error of law when he failed to note that there was material variance between the charge and the evidence adduced.
5. That the learned trial magistrate erred in law and factual analysis when he failed to consider the defence evidence at all.
6. That the learned trial magistrate erred in law and factual analysis when he relied upon weak, inconsistency, contradictory, with material discrepancies and uncorroborated prosecution evidence.

7. That the learned trial magistrate erred in law and factual analysis when he failed to note that the charge against the appellants was not proved beyond reasonable doubt.

At the hearing of this appeal, the appellants appeared themselves without legal representation, whereas the respondent Republic had the services of Mr. Frank Wambura, learned State Attorney. The appellants submitted their arguments by way of writings while their opponent proceed orally.

Before I proceed with the merit of this appeal, I find pertinent to be guided by the rule that this being the first appellate court has a duty to re-evaluate the entire evidence in an objective manner and if necessary, arrive in its own findings of fact. (See **Future Century Ltd vs. TANESCO,** Civil Appeal No. 5 of 2009, and **Makubi Dogani vs. Ngodongo Maganga,** Civil Appeal No. 78 of 2019 (all unreported).

I have entirely considered the submission by the appellants and respondent and having scanned the record of the trial court and grounds of appeal, I have grasped the first, second and third grounds both aim to challenge the related subject, that the appellants were not identified, therefore will be dispensed together.

In essence, submitting in support of these grounds, appellants contended that according to the prosecution evidence they were neither identified nor recognised at the scene of crime by all prosecution witnesses, to buttress this position they referred the case of **Shamir John vs. Republic**, Criminal Appeal No.166 Of 2014 (Unreported) and **Waziri Amani vs. Republic** (1980) TLR 250. They further contended that PWI, PW2 and PW3 testimonies in respect to whether they knew them before was uncertain. Nonetheless, in respect to naming the appellants at earliest opportunity, they argued that the village chairman and hamlet chairman, mentioned by PW2 and PW3 respectively, whom they reported to them about the said incident were not called as witnesses, thus appellants commented that by not doing so the same diminished the credibility of their testimony.

Responding to these grounds, Mr. Wambura submitted that the appellants were identified, for instance he said that PW1 identified the culprit because he knew them before the incident and was able to mention their names since they live in one community, also PW1 chased first appellant and assaulted his left hand, wherefore the first appellant next day was found in hospital attending treatment. Mr. Wambura further said

that PW1 identified them due to presence of electricity light. Moreover, said PW2 who is the mother of the victim at page 32 that she identified the appellant because in her room she never switches off the light. To bolster his argument the learned counsel referred the case of **Sadick s/o Hamis @ Rushikana & Others vs. Republic** [2021] TZCA 625 (TANZLII) which referred the case of **Waziri Amani vs. Republic** (supra).

I am aware, it is an established principle that where conditions of identification are unfavourable, evidence must be watertight. In order to establish that the identification evidence is watertight there are several factors which need to be considered and they include the time the witness had an occasion to observe the accused; the distance at which he observed him; the conditions in which the observation occurred for instance, whether it was day or night time, whether there was good or poor lighting at the scene of crime, and whether the witness knew or had seen the accused before. (See **Kisandu Mboje vs. Republic** [2022] TZCA 425 (TANZLII), **Waziri Amani vs Republic** (supra), **Sadick s/o Hamis @ Rushikana** (supra), **Shamir John vs. Republic** (supra), **Mathew Stephen @ Lawrence vs. Republic,** Criminal Appeal No. 16 of 2007 (unreported), **Marwa Wangiti Mwita and Another vs. Republic** [2002] T.L.R. 39,

Ally Manono vs. Republic, Criminal Appeal No. 242 of 2007, **Jamila Mfaume Makandila @ Mama Warda,** Criminal Appeal No. 383 of 2016 (unreported) to mention few.

In this matter at hand there is no dispute according to the evidence of PW1, PW2 and PW3 as eye witnesses that the incident happened almost at midnight, accordingly, this time indeed is dark hours. Both said they were aided by the electricity light, despite that no any witness said on the intensity of the said light, PW2 and PW3 did not state the distance they observed the culprit and whether they faced any obstruction which might interrupt their concentration, moreover neither did they disclose that they named the accused immediately after the incident nor stated to whom they did so. It is settled in law that in cases which depends on identification or recognition evidence like the instant one, ability of the witness to describe the culprits is very important.

For instance, at page 33 of the typed proceeding, PW2 said she reported the incident to Epafra Mushi the village Chairman and PW3 at page 38 of typed proceeding said she reported to one Aloyce Mbuya who is Hamlet leader, though were not called as witnesses, they did not say in

their evidence that they mentioned names of the culprit to those leaders. I think this was necessary to make them credible since the ability of the witness to name a suspect at the earliest possible opportunity is an important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to enquiry. (See **Marwa Wangiti Mwita and Another vs. The Republic** (supra).

Nonetheless, according to the record I find other impediments or discrepancies affecting the correct identification of the accused by these witnesses. For instance, at page 33 of the typed proceeding of trial court record when PW2 was being cross examined by the first accused had this to say;

> *"The commission of the offence took almost one hour and all three culprits had bush knives, wearing black clothes, I have eye problem I cannot head everything after the commission of offence culprits went away."*

Also, PW3 at page 39 of the typed proceeding of the trial court record when cross examined by the second appellant said as follows;

"I was injured on the grateful material date; I was admitted two days in the hospital. I also rest at home and I had said the same before this court. The PF3 is with me i pray to serve the court with the same. I had identified you two because you are not stranger before my eyes. After you had invaded me the matter was reported at police"

Notwithstanding the above, according to the record, it was unfortunately the Prosecutor at the trial court did not re- examine these witnesses' despite of their testimonies left a lot to be settled in that. In my view, I think the prosecution was required to clear out all the above to remove any possibility of mistaken apprehension of what really, they mean. Since their evidence remained as above, in my considered opinion I cannot hesitate to say their evidence left doubts in respect to correct identification of the appellant, thus the same is to be taken to the benefit of the appellants.

In respect to the evidence PW1, in my view I saw he has a different testimony which has its own circumstances, I am saying this because, PW1 after heard fracas at his mother's house, he rushed to the scene using his a

torch, thereat he found his young brother being invaded by culprits he saw them and named them one being Linus Marcel (first appellant) also mentioned other two by one name each as Kababa and Nderingo who escaped. Then he remained fighting with the first appellant and for this purpose I find it pertinent to reproduce what he said in examination in chief at page 24 of the typed trial court record as follows;

> *"I had injured one Linus at the left arm so that I could reduce his powers, as such he started to run aiming at the farm, I chased him as well until we reached at the farm of the person by name of Fidelis s/o Shayo where I had* ***hold tightly as such, he started to raise alarm calling his fellows for assistance.*** *The fellow's respondent as well asking him his where about I had asking him his where about. I had as well injured his left leg around the knee using the "panga" I had identified these robbers at that night using the electronic light as such both those houses were electronical installed and there was electronical light."*

Further in cross examination by the first appellant at page 26, PW1 said also injured him on his harm.

Moreover, the reliability of PW1 was strengthened, first, when he reported the matter at police station and mentioned the name of the first appellant and also mentioned the name of the second accused and other person by the name of Nderingo, further he stated his items robbed by them. Second, circumstances upon the first appellant was arrested. To dispel any possibility of distortion, in his words, PW4 D/Cpl Ziadi testified at page... that;

> *"We then investigate to know the person responsible for such act where we found first accused at Himo Health Centre OPD for medication as such he knew he was the accused who did all these because in the due cause of fighting at the scene of crime he was injured by the victim and that he sustained injuries. The 1st Accused I am speaking about is this one before this court."*

Furthermore, at page 48 of the typed proceeding, PW4 in cross examination by the first appellant responded as hereunder;

> *"The victim had mentioned to have injured you in the left arm and on the left the arm was injured at the upper finger part, only know the arm and at the place you were injured."*

As I hinted earlier, each case must be decided on its own merits and the prevailing circumstances at the time, I have keenly considered the above evidence, in my view, it clearly express the connectivity of incidents which irresistibly lead to the fact of truth that the first appellant were among the person who robbed the said night. This is substantiated, first PW1 had a fight with first appellant at the scene of crime, PW1 chased him and held him in a farm until he sought for help to his fellows, PW1 injured the first appellant and ran while bleeding, PW1 reported the incident at police station and mentioned the first appellant, first appellant was found at the hospital seeking for treatment of the same injuries stated and reported at police station. This in view means PW1 had a time to recognise the first appellant during the said fight and moreover when he tightened him on the said farm, thus he had enough time under his custody to see him and the part of his body he injured him. Having considered all of the above I am settled the first appellant was identified at the scene of the crime.

In respect to the allegation by the appellants that PW1 said he knows the first appellant and the second appellant because they live in the same village at Kilewa Chini, but later PW1 on the same page admitted

that he never knew their names until when they were arrested, in my opinion this cannot affect the above strong evidence stated , this is because in normal circumstances, a person can recognise a person physically as human being who they reside in the same locality without knowing his/her name, thus if it happened to know his/her names later does not mean that he did not know him before.

In respect to other culprits including the second appellant, in my view, although PW1 mentioned them at the police station, he has not testified to the perquisites stated by land mark case of **Waziri Amani** (supra), I am saying so because, at first, he saw them is immediately upon entering the house and found his young brother being invaded, they ran away. I think the opportunity was not satisfactory to enable him to access their position they posed and did not say the time used to have his sight on them. By saying nothing on these important factors, I cannot hold that there was correct identification on them. In the premises, I am of considered view that the second appellant was not identified by PW1.

Now, having found as above, the next point to be considered is whether the above findings of identification above affect the counts charged against the appellants. My answer is yes indeed, I reserve the first

count and I start with the second count and third count together, in first count the victim was one Juliana August Kombe (PW2), also in count number three the victim Godleav August Kombe (PW3), similarly PW3 appeared as victim in count number four. Since these witnesses were the one threatened by the culprit, I am of settled view the said counts cannot be proved, because as observed above the said victims PW2 and PW3 did not identify the culprit.

I am mindful the threatening of the victim by using weapons is the key element for the offence of armed robbery to be committed, thus in the absence of it nothing about this offence can be proved. Therefore, the facts that they did not identify the appellant, there is no proof who threatened them by weapons and took the said items. Having considered the above, I am settled all doubts were not cleared. Consequently, in the circumstances I hold the second, third and fourth counts were not proved by the prosecution case beyond reasonable doubt at the trial court, therefore I proceed to find that the appellants are not liable for these counts and are hereby acquitted for second, third and fourth counts forthwith.

Back to the remaining count number one, as I said each case depends on its own circumstances, this count has two victims, first is PW2 whose evidence was scanty for her to identify the appellants, but testified that the properties stolen from her house belong to the PW1. I have considered the facts PW1 testified on the items stolen from PW2 house who is her mother, he did exactly mention those items to be his belongings as a veterinary officer which were kept on her mother's house. Nonetheless, the facts that he apprehended the first appellant being armed with a machete (panga) and club, but the facts he testified that the first appellant was accompanied by other two persons who happened to escape and run away, I am settled that, first appellant being accompanied with other culprits also aimed to steal the said items which belonged to PW1, therefore be that as it may, even if the first appellant was arrested with nothing, but since in that incident he was with others culprits who participated in stealing properties of PW1, and the facts stated above that PW1 apprehended the first appellant but later escaped, in my settled opinion he did participate in the commission of the said offence of armed robbery by the doctrine of the common intention.

The law in our land is settled on this doctrine. Under section 23 of the Penal Code which provides that where there is common intention each of the person who formed such intention in effecting an unlawful purpose is deemed to have committed that offence. This provision provides as under: -

> *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose each of them is deemed to have committed the offence."*

In **Daimon s/o Malekela @ Maunganga vs. Republic**, Criminal Appeal No. 205 of 2005 (unreported) the Court observed that: -

> *" we take it as settled law that in order to successfully invoke section 23, there must be cogent evidence to establish that one or more persons had shared with the accused a common intention to pursue an unlawful act and that in the execution of the said pre-*

conceived plans an offence was committed by both or some or all of them. Furthermore, to secure a conviction under this section two person or more must be jointly charged and tried."

The evidence of PW1 stated above shows the first appellant conduct had close connection with those who escaped unidentified, therefore I am settled that first appellant's actions and conducts are sufficient evidence of common intention under section 23 of the Penal Code. Thus, it is immaterial whether the appellant was arrested with nothing. (See also **Wanjiro Wamiero & Others vs. Republic** [1955] 22 EACA at page 523; **Solomon Mungai & Others vs. Republic** [1965] EA. 782; **Mathias Mhyeni and Another vs. Republic** [1980] TLR 290, **Alex Kapinga and Three Others vs. Republic,** Criminal Appeal No. 252 of 2005 and Ami Omary @ Senga and Three Others vs. Republic, Criminal Appeal No. 233 of 2013 (unreported), to mention only a few.

Coming to the fourth ground, the appellants contention was that there was variance between the charge and the evidence adduced. It true as rightly argued by the appellant, the prosecution is required under

section 234 (1) of the Criminal Procedure Act, Cap 20. to amend the charge if there such defect stated. But under the circumstances of this matter as highlighted above, for the remaining count which is first count that variance does exists, for purpose of clarity, the first count in the said charge reads as follows;

"1ST COUNT

STATEMENT OF OFFENCE:

ARMED ROBBERY; *Contrary to Section 287A of the Penal Code, [Cap. 16 R.E 2019].*

PARTICULARS OF OFFENCE:

LINUS MARSELi LYAKURWA *and* ***ALBERT RICHARD MMBANDO@ KABABAA*** *on the 13th day of June, 2021 at Kilema Chini area within Municipality of Moshi District in Kilimanjaro Region, did steal a Motor Cycle make SKY Go with Registration Number MC 882 ADG valued at Tshs 2,000,000/=, One Bag valued at Tshs 25,000/=, Vetenary Medicine Valued at Tshs 100,000/=, One Laptop make Asus valued at Tshs 700,000/= and One Laptop Bag Valued at Tshs 25,000/=, all in total valued at Tshs 2,850,000/=, the properties of one OCTAVIAN JOVIN MOSHI and immediately before or after such act did threaten JULIANA AUGUST KOMBE with bush knives and clubs in order to obtain and retain the said properties."*

According to the evidence of PW1 who is Octavian Jovin Moshi testified at the trial court about the stolen item stated above that belong to him, I also find it apposite to reproduce the kernel of PW1's testimony as reflected at page 6 of the typed proceeding of the trial court record;

> *"When I reached at home, I found my motor cycle make SKYGO was stolen with the value of TShs.2,000,000/= my veterinary bag was also stolen containing veterinary medicines, all together valued at Tshs. 125,000/= Another bag containing my laptop was stolen valued at Tshs.700,000/="*

When you sum up the above value bring a total of Tshs. 2,850,000/= which is stated above, nevertheless, those items where in the house of his mother PW2, the evidence reveals all houses were very close and in one compound (boma). PW2 testified on the circumstances of those items were stolen, though as said above her evidence was not enough to identify the culprit, but that does not mean her evidence on how those items were taken was also weaned out. At page 32 of the typed trial court proceeding PW2 testified in respect to those items and said that;

"On 13/6/2021 1 was at my home when sleeping at home accused 00:00 hours mid right my door was broken and I heard one speaking I need one's heart or money. These people then outened the house where I kept quite because these people had sharp equipment such as bush knives The culprits took ..... ***there was laptop on the table and the motor cycle and the veteran bag of my son.*** *I also heard alarm in the neighbouring house belonging to my daughter Godliver calling for assistance"*

In my view of the evidence above of PW2 proved threatening procured by armed culprits before taking the above items and those items belonged to her son PW1. Therefore, in my settled opinion I find the offence of stealing was proved.

Nonetheless, since it was proved as observed above that the same act of stealing those items was actuated by the culprits armed with local weapons, which were also stipulated in the particulars of the offence which alleged that those stated items valued at Tshs. 2,850,000/= were stolen during the said incident and threats was used before taking those items. I am settled the above evidence plus the earlier stated evidence establishes

ingredients of armed robbery. According to section 287A of the penal code armed robbery is defined as hereunder;

> ***"287A**. A person who steals anything, and, at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or immediately before or after stealing uses or threatens to use violence to any person in order to obtain or retain the stolen property, commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment."*

Certainly, from the above excerpt of the law in relation to the evidence evaluated hereinabove, I am also settled the offence of armed robbery was committed by the first appellant, and in the circumstance, I find that the prosecution evidence was compatible with the particulars in the first count, therefore this means the first appellant was duly informed about the nature and magnitude of the charge facing him with a view of enabling him to prepare his defence. Therefore I find this ground has no merit and is hereby dismissed.

In respect to the ground number five, the appellants challenges that the trial court failed to consider defence case. In their submission the appellant contended that the trial magistrate was supposed to deal with the prosecution and defence evidence and after analysing such evidence, the magistrate should have then reached the conclusion, but, in this appeal, the appellants were deprived of having their defence properly considered. In the circumstances, the conviction and sentence imposed upon them should not be allowed to stand. To support their contention they referred the case of **Hussein Idd and Another vs Republic** (1986) TLR166) And **Moses Mayanja@Msoke vs. Republic** Criminal Appeal No.59 of 2009 (Unreported).

In reply to the above, Mr. Wambura responded in the trial court judgment at page 7 and 8 the trial magistrate weighted what appellants testified in courts and found it has no merit, hence this ground raised is misplaced.

I have considered the said trial court judgment, I am constrained to agree with Mr. Wambura, it is true at the said pages the trial court judgment narrated the evidence of the appellants and then raised a

question on whether the prosecution side had proved the case beyond reasonable doubt in respect to accused persons. In considering the whole evidence, the trial magistrate at page 13 of the typed judgment had this to conclude in his analysis and I quote as hereunder;

> *"In the instant case therefore, this court is of the settled opinion that, prosecution had managed to prove the matter beyond reasonable doubt, there is no any contradiction on evidence provided by prosecution witnesses as compared to weak defence case."*

From the above excerpt, it is noteworthy that the trial court remarked on how it considered the evidence as a whole including that of defence after narrating it in the said judgment and weighted it in comparison with the other evidence, thus reached the conclusion that the prosecution has proved its case beyond reasonable doubt. In the premises, I am satisfied that the defence case was duly considered by the trial court, hence this ground fails for want of merit.

In respect to ground number six, the appellants allege that. the trial magistrate relied on weak, inconsistency, contradictory, with material

discrepancies and uncorroborated prosecution evidence. Responding to these allegations Mr. Wambura refuted and in respect to inconsistency of witnesses and uncorroborated, he said the evidence were consistent, no need of corroboration because each witness narrated corrective, and no contradictions because it was independent testimonials.

Having considered submissions by appellant, in my view what the appellants called errors above aimed on identification of the appellants at the scene of the crime. Thus, as analysed and decided above the other two witnesses PW2 and PW3 as observed did not identify the appellants that is why their respective counts were not proved, in respect to the first count, the evidence of PW1 in identifying the first appellant was clear, consistent and did not need any corroboration, that is why it enable simple arrest of the first appellant at the Hospital seeking for treatment after being injured during incident in this matter. Therefore, the evidence of PW2 and PW3 in respect to identification has nothing to do in this appeal since were discarded as above.

The last ground to my view is general ground which assembles all the above stated, on which the appellants are contending that the charge

against the appellants was not proved beyond reasonable doubt. Disputing this ground, Mr. Wambura submitted that prosecution brought very credible witnesses who were eye witness and threats were directed to them, and according to section 143 of evidence act, no number of witnesses is required only those relevant to the case, to strengthen his position the learned State Attorney referred the case of **Republic vs. Rugisha Kashinde & Sida Jibuge** 1991 TLR 175 (TZHC) which provide that the prosecution has discretion to bring the competent and credible to testify.

As I observed hereinabove, the peculiar circumstances of this case as I have endeavoured to explain above and also on the principle that each case has to be decided largely on its own facts, the analysis I stated in ground number one proves that PW1 identified the first appellant and actually that identification led to his arrest next day at Hospital, also the circumstances stated above proves that the first appellant and his fellows escaped with PW1's items committed the offence of armed robbery. Therefore, I am settled PW1 was credible witness who was also believed by the trial court. In that regard I have no reason to fault the trial Court in that holding. And this is because it is trite law that every witness is entitled

to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing. (See **Goodluck Kyando vs. Republic** (2006) TLR 367.

Also, I am aware that, in the case at hand, PW1 and PW2 are close relatives. However, this close relationship, as rightly evidenced above, did not bar them from testifying for or against the prosecution. What is relevant is their credibility. (see **Mustafa Ramadhani Kihiyo vs. Republic** [2006] TLR 323 at p. 328); **Godi Kasenegala vs. Republic,** Criminal Appeal No. 10 of 2008 and **Sprian Justine Tarimo vs. Republic,** Criminal Appeal No. 226 of 2007(both unreported).

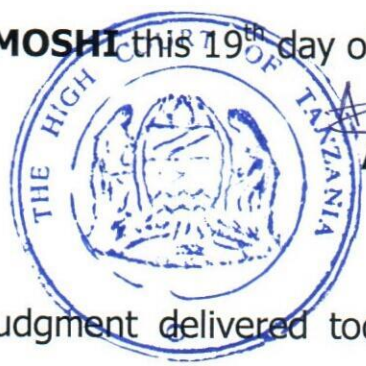
In the upshot, I find and hold that the appeal is partly allowed. In respect to the second appellant as observed above was not identified at the scene of crime hence his charge was not proved at the trial court. Consequently, I order that the conviction entered and the sentence passed against the second appellant in all counts charged by the trial Court be quashed and set aside. And I proceed to order that the second appellant one ALBERT RICHARD MBANDO@ KABABAA be immediately released from prison unless he is held for other lawful reasons.

In respect to the first appellant, I am satisfied that the first Appellant was wrongly convicted as observed above in respect to second, third and fourth counts which were not proved beyond reasonable doubts, therefore, I order that the conviction entered and the sentence passed against the first appellant in respect to counts number two, three and four charged by the trial Court be quashed and set aside.

However, the same first appellant one LINUS MARCELI LYAKURWA, I find him was properly convicted and sentenced in respect to first count. Consequently, this appeal is devoid of merit against first appellant for the first count and subsequently is hereby dismissed in such respect.

It is so ordered.

DATED at **MOSHI** this 19th day of March, 2024.



A. P. KILIMI
JUDGE

Court: - Judgment delivered today on 19th day of March, 2024 in the presence of Mr. Wambura learned State Attorney for the respondent and all appellants present.

Sgd: A. P. KILIMI
JUDGE
19/03/2024

Court: - Right of appeal duly explained.

Sgd: A. P. KILIMI
JUDGE
19/03/2024