IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO 156 OF 2016

(Appeal from decision of District Court of Temeke6)

JUMANNE ANDREW @ MGOGO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

29.06.2018

A.Z.MGEYEKWA, J

In the District Court of Temeke, Mr. Jumanne Andrew, the appellant was charged with the offence of armed robbery s/c 287 'A' of the Penal Code Cap.16 [R.E. 2002] and sentenced to the statutory thirty years term of imprisonment. The appellants are still dissatisfied, hence this appeal.

The facts of the case, in so far as they are relevant to this appeal, may briefly be stated. On 6th October, 2011 at about 01:30 hrs at Kisota Kigamboni area within Temeke Municipality in Dar es the appellant, did steal two laptops make HP valued Tshs. 2,000,000/= one mobile phone make Nokia Tshs. 850,000/= and cash money Tshs. 500,000/= a total valued of Tshs. 3,350,000/= the properties of one

Chadiel s/o Mkono and immediately before stealing did threaten PW1 with a bush knife in order to obtain the said properties.

In the prosecution case, PW1 said he was asleep at his room then he heard the watchman shouting "*Ninauliwa*" then invaders broke the door and entered inside the house and order PW1 to put on lights whereby he saw about 4 or 5 invaders and managed to recognize the accused persons. PW1 also testified that the 2nd accused was holding a gun and the 1st accused beat him and ordered him to sit down. Then they searched the house and took cash money Tshs. 200,000/= , two laptops make HP and one mobile phone make Nokia.

PW1 further testified that, after a while the policeman came and took PW1 and the watchman statements. Afterward PWI took the watchman to the hospital. In cross-examination PW1 testified that he knew the 1st accused even before the incident because he was his neighbor. He further testified that the identification parade was not conducted.

PW2 informed the court he was a guest of PW1 and on 6th October 2011 at midnight, he was asleep in his room when he heard the watchman shouting for help over sudden the door was broken and four men entered in his room, one of them was holding a small pistol. They demanded his phones and money; PW2 surrendered the

phones and money to the invaders. He managed to identify one accused who did not wear a mask.

PW3, a police officer, informed the trial court that on 2nd December 2011 he was at Kigamboni, the complainant came to report the incident and wanted the accused persons to be arrested. PW1 told him he managed to identify one accused. PW3 and PW1 went to ferry area where they saw the accused person and arrested him. There after they went to the accused house for search but nothing was found.

PW4, inspector James Kabombo who investigated the case testified that on 6th October 2011 was informed of the armed robbery incident, which happened at Kisota. PW4 went to the scene and inspected the place and found the main and the bedroom doors broken. PW1 reported that five culprits committed the crime and he managed to identify one of them named Jumanne Andrew.

PW5 affirmed and testified that he was a watchman at PW1 premises. On 6th October 2011 while on duty five people invaded the house and struck him with panga and cut his right finger then he run away for help later PW1 took him to the hospital. He said he managed to recognize the 2nd accused person, the one who held his neck and struck him with panga.

In the defence case, DW1 testified that on 11th October 2011 around 5:00 pm after work he went to his girlfriend who resides at Kigamboni but he did not find her. DW1 further testified that he was arrested at one bar where he was alone and then he saw his girlfriend with another man. The man started to insult DW1 and they exchanged words, later on he was arrested by the said man and was taken to the police station, he was locked up without making any statement. DW1 distanced himself from the commission of the offence.

Before this Court the appellant filed a 6 grounds for Petition of Appeal which can be crystallized as follows:-

1. That the learned magistrate did gravel erred both in law and fact by sustain conviction against the appellant merely relying in un-credible and unreliable visual identification regarding the elementary factors of identity were fall far short from the set down standard for want of vindicate the main source of light, its intensity as well as where it was situated/kept, including what was the mental state of the victim when identifying the bandit.
2. That, the honorouble trial magistrate had erred both in law and fact by grounding the conviction of the appellant on the testimonies of PW1, where as there was no first information report ever given to corroborate the PW1 and PW4 whether PW1 was made first information report by

mention the bandit immediately including his proper detail description of the appellant, instead the trial magistrate relied on mere story of PW1 and PW4 which were insufficient to established standardly the material fact.

3. That, the trial magistrate did gravely err on points of law and facts by sustain conviction against appellant in a case whose proved were below the required standard and further the lower court did fail the prosecution adduced evidence were purely concocted aimed to easily implicate the appellant to the offence charged, regarding there was no any local leader from that area such as T.C.L. who came to testify whether he was given any report that his residential [appellant] has committed the felony and identified.
4. That, the learned trial magistrate had erred both in law and fact by convicting the appellant merely relying on [Exh.P] cautioned statement which was admitted under irregular procedure of law as was not read over in trial court to ascertain the contents therein that the trial court was not fair and the appellant was prejudiced.
5. That, the honorable magistrate had erred on points of law when deprived the appellant the basic right to call the defense witness as prayed hence the trial court was not fair and just as per mandatory provisions of law in criminal procedure Act, Cap. 20 [R.E.2002].

6. That, the honorable trial magistrate misdirected and non-directed in points of law by convicting the appellant in a case whose judgment was frivolous to the irregularity procedure adopted by on entering conviction and sentence against appellant as has contravened by requirement of law in issue.

At the hearing of this appeal the appellant appeared in person and defended for himself while Miss. Immelda Mushi, learned State Attorney represented the respondent the Republic.

In her submission, the learned State Attorney supported the appeal and stated that the appellant conviction was based on visual identification. Visual identification was not well addressed by the prosecution case. PW1 in his testimony said that he was attacked by four or five people and identified two of them, he could identify them because of the existing light but he did not elaborate the intensity of the light, if it was low or high and he did not state the physical prescription of the appellant that enabled him to identify him. Further Ms. Mushi stated that PW1 did not mention the distance between him and the appellant. She referred to the case of **Waziri Amani v R** of 1980 TLR 250 where the court held that the witness is supposed to mention the intensity of light and physical appearance of the accused. With the shortfalls on visual identification but the court proceeded to convict the accused without any strong prove.

She further contested that the lower court had set free the 2nd accused because he was not well identified while both accused committed the same offence at the same place this means the appellant was wrongly convicted therefore the conviction was unjust. She added that the 1st appellant was arrested s on 1st October 2011 while witnesses testified that the offence took place on 6th October 2011 this means the accused were arrested before the act.

With regard to the caution statement, the learned State Attorney stated that the court admitted the caution statement and marked exhibit P1 but it was not read before the court. She referred the case of **Abdallah and others v R** Crim. Appeal No. 384 of 2008 (unreported). For the mentioned reasons the lower court has failed to prove the case beyond reasonable doubt. Thus the learned State Attorney prayed the court to quash the conviction and sentence of appellant.

I have given due consideration to the argument of both sides. Now I proceed to determine the appeal.

Starting with the first ground of the appeal, I have found that the visual identification was not well established by the prosecution case when PW1 described the scene of the crime, he testified that he switched on the lights and saw about four to five people and managed to recognized them, one was holding a gun. PW1 testified

that he was able to identify the appellants because there was light, but he did not specify whether the light was bright enough to enable her identify the appellants. PW1 also did not elaborate on the nature of the light in question. He did not mentioned whether the light came from a wick lamp, a candle, a lamp, a fluorescent tubelight or a candle a reference is made to the case of **Waziri Amani v R** (1980) TLR No. 250.

Failure for the appellant to describe the nature of the light means there was a possibility of mistaken the accused even though the PW1testified that he has seen the 1st appellant before the crime and he identified him as his neighbor. In the case of **Riziki Method Myumbo v R 2007** the first appellant judge said that –

> "Visual identification is a class of evidence that is vulnerable to mistake particular in the conditions of darkness. Courts must as a rule of prudence exercise caution in relying on such evidence. It may result in a substantial miscarriage of justice."

In the same case **Riziki Method** (supra) the court further stated that:-

> *"That visual identification evidence is one of the weakest character and most unreliable. It must be approached with great judicial circumspection, although it is usual to base a conviction on the basis of evidence of the single identifying witness."*

exhibit P1 thus the determination of this appeal will base on the remained evidence.

With regard to ground five the appellant stated that the trial court deprived his basic right to call the defense witnesses. On 5th February 2014 during cross-examination the appellant requested the court to call Rachel her girlfriend to testify in court. The lower court heard the appellant request but the court did not grant his request. It is a requirement under section 231(4) Criminal Procedure Act Cap. 22 [R.E 2002] for the defence case to call witness. The section 231 (4) states that:-

> " *If the accused person states that he has witnesses to call but they are not present in court and the court is satisfied that the absence of such witness is not due to any fault or neglect of the accused person and that there is likelihood that they could, if present give material evidence on behalf of the accused person, the court may adjourn the trial and issue process or take steps to compel attendance of such witness."*

The burden of proof is on the prosecution side they are obliged to present at least one witness to make their case as they did for the 2nd accused (DW2) he was allowed to call a witness but that was not the case with DW1. The court was in position to summon the defense witness as requested by DW1since the appellant had no witness who was included in the prosecution case.