

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MBAROUK, J.A, MZIRAY, J. A. And MKUYE, J.A.)

CRIMINAL APPEAL NO. 91 OF 2016

OMARY LAMINI@ KAPERAAPPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Mlay, J.)

dated 18th day of October , 2006

in

Criminal Appeal No. 141 of 2005

JUDGMENT OF THE COURT

9th& 19th day of February, 2018

MZIRAY, J. A.:

Omary Lamini @ Kapera, the appellant in this appeal, was charged and convicted by the District Court of Kibaha at Kibaha for the offence of armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 of the Laws (R.E. 2002). He was sentenced to 30 years imprisonment. His first appeal before the High Court of Tanzania at Dar es Salaam (Mlay, J.) was dismissed. Still aggrieved, the appellant has preferred this second appeal.

The background facts of the case were fully and clearly set out by both the trial court and the first appellate court, but we feel that it is indispensable to once again summarize them, albeit very briefly.

It is on record that PW2, Ally Ibrahim, the victim of the crime, was a businessman selling empty bags. On 16/7/2004, while he was in his shop, he was informed by the appellant, who was acquainted to him by being his brother in-law that at NAFCO – Ruvu there were empty bags worth of 470,000/= being sold. Convinced, PW2 took the said amount of money from his brother, Mussa Idd Kaoneka (PW3) for the purpose of buying the empty bags. On the same day at around 13:00 hours, the two in the company of one Jamal, the appellant's friend, started the journey to Ruvu. On their way, the appellant together with his friend suddenly attacked him and ordered him to give them the money or else they would kill him. Suddenly, the appellant pulled out a sword and started assaulting him. To save his life, he gave them all the money that he had. After taking the money the appellant and his friend fled, leaving him unconscious. Fate would have it, he was found by two people who took him to Mlandizi Police Station. PW2 immediately named the appellant to the police as the culprit.

He did the same to PW3 when he visited him at Tumbi Hospital. On 18/9/2005, the appellant was arrested in connection with the alleged offence.

In his defence, the appellant denied the allegation of committing the offence and raised a defence of *alibi* that at the material time he was at Makuyuni, in Korogwe District doing his own business. The trial court was not impressed by his defence. He was convicted and sentenced as already indicated.

In this appeal, the appellant filed a memorandum of appeal which contained six grounds of complaint namely;

- 1. That, the first appellate judge grossly erred in law when he upheld (sic) the appellant's conviction and sentence but failed to note that there was no first report to the effect that it's the appellant who robbed the victim.*
- 2. That, the first appellate judge grossly erred in law when he upheld (sic) the appellant's conviction and sentence despite that there was lacking any evidence from the prosecution witnesses to show that there was a manhunt mounted after the alleged crime.*

3. *That, the first appellate judge grossly erred in law when he upheld (sic) the appellant's conviction and sentence but failed to note that there was no investigation evidence as to how the appellant was arrested to ascertain whether his apprehension emanated from the offence at hand.*
4. *That, the first appellate judge grossly erred in law when he upheld (sic) the appellant's conviction and sentence despite it being based on inconsistent and incredible evidence of PW1 and PW3 as regard the time. Furthermore, he (judge) failed to assess the veracity of the prosecution evidence as a whole.*
5. *That, the first appellate judge grossly erred in law when he upheld (sic) the appellant's conviction and sentence basing on Exh"pw1" (PF3) (sic) despite that the doctor was not brought to testify to prove its authenticity.(here the appellant was denied a right to fully defend himself).*
6. *That, the first appellate judge grossly erred in law by upholding the appellant's conviction and sentence despite it being based on a case that was not proved to the required standard of the law.*

When the appeal was called on for hearing before us, the appellant appeared in person and defended for himself, while Ms. Faraja George, learned State Attorney represented the respondent Republic. Being a layman, the appellant opted to have the learned State Attorney submit for the Republic first and he would then respond thereon.

In arguing the appeal, the learned State Attorney combined the 1st, 2nd, 3rd, 4th and 6th grounds and argued them together. She submitted that the entire case lies on the issue of visual identification. Citing the cases of **Waziri Amani v. Republic**, [1980] 250 and that of **Scapu John & Another v. Republic**, Criminal Appeal No. 197 of 2008 (unreported), the learned State Attorney argued that the prosecution proved the guilty of the appellant sufficiently through the evidence of PW2, the victim and the corroborative evidence of PW3. She pointed out that PW2 and the appellant were related and that they knew each other as the appellant was his brother in-law. She further submitted that the incident happened during broad day light and that when the matter was reported to police PW2 readily named the appellant as the culprit. He also at the hospital named the appellant to PW3.

As to the 5th ground of appeal, the learned State Attorney readily conceded that the PF. 3 was erroneously admitted in evidence when it was tendered by the complainant as exhibit P1. The same was tendered in violation of clear provisions of section 240 (3) of the Criminal Procedure Act, Cap. 20 R.E. 2002(the CPA). She urged the Court to expunge the same. She further added that the charge against the appellant was armed robbery in which the evidence of PF.3 is not required to prove the case of that nature. She pointed out that even if the evidence of PF3 is expunged, still the remaining evidence is sufficient to sustain a conviction.

We do agree that the PF.3 produced in evidence did not follow the procedure provided under section 240 (3) of the CPA. So it ought to be and we do proceed to expunge it from the record.

After expunging the PF.3 on record, we now proceed to ascertain the rest of the evidence if the same is cogent to sustain a conviction. The evidence adduced by PW2, the victim and that of PW3 sufficiently proved beyond reasonable doubt that it was the appellant and no other person who committed the offence. As the record shows, PW2 testified that he knew

the appellant before the incident occurred. He was his brother in- law.He also testified that the incident took place during broad day light to which the issue of mistaken identity cannot raise. In addition to that, PW2 named the appellant to police and PW3 at the earliest possible time. This cemented assurance. (See the unreported Criminal Appeal No. 6 of 1995 – **Marwa Wangiti Mwita v. Republic**).The combinations of all those factors have led us to have no flicker of doubt that it was the appellant and no other person who committed the offence.

The appellant however in his rejoinder posed the issue of contradictions in the evidence of PW2 and PW3 as to the time of the incident. However, we should perhaps point out here that this issue of contradiction was neither raised before the High Court nor being one of the grounds in this appeal. Although we are vested with jurisdiction to hear appeals from or revise proceedings or decisions by the High Court in the exercise of its original, appellate or revisional and/or review jurisdictions, we cannot decide, like in the instant matter, on any issue which was never decided by the High Court (see, for example: **JAFARI MOHAMED VS.**

THE REPUBLIC, Criminal Appeal No. 112 of 2006(CAT at Dodoma)(unreported).

In the event and for the foregoing reasons, we do not find any basis for which to fault the findings of the two courts below. The appeal in the circumstance is without merit. We accordingly dismiss it in its entirety.

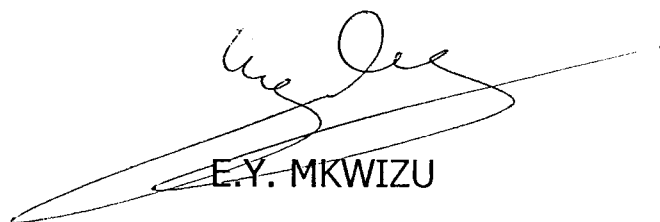
DATED at **DAR ES SALAAM** this 15th day of February, 2018.

M.S. MBAROUK
JUSTICE OF APPEAL

R.E.S MZIRAY
JUSTICE OF APPEAL

R.K. MKUYE
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL