

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

**(CORAM: MUGASHA, J.A., MWAMBEGELE, J.A. And KEREFU, J.A.)**

**CRIMINAL APPEAL NO. 381 OF 2016**

**FARAJI ALLY LIKENGE.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**(Appeal from the Judgment of the High Court of Tanzania  
at Mtwara)**

**(Lukelelwa, J.)**

**Dated the 15<sup>th</sup> day of March, 2005**

**in**

**Criminal Appeal No. 96 of 2004**

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**JUDGMENT OF THE COURT**

16<sup>th</sup> & 19<sup>th</sup> November, 2020.

**KEREFU, J.A.:**

This is a second appeal by Faraji Ally Likenge, the appellant who was before the District Court of Liwale sitting at Liwale charged with armed robbery contrary to sections 285 and 286 of the Penal Code, Cap 16 of the Revised Edition, 2002 (now Revised Edition, 2019). It was alleged that, on 26<sup>th</sup> April, 2004 at around 13:00 hours at Liwale 'B' Village within Liwale District in Lindi Region the appellant stole one bicycle make phoenix valued at TZS 45,000.00 the property of one Fatuma Likoko and immediately before stealing he used a *panga* to injure her.

The appellant denied the charge laid against him and therefore, the case had to proceed to a full trial. To establish its case, the prosecution marshalled a total of four witnesses and tendered two exhibits, PF3 (exhibit P1) and the alleged stolen bicycle (exhibit P2) respectively. The appellant relied on his own evidence as he did not call any witness.

In a nutshell, the prosecution case found on the record of appeal stated that, on 26<sup>th</sup> April, 2004 at about 11:00 hours Fatu Likoko (PW1) was coming from her *shamba*. At around 12:00 hours when approached Nanjegaja village she met a man who was coming from the opposite side. The said man passed her and then turned around and caught the bicycle which PW1 was riding. The man ordered PW1 to leave the bicycle for him. PW1 refused and the said man cut her with a *panga* on her left hand. PW1 raised an alarm which was heard by Hashimu Rashidi Libingai (PW2). Before PW2 could take any action, he saw a man he knew as Faraji Ngambe emerged from a bush riding a bicycle. When PW2 asked him what happened, the said man threw the bicycle and ran away. PW2 added that, he later saw PW1 who told him that she was robbed of her bicycle by unknown person. When they went to where the said bicycle was thrown, PW1 recognized it to be hers and reported the matter to Police. PW1

tendered a PF3 and the said bicycle which were admitted in evidence as exhibits P1 and P2, respectively.

Swedi Ismail Mnungu (PW3) testified that he heard the alarm raised by PW1 and upon making a follow up he saw PW1 wounded with a *panga* and robbed of her bicycle. He said that they went to the scene of crime and found bicycle prints. PW3 stated further that, when they followed the said prints, they found PW2 in his *shamba* and he told them that the bicycle was thrown by one man after he saw him.

E. 8711 PC Sofelet (PW4) the investigation officer testified that, he was involved in the investigation of the incident and visited the scene of crime. PW4 prepared a sketch map of the scene of crime, interviewed the appellant and recorded his cautioned statement.

In his defence, the appellant denied any involvement in the alleged offence. However, after a full trial, the appellant was found guilty, convicted and sentenced to thirty years imprisonment. Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. Still undaunted, the appellant has preferred the present appeal. In the Memorandum of Appeal, the appellant

raised eight (8) grounds of complaint. However for reasons that will shortly come to light we need not recite them herein.

It is noteworthy that this appeal was called for hearing on 4<sup>th</sup> May, 2018 and 12<sup>th</sup> February, 2020, respectively but could not proceed on account of mental health of the appellant as it was observed that he was not able to follow the Court proceedings properly. As such, and in the interest of justice, the Court ordered the appellant to undergo medical treatment and a report on his mental status be availed to the Court prior to the hearing of the appeal. In his report dated 24<sup>th</sup> March, 2019 with Ref: No. 10505/2019 and received in Court on 7<sup>th</sup> October, 2020, Dr. Enock Changarawe, a psychiatric at Isanga Institution Mental Hospital, provided an encompassing and comprehensive account of medical examination conducted on the appellant's mental status as well as his past medical history. The said Doctor opined that the appellant's mental status after being diagnosed was found to be normal and he can proceed well with his appeal.

When the appeal was placed before us for hearing, the appellant appeared in person without legal representation whereas the respondent Republic was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney.

Upon being given an opportunity to amplify on the grounds of appeal, the appellant opted to initially hear the submission of the learned Senior State Attorney but he reserved his right to rejoin, if need to do so would arise.

Responding to the appeal, Mr. Ndunguru expressed his stance that he is supporting it in respect of the second, fifth and sixth grounds of appeal. The said grounds of appeal mainly raise the following points; **one**, that PW1 did not sufficiently establish positive identification of the appellant at the scene of crime to eliminate all possibilities of mistaken identity; **two**, that the appellant was not found in possession of the alleged stolen bicycle (exhibit P2) and the same was not properly identified by PW1; and **three**, that the prosecution case was not proved to the required standard.

Submitting generally in support of the above grounds, Mr. Ndunguru argued that the said grounds have merits because the prosecution case was marred with doubts which at the end of the day were supposed to be resolved in favour of the appellant. The learned Senior State Attorney with some tenacity enumerated the said doubts. He submitted that the visual identification of the appellant was not watertight, as PW1 the only prosecution eye witness at the scene of crime did not give proper

descriptions of the appellant, such as the attire he was wearing and/or any special mark(s) which enabled her to identify him. He added that, since the appellant was not known to PW1 prior to the incident, PW1 was expected to give further descriptions on how he managed to identify him to avoid mistaken identity but, he said, that was not done.

In addition, Mr. Ndunguru argued further that even the identification of the alleged stolen bicycle was too general to eliminate the possibility of the same being the property of somebody else, because PW1 though claimed that it was hers, she did not describe it and give any particular symbol or special mark to distinguish it with other bicycles of similar nature. To buttress his position, Mr. Ndunguru cited the case of **Ally Bakari and Pili Bakari v. the Republic** [1992] T.L.R 10. He then concluded that, since the testimony of PW1 was weak the remaining evidence of PW2, PW3 and PW4 could not have any weight to corroborate it. On the basis of his submission, Mr. Ndunguru urged us to allow the appeal, quash the conviction and set aside the sentence imposed against the appellant and release him from the prison.

In his brief rejoinder, the appellant did not have much to say other than supporting what was submitted by Mr. Ndunguru and he also urged us to allow the appeal and set him at liberty.

We have carefully considered the submissions made by the parties in the light of the record of appeal before us and the grounds of complaint the main issue for our determination is whether the appellant was properly identified at the scene of crime.

Before dealing with the above issue, we find it crucial to reiterate the settled principle which state that, in the second appeal like the present one, the Court should rarely interfere with concurrent findings of fact by the lower courts. The rationale behind is that the trial court having seen the witnesses testify is better placed to assess their demeanour and credibility, whereas the second appellate court assess the same from the record. Therefore, the Court is entitled to interfere with the concurrent findings of facts made by the courts below if there has been a misapprehension of the nature and quality of evidence and other recognized factors occasioning miscarriage of justice. This position was well stated in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] TLR 149; **Mussa Mwaikunda v. Republic** [2006] TLR 387; **Wankuru Mwita v. Republic**, Criminal Appeal No. 219 of 2012 and

**Omary Lugiko Ndaki v. Republic**, Criminal Appeal No. 544 of 2015 (both unreported). Specifically in **Wankuru Mwita** (supra) the Court stated that:-

*"...The law is well-settled that on second appeal, the Court will not readily disturb concurrent findings of facts by the trial court and first appellate court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice."*

Therefore, in determining this appeal, we shall be guided by the above principle.

It is on record that the courts below believed PW1's account that she positively identified the appellant at the scene of crime. We wish to remark that, a proper identification of an accused person is crucial in proving a criminal charge in order to ensure that any possibility of mistaken identification is eliminated. In this regard, the Court has established principles in considering favourable conditions for identifying the accused. For instance, in a landmark case of **Waziri Amani v. Republic** [1980]



TLR 250 the Court has set out guidelines on visual identification which the courts in this jurisdiction have uninterruptedly followed, that:-

*"...evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification **unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight.**" [Emphasis added].*

Then, the Court went on to state the following conditions to be taken into account: -

*"...the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night time; whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not. These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity." [Emphasis added].*

Following the above conditions, it is now settled that a witness who alleges to have identified a suspect at the scene of crime ought to give

detailed description of such a suspect to a person whom he first reports the matter to before such a suspect is arrested. In **Mohamed Alhui v. Rex** [1943] 9 EACA 72 the erstwhile East African Court of Appeal stated categorically that: -

*"In every case in which there is a question as to the identity of the accused, the fact of there, having been a description and terms of that description, are matters of the highest importance of which evidence ought always to be given first of all, of course, by the person who gave the description or purports to identify the accused and then by person to whom the description was given."*

In the case at hand, the incident took place at noon in the broad daylight and as indicated above the trial court and the first appellate court relied on the evidence of PW1, the only prosecution eye witness, to prove that the appellant was properly identified. In his submission, Mr. Nduguru faulted the decisions of the lower courts for failure to observe that the evidence on visual identification of the appellant was not watertight. To verify this matter, we have scrutinized the evidence adduced by PW1, PW2 and PW3 before the trial court found at pages 7 to 9 of the record of appeal and we are in agreement with Mr. Ndunguru that the appellant was not properly identified. This is due to the fact that, in her testimony PW1 did not give any description of the appellant to indicate that she positively

recognized him. In addition, PW2 the first witness to respond to the alarm raised by PW1 was informed by PW1 that she did not know the assailant.

In his own words found at page 8 of the record PW2 testified that: -

*"When I asked PW1 what happened she said, she was cut with a panga and robbed her bicycle by unknown person. From there we went to where a bicycle was thrown and PW1 recognized it to be her property."*

Again, PW3 at pages 8 to 9 of the same record testified that: -

*"Then, we followed where the cry came from. We met PW1 and asked her why she was crying, she told us that she was wounded with a panga also robbed her bicycle. She said she knew him by face and not name."*

From the above extracted excerpts, it is clear that PW1 gave two contradictory statements, first that the assailant was not known to her and second, that she only knew him by face. In all scenarios, however she completely failed to describe the physique, size and/or attire of the said assailant. Her testimony was in general terms. Therefore, given the general descriptions given by PW1, we are in agreement with Mr. Ndunguru that the appellant was not properly identified by PW1 at the scene of crime to rule out the possibility of mistaken identity.

Worse still and as eloquently submitted by Mr. Ndunguru even the alleged stolen bicycle was not conclusively identified. PW1 did not testify with respect to any special symbols or mark of the allegedly stolen bicycle. It is also clear that PW1 did not establish ownership of the same, as she did not tender any Registration Card or receipt to show satisfactorily that she once owned it. This raises doubt as whether the said bicycle PW1 purported to identify was hers. In **Mustapha Darajani v. Republic**, Criminal Appeal No. 242 of 2015 (unreported) this Court stated that:-

*"I such cases, description of special mark to any property alleged stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits."*

We wish to emphasize that, in cases of this nature, identification and proof of ownership of the allegedly stolen property is of paramount importance. A mere mention of the item stolen, as in the case at hand, is not sufficient. The bicycle being an item of general nature which did not have any distinct marks to differentiate it from others of similar category, cannot be safely concluded that it was stolen from PW1. In the circumstances, we agree with Mr. Ndunguru that the case against the appellant was not proved beyond reasonable doubt.

The totality of the foregoing leads us to the conclusion that the prosecution case was tainted with doubts which in our criminal jurisprudence requires us to decide in favour of the appellant.

In view of what we have demonstrated above, we allow the appeal and accordingly quash the conviction and set aside the sentence imposed against the appellant. Consequently, we order for immediate release of the appellant from prison unless he is being held for some other lawful cause.

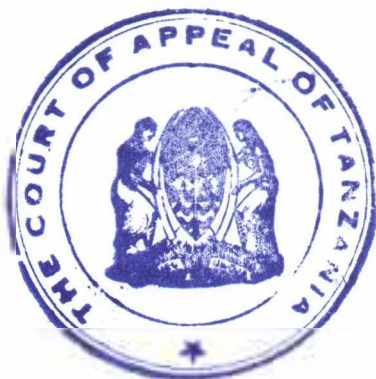
**DATED at MTWARA** this 19<sup>th</sup> day of November, 2020.

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

J. C. M. MWAMBEGELE  
**JUSTICE OF APPEAL**

R. J. KEREFU  
**JUSTICE OF APPEAL**

The Judgment delivered this 19<sup>th</sup> day of November, 2020 in the presence of the Appellant in person and Mr. Wilbroad Nduguru, Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



  
B. A. MPEPO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**