

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

(CORAM: LILA, J.A., KITUSI, J.A., And MASHAKA, J.A.)

CRIMINAL APPEAL NO. 217 OF 2020

HOSEA EMU MWANGAMA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mbeya)

(Mongella, J.)

dated the 29th day of April, 2020

in

Criminal Appeal No. 101 of 2019

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JUDGMENT OF THE COURT

6th & 13th February, 2023.

KITUSI, J.A.:

Hosea Emu Mwangama the appellant, was one of the six accused persons who stood trial for armed robbery before the District Court of Mbeya, it being alleged that he and the other five carrying a firearm and machetes raided the shop of one Ayoub Gaitan Ng'ande and used those weapons to facilitate robbery of cash money and some shop items. Five of the accused, including the appellant were convicted and sentenced to imprisonment, but on appeal to the High Court, only the appellant's conviction was sustained.

Hence this appeal seeking to challenge that conviction and sentence of 30 years imprisonment.

Since the two courts below made a concurrent finding, which we have no reason to disturb, that armed robbery did in fact take place at the shop of the said Ayoub Gaitan Ngánde who testified as PW1, the major determination that this appeal calls upon us to make is whether the appellant is the transgressor.

There were two pieces of evidence as regards the identity of the perpetrator of the robbery. PW1 who offered the first piece of evidence that he identified two of the assailants who during the trial, stood as fifth and sixth accused. The appellant who was the first accused was, therefore, not identified by PW1. Yet the trial Court made the following finding in relation to the appellant:-

*"From the evidence, the first accused was not identified at the scene by PW1. However, **he was outside with others threatening people passing and those wanting to go to rescue him.** He injured PW3 who was passing."*

So, PW3 is the second thread of evidence. We shall refer to his testimony at some length because of its relevance in the argument which

have been made by Ms. Mwajabu Tengeneza, learned Senior State Attorney, in the course of supporting the appeal, and also because of its relevance in our determination of the major point we earlier alluded to, that is, whether the appellant is the one who committed the robbery.

PW3 happens to be a member of the People's Militia, and he is officially known as MG 351022 Robert Simon. On the material day at around 22.00 hours, PW3 was proceeding from the old Airport area within the city of Mbeya where he had visited a friend. While at Maendeleo Market looking for transport for hire, he heard women crying. He looked around and saw armed people clad in long coats and masks and the victims of what appeared to be a hold up, sitting down. PW3 was also ordered to sit down, and he obliged. One of the bandits dispossessed him of his mobile phone and PW3 testified that the appellant, whom he knew well before was the one who took the mobile phone from him amid threats. Another bandit physically assaulted PW3 but he could not identify this one because as it were, he had his face masked. Therefore, PW3 testified that he easily identified the appellant during that scuffle. In his defence, the appellant did not deny being known to PW3 and he has reiterated that position before us. He has submitted that PW3 and him grew together and went to school together. He has however,

maintained that he had nothing to do with the alleged robbery and challenged PW3's evidence of visual identification as untrue.

As we have alluded to above, the appellant was convicted mainly on the strength of PW3's testimony and his appeal to the High Court, was dismissed because the learned High Court Judge accepted the reasoning of the trial court.

The appellant has raised five grounds for us to consider in allowing his appeal. The first ground of appeal alleging that the learned Judge did not determine the grounds of appeal that had been raised in the petition of appeal is misconceived because that is exactly what the learned Judge meticulously did. The second and fourth grounds of appeal are, in our view, off the mark also because they raise issue with the failure by the two courts below to evaluate the evidence of PW1. Clearly PW1's evidence did not lead to the conviction of the appellant anyhow and the trial magistrate was unambiguous about it in the excerpt reproduced a while ago.

In the third ground of appeal, the appellant's complaint is that there were double standards that allegedly favoured the other suspects who were in the same scenario as him. Of course, the principle of equality before the law expects courts to treat equally accused persons who are in similar

circumstances. We have held, not once, that justice should not be rationed.

See **Msafiri Issa Dodo & Another V. Republic**, Criminal Appeal No. 255 of 2006 (unreported). In that case the Court held:-

"We are of the considered opinion that, the act of the trial court to acquit the 3^d and 4th accused persons and convict the 1st and 2nd appellants was an act of double standards, because all were presumably identified by PW1. Why others should be acquitted and others be convicted at the time when the record has shown the same witness said he identified them? This clearly was a double standard found on the side of the trial court. The evidence was either good enough to cover all or unreliable for all".

However, we do not think this case presents a question of "discrimination" as suggested by the appellant, rather it is a case of the appellant being the only one who was allegedly identified by PW3, a fact that singled him out from the rest. Therefore, this ground of appeal lacks merit as well.

In the fifth ground of appeal, the two courts below are faulted for not considering the appellant's defence. With much respect, the opposite is true, because the fact that the defence was rejected as a "white lie" and the

allegation of grudge with PW3 dismissed as “an afterthought” does not justify alleging non-consideration. What we see here is the defence being considered, subjecting it to evaluation and finally being rejected as untrue and an afterthought.

In view of our consideration of the first, second, third, fourth and fifth grounds of appeal, we dismiss them for the reasons shown.

Back to the evidence of PW3 and its utility in finding the appellant guilty. Ms. Tengeneza, who was flanked with Mr. Edgar Luoga, learned Principal Attorney and Ms. Hannarose Kasambala, learned State Attorney has submitted that there is no nexus between PW3’s testimony and the shop robbery. We entirely agree with the learned Senior State Attorney. With respect, as argued by Ms. Tengeneza, the distance from the shop to where PW3 was held up, is unknown. The conclusion that the appellant was outside so as to scare away those who would wish to help PW1, is informed by extraneous matters because it is not supported by the evidence on record. If PW3 was held up by the appellant as he would wish us believe, then that set of facts has nothing to do with the robbery which forms the basis of this appeal.

In concluding her address, Ms. Tengeneza has submitted that PW3 identified the appellant but that the evidence is worthless because the incident is isolated from the shop robbery. We hold a slightly different view because we find PW3's story regarding his ability to identify the appellant, suspicious.

According to both PW3 and the appellant, the two grew together and went to the same school. Section 13 (b) of the Evidence Act enjoins courts to consider situations that are highly probable or otherwise highly improbable. Now, PW3 stated that the bandits who had taken the victims hostage and forced them to sit down, wore masks to cover their faces, except the appellant. And then, the appellant is also the one who allegedly approached PW3 and snatched his mobile phone. In our view it is highly improbable that a criminal would stick his neck so recklessly by exposing himself to such a familiar victim as PW3. More so, knowing him to be a member of People's Militia, with powers of arrest.

In our conclusion, had the two courts below considered PW3's testimony with a pinch of salt as we have done, they would not have found his evidence worth grounding a conviction of the appellant on. In our view, PW3's story about identification of the appellant is too good to be true, apart

from the fact that the story is unrelated to the robbery at issue, as rightly submitted by Ms. Tengeneza.

Consequently, we allow the appeal, quash the conviction and set aside the sentence imposed against the appellant. We order the appellant's immediate release if his incarceration is not for some other lawful cause.

DATED at **MBEYA** this 10th day of February, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 13th day of February, 2023 in the presence of the Appellant in person, Mr. Edgar Luoga, learned Principal State Attorney and Mr. Davice Msanga, learned State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL