

TANZANIA / JUDGMENT

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IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA MOROGORO SUB REGISTRY AT MOROGORO CRIMINAL APPEAL NO. 19317 OF 2024 (Appeal from the decision of the District Court of Morogoro at Morogoro dated 27th day of May 2024 in Criminal Case No. 101 of 2023)

1. JACKSON SIABA SAMWELI APPELLANT
2. RICARDO SEVERINE MCHINDE 2nd APPELLANT VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

05/11/2024 & 18/11/2024 KINYAKA,J.: The present appeal is against both the conviction and sentence that was imposed by the District Court of Morogoro hereinafter the "trial court" on the appellants on the charge of Armed Robbery contrary to section 287A of the Penal Code Cap. 16 R.E. 2022. The prosecution's allegations against the appellants were to the effect that the appellants and one Shaban Abdul who is not a party to the instant appeal alleged to have willfully and unlawfully stole a mobile phone make NOKIA valued at TZS 50,000 and cash money valued at TZS 10,000 all valued at TZS 60,000, the properties of one Kurwa Shaban @Tungwa. The prosecution further alleged that immediately before such stealing, the appellants and Shaban Abdul assaulted the said Kurwa by using machete 1 in order to obtain the said stoien properties, in an incident that took piace on the 21st day of June 2023 at Kihonda Mbuyuni Area within Morogoro District in Morogoro region. The appeliants entered a plea of not guilty to the charge against them and in consequence, the matter proceeded to a full trial that saw the prosecution lining up a total of seven witnesses and two documentary exhibits while the defence side fronted four defence witnesses and one documentary exhibit. According to the records availed to this Court, a brief background to the present appeal is that on the fateful day, Kurwa Shaban hereinafter "the victim or PW1, interchangeably" while in his way to his work piace was attacked by a group of six bandits. His testimony revealed that in a bid to rescue himself he confronted the bandits but his efforts were fruitless as they managed to take away his mobile phone make NOKIA as well as his cash money to the tune of TZS 10,000 and further that he was cut his right thumb finger, the forehead and a part of both his right and left hand. PW1 went on telling the trial court that after they had accomplished their mission, the bandits run away. He said, it was a bodaboda rider passing by who came into his rescue and assisted him to reach his work piace where he was taken to the police station and issued with the PF3. The medical examination that was conducted on the victim by Dr. Lekora Koiingo (PW3) from Morogoro Regional Hospital

confirmed PW1's testimony that he was cut with a blunt/sharp object as evidenced by the PF3 that was filed by PW3 and tendered in evidence as Exhibit P2. In his further testimony, PW1 informed the trial court he was able to identify the assailants as they were very close to him and that the day was dawning. The appellants were arrested upon the investigation that was mounted by the Police force through F8557 DC Benard (PW7) who told the trial court that upon interrogating the appellants, they admitted their involvement in the commission of the offence in their respective caution statements. However, the said caution statements were not presented before the trial court in support of the alleged appellants' admission to the offence they were indicted with. In order to confirm the identification of the appellants by the victim at the crime scene, an identification parade was prepared by DF 12193 ASP Laurian Mkomage (PW2) and conducted on 28th June 2023. According to him, there were 12 participants including Juma Adam Saiehe (PW4) and Ally Abeid Mgwenu (PW6). It was the evidence of the PW4 and PW6 that the appellants were positively identified by the victim. As such, the identification parade register was prepared by PW7 and admitted in evidence as Exhibit PI. In their defence, the appellants distanced themselves from the prosecution's accusations levied against them. As for the first appellant (DW1), he denied to know the other two accused persons, but admitted 3 to have been arrested on 26th June 2024. DW2's defence testimony was to the effect that on 21st June 2023 he spent the entire day at his home place. He disassociated himself from both DW1 and DW3. He further denied his alleged participation in the identification parade prepared by PW2. Upon the evaluation of the evidence, the trial court believed the prosecution's account on PW1's identification of the appellants both at the crime scene and in the identification parade to be true and watertight. It therefore convicted the appellants as charged and sentenced both the 1st and 2nd appellants to serve 30 years imprisonment in jail while acquitting DW3. Aggrieved, the appellants lodged the instant appeal premised on eleven grounds as reproduced hereunder:

1. That, the learned trial Magistrate erred in law and fact in relying on the evidence of PW1 (sole eye witness) to convict the appellants without consideration that visual identification was not watertight for a firm and positive identification of the appellants as perpetrators of the armed robbery as; I. Victim did not give details as to how he identified the assailants at the scene of crime, II. Exhibit DI (complainant statement) does not reflect if he mentioned the appellants features/names, it was too general 4th description, iii. It is on record that there was poor lighting at the scene of crime (see page no 13 of the trial court proceeding), iv. Neither disclosed the intensity or brightness of the light which enable his identification of culprits. It is on record that victim faced obstruction or fighting with the assailants hence impeding proper identification of the culprits.
2. That, the learned trial magistrate erred in law and fact by holding to unprocedural identification parade conducted by PW2 against the appellants whereby it was not conducted in accordance with the Police General Order [P.G.O No.232(2)] as;

- i. Participants did not have similar shape and dress (see page 46 of the trial courts proceeding)
 - ii. There was no description of the appellants given to parade supervisor prior to the identification parade.
 - iii. Appellants were not informed of their right properly before conduct of the identification parade.
3. Without prejudice to the above ground of appeal, the learned trial Magistrate erred in law and fact to convict and sentence the appellants without observing that the credibility of the police officer conducting the identification parade (PW2) was shaken by flaws indicated in exhibit Pi, hence he was not entitled to belief;
4. That, the learned trial Magistrate erred in law and in fact to convict the appellants based on exhibit Pi (Identification parade register) without consideration that the credibility of the document itself was affected by flaws reflected therein, hence lacks evidential value to be relied as;
- i. The witness number 3 did not sign the form. ii. The named HABIB RASHID appeared in the form but it is not indicated he participated as whom. iii. Kuiwa Shaban was not indicated he participated as whom. iv. Names of participants of parade reflected in the form (Exh.PI) are different to those who testified and alleged they were parade's participants.
5. That the learned trial Magistrate erred in receiving the exhibit PI unprocedural as it is not indicated in the trial court record when it was received and marked as Exhibit PI, since was illegally penetrated therefore it lacks evidential value and need be expunged from the record;
6. That, the learned trial Magistrate erred in law and fact by convicting and sentencing the appellants when the prosecution did not establish the appellants apprehension in connection with the case at hand to the required standard of the law as; 6
- i. There is no Investigatory evidence which leads as to how police officers link the appellants with the alleged robbery prior to their arrest;
11. Neither victim nor any other person explained to police that the appellants were involved with the alleged crime; ill. No caution statements were tendered
7. That, the learned trial Magistrate erred in law and fact to convict and sentence the appellants when relied on unreliable, incredible and contradictory evidence of PW1, PW2, PW4 and PW6 as:
- i. PW4 stated in his testimony that only one person was identified during Identification parade and that was appellant. ii. PW6 testified that participants in the parade were of different body structure and cloths while PW2 testified were of similar body structure. iii. PW1 testified he identified two persons (1st and 2nd appellants) while PW6 testified that only 1st appellant was identified by PW1.

8. That, the learned trial Magistrate erred in law and fact by failing to notice the credibility of PW7 were undermined by failure to tender the allegedly cautioned statements of the appellants claimed that they admitted to commit the said offence; 7
9. That, the trial court Magistrate erred in law and in fact by convicting the appellants while erroneously failed to assess, evaluate and analyse the appellant's defence evidence In order to arrive In the fair decision;
10. That, the trial Court Judgment lacked factual or legal points of determination In accordance with a mandatory provisions of criminal procedure Act (cap 20 RE 2022) otherwise section 312(1) of the C.P.A was not complied with;
11. That, the learned trial Magistrate erred In law and fact by convicting the appellant In a case whose proof was below the required standard. At the hearing of the appeal, the two appellants appeared In person and unrepresented whilst Mr. Josberth KItale, learned state attorney entered appearance for the respondent. Starting with the first ground of appeal, which was grounded on the trial court's reliance on PW1's Identification of the appellants In entering conviction against them, the appellants contended that the Identification testimony was not watertight for firm and positive Identification because PW1 did not state how he Identified the assailants at the crime scene. They contended further that exhibit D1 does not mention the appellants' features. They referred the court to page 13 of the proceedings which reveal that there was poor lighting at the crime scene and expounded that o PW1 did not disclose the intensity or brightness of the light that enabled him to identify the culprits. They cemented that the record show that PW1 faced obstruction as he fought with the assailants which according to them, the alleged fights impeded him from properly identifying the culprits. On the second ground, the appellants attacked the trial court for convicting them relying on identification parade which did not comply with PGO 232(2). They expounded that the participants of the parade had no similar appearance and did not wear similar clothes as shown in page 46 of the proceedings; there was no description of appellants prior to identification parade; and that they were not properly informed of their rights before the conduct of the parade apart from being asked to sit down. The appellants' submissions on the third ground were very brief. They lamented on lack of credibility of PW2 who conducted the identification parade whose evidence was shaken by flaws indicated in Exhibit PI. To them, it was wrong for the trial court to rely on his evidence. As for the fourth ground, the appellants faulted the trial court's reliance on the identification parade register (Exhibit PI) which lacked credibility and lacked evidential value due to lack of signature of PW3 in the Form. They added that it is not known under which capacity Habibu Rashid and Kulwa Shabani participated in the parade, and claimed that the names of 9 participants of the parade in Exhibit PI are different from those who testified to have participated in the parade. Regarding the fifth ground, the appeiiants submitted that Exhibit PI was admitted unproceduraiiy as the record does not show when it was received as exhibit. They therefore prayed for the exhibit to be expunged. In reiation to the sixth ground, it was the appeiiants' submission that the prosecution failed to estabiish their apprehension in

connection with the case to the required standard. They elaborated that there is no evidence on record as to how the police officers linked the appellants with the alleged robbery as neither the victim nor any person explained to the police that they were the ones involved with the crime and that no caution statement was produced before the trial court. In support of the seventh ground, the appellants were of the view that the testimonies of PW1, PW2, PW4 and PW6 were unreliable, incredible and contradictory. They expounded that PW4 testified that only one person, the 2nd appellant was identified during the parade while PW6 testified on the dissimilarities of participants' body structure and the manner they dressed. They said, on the other hand PW2 testified on the participants' similar body structures, and that PW1 testified to have identified two persons, 1st and 2nd appellants but PW6 identified appellant. 10 On the eighth ground, the appellants contended that the trial court failed to notice lack of credibility of PW7 for his failure to tender caution statements while the same was the proof of their alleged admission to the commission of the offence. As regards to the ninth ground, the appellants lamented that their defence evidence was not assessed, evaluated and analysed by the trial magistrate before they were convicted. On the tenth ground, the appellants faulted the trial court's judgement for lacking factual or legal points of determination contrary to section 312(1) of the Criminal Procedure Act. Submitting on the eleventh ground, the appellants complained that their conviction by the trial court was based on a case whose proof was below the required standard. It was therefore the appellants' prayer that the appeal be allowed, the conviction be quashed and eventually that the court set them free. In response to the appellants' submissions, the learned state attorney informed the trial court that the respondent opposes all the appellant's grounds of appeal and thereafter prayed for the Court to uphold the trial court's conviction of the appellants. Amplifying the first ground of appeal, Mr. Kitale contended that the identification of the appellants made by PW1 was watertight and had 11 complied with the conditions in the case of *Waziri Amani v. R* [1980] TLR 250 as PW1 gave sufficient explanation on how he identified the culprits who robbed him. Mr. Kitale summarized PW1's testimony on how he identified the appellants as presented at the trial court and relied on the case of *Marwa Wangiti v. R* (2002) TLR 39 and *R. v. Mohamed bin Alui* (1942) 9 EACA 72 cited in the case of *Cyprian Mtungilei v. R.*, Criminal Appeal No. 244 of 2021 CAT on page 11 to contend that the appellants were properly identified. He further submitted that PW1 identified the appellants by their identities and appearance. Fortified by the case of *Mgambo Saanane & Another v. R.*, Criminal Appeal No. 255 of 2021 CAT on page 10, he learned state attorney told the Court that PW1 was able to describe the identities of the appellants at the police station on 21st June 2023. Justifying more on the appellants' identification, Mr. Kitale added that the scene of crime had sufficient light as it was 6:00 am. He refuted the appellants' contention that the victim couldn't identify the appellants properly as there was a fight between them by averring that it is not always that the victim cannot identify the culprits due to fighting or existence of impediment. The learned state counsel cited the case of *Alfred Kwezi @Aiphone v. R.*, Criminal Appeal No. 216 of 2022 HCT on page 26 to reinforce his assertion. He added that PW1 identified the 12th appellants both in the identification parade and in the court during the hearing of the case. He went on submitting that the

evidence of PW1, PW2 and PW3 reveal that the appellants' structure was similar to those of the participants of the parade and that PGO 232(2) does not require the participants of the parade to dress similarly. He also highlighted that according to PGO 232(2) the person who prepare the parade is the officer in charge of the criminal case, the investigation officer of the case and that there is no such a person called parade supervisor. On that basis, he remarked that the participants who were involved in the parade were proper persons as the investigation officer knew what he wanted to establish as he had already investigated the matter. Mr. Kitale further informed the Court that the appellants were both informed and given their rights and that in their defence testimonies, neither of the appellant complained that they were not given their rights. Rounding off, the state attorney urged the court to dismiss the ground for being an afterthought. Submitting against the appellants' attack on PW2's credibility, Mr. Kitale maintained that PW2 was credible because of his demeanour and consistency of his evidence as adduced in the trial court, and that his 13 testimony corroborated the evidence of other witnesses. While admitting that PW6 Ally Abed Mgwenu did not sign as a witness but he signed the top part of the exhibit as a participant in the parade, it was the state counsel's opinion that the anomaly does not affect the credibility of Exhibit PI as the appellants were duly identified. Regarding the fourth ground of appeal, the learned state attorney informed the Court that it was only PW6 who did not sign in the exhibit PI at the bottom part but he did sign at the top of the document and that all other witnesses signed and were indicated their capacities in the parade. It was also his view that the complaint in item (11) of ground four is of no basis as Kulwa Shabani participated as an identifying witness as shown in Exhibit PI. He also clarified that there are no any different names of witnesses who participated in the parade and that the only witness who was asked about the different name was PW4. Regarding the fifth ground, Mr. Kitale briefly submitted that the ground has no merit as the typed ruling which formed the basis of the appellant's complaints is found in the records of the trial court. With regards to the sixth grounds of appeal, the state attorney started his submission by reiterating PW5's testimony as depicted on page 40 of the 14 typed trial court's proceedings and substantiated that PW5 managed to demonstrate how the appellants were connected with the offence of armed robbery that occurred on 21st June 2023. He added that the conduct of the 1st appellant of running away after he was stopped by the police connects him with the offence. As such, he prayed for the Court to take note of section 10(2) of the Evidence Act. Explaining on the complaint that neither the victim nor any other person explained to police that the appellants were involved with the alleged crime, Mr. Kitale told the Court that PW1 named those who robbed him by their characteristics including their appearance as evidenced by Exhibit D1 and that in the identification parade which was conducted on 26th June 2023, the victim (PW1) was able to identify the appellants. In his view, it was not necessary for PW1 to name the appellants by their names as it was the first time PW1 met the appellants at the place of the incident. On the complaint that the caution statement was not tendered in evidence, it was the learned counsel's submission that there is no law that compel the republic or any party to the case to tender a certain exhibit. To fortify his submission, reference was made to the case of Justine Hamis Chamshine v. R, Criminal Appeal No. 669 of 2021 CAT on page 24. In respect of the

seventh ground of appeal Mr. Kitale sought reliance in case of Jaffer Mfaume Kawawa v. R. (1981) TLR 149, and contended that PW2's testimony should not be taken in isolation of the testimony of other witnesses who testified on the identification parade. He said Exhibit PI show that the appellants were identified and there is no dispute that the identification parade conducted on 26th June 2023 was the only one which involved the appellants. He was of the opinion that the contradiction between PW1, PW4 and PW6 has been occasioned by the manner in which the proceedings were recorded or written by the Thai court. He submitted further that the other contradictions in PW6's testimony as regards to the appellant's body structures were occasioned by passage of time because the identification parade was conducted on 26th June 2023 and PW6 testified on 13th March 2024. The learned counsel cited the case of Dickson Elia Nsamba Shapwata & Another v. R, Criminal Appeal No. 92 of 2007 on page 7 and submitted that the weaknesses do not affect the prosecution case as the identification parade was conducted and the appellants were identified. With regards to the eighth ground, it was Mr. Kitale's contention that the credibility of PW7 cannot be diminished on the ground that he did not tender caution statement as his testimony was consistent and satisfactory which demonstrated the offence against the appellant and corroborated the testimonies of other prosecution witnesses. Against the ninth ground of appeal, the counsel supported the trial court's analysis of evidence of both parties. However he was of the view that in 16 cases the Court will find that there was improper analysis of evidence, then being the first appellate court, the same can step into the shoes of the trial court to re-evaluate the evidence and make its own findings as held in the case of Lengai Ole Sabaya & 2 Others v. R, Criminal Appeal No. 129 of 2021 High Court on page 11, where in emphasising the foregoing point, the court cited the case of Napambani Michael @ Mayanga v. R., Criminal Appeal No. 268 of 2015 on page 11. In respect of the tenth ground, reference was made on page 6 and 8 of the judgement, where the trial court made the points of determination in respect of the first and second issue respectively. On the eleventh ground, Mr. Kitale reminded the Court of the five ingredients for the offence of armed robbery to be proved and contended that the same were established by the prosecution to the required standard, which is proof beyond reasonable doubt. He said, the testimony of the sole eyewitness (PW1) is valuable in line with the case of Rex v. Mohamed bin Aiui (1942) 9 EA 72. In the end, he prayed for the appeal to be dismissed for lack of merit. In rejoinder submission, the first appellant stressed that PW1 failed to identify them and thereafter took pains to outline the flaws in the identification parade. He emphasized that it was wrong for PW7 not to present the caution statement or any exhibit to the court showing that the appellants were involved in the offence. He afterwards implored the Court to consider their grounds of appeal, reverse the decision of the trial court and set them free. As for the 2nd appellant, he informed the Court that the victim identified them at the police station but he was hesitant to identify them in court as shown on page 14 of the proceedings. Fortified by the case of Baruani Hassan v. R, Criminal Appeal No. 580 of 2017 CAT, he maintained that PW7 testified that the appellants confessed to commit the offence but failed to present the evidence in court. He thus prayed for the Court to allow the appeal and quash the conviction, set aside the sentence and set them free. The closure of the

parties' submissions enjoins me to determine whether the conviction and sentence against the appellants were incorrect at fact and law. The first ground is against the trial magistrate's reliance on the evidence of PW1 who was the sole eye witness to convict the appellant without considering that the identification was visual and not watertight for a firm and positive identification. The appellants complained that the victim (PW1) did not give details as to how he identified the assailants at the scene of crime; he did not name and describe the features of the appellants in Exhibit D1 as his description was too general; there was poor lighting at the crime scene; he did not disclose the intensity or brightness of the light which enabled his identification of the culprits; and that the victim faced obstruction by fighting with the assailants which impeded proper identification of the culprits. I have considered the complaint and the record of the trial court in line with the requirement established in the case of *Waziri Amani v. Republic* (1980) TLR 250 on conditions to be complied with in visual identification. It has been the position through decided cases that evidence of visual identification is the weakest kind and unreliable, and that no court should act on such evidence unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight. In the case of *Samson Chacha @ Mwita Pius @ Kipepeo v. The Republic* (supra), the Court of Appeal held on page 13 that: 'We wish to state that, we agree with Ms. Mbuya that, the law is settled that visual identification 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 watertight. The principles to be taken into account were enunciated by this Court in the famous case of *Waziri Amani* (supra) to include: One, the time the witness had the accused under observation; two, the distance at which the witness observed the accused; three, the conditions where such observation occurred, for instance, whether it was during day or night time and whether there was good or poor light at the scene; and four, whether the witness knew or had seen the accused before or not - see also cases of *Issa s/o Mgara @ Shuka v. Republic*, Criminal Appeal No. 35 of 2005, *Masoiswa Samwel v. Republic*, Criminal Appeal No. 348 of 2016 and *Byamtonzi John @ Buyoya and Another v. Republic*, Criminal Appeal No. 289 of 2019 (all unreported)." In establishing the identification of the appellants, the trial court heavily relied on the evidence of PW1, the victim, to hold that the identification was firm, positive and watertight. This Court being the first appellate court, is empowered to re-evaluate the evidence and come up with its findings [See the case of *Gaudence Sangu v. Republic*, Criminal Appeal No. 88 of 2020 [2022] TZCA 784 (7 December 2022) on page 7]. In that regard, I had to read the testimony of PW1 and the statement he made at the police admitted in evidence as Exhibit D1. On page 9, PW1 stated: "On 21/06/2023 on my way to work around 6:00 am when I got to Kihonda Mbuyuni I was attacked by 6 boys. In the course of attacking me I was trying to defend myself so the boys left me. One of the boys removed a knife (simba) and cut off my finger (right hand) (dole gumba). He also cut my left hand back part of my right hand and forehead. While I was still trying to defend myself I lost control and fell down, the boy who was holding a knife snatched me on my neck (akanika kwenye shingo) while I fell down then he called his fellow "Emmanuel njoo" the boy who was called to search me and took my phone make Nokia (Kitochi). I identified the

tioys because they were very close and it was already in the morning so there was daylight. After the phone was taken I removed the boys' hand from my neck then I shouted." On being cross-examined, PW1 testified as reflected on page 13 through to 14 of the typed proceedings that he identified the appellants by God's light as the sky was bright and it was already in the morning at 6:00 am. When re-examined as reflected on page 12, PW1 added that the words "kumeanza kupambazuka" meant it was already in the morning and that the incident took about 10 minutes. In the statement he gave at the police on the same date of the incident, In addition to his testimony quoted above, PW1 informed the police that: ".../7a wakati vijana hao wananifanyia tukio hii niiweza kuwatambua vijana wawili kwa sura na niiisikia wakiwa wanatajiana kwa majina kuna mmoja niiisikia wenzake wanamwita kawa jina la EMMANUEL waiikuwa wanamwambia achukue baiskei yangu iakini wakati anataka kuchukua baiskei niiipiga keieie kuomba msaaada. Vijana niiowatambua sura zao mmoja aiikuwa ni mfupi, mnene na ni mweusi aiikuwa amevaa tisheti ya njano ya yanga na mwingine aiikuwa ni mrefu wastani, mnene wastani aiikuwa amevaa swetajeupe na ni mweupe wastani niiweza kuwaona vijana hao kwa mwanga wa kawaida (wa mbaia mwezi) kwani muda huo kuiikuwa kumepambazuka na kijana aiiyenikata kwa panga mkono wangu yeye aiikuwa amevaa swetajeupe vijana wengine waiikimbia sikuweza kuwatambua sura zao." 21 PW1's statements above reveal that his Identification was marred with the fighting that took place immediately upon being attacked by the six boys. Under the circumstance, it is certain that it was difficult for the victim to identify the appellants while fighting against the six boys who attacked him unexpectedly leading to his falling in the canal. I have further considered that fact that it was the first time the victim saw the assailants including the appellants. Although the distance between PW1 and the assailants was very close, the time in which the incident took place was favourable for identification, and the sufficient time of about 10 minutes that PW1 had to observe the assailants, I find that the circumstance did not favour correct identification due to obstructions that existed resulting from fear and the prevailing terrifying situation from being attacked by six assailants and the immediate fighting between them. I find the identification of the appellants by PW1 unreliable and incredible in the circumstances. I fully subscribe to the holding of the Court of Appeal in the case of *Daudi Loti Mollel Masai v. Republic*, Criminal Appeal No. 306 of 2021 [2024] TZCA 119 (23 February 2024) where the Identifying witness testified to have identified the accused person in stressful environment. In its decision, the Court of Appeal made the following observations on page 11 through to 12 of its judgment: 22 "...In view of the evidence of PW2 on the record, there is no doubt that during the encounter with the assailants on the material day PW2 was under stressful and terrifying situation whereby the pockets of his trouser were searched by one of the assailants and robbed of his possession before they subsequently left the scene of crime. In the circumstances, it is unlikely that PW2 would have correctly identified the registration number of the said motorcycle. We are however aware that it is not always impossible for a victim of armed robbery to identify the assailant even under stressful and terrifying condition (see *Philip Rukairu v. The Republic*, Criminal Appeal No. 215 of 1994 (unreported)). Nonetheless, in most cases, there are difficulties in identifying the assailant by the victim

under those conditions. In *Tagara Makongoro and Two Others v. The Republic*, Criminal Appeal No. 126 of 2015 (unreported), the Court was inspired by decision of the Court of Appeal of Kenya in *Wamaiwa and Another v. The Republic* [1999] 2 EA 358, where it was stated: "The Court should always warn itself of the danger of convicting on identification evidence where the witness only sees the perpetrator of an offence fleetingly and under stressful circumstances" Guided by the above authority, I hold that the appellants were not properly and positively identified by PW1 at the scene of crime, and that the identification was not watertight enough to remove the possibility of mistaken identity. The first ground of appeal is merited and therefore allowed. , 23 The second ground faults the decision of the trial court for holding to the identification parade which was conducted unprocedurally in contravention of the Police General Order (PGO) No. 232(2) as the participants had dissimilar shape and dresses; there were no description of the appellants prior to the identification parade; and that the appellants were not properly informed of their rights before the identification parade. I have read the testimonies of PW1, PW2, PW4 and PW6 who engaged in the identification parade as well as Exhibit PI, the identification parade register. However, considering my deliberation on the first ground that the identification of the appellants on the crime scene was not watertight, I won't be delayed in determining the propriety of the identification parade as it is a common knowledge that in itself, the identification parade cannot be relied to ground the accused's conviction. That was the position in the case of *Flano Alphonse Masalu Singu v Republic*, Criminal Appeal No. 366 of 2018 [2020] TZCA 197 (30 April 2020) on page 23 where the Court of Appeal held: 'We also recall the evidence that the appellants were purportedly Identified at several Identification parades and that extracts from the Identification parade register were admitted In evidence (Exhibits P.5 and P.6). Be that as it may, in view of our above conclusion that the visual evidence was Insufficient, we need not deal with the grounds of appeal 24 assailing the propriety of the identification parade and the validity of the parade register extracts. An identification parade presupposes that the person to be identified on it was identified at the scene of the crime, which is not the case in the instant case" The Court went on referring to its decision in the case of *Ahmad Hassan Marwa v. Republic*, Criminal Appeal No. 264 of 2005 in which it was articulated that: "We wish to restate the law that an identification parade is itself not substantive evidence, but only admitted for collateral purposes. It derives its corroborative value from section 166 of the Tanzania Evidence Act. So, if well conducted, its value is only to corroborate the evidence of the identifying witness (see *Moses Deo v. Republic* [1987] TLR 134 (CA T), *Dennis Nyakonda v. Republic*, Criminal Appeal No. 155 of 1990 (unreported)). But the purpose of corroboration is only to confirm or support evidence which is sufficient satisfactory and credible and not to give validity or credence to evidence which is deficient suspect or incredible (See *Aziz Abdallah v. Republic* [1991] TLR 7)." With the above authority in mind, I now move to determine the third ground of appeal, which attacked the conviction and sentence by the trial court in disregard of the credibility of PW2 whose evidence was shaken by flaws in Exhibit PI. I have noted the appellants' concern that PW6 did not sign in the certification part. I find that the lack of signature in the certification part 25 is a minor oversight, which could not diminish the credibility of PW2. I accord

weight on the testimony of PW6 as reflected on page 45 of the proceedings when identifying Exhibit PI that it contained his signature. Further, PW6 signed on the list of participants as participant No. 11 in Exhibit PI. Considering the above, I dismiss the third ground for lack of merit. Equally, I do not find merit in the complaint in the fourth ground that Exhibit PI lacks credibility as witness number 3 did not sign the exhibit; there is no indication of the capacity of Habibu Rashid and Kuiwa Shabani in the identification parade; and that the names of participants are different from the names of PW4 and PW6. I have scanned the records available to this Court in respect of the present appeal. There is no witness number 3. There was only one identifying witness who was Kuiwa Shabani who testified in court as PW1. It is indicated in Item 5 of the second page of Exhibit PI that Habibu Rashid was the participant in the identification parade who stood in the 9th position and who duly signed Exhibit PI. It is true that the name of PW4 as indicated on page 34 of the proceedings is Juma Adam Saiehe but in Exhibit PI, his name is written as Juma Saiehe. It is also true that the name of PW6 is Aiiy Abed Mgwenu as reflected on page 44 of the proceedings is written as Aiiy Mgwenu in Exhibit PI. However, I do not find the same as a material variance that would impair 26 ■«=>- the prosecution case. The names of PW4 and PW6 during their testimonies were written in full while in Exhibit PI their middle names were omitted. Further, PW4 explained, when cross-examined on page 37 of the proceedings, that his name was not fully indicated in Exhibit PI. The fourth ground is dismissed. The fifth ground need not delay me much. Upon confirmation that the ruling of the trial court admitting Exhibit PI was in the trial court's record and indicated that the Identification parade register was received on 14th November 2023 and marked Exhibit P2, the ground lacks merit and is dismissed for want of substance. The sixth ground is an attack to the trial court's conviction and sentence of the appellants regardless of the prosecution's failure to connect them with the offence to the required standards due to lack of investigatory evidence leading to police officers' link of the appellants with the alleged robbery prior to their arrest; lack of explanation by the victim or another person to police of the appellants' involvement in the crime; and failure by the prosecution to tender caution statements of the appellants. I have held above in the first ground that there was no proper identification of the appellants by PW1. PW7, the investigation officer testified on page 48 through to 49 of the proceedings that in his investigation, he discovered that the appellants committed the offence as they admitted to have committed the offence when he interrogated them 27th and that PW1 identified them in the identification parade. However, upon my holding that PW1's identification at the crime scene was not watertight, there is no gainsaying that his identification of the appellants in the identification parade is unreliable. [See Ahmad Hassan Marwa v. Republic (supra)]. As for the complaint on the prosecution's omission to tender the caution statement evidencing the appellants' admission to the commission of the offence, I agree with Mr. Kitale that the prosecution as for the defence are not compelled by the law to tender a certain exhibit as held by the Court of Appeal in the case of Justine Hamis Chamshine (supra). Though it was crucial for the PW7 to confirm his testimony that the appellants confessed to the crime, I know no law compelling the prosecution witness who recorded the caution statement to tender the same to court. There could be other evidence

that the prosecution would prove the offence charged other than the caution statements. It was the holding of the Court of Appeal on page 13 of Its decision in the case of Justine Bruno @ Mkandamambwe v. The Director of Public Prosecutions, Criminal Appeal No. 323 of 2018 [2021] TZCA 490 (17 September 2021) that; On ground number 6 the allegation is that the recorded cautioned and extra-Judicial statements were not tendered. It is indeed correct that none of the statements were tendered in evidence. What witness or document should be used in proving the prosecution case squarely rests with them. In this instant case, as rightly submitted by the learned Principal State Attorney, the prosecution had other evidence. Besides the direct evidence of PW1, PW2, PW3, PW4, and PW6, there were exhibits P1, P2, P3, P4, P5, P6 and P7. Moreover, the appellant was arrested at the scene of the crime. We are of the considered view that the prosecution must have thoroughly contemplated their decision of what to tender into evidence in proving their case, otherwise, they are not obliged to tender the evidence they did not need. We thus find this ground baseless." Fortified by the above position, I dismiss the sixth ground for lack of merit. The seventh ground is against the appellants' conviction and sentence which according to the appellants, the same was based on the trial court's erroneous reliance on the unreliable. Incredible and contradictory evidence of PW1, PW2 and PW6 where PW4 testified that only the 2nd appellant was identified in the identification parade; PW6 testified that the participants had different body structure; and PW1 testified that he identified the 1st and 2nd appellants. I have held in respect of the first ground that PW1's identification at the crime scene was not watertight and contradictory. However, I disagree with the appellants that the testimonies of PW1, PW2, PW4 and PW6 testimonies were contradictory. It is clear that PW4 testified on page 35 of the proceedings that he stood in the 7th position and witnessed one person touching the person who stood in the sixth line and his name was Ricardo. PW4 was able to identify the 2nd appellant in court. He informed the trial court that the exercise was very quiet to the extent that he wouldn't know if others were touched. On the other hand, PW6's testimony on page 45 of the proceedings was that he was the 11th in the line and he witnessed the identifying witness touching the person on his right side who stood in the 10th position. PW6 identified the appellant as the person who was identified. The testimonies of PW4 and PW6 on the positions they stood during the identification parade and those of the appellants who were identified by PW1 match. Again, I do not find any variance or contradictions in the evidence of PW4, PW6 and that of PW1 and PW2. PW1 testified that he identified the 1st and 2nd accused persons (the appellants) so as PW2 who testified that PW1 identified the 1st and 2nd accused persons. The testimonies of PW4 and PW6 who stood at different positions reveal in totality that the 1st and 2nd appellants were identified by one witness. The fact that each of PW4 and PW6 testified that the witness identified one person, does not create doubt as to the identification of the 1st and 2nd appellants in the parade and so the testimonies of PW4, PW6, PW1 and PW2. Nonetheless, PW6 did not testify that the participants of the parade had different structures. His testimony on page 46 when cross-examined was that he does not know the age of the other participants and did not remember their physical structures. The seventh ground partly succeeds but partly fails based on my above findings. As regards to the eighth ground of appeal, I have held above in my determination of the

sixth ground that the failure to tender the recorded caution statements was not fatal. I therefore dismiss the eighth ground for being unmerited. In the ninth ground, the appellants complained that the trial magistrate convicted the appellants without assessing, evaluating and analyzing the defence evidence. I have read the whole judgment of the trial court. Indeed, the trial magistrate did not evaluate, discuss and analyze the defence evidence. Noteworthy, in criminal cases, the onus of proof lies on the prosecution to establish beyond reasonable doubt that it is the accused person(s) who committed the charged offence. Courts are enjoined to look at the strength of the prosecution case and not the strength or weakness of the defence case. However, it has been stressed times without number that the trial court is duty bound to evaluate evidence of each witness and make findings on each issue raising therefrom. By failing to evaluate the testimony adduced by the defence witnesses. It is without question that the trial court departed from its statutory duty. The above notwithstanding, sitting as the first appellate forum, this Court is mandated to re-evaluate the evidence on record and come up with its findings. I shall step into the shoes of the trial court and do what it omitted to do by considering the defence case marshalled by DW1, DW2, DW3 and DW4 [See the case of Gaudence Sangu v. Republic, Criminal Appeal No. 88 of 2020 [2022] TZCA 784 (7 December 2022) on page 7 through to 8]. Having examined the evidence, I find as correctly held by the trial court that the prosecution failed to prove the offence against DW3, the then third accused person. The evidence of the prosecution and that of DW3 and DW4 duly established that the third accused person was not at the crime scene and was not found with the mobile phone make Nokia when searched. On the other hand, the testimonies of DW1 and DW2, the 1st and 2nd appellants respectively, were that they were not at the scene of crime on the said date and time. Though the defence did not file a notice of alibi or furnish its particulars as required under section 194(4) and (5), respectively, of the Criminal Procedure Act Cap. 20 R.E. 2022 hereinafter the "CPA", their defence casted doubt on the prosecution evidence especially on their identification by PW1 at the crime scene, and the 32nd hesitation by PW1 to identify them before the trial court as reflected on page 14 of the typed proceedings. I allow the ninth ground of appeal. Having scanned the trial court's judgment, it is clear that contrary to the appellants' lamentations on the tenth ground of appeal, the trial court duly complied with stating the points of determination of the case in the last paragraph of page 6 and the first paragraph of page 8 of the judgement. I hold without hesitation that the trial court complied with the provisions of section 312(1) of the CPA. I dismiss the tenth ground based on the above observations. In the totality of my findings in the appellants' first to tenth grounds of appeal, I find merit in the appellants' eleventh ground of appeal. Although there was proof that the victim was robbed, assaulted, and his cellphone and TZS 10,000 were stolen, the prosecution evidence failed to connect the appellants with the offence of Armed Robbery. The evidence as to the identification of the appellants by PW1 is neither absolute nor watertight. I allow the eleventh ground of appeal by holding that the prosecution failed to establish the offence against the appellants beyond reasonable doubt. Based on my findings above that the prosecution failed to prove beyond shades of doubt that it was the appellants who robbed the victim (PW1) upon failure by the prosecution to prove identification of the

appellants, I allow the present appeal for being merited. In consequence, I quash the 33 "ter trial court's conviction against the appellants, set aside the sentence and order the appellants' immediate release from prison, unless they are held therein for any other lawful cause. It is so ordered. Right of appeal to the Court of Appeal fully explained. DATED at MOROGORO this 18^^ day of November 2024. H. A. KINYAKA JUDGE 18/11/2024 34

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