

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

**(CORAM: KILEO, J.A., MBAROUK, J.A. And MASSATI, J.A.:)**

**CRIMINAL APPEAL NO. 310 OF 2009**

**ABDUL JUMA @ JUMANNE.....APPELLANT  
VERSUS  
THE D.P.P. ....RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania  
At Arusha)**

**(Sambo, J.)**

**Dated 21<sup>st</sup> day of August, 2007  
in  
Criminal Appeal No. 46 of 2007  
.....**

**JUDGMENT OF THE COURT**

4<sup>th</sup> & 7<sup>th</sup> September, 2012

**MBAROUK, J.A.:**

In the District Court of Arusha at Arusha in Criminal Case No. 501 of 2007, the appellant was convicted of the offence of armed robbery contrary to section 287A of the Penal Code Cap. 16 [R.E. 2002] as amended by Act No. 4 of 2004. He was sentenced to thirty (30) years imprisonment. Aggrieved, the appellant unsuccessfully appealed to the High Court (Sambo, J.) where his

appeal was dismissed in its entirety. Undaunted, he has filed this second appeal.

The facts which led to the conviction of the appellant at the trial court were as follows. On 6/6/2007 at about 18:00 hours, PW1, Abdallah Juma who was working as a cook at the house of a white man "mzungu" at Duluti area, Tengeru was coming from town where he was sent by his boss to collect salary of two watchmen amounting to T.shs. 300,000/=. On his way, PW1 met five young men and was able to recognize two of them who were the appellant (Abdul) and Baunsa. PW1 testified that, he was threatened with a bush knife and those bandits took from him cash money, laptop, CD and a mobile phone make Motorola and thereafter disappeared. PW1 reported the matter to the police station where he met PW3 E. 9921 D/Sgt. Deusi he named the appellant (Abdul) and Baunsa as those who stole his items. PW3 testified that, he was told by PW1 that he recognised the appellant and Baunsa as he used to see them at Tengeru stand. On 7/6/2007, at 14:00 hours, the day after the incident while PW1

was at Ngaresero area with PW2 Hussein Shaaban he saw the appellant and Baunsa and recognized them. PW1 screamed for assistance from people, who chased them and succeeded to arrest Baunsa who later died because of the beating he was subjected to by the people. The appellant disappeared, but he was later arrested. PW4 Jumanne Said, owner of a small shop at Singisi area testified that on 7/6/2007 at 12:00 hours, he was in his shop and two customers, the appellant (Abdul) and Baunsa went to buy cigarettes and then asked him to keep their CD so as to collect the same later in the evening. PW4 further testified that, he knew the appellant and Baunsa before, and added that, on the same day, at 20:00 hours, the appellant went to his shop together with a policeman to collect the CD. However, PW4 said when the appellant and Baunsa gave him the said CD, no one witnessed the incident.

In his defence at the trial court, the appellant categorically denied any involvement to the charge preferred against him. He

said, he was arrested next day after the incident on 7/6/2007 at 15:00 hours while coming from his farm. He contended that, while on his way home, he met a group of people who invaded him and beat him without any good reason, but later saved by a good samaritan who communicated by phone with the police station. He was then arrested and later sent to court.

In this appeal, the appellant filed a memorandum of appeal comprising three grounds and later filed one additional ground. In essence, those grounds relate to the following complaints:-

1. That, PW1 did not sufficiently identify the appellant.
2. That, PW1 failed to prove the existence of the alleged stolen properties to the standard required by the law.

At the hearing, the appellant appeared in person unrepresented, whereas the respondent/Republic was represented by Ms. Javelin Rugaihuruzza, learned Senior State Attorney.

In elaboration of his grounds of appeal, the appellant submitted that, the complainant (PW1) failed to give his full name at the police station. Instead of giving his full name he gave only just one name which was not enough as PW1 claimed to know him before that incident. To support his argument, he cited to us the decision of this Court in the case of **Josiah Ezekiel @ Belito vs Republic**, Criminal Appeal No. 11 of 2007 (unreported). He further submitted that, PW1 gave no description of the appellant's physique, or the clothes he was wearing at the scene of crime. For that reason, the appellant urged us to find that he was not properly identified.

Secondly, the appellant submitted that, the charge sheet at the trial court did not state that the CD claimed to have been

stolen as among the items stolen from PW1. He said, even if the prosecution evidence showed that the said CD was stolen from PW1, but it is at variance with the contents of the particulars of the offence found in the charge sheet. For that reason, he urged us to discount the evidence tendered concerning the CD and find that the same was not properly admitted.

On her part, from the outset, Ms. Javelin did not support the appeal, she was of the view that, the appellant was properly identified. In support of her argument, she gave the following reasons:-

- PW1 knew the appellant before the incident and used to see him at Tengeru stand.
- The incident happened at day time at 18:00 hours, hence no element of mistaken identity could arise.

- PW1 named the appellant by the name of Abdul at the earliest possible opportunity when he reported the matter at the police station.
- On the second day of the incident, PW1 managed to identify the appellant when he was with PW2, but the appellant ran away.

For those reasons, the learned Senior State Attorney urged us to find that the appellant was properly identified by PW1 at the scene of crime.

On the issue of the CD, the learned Senior State Attorney submitted that, the variance between the contents found in the charge-sheet and the evidence ought to have been corrected by filing an amended charge-sheet as per the requirements of Section 234 (1) of the Criminal Procedure Act (CPA). Even without such amended charge sheet, Ms. Javelin submitted that such a defect

alone cannot lead this Court to allow the appeal as the prosecution evidence concerning identification was sufficient enough to prove the offence against the appellant.

We fully agree with the learned Senior State Attorney to the effect that the appellant was properly identified at the scene of crime by PW1. As the record shows, the incident happened at a day time at 18:00 hours and the appellant was known to PW1 before the incident, hence the element of mistaken identity cannot arise. Also, PW1 named the appellant at the earliest possible opportunity when he reported him at the police station. (See **Marwa Wangiti Mwita and Another vs Republic**, Criminal Appeal No. 6 of 1995 and **Juma Said Chanyunga vs Republic**, Criminal Appeal No. 80 of 2001 (both unreported) to name but a few.

The appellant cited to us the case of **Josiah Ezekiel @ Belito**(*supra*) to the effect that naming a suspect by one name is

not enough, but with due respect, we are of the view that ***Josiah's case*** (*supra*) is distinguishable from this case, because in that case the appellant was named by his nickname not by his first name as it appeared in this case. Also in that case, the incident occurred at night while in this case the incident occurred in broad day light. The evidence of naming the appellant at the earliest possible opportunity at the police station was supported by the evidence of PW3 E.9921 D/Sgt. Deusi.

Apart from the identification of the appellant by PW1 at the scene of crime on the first day, the record shows that PW1 on the second day of the incident identified the appellant and pointed him to PW2, but the appellant escaped. We are of the view that, such a conduct of running away after PW1 and PW2 saw the appellant shows that he had a guilty conscious.

The High Court which upheld the decision of the trial court had this to say on the identification of the appellant:-

*"The said robbery took place at about 18:00 hours, it was not dark for one to commit mistake on his identification, and there's evidence that the complainant knew him well even before this fateful incident. Infact, the records indicate that the complainant pointed at the appellant being one of his culprits even before he was arrested."*

We fully agree with the findings of facts of the two courts below and we cannot fault them on the issue of identification. See, **The Director of Public Prosecutions vs Jaffari Mfaume Kawawa** [1981] TLR 149.

On the issue that the charge sheet did not state that the CD mentioned by some prosecution witnesses as among the items stolen from PW1, we agree with the learned Senior State Attorney to the effect that, even with such a defect, there is enough

evidence to prove the offence against the appellant. As shown earlier, the evidence of identification was sufficient to prove that the appellant is the one who committed the offence.

For the reasons stated herein above, we find the appeal without merit. Hence, the same is hereby dismissed.

DATED at ARUSHA this 5<sup>th</sup> day of September, 2012

E. A. KILEO  
**JUSTICE OF APPEAL**

M. S. MBAROUK  
**JUSTICE OF APPEAL**

S. A. MASSATI  
**JUSTICE OF APPEAL**

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



M. A. MALEWO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**