IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MJASIRI, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 142 OF 2014

1. **HAMZA THABITI**
2. **CHARLES MWAGUU @ CHRISTOPHER**
3. **SHABANI SAID**
4. **ABEL JEREMIA** ..... **APPELLANTS**
5. **ABDALLAH SHABANI @ DULLAH**
6. **PATRICK PHILIPO @ CHOMEKA**
7. **HABIBU VICTOR @ GOVACHOVU**

VERSUS

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

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mwakipesile, J.)

dated the 12th day of June, 2013
in
Criminal Appeal No. 55 of 2012
.....

JUDGEMENT OF THE COURT

11th November & 30th December, 2015

MJASIRI, J.A.:

In the District Court of Temeke District, the appellants, Hamza Thabiti; Charles Mwaguu @ Christopher; Shabani Said; Abel Jeremia; Abdallah

Shabani @ Dullah; Patrick Philipo @ Chomeka and Habibu Victor @ Govachovu were charged and convicted of the offences of armed robbery contrary to section 287A and gang rape contrary to section 131A of the Penal Code, Cap 16 R.E. 2002 (the Penal Code). Aggrieved by the conviction and sentence they filed an appeal in the High Court which was dismissed hence this second appeal.

The background to this case is simple. It is the prosecution case that on September 9, 2010 at 02:30 hours at Yombo Kilakala, the appellants jointly stole properties of Aisha Said, Mkwira Hassan, Chrispin Shayo, Iddi Ismail, Salum Mkandemba and used a machine gun to threaten the various victims in order to obtain the said properties. The 1st, 4th and 7th appellants were also alleged to have raped three victims, namely, Pili Saidi, Husna Shaibu and Rukia Ismail. The prosecution relied on the evidence of PW1, PW2, PW4 and PW5 who claimed to have identified the appellants. The appellants filed a joint memorandum of appeal and they presented a lengthy fifteen (15) point grounds of appeal.

At the hearing of the appeal the appellants had no benefit of legal counsel and had to fend for themselves. The respondent Republic had the services of Mr. Patrick Mwita learned Senior State Attorney.

Before the commencement of hearing, Mr. Mwita made a request to the Court to be allowed to raise a point of law. He submitted that the appeal before the Court is incompetent as only one appellant, Hamza Thabiti, the first appellant has filed a notice of appeal, the other appellants have not done so. According to him the notice filed by the first appellant, makes reference to six (6) others. He submitted that it is a requirement under the law that each appellant has to be specifically mentioned in the notice of appeal. He submitted further that it is the notice of appeal which institutes the appeal.

We on our part entirely agree with the submissions made by the learned Senior State Attorney. As it is the notice of appeal which institutes an appeal, there was no appeal before the Court in relation to the 2nd, 3rd, 4th, 5th, 6th and 7th appellants. Rule 68(1) of the Tanzania Court of Appeal Rules provides as under:

> *"68 (1) Any person who desires to appeal to the Court shall give notice in writing which shall be lodged in triplicate with the Registrar of the High Court at the place where the decision against which it is desired to appeal was given, within thirty days*

of the date of that decision, ***and the notice of appeal shall institute the appeal."***

[Emphasis provided.]

Given the circumstances, the Court proceeded with the appeal filed by the 1st appellant.

Mr. Mwita submitted that the main and crucial ground of appeal is whether or not the 1st appellant was properly identified. Mr. Mwita contended that there is no concrete evidence to establish that the first appellant was properly identified. He submitted further that seven (7) witnesses testified for the prosecution. He stated that the identification of the appellants by PW1 and PW3 was doubtful. PW6 did not identify anybody. The evidence of PW4 and PW5, (who were amongst the victims whose premises were broken into) is doubtful. Whereas PW5 testified that only three (3) people entered the room, PW4 stated that five (5) people entered the room even though both of them were in the same room. He submitted that the identification of the 1st appellant was not water tight. He also stated that the other six appellants were also not properly identified. The surrounding circumstances

were not favourable to correct identification. The standards required under the law were not met, he concluded.

Mr. Mwita also submitted that the trial court failed to enter a conviction, therefore the judgment of the trial court was not a valid one. He submitted that a proper course of action would be for the Court to return the record to the trial court in order to write a proper judgment by entering a conviction. He however left the decision to the Court given the nature of the evidence on record.

We on our part, after taking into consideration the circumstances of this case, would like to make the following observations. We are inclined to agree with the learned Senior State Attorney that the main issue for consideration and determination is whether or not the 1st appellant was properly identified. We need to establish whether the conditions were fovourable for adequate and correct identification. See **Waziri Amani v Republic** (1980) TLR 250 and **Saidi Chally Scania v Republic** Criminal Appeal No. 69 of 2005 CAT (unreported).

After a careful evaluation of the entire evidence on record, and reading of the judgment of the High Court and consideration of the grounds of appeal

and Mr. Mwita's submissions, we entirely agree with the learned Senior State Attorney that the appellants were not sufficiently identified. The incident occurred at night. We are fully aware that the evidence of visual identification is one of the weakest kind and should only be relied upon when all possibilities of mistaken identity are eliminated and the Court is satisfied that the evidence before it is absolutely water tight. See for instance the cases of **Anthony Kigodi v Republic**, Criminal Appeal No. 94 of 2005 CAT (unreported); **Raymond Francis v Republic** (1994) TLR 100, **Shamir John v Republic,** Criminal Appeal No. 202 of 2004 CAT (unreported) and **R v Turnbull** (1976) All ER 549. In this case the condition of identification were not favourable.

In view of the nature of the evidence on record and the fact that the identification of the first appellant as well as the other six (6) appellants was not watertight, we are of the considered view that it would be a futile exercise to return the record to the trial court in order to enter a conviction. There being no evidence on record to sustain a conviction against the first appellant, we are compelled to allow the appeal in favour of the first appellant, Hamza Thabiti. In the result, the first appellant should be set free forthwith unless he is otherwise being lawfully held.

In the same vein, there being no evidence on record against the remaining six appellants, as submitted by the learned Senior State Attorney, we are constrained to use the powers vested in us under section 4(2) the Appellate Jurisdiction Act 1979, to nullify the proceedings of the two courts below and set aside the sentence of 30 years imprisonment in respect of all the six appellants and the sentences of life imprisonment in the respect of the 4th and 7th appellants. The 2nd, 3rd, 4th, 5th, 6th and 7th appellants should be released from custody with immediate effect unless otherwise lawfully held. Order accordingly.

DATED at DAR ES SALAAM this 22nd day of December, 2015.

S. MJASIRI
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

K.M. MUSSA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL