**IN THE COURT OF APPEAL OF TANZANIA**
**AT KIGOMA**

**(CORAM: MUGASHA, J.A., SEHEL, J.A. And MWAMPASHI, J.A.)**

**CRIMINAL APPEAL NO. 41 OF 2022**

**HASSAN HUSSEIN..... APPELLANT**
**VERSUS**
**THE REPUBLIC..... RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania at Kigoma)**

**(Mlacha, J.)**

**dated the 13th day of December, 2021**

**in**

**(DC) Criminal Appeal No. 39 of 2021**

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## JUDGMENT OF THE COURT

30th May & 2nd June, 2023

**MWAMPASHI, J.A.:**

This appeal arises from the decision of the District Court of Kibondo at Kibondo (the trial court). The appeal seeks to challenge the decision of the High Court of Tanzania at Kigoma (Mlacha, J) that confirmed the conviction and sentence passed by the trial court against the appellant. Before the trial court, the appellant Hassan Hussein, together with one Bukuru Wilbard @ Said (hereinafter to be referred to as the co- accused) who is not subject to this appeal, were charged with and convicted of armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E. 2019; now R.E. 2022] (the Penal Code). Whereas the co-accused was acquitted by the trial court, the appellant was convicted and sentenced to

serve a period of 30 years' imprisonment. The appellant's first appeal to the High Court (Mlacha, J) was unsuccessful, hence the instant appeal.

The prosecution case before the trial court was to the effect that on 19.03.2021 during night time at Kibondo town within the District of Kibondo in Kigoma Region, the appellant together with the co-accused, stole a mobile phone, make Tecno, valued at Tshs. 45,000/= the property of one Isaka Samuel and further that immediately before and after such stealing, they threatened the said Isaka Samuel with a knife in order to obtain and retain the said property.

The facts of the case leading to the appellant's arraignment and conviction are not complicated. On 19.03.2021 at about 23.00 hours, Isaka Samuel (PW1) and his friend Mussa Barnaba (PW2), were on their way coming from visiting PW1's sister when they were confronted by the appellant and the co-accused at Maduka Saba area. The appellant who was wielding a knife held PW1 by the neck tightly and threatened to stab him before he reached into the pockets of PW1's pair of trousers and picked his mobile phone, make Tecno. PW1 and PW2 raised an alarm which was responded to by a number of watchmen who were guarding the neighbouring shops. The appellant and the co-accused ran away but unfortunate to the co-accused, he was arrested by the watchmen who put him under arrest before he was later collected by the police officers who

were on patrol. PW1 and PW2 claimed to have identified and recognized the appellant and the co-accused because they knew them well before the incident. They also insisted that the scene of crime was illuminated by electricity light from the neighbouring shops.

Among the watchmen who responded to the alarm and rushed to the scene of crime were Adam Magazi (PW3) and Benda Mrefu (PW4). According to PW3, upon getting close to the scene of crime, he managed to identify the appellant who was wielding the knife and who was not a stranger to him as he used to see him around. On his part, PW4 testified that when they were running towards the scene of crime in response to the alarm, they met the co-accused being chased by PW1. The said co-accused was then put under arrest until when he was picked up by the police officers who were on patrol.

According to F. 5585, D/C Alex (PW5), on 19.03.2021 he was the head of the night patrol around Kibondo town. While on the patrol heading to the fish market, they found a group of civilians who had arrested the co-accused on accusations of robbing PW1 of his mobile phone. They picked the co-accused and took him together with PW1 to Kibondo Police Station for further legal steps. On 08.04.2021, he was informed that the appellant who was also being accused of participating in robbing PW1 with the co-accused, had been arrested and was at the police station. He

was directed to interrogate him and record his statement. In his cautioned statement, the appellant admitted to have committed the robbery in question. The cautioned statement was tendered and admitted in evidence as Exhibit PE1.

In his sworn defence, the appellant distanced himself from the offence claiming that on 19.03.2021 he was at Kigoma town where he stayed till on 28.03.2021 when he returned to Kibondo. He further stated that he was arrested on 03.04.2021 while drunk and stayed in remand for four days before he was interrogated and his cautioned statement recorded. The appellant complained that the cautioned statement tendered before the trial court is not the statement made by him. He also denied to have known the co-accused before meeting him in court.

The trial court refused the appellant's defence of alibi for being an afterthought. Basing on the evidence given by PW1, PW2 and PW3, the trial court found that the prosecution proved beyond reasonable doubt that the appellant committed the robbery in question. The trial court further found that the said three witnesses positively identified the appellant at the scene of crime. The cautioned statement (Exhibit PE1) was discarded for being recorded beyond the prescribed period. As we have alluded to earlier, the appellant's first appeal was dismissed by the High Court which joined hands with the trial court that the appellant was

properly identified at the scene of crime by PW1, PW2 and PW3. In addition, the High Court held that the cautioned statement had no evidential value and was liable for expunction because it was admitted in evidence without an inquiry having been conducted first. Still aggrieved, the appellant has preferred the instant appeal raising five grounds of complaint that can be paraphrased as follows:

1. *That, the High Court erred in law and facts in failing to take into account the fact that the case against the appellant was fabricated.*
2. *That, the cautioned statement was in respect of the charge of house breaking and stealing and not armed robbery.*
3. *That, the cautioned statement was made beyond the prescribed period of four hours.*
4. *That, the prosecution evidence was weak, insufficient and contradictory, such that it could not have sustained the conviction.*
5. *That, the cautioned statement was improperly tendered and admitted in evidence.*

When the appeal was called on for hearing before us, the appellant appeared in person and defended for himself. He adopted his grounds of appeal and preferred to let Mr. Shaban Juma Masanja, learned Senior

State Attorney, who appeared for the respondent Republic, to respond to the grounds of appeal first, while reserving his right to rejoin should the need to do so arise.

Upon taking the floor, Mr. Masanja began by pointing out that, out of five grounds of appeal raised, it is only the 4th ground of appeal which is worth for determination by the Court. He argued that while the 1st ground of appeal is new and it raises issue of facts which was not raised and decided by the High Court, the 2nd, 3rd and 5th grounds of appeal are complaints seeking to challenge the cautioned statement (Exhibit PE1) which did not form the basis of the conviction and which was expunged by the High Court. He therefore urged us to refrain from entertaining the 1st ground of appeal and to disregard the 2nd, 3rd and 5th grounds of appeal.

On our part, having examined the record of appeal, particularly the grounds of appeal which were raised before the High Court, we agree with Mr. Masanja that the 1st ground of appeal is not only a new ground which was never raised and decided by the High Court but it is also on facts and not addressing any point of law. That being the case, we find ourselves without the requisite jurisdiction to entertain the said ground of appeal. Accordingly, we refrain from considering it. See- **Halid Maulid v.**

**Republic**, Criminal Appeal No. 94 of 2021 and **Galus Kitaya v. Republic**, Criminal Appeal No. 196 of 2015 (both unreported).

As regards to the 2nd, 3rd and 5th grounds of appeal which seek to challenge the cautioned statement, we again agree with Mr. Masanja that the same are misconceived. According to the record of appeal at pages 52 and 71, the cautioned statement was disregarded by the trial court and was later, on appeal, expunged from the record by the High Court. It is also clear from the record that the appellant's conviction was not found on the said cautioned statement. For the above reasons, the 2nd, 3rd and 5th grounds of appeal are hereby discarded.

Turning to the 4th ground of appeal and upon being probed by the Court, Mr. Masanja who had initially intimated that he was supporting the conviction, changed his stand. He submitted that having re-examined the record of appeal particularly the evidence given by PW1, PW2 and PW3, he was no longer opposing the appeal. He contended that the appellant was not positively identified at the scene of crime. He thus urged us to allow the appeal because the case against the appellant was not proved to the hilt.

The appeal having not been opposed, the appellant had nothing to argue in rejoinder rather than praying for the appeal to be allowed.

The issue for our determination is generally whether the case against the appellant was proved beyond reasonable doubt. However, since the appellant's conviction by the trial court which was upheld by the High Court, was solely based on the finding that the appellant was positively identified at the scene of crime by PW1, PW2 and PW3, the narrow and particular issue before us is whether the identification in question was watertight.

First and foremost, we wish to restate the general rule that where there is a concurrent finding of facts by two lower courts, a second appellate court can rarely interfere with such findings unless there are serious misdirection, non-direction or misapprehension of the evidence leading to miscarriage of justice. See- **D.R. Pandya v. R.** [1957] E.A. 336, **Director of Public Prosecution v. Jaffari Mfaume Kawawa** [1981] TLR 149, **Edwin Isdori Elias v. Serikali ya Mapinduzi Zanzibar** [2004] T.R.L. 297, **Musa Mwaikunda v Republic** [2006] T.L.R. 387 and **Rashid Ramadhani Hamis Mwenda v. Republic,** Criminal Appeal No. 116 of 2008 (unreported).

Secondly, and of equal importance and relevant to the instant case, it is a settled law on visual identification evidence that, such evidence is of the weakest kind which in order to found conviction it must be absolutely watertight. See- **Waziri Amani v Republic** [1980] T.R.L 250.

It is also settled that before the court can act on visual identification evidence, it must satisfy itself that the conditions for a proper identification were favourable. The evidence must be watertight and all possibilities of mistaken identity must be eliminated. The principle applies even in cases of visual identification by recognition as it is in the instant case where PW1, PW2 and PW3 claimed that the appellant was not a stranger to them. See- **Shamir s/o John v Republic**, Criminal Appeal No. 166 of 2004, **Issa s/ Ngara @ Shuka v. Republic**, Criminal Appeal No. 37 of 2005, **Magwisha Mzee Shija Paulo v Republic**, Criminal Appeal No. 467 of 2007 and **Philimon Jumanne Agala @ J4 v. Republic,** Criminal Appeal No. 187 of 2015 (all unreported). In **Shamir s/o John** (supra) the Court observed, among other things, that:

> *"Finally, recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows,* ***the court should always be aware that mistakes in recognition of close relatives and friends are sometimes made."***
> (Emphasis added).

We should also restate the settled position that the ability of a witness to name a suspect at the earliest possible opportunity is an all-important assurance of his reliability in the same way as unexplained delay

or complete failure to do so should put a prudent court to inquiry. See **Marwa Wangiti Mwita v. Republic** [2002] T.L.R. 39, **Jaribu Abdallah v. Republic** [2003] T.L.R. 271 and **Minani Evarist v Republic,** Criminal Appeal No. 124 of 2007. In **Jaribu Abdallah** (supra) the Court stated that:

> *"In matters of identification, it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of the witness. The conditions for identifications for identification might appear ideal but that is not guarantee against untruthful evidence.* ***The ability of the witness to name the offender at the earliest possible opportunity is in our view reassuring though not a decisive factor****".*
>
> [Emphasis added]

Guided by the above principles, we have revisited the relevant evidence given by PW1, PW2 and PW3 who claimed to have recognized the appellant at the scene of crime because they used to know him well and also as the scene of crime was illuminated by electricity light from the neighbouring shops. Our observation is that though the said three witnesses claimed to have recognized the appellant, they completely failed to name him to any person. The witnesses never named the

appellant to PW5, the police officer who collected the co-accused from the civilians who had arrested him while attempting to flee from the scene of crime.

There is also no evidence that PW1 named the appellant to the police when his statement was being recorded at the police station. Further, the delay in arresting the appellant leaves a lot to be desired. If the appellant was well known to PW1, PW2 and PW3 and if he was recognized at the scene of crime, how comes it took almost a month to arrest him.

Worse still, there is no evidence from the prosecution on how and for what reason the appellant was arrested. According to PW5, he was just informed that the appellant had been arrested and that he was in the police custody. While there is no evidence from the prosecution which is to the effect that the appellant was arrested for the offence of the armed robbery in question, the evidence by the appellant is that he was arrested for drunkenness and that he was later charged with the offence of armed robbery together with the co-accused who he did not know before.

For the above reasons, we find that the identification evidence from PW1, PW2 and PW3 was not watertight or reliable. We also find that the two lower courts misapprehended the said evidence. It was doubtful that the appellant was positively identified at the scene of crime. As we have pointed out above, the evidence was not watertight to warrant the

conviction and the two lower courts erred in basing the conviction on such evidence.

Consequently, we find that the appellant was wrongly convicted of the armed robbery in question as the case against him was not proved to the hilt. We therefore allow the appeal, quash the conviction and set aside the sentence. The appellant be released from the prison forthwith unless he is otherwise lawfully held.

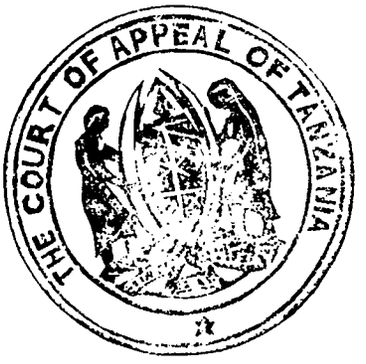
**DATED** at **DAR ES SALAAM** this 1st day of June, 2023.

S. E. A. MUGASHA
**JUSTICE OF APPEAL**

B. M. A. SEHEL
**JUSTICE OF APPEAL**

A. M. MWAMPASHI
**JUSTICE OF APPEAL**

The judgment delivered this 2nd day of June, 2023 in the presence of the appellant in person and Ms. Sabina Silayo, learned Senior State Attorney assisted by Ms. Edina Makala, learned State Attorney for the respondent Republic is hereby certified as a true copy of the original.




D. R. LYIMO
**DEPUTY REGISTRAR**
**COURT OF APPEAL**