

IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: MKUYE, J.A., MWAMBEGELE, J.A. And LEVIRA, J.A.)

CRIMINAL APPEAL NO. 121 OF 2017

RAMADHANI HAMISI..... APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

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

(Matupa, J.)

dated the 17th day of March, 2017

in

Criminal Appeal No. 381 of 2016

.....

JUDGMENT OF THE COURT

20th & 28th April, 2021

MWAMBEGELE, J.A.:

The appellant Ramadhani Hamisi, along with three others who are not party to this appeal, were arraigned before the District Court of Chato, Geita Region for the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 of the Revised Edition, 2002 (henceforth "the Penal Code"). They pleaded not guilty to the charge after which a full trial ensued. At the end of the trial, they were found guilty as charged,

convicted and sentenced to a prison term of thirty years. They all appealed to the High Court of Tanzania at Mwanza vide Criminal Appeal No. 381 of 2016 where, save for the appellant's, the appeal in respect of the other three was successful. Aggrieved, the appellant has now come to this Court on second appeal to vindicate his innocence.

We wish to narrate, albeit briefly, the material background facts leading to the appellant's arraignment as featured in the prosecution's case with a view to appreciating the appeal before us. On 16.01.2015, Masele Ludigija (PW1), a driver to a motor vehicle make Scania, at night, withdrew Tshs. 1,200,000/= by M-Pesa from a Vodashop belonging to a certain Tege at Buziku area in the District of Chato in Geita Region. He used part of the money to pay his casual labourers and the owner of the motor vehicle he was driving. He remained with Tshs. 465,000/=. Thereafter, he started his drive to Mwanza in the company of three other persons; Malando Shole (PW2), Mawingu Faida (PW4) and a certain Leonard who did not testify.

While on their way, at Igando Forest, they were overtaken by a motorcycle ridden by the first accused person at the trial and after some

distance, they were stopped at gun point. After some minutes, there arrived another motor cycle with other robbers making them four in number. The gang of robbers robbed PW1 of Tshs. 465,000/= and a mobile phone. PW2 and PW4 were also robbed of their mobile phones. The said Leonard had no mobile phone and was not robbed of anything. After the robbery, the robbers made away with the said items on board the two motor cycles one of which PW1 identified to be with registration No. T807 CAF.

PW1 and his colleagues, reported the incidence at Bwanga Police Station where PW1 told them that he identified the first accused at the trial as one of the culprits as he used to ferry them in his *bodaboda*; a motorcycle used as a taxi. A search for the culprits was launched. Initially, it did not bear any fruit but later the police managed to locate where the first accused resided and a search was conducted in his rented room and therein was discovered an assortment of items suspected to have been stolen. PW2 managed to identify one of the mobile phones found in the first accused person's room as belonging to him and stolen during the robbery incident. The appellant and his accomplices were arrested at some

point later. The first accused was made to write a cautioned statement in which he confessed to have participated in the robbery. They were later arraigned and prosecuted as shown above.

At the trial, the appellant denied the charges levelled against him. He stated in his defence that no witness identified him at the scene of crime. Neither was there any cautioned statement tendered against him by PW12. He simply prayed before the trial court to be acquitted

The appeal was argued before us on 23.04.2021 during which the appellant appeared in person, unrepresented. The respondent Republic appeared through Ms. Revina Tibilengwa, learned Senior State Attorney assisted by Mr. Hezron Mwasimba, also learned Senior State Attorney and Ms. Dorcas Akyoo, learned State Attorney.

The appellant had earlier on filed a memorandum of appeal comprising two grounds which can be paraphrased as; **one**, that there was a misapprehension of evidence by the first appellate court; and, **two**, visual identification of the appellant relied on by the two courts below was not watertight.

When we called upon the appellant to address us on his appeal, he simply adopted his memorandum of appeal as his oral arguments and preferred to hear the Republic's response. He, however, reserved his right of rejoinder if need to do so would arise.

Responding, Ms. Tibilengwa expressed the stance of the respondent Republic at the very outset that it supported the appellant's appeal.

With respect to the first ground of appeal, the learned Senior State Attorney, started by clarifying that the charge sheet appearing at p. 4 of the record of appeal indicates that Kapuruwaka Msigwa @ Ustadhi, Osca Johnbosco @ Jacobo, Ramadhani Hamis and Elias Shigemelo @ Bambala were the first, second, third and fourth accused persons respectively. However, the notice of appeal to the High Court which appears at p. 61 of the record of appeal shows the following sequence; Osca Johnbosco @ Jacobo, Kapuruwaka Msigwa @ Ustadhi, Ramadhani Hamis and Elias Shigemelo @ Bambala as being the first, second, third and fourth appellants respectively. Conversely, the Petition of Appeal at p. 62 shows Ramadhani Hamis, Kapuruwaka Msigwa @ Ustadhi, Osca Johnbosco @

Jacobo and Elias Shigemelo @ Bambala as being the first, second, third and fourth appellants respectively. In the judgment of the High Court, the parties are as they appear in the petition of appeal in which the appellant is the first appellant.

The learned counsel went on to submit that reference by witnesses to the first and second accused persons was reference to Kapuruwaka Msigwa @ Ustadhi and Osca Johnbosco @ Jacobo; not to the appellant. She added that at p. 77 of the record of appeal, the first appellate court stated that PW2 testified that it was the appellant who was holding a gun but when PW2 testified at p. 9 of the record of appeal, he referred to the first accused who pointed a gun at the driver, the first accused at the trial was not the appellant but Kapuruwaka Msigwa @ Ustadhi.

Likewise, Ms. Tibilengwa went on, at p. 78 of the record of appeal, the High Court Judge referred to the testimony of No. D 6429 Sgt. Beatus (PW12) to the effect that the respective rooms of the first and second appellants were searched and an assortment of items suspected to have been stolen were retrieved. However, the learned Senior State Attorney

contended, PW12 testified that the search was conducted on the rooms of the first and second accused persons at the trial and the first and second accused persons at the trial were Kapuruwaka Msigwa @ Ustadhi and Osca Johnbosco @ Jacobo.

Similarly, Ms. Tibilengwa went on, the High Court Judge, at p. 80 of the record of appeal, made reference to the testimony of PW1 to the effect that he could identify the rider of the motorcycle and who claimed the money from him. The learned Senior State Attorney argued that the evidence of PW1 referred to Kapuruwaka Msigwa @ Ustadhi who was the first accused person at the trial, not the appellant who was the third.

Ms. Tibilengwa submitted further that the analysis of evidence by the High Court Judge was misapprehended and that the mix-up of evidence was perhaps caused by the change of the accused persons' positions in the charge sheet, the notice of appeal and the petition of appeal. The learned Senior State Attorney argued that while the High Court Judge was aware, as appearing at 75 of the record of appeal, that there was a mix-up of the positions of the accused persons and the appellants, he did not analyze

well the evidence which touched the appellant. He contended that the only evidence which touched the appellant was the testimony of PW2 at p. 9 of the record where he said he handed his mobile phone to the third accused (the appellant) during the robbery and that of PW12 at p. 38 where he testified that they arrested the third accused (the appellant) with the help of the first and second accused persons. That evidence, she argued, was not enough to mount a conviction against the appellant.

Having submitted as above, the learned counsel implored us to step into the shoes of the first appellate court and analyze the evidence which was misapprehended. To buttress this proposition, she referred us to our decision in **Yosiala Nicholas Marwa and two others v. Republic**, Criminal Appeal No. 193 of 2016 (unreported) in which we relied on our previous decision in **Salum Mhando v. Republic** [1993] TLR 170 to hold that a second appellate court is entitled to look at the misdirections and nondirections and make its own findings of fact.

With regard to the second ground of appeal, Ms. Tibilengwa submitted that part of the arguments in respect of this ground have been

canvassed when arguing the first ground of appeal. He added that the appellant was not at all identified at the *locus in quo* by PW1 and PW4. PW2 who testified that he handed him the mobile phone did not testify as to how he identified or recognized him, she submitted. She went on to submit that PW12 who simply said they arrested the appellant with the help of the first and second accused persons, did not testify as to how he participated in the commission of the offence.

In view of the above submissions, she found both grounds of appeal filed by the appellant meritorious and implored us to find merit in this appeal and release the appellant from prison.

Given the response by the learned Senior State Attorney, the appellant had nothing useful to add in rejoinder. He simply rejoined that he supported what the learned Senior State Attorney submitted and prayed to be released from prison where he has been for six years since his arrest.

We have dispassionately considered the submissions made by Ms. Tibilengwa and examined the record as well. Having so done, we are in full agreement with the position she has taken. As the learned Senior

State Attorney put, and to our mind rightly so, ordinarily, this Court as a second appellate court, will not interfere with the findings of fact of the courts below unless there is a misapprehension of evidence by misdirections or nondirections or when it is clearly shown that there has been a miscarriage of justice or violation of some principles of law or procedure. We have so held in a number of our decisions – see **Salum Mhando** (supra), **Edwin Isdori Elias v. Serikali ya Mapinduzi Zanzibar** [2004] T.L.R. 297 and **Musa Mwaikunda v. Republic** [2006] T.L.R. 387 as well as **Julius Josephat v. Republic**, Criminal Appeal No. 3 of 2017, **Joseph Safari Massay v. Republic**, Criminal Appeal No. 125 of 2012, and **Felix s/o Kichele & Another v. Republic**, Criminal Appeal No 159 of 2005 (all unreported). We held in **Salum Mhando** (supra) and recited a holding from that case in **Yosiala Nicholaus Marwa** (supra), the case referred to us by the learned Senior State Attorney. We think that holding merits recitation here. It was held:

"Where there are misdirections and nondirections on the evidence, a court of second appeal is entitled

to look at the relevant evidence and make its own findings of fact.”

Likewise, in **Julius Josephat** (supra) we reproduced the following observation from our previous decision in **Felix s/o Kichele & Another** (supra):

“This Court may, however, interfere with such finding [of fact] if it is evident that the two courts below misapprehended the evidence or omitted to consider available evidence or have drawn wrong conclusions from the facts, or if there have been misdirections or non-directions on the evidence.”

Flowing from the above, we now proceed to show why we say the first appellate court misapprehended the evidence and when doing this we find ourselves unable to resist the urge of commending the learned Senior State Attorney for her eloquent submissions which she argued with some considerable tenacity, a good work well done.

The appellant complains in the first ground over the mix-up of their positions in the charge sheet and the petition of appeal which led to the

dismissal of his appeal. In the actual fact, the appellant is recorded when arguing the appeal before the first appellate court as saying:

"... I was referred as 3^d accused and not 1st accused. In that case, Kapuruwaka was the 1st accused. There is a mix up of accused persons."

Indeed, as we have alluded to above, the appellant was the third accused person at the trial. Thus, when PW12 testified that they searched the respective rooms of the first and second accused persons and found an assortment of items they suspected to have been stolen, he meant they searched the residences of Kapuruwaka Msigwa @ Ustadhi and Osca Johnbosco @ Jacobo who were, respectively, the first and second accused persons at the trial. It was by no means a reference to the appellant who was the third accused person at the trial. This stated, the reference by the first appellate court that the first appellant was the one wielding a gun is not correct. At p. 77 of the record of appeal, the first appellate court stated:

".... This witness [PW2] was categorical that it was the first appellant who was holding the gun on

them ... PW4 one Mawingu Faida who was also a passenger in the lorry was able to name the first appellant by the name of Ustadhi, and has claimed that he was able to identify him at the scene as the person who commandeered the operation with the gun."

Let us see what PW2 testified at p. 9 of the record of appeal:

"After a short distance at Igando forest, the 1st accused pointed a gun at the driver and required the driver to stop"

And PW4 testified at p. 14 of the record of appeal:

"... the 1st accused was armed with a gun and pointed it at the driver, the driver responded by parking the car and we were ordered to drop down at Igando Village and after that, the joint accused being with 1st accused started to search us one after another."

With due respect to the first appellate Judge, we think there is a misapprehension of evidence here. We say so because, reference to the first accused by PW1 and PW4 was reference to Kapuruwaka Msigwa @

Ustadhi who was the first accused person at the trial and not the appellant who was the third. Equally, reference to Ustadhi as the person who was armed with a gun and pointed it at PW1, was reference to the same Kapuruwaka Msigwa @ Ustadhi, the first accused person and not the appellant who was the third accused person at the trial and who was the first appellant before the first appellate court.

Equally, reference by PW12 to the effect that they searched the respective rooms of the first and second accused persons and an assortment of items suspected to have been stolen were retrieved therefrom was reference to Kapuruwaka Msigwa @ Ustadhi and Osca Johnbosco @ Jacobo who were, respectively the first and second accused persons at the trial; not the appellant who was the third accused person at the trial. Similarly, PW1's reference to the effect that he could identify the rider of the motorcycle and who claimed the money from him as a person who pointed a gun at him was reference to the first accused at the trial; that is, Kapuruwaka Msigwa @ Ustadhi, not the appellant who was the third accused person at the trial. We agree with Ms. Tibilengwa that the High Court Judge misapprehended the evidence to the detriment of the

appellant. We also agree with her that the mix-up of evidence might have been caused by the change of the accused persons' positions in the charge sheet, the notice of appeal and the petition of appeal. We also have no difficulties in agreeing with Ms. Tibilengwa that the only evidence touching the appellant was the testimony of PW2 at p. 9 of the record where he said, during the robbery, he handed his mobile phone to the third accused (the appellant) and that of PW12 at p. 38 where he testified that they arrested the third accused (the appellant) with the help of the first and second accused persons. That evidence, as submitted by Ms. Tibilengwa, and to our mind rightly so, fell short of proving the case against the appellant to the required standard; beyond reasonable doubt.

Next for consideration is the second ground of appeal. As rightly argued by Ms. Tibilengwa, the arguments in respect of this ground have been canvassed in the first ground of appeal. The appellant was not at all identified at the scene of crime by PW1 and PW4. The only evidence which somewhat implicated the appellant is that of PW2 and PW12. It was the testimony of PW2 that he handed the mobile phone during the robbery but his testimony was short of how he identified or recognized him. We are

positive that the circumstances obtaining at the *locus in quo* were such that possibilities of mistaken identity could not be eliminated. It is our considered view that holding the appellant as being positively identified given the casual testimony of the witnesses will be a mere trial and error which our criminal jurisprudence does not allow. As we held in **Ibrahim Ramadhan Manguvu v. Republic**, Criminal Appeal No. 26 of 2016 (unreported):

"... without requisite evidence on the intensity of light and the distance from the source of lights to where the complainant and his assailant were, it is hazardous to guess that riding on the motorcycle to Mahamoud area facilitated positive identification under otherwise difficult conditions."

PW12 simply testified that they arrested the appellant with the help of the first and second accused persons. He did not testify as to how the appellant participated in the robbery.

In view of the above, we are inclined to accept the invitation extended to us by Ms. Tibilengwa that we should find and hold, as we hereby do, that the guilty of the appellant (the third accused person at the

trial) was not established to the hilt. The appellant's appeal is meritorious. We therefore quash his conviction and set aside the sentence meted out to him by the trial court and upheld by the first appellate court. In consequence whereof, we order the immediate release from prison of the appellant Ramadhani Hamis unless he is held there for some other lawful cause.

DATED at **MWANZA** this 27th day of April, 2021.

R. K. MKUYE
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

This Judgment delivered this 28th day of April, 2021 in the presence of the appellant in person and Ms. Sophia Mgasas, the learned State Attorney for the respondent/Republic, is hereby certified as a true copy of the original.


E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL