IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM
(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 107 OF 2015
(From the Konondoni District Court Criminal Case No. 786 of 2010)

ATUPELE S/O GODFREY ..... APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

Date of Last Order: 03/12/2015
Date of Judgment: 11.12.2015

JUDGMENT

FELESHI, J.:

In the District Court of Kinondoni at Kinondoni, the appellant and EDES FAUSTINE @ OISSO were charged as 1st and 2nd accused respectively with two counts, that is, **one,** Conspiracy contrary to section 384 of the Penal Code, [CAP. 16 R.E, 2002] and **two,** Armed Robbery contrary to section 287A of the Penal Code (supra).

It was alleged for the first count that, on unknown date and place in May, 2010 within Kinondoni District, the accused persons conspired to commit armed robbery at Mbezi Beach area. Besides, it was asserted for the second count that, on 22nd day of May, 2010 during night hours at Mbezi Beach area within Kinondoni District, Dar es Salaam region, the accused persons stole cash money amounting to Tshs. 500,000/=, one silver chain valued at Tshs. 780,000/=, one gold chain valued at Tshs. 500,000/=, one pair of irens valued at Tshs. 500,000/=, one mobile phone

make Micromax Q3 valued at Tshs. 1,000,000/= and one mobile phone make Blackberry valued at Tshs. 1,000,000/= all making a total of Tshs. 4,780,000/= being the properties of JULIUS MZIRAI and that immediately before such stealing, the accused persons threatened him with a gun, panga and axe in order to obtain the said properties.

The accused persons pleaded not guilty to the charged offences. They were tried in which the 2nd accused was acquitted whereas the appellant was convicted of the count of Armed Robbery and sentenced to thirty (30) years imprisonment. Aggrieved, the appellant preferred this appeal on six (6) grounds namely:-

1. **That, the trial Court erred both in law and in fact to rely part of conviction of the appellant upon the unsubstantiated evidence, that is, Exhibits "P1", "P2", and "P3" which were retrieved in absence of the appellant and neither the alleged relative who witnessed the search testified as required by law.**
2. **That, the trial Court erred both in law and fact when convicted the appellant upon a repudiated Caution Statement, Exhibit "P4" without first attesting its voluntariness by conducting an inquiry as demanded by law, thus the omission rendering the Statement in itself inadmissible in the evidence.**
3. **That, the trial Court fatally erred both in law and in fact to rely conviction of the appellant on the un-credible and incredible visual identification evidence while knowing that the conditions at the scene of crime were not favourable to lead to an accurate identification as there was no light as per PW2 and PW4's testimonies.**
4. **That, the trial Court erred both in law and in fact when based the guilty of the appellant upon PF. 186 – Exhibit P6 without critically assessing the variance of dates as PW2 and PW4 strongly differed with PW3 upon the exact date when the police Identification Parade was held. Moreover, the alleged parade was held un-procedurally as PW2 allegedly knew the appellant prior the crime, hence, both vitiated the whole evidence.**
5. **That, the trial Court grossly erred both in law and in fact to convict the appellant in the offence whereby the arrest personnel (Orio) did not**

testify to the effect as to collate the cause of arrest with the allegation in the charge sheet laid against the appellant and this thing strong destroyed the inference in proving the prosecution case.

6. **That, the trial Court erred both in law and in fact to find that the prosecution case against the appellant was proved beyond all reasonable doubts.**

The hearing of the appeal was conducted orally whereas the appellant appeared in person, that is, unrepresented whereas the Respondent/Republic was represented by Ms Celina Kapange, learned State Attorney. Addressing the grounds of appeal, the appellant urged for the grounds of appeal to form integral part of his submission.

On her part, the learned State Attorney supported the appeal. Addressing the 2nd ground of appeal, Ms Kapange submitted that, though the appellant objected to the tendering of his Cautioned Statement, no inquiry was conducted as required by law to test the voluntariness of the confession. She cited the case of **Steven S/O Jason & 2 Others Vs. The Republic,** Criminal Appeal No. 79 of 1999 (Mwanza Registry) (Unreported) where the Court of Appeal of Tanzania underscored at page 7 that:-

> **"Ordinarily, when the admission of evidence is objected on the ground that such evidence was obtained involuntarily the Court orders a trial within a trial in order to inquire into its voluntariness or otherwise".**

Thus, from the above circumstances, Ms Kapange urged the appellant's Caution Statement to be discarded from the Court record. In respect of the 3rd ground of appeal, the learned State Attorney submitted that, PW2 testified to have seen the appellant before the incident. She added that, the invasion episode involved seven (7) people and despite there been electric light, PW2 did not describe the appellant to the police.

Besides, PW4 said he saw ten (10) assailants and identified the appellant. Like PW3, PW4 did not describe his appearance to the police. Due to such weakness, Ms Kapange argued that the prosecution case was not established as regards to identification of the appellant. She cited a High Court decision in the case of BUSHIRI AMIRI vs. REPUBLIC, [1992] T.L.R 65 where the Court held that description ought to have been given regarding the accused's appearance, colour, height and or any peculiar mark of identity.

Having considered the respective submissions by the appellant and the learned State Attorney in hand with the Court record, the following are the deliberations of this Court in disposal.

As correctly submitted by the learned State Attorney, two categories of evidence worth for determination in this appeal that is, **one,** the testimonies by the prosecution witnesses and **two,** the appellant's Caution Statement.

Starting with the appellant's caution statement albeit brief, as correctly submitted by Ms Kapange, since the trial Court did not conduct an inquiry, such piece of piece cannot be relied upon in evidence. Being the case, the remaining pieces of evidence worth to earn conviction is the testimonies by the eye witnesses, that is, PW2 and PW4 under scrutiny.

In the first place, the said eye witnesses that is PW2 and PW4 did not account for all the necessary precepts of the law as found rich and trite in our local Jurisdiction regarding visual identification in offences committed at night. Notably, the fact that one is alleged to have seen a person once,

twice or thrice does not suffice proof that the said person was properly identified at the scene of crime for the purposes of earning a conviction known in law especially in capital offences attracting capital punishment.

Moreover, it does not matter that a person accused is absolutely known to the identifying witness like a son, daughter, husband, wife or the like. What counts is as to what facilitated the identifying witness to properly identify the assailant at the scene of crime beyond any shadow of doubts.

Accounting for the value of visual identification, the Court of Appeal of Tanzania in the case of **Galous Faustine Stanslaus Vs. The Republic,** Criminal Appeal No. 2 of 2009 had the following observations at page 7 of the typed copy of Judgment:-

> **"The law on visual identification be it of a stranger or of a known person (i.e. recognition) is now well settled. It is trite law that such evidence is of the weakest type and Courts should not act on it unless all possibilities of mistaken identity are eliminated. Furthermore, the Courts must be fully satisfied that the evidence clearly shows the conditions favouring a correct identification and is accordingly watertight".**

In the case of **Shamir John Vs. The Republic,** Criminal Appeal No. 166 of 2004 the Court of Appeal of Tanzania observed that:-

> **"It is now trite law that the Courts should closely examine the circumstances in which the identification by each witness was made. ..... These may be summarized as follows, How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example, by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? What interval had elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the**

accused given to the police by the witnesses when first seen by them and his actual appearance?".

As to description, the Court of Appeal of Tanzania in the case of **Karim Ramadhani & 2 Others Vs. The Republic,** Criminal Appeal No. 113 of 2009 (Unreported) (Arusha Registry) at page 7 stressed that:-

> **"What is on record is general statement that the witnesses identified the appellants with an assistance of seventeen tube lights. Under such circumstances, without description of the appellants either of their outlook or attire, the seventeen tube lights notwithstanding, one cannot with certainty say that there was no mistaken in the identification of the appellants".**

From the above in compliment to the submission by the learned State Attorney for the Respondent/Republic, no evidence was duly availed in Court to prove that, as such, the appellant perpetrated commission of the charged offences specifically the convicted charge of Armed Robbery. In a nutshell, the prosecution failed to establish their case beyond reasonable doubts to earn a safe conviction known in law.

Moreover, though the evidence by PW1 1737 D/CPL EVANCE is to the effect that on 06/06/2010 they arrested the appellant with a stolen cell phone in a trap set at MANZESE DARAJANI, the said cell phone was not tendered and admitted in Court to form part of the prosecution case. Furthermore, the said cell phone was not positively proved to be the one stolen in the fateful incident and that it belonged to the complainant.

It is also worth to note that, the searched items found in the house of the appellant's house were not proved to be the ones used to have been used by the appellant in committing the charged offence. The fact that the said items that is, a piece of iron bar, bullets, pistol and a bush knife which

might be used in committing offences of the present nature were found in the house by the search officers cannot on their own be a proof of commission of the charged offence of armed robbery.

Likewise, the fact that one bullet was tested to see whether the pistol works cannot be ascertained as proof of the charged offence of Armed Robbery. On the other hand, such argument would hold if the said bullets and pistol were proved to have been used in the Armed Robbery incident through proof of the bullet cartridges found at the scene of crime (if any).

To this Court, bearing in mind the above circumstances regarding the found items and considering the fact that the said found items could not have been safely linked with the charged offence of Armed Robbery, the prosecution ought to have charged the appellant and anybody else with the offences under the Arms and Ammunition Act, [CAP. 223 R.E, 2002] or any other law (if any) whatsoever.

For that matter, the appeal is meritorious and is hereby allowed. The conviction entered by the trial Court is hereby quashed and the sentence is set aside. I further make order for the appellant to be released from prison forthwith unless otherwise lawfully held in another lawful course.

It is so ordered.

E.M. FELESHI
JUDGE
11.10.2015

Judgment delivered in chambers this 11th day of December, 2015 in presence of Ms.Saada Mohamed, learned State Attorney and the Appellant in person. Right of Appeal explained.

E.M. FELESHI
JUDGE
11.12.2015