IN THE COURT OF COURT OF TANZANIA

AT DAR ES SALAAM

(DAR ES SALAAM REGISTRY)

CRIMINAL APPEAL NO 232 OF 2016

(ORIGINATING FROM KINONDONI DISTRICT COURT CRMINAL CASE NO 267 OF 2015, BY HON KUPPA, RESIDENT MAGISTRATE)

1. PRINCE JUMA MANENO @ JORDAN.....1st APPELLANT

2. INNOCENT RUSHAGARA JINEUS.....2nd APPELLANT

3.FRANCIS AZARIA @CHEKA.....3rd APPELLANT

4. JACKSON FORTUNATUS MUSHI.....4th APPELLANT

5. JOSEPH EMMAMUEL SHAO.....5th APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT.

Date of last order:12/06/2018.

Date of the judgment:22/06/2018.

JUDGMENT.

MAGOIGA, J.

The appellants were jointly charged in the District Court of Kinondoni with one count of armed robbery contrary to section 287A of the Penal Code, Cap 16 (R.E. 2002). The District Court found them guilty as charged, convicted and sentenced them to 30 years' imprisonment. Dissatisfied, the appellant preferred this appeal to contest for their innocence, hence this appeal.

The brief facts of this case are that, the appellants on 25th day of May 2015 at Tageta Kibaoni area, within Kinondoni District in Dar es salaam region, did steal cash money tsh 7,000,000/=, different types of mobile vouchers of Airtel, Tigo, and Vodacom valued at tshs. 3,000,000/= all valued at tshs. 10,000,000/= the property of one BUHOHELA IDDY MARWA and

immediately before such stealing did shoot the said BUHOHELA IDDY MARWA with a bullet in order to obtain the said stolen properties. The incident was immediately reported to police. Following thorough investigations, the appellants were arrested on different dates and interrogated and admitted to have committed the alleged offence of armed robbery.

In this appeal the appellants who were unrepresented have raised several grounds in their amended memorandum of appeal. The raised grounds of appeal evolve around the visual identification of the appellants, un-procedural and flawed identification parade, and the admission of their cautioned statements and failure to read them in court. In their totality are challenging the evidence tendered did not prove the case for Republic to the standard required in criminal cases.

The respondent, Republic was represented by Ms. Selina Kapange, learned State Attorney. The learned State Attorney submitted that she supports the appeal based on the grounds raised by the appellants. Starting with the cautioned statements of the appellants, exhibit P1-5, she submitted that the same were admitted but were not read in court. AS to exhibit P5, she submitted, was objected to its admission but was not cleared of its voluntariness. She cited the case of **SELEMAN ABDALLAH V. REPUBLIC, CRIMINAL APPEAL NO 348 OF 2008, (unreported) Dar es salaam, CAT,** which explain in details how an inquiry and trial within a trial is supposed to be conducted. She urged the court to expunge them from the court record because the procedures were not followed and were fatal irregularities on the part of the Republic case. She submitted further that if they are expunged, what remain is the evidence of visual identification which is doubtful because there was no prior description of the appellants but rather dock identification.

Arguing on the second limb of the reason for supporting the appeal, the learned State Attorney, submitted that PW1 testified that he identified the appellants but did not give the description one after the other before going to identify them in the identification parade. Further, she submitted it is a requirement of the law that visual identification must be watertight. She cited the case of **SCAPU JOHN and LIPI SHANA V. REPUBLIC, CRIMINAL**

APPEAL NO 197 OF 2008 (unreported) Dar es salaam, (CAT) in which it was held that **"watertight identification, in our considered view, entails the exclusion of all possibilities of mistaken identity."**

The Court of Appeal in the cited case further observed that the following should be taken into consideration, namely: -

- How long the witness had the accused under observation
- What was the estimated distance between the two
- If the offence took place at night which kind of light did exist and what was its intensity.
- Whether the accused was known to the witness before the incidence.
- Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like which may have interrupted the latter's concentration.

The learned State Attorney cited the case of **RAYMOND FRANCIS V. REPUBLIC [1994] TLR 100** to underscore this point. She further submitted that in the instant appeal PW1 did not explain as demonstrated in the case law above, hence making the case for prosecution weak and as such conviction and sentence cannot stand on such weak evidence. She concluded that it is on those two reasons she supports the appeal and agrees with the appellants.

In reply, the appellants had nothing to add but each one of them subscribed to the submission made by the learned State Attorney.

I have gone through the entire record of the trial court. I entirely agree with the submission by the learned State Attorney that this appeal hinges on the visual identification, identification parade and the admission and failure to read of the cautioned statements of the appellants. For purposes of disposing this appeal I will start with the cautioned statements of the appellants. The record is clear that when PW2 (D2982 D/C Athuman) testified at pages 17-18 of the typed proceedings, he introduced the production of the cautioned statement of the third accused person. When an objection was taken, the Public Prosecutor prayed for inquiry to be conducted and the court **ordered that let inquiry be set.** My effort to go through the trial record ended up in vain as no inquiry was at all conducted but it was the very cautioned

statement, among other, was the basis of conviction of the appellant. This was wrong and un-procedural on the trial court to convict on a document that it was not cleared of its voluntariness and admission. In the event same is expunged from the court record for not following the established principles of admissibility of cautioned statement. Not only the admission of the cautioned statement but even the testimony of PW2 was not cross examined and as such his evidence is equally expunged from the court as it never passed the mandatory procedures as provided under section 147 (1) The Tanzania Evidence Act, Cap 6 (R.E.2002). In fact, it vitiated the fairness of the trial to a great extent.

The problem with the trial court's proceedings did not end there, but again PW6 (WP 3 D/C GLORY) testified and introduced the production of 4th appellant's cautioned statement. The objection taken by 4th accused person was purely suggesting a conduct of inquiry, but same was not. Following such a serious omission renders the same be expunged from the court record as I hereby do.

Another yet irregularity noted is that even with the other admitted cautioned statements of the appellants same were not read over to court after being cleared of its admission. In the case of MBAGGA JULIUS V. REUBLIC, CRIMINAL APPEAL NO 131 OF 2015 (unreported) Mwanza, (CAT) quoting the case of LACK KILINAGANI V. REPUBLIC, CRIMINAL NO 405 OF 2015 (unreported) Dsm, the Court of Appeal **held that failure to read the contents of cautioned statement in court after its admission in evidence is fatal.** On the same vein and guided by the above cases I hereby expunge the cautioned statements of the appellants from the court record for reasons demonstrated above.

Now that the cautioned statements of the accused being expunged from the court record, the remaining evidence is that of visual identification of the appellants at the scene of the crime. This has prompted this court to revisit the testimony of PW1 who categorically testified that before the robbery incidence he never knew the appellants-see page 8 of the typed proceedings. He went to say he identified them through the help of electricity light. The intensity of the light is not mentioned in his testimony nor description of the appellants. These are one of the very important factors to consider when the

only evidence is that of visual identification. In the case of **SCAPU JOHN and LIPI SHANA V. REPUBLIC, CRIMINAL APPEAL NO 197 OF 2008 (supra)** the above named factors it was held are imperative to have a conclusion that the visual identification was watertight. The absence of which the whole visual identification becomes doubtful. Throughout the testimony of PW1 nowhere he even attempted to describe his assailants. This not only became doubtful but it even destroys the conducted identification parade which was supposed to be preceded by proper description of the assailants and enable the said identification to prepare the persons of such description. The only description offered was after identification parade. He is recorded to say the suspects look alike, some light, alarm, they were almost look alike. This piece of testimony shows PW1 before identification parade was unable to describe anyone. Hence, not acceptable to any fair trial. It is on the deficiency that has been noted above and guidance by the holding in the case of SCAPU JOHN and another V R (supra) this court without much ado finds that there was no correct identification of the appellants at the scene of crime. In the absence of such evidence, no conviction can be left to stand.

Worse still when one read the testimony of PW1, it shows that his assailants attacked him while he was walking carrying a bad with money and some stuffs. But the alleged cautioned statements are suggesting the PW1 was inside the shop of mpesa. This is yet another serious contradiction on the part of prosecution case which water down the versions of the story. It is on that I find myself having unhesitatingly and considered opinion that the visual identification was not favorable, unreliable and weak to sustain conviction.

Having discarded the visual identification evidence as I hereby declare to be weak on reasons shown above, equally this affect the identification parade conducted, I remain with nothing to spare the conviction of the appellants.

In the upshot I allow this appeal to all appellants. I quash their proceedings and set aside the judgment, conviction and sentence of thirty years' custodial imprisonment.

I further order their immediate release from prison unless otherwise held for another lawful cause.

It is so ordered.

Dated at Dar es salaam this 22nd day of June 2018.

S.M. MAGOIGA.

JUDGE.

22/06/2018.