

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

CRIMINAL APPEAL NO. 55 OF 2012

(C/F Criminal Case No. 9 of 2011 in the District Court of
Kiteto at Kibaya)

ABRAHAMU KIDEREMA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(From Judgment of the District Court of Kiteto at Kibaya)
(N.A. Baro, RM)

REASONS FOR JUDGMENT

MUGASHA, J.

When the appeal was called for hearing on 1st July, 2013; after hearing both sides, I allowed the appeal by quashing the conviction and sentence and ordered release of appellant from custody. I reserved my reasons which I now give.

In the District Court of Kiteto at Kibaya, the appellant was charged with grievous harm contrary to section 225 of the Penal Code, [CAP. 16 R.E, 2002]. It was alleged that; on 8th January, 2011 at about 00:00hrs at Naberera village within Simanjiro District and Manyara Region, the appellant did cut one MELKIORY MARCEL on his head and back causing him to suffer grievous harm.

The accused did not plead guilty. He was tried, convicted and sentenced to seven (7) years imprisonment. Aggrieved; the appellant filed an appeal with three (3) grounds namely;

1. That; the learned trial Magistrate erred both in law and fact in satisfying himself that the appellant was properly and correctly identified at the scene of crime by PW1.
2. That; the trial Magistrate erred both in law and fact in convicting the appellant through evidence of a single witness without first warning himself about the dangers of doing so.
3. That; the trial Magistrate contravened the provisions of section 312(2) of the Criminal Procedure Act, [CAP. 20 R.E, 2002] when making his Judgment.

The appellant appeared in person and Ms Adelaide Kasala learned State Attorney appeared for the Respondent. Addressing the grounds of appeal, the appellant argued that; at page 9 of the proceedings of the trial Court it shows that PW1 was attacked by the appellant on his back and buttocks while he was at home. However; at page 7 of the proceedings, PW1 asserted to have been attacked and injured by the appellant at his shoulder while at *shamba*. The two scenarios pose a contradiction.

Though there was no submission on the alleged contradictions; there are serious contradictions even as to which incident the appellant is held accountable. For instance; it is alleged at page 10 of the proceedings that,

the complainant was attacked at the shoulder and back while at shamba whereas at page 9 of the same proceedings it shows that, the victim was attacked at his back bone, hand and buttocks while at home when responding to someone who knocked at his door. Under such circumstances, such pieces of evidence are incompatible and cast reasonable doubt as to the charged offence against the appellant for a Court of law to confidently hold conviction.

As to need for the prosecution to parade some key witnesses; the appellant submitted that; both HAJI, the one who responded to the alarm raised by the appellant and the village Chairperson, who arrested the culprits were not paraded in Court as witnesses. He added that, sketch map of the scene of crime was not tendered in Court as exhibit. Besides; the investigator was not also paraded in Court as prosecution witness. Again; the learned State Attorney had nothing to submit in this aspect.

Notwithstanding that, the law does not dictate a party to bring in Court a specific number of witnesses and or kind of witnesses to be paraded in Court in proof of any averment in Court, yet; it is now trite law that, it is important for whoever has key witness to ensure that he parades such witness to prove his claim or case. If a key and material witness is not paraded to testify, then the Court is entitled to draw adverse inference on the prosecution. In the case at hand, HAJI who responded to the complainant's alarm and the village chairperson were material witnesses and failure to parade them weakens the prosecution case.

In respect of the issue of identification of the accused at the scene of crime, the appellant argued that; he was not identified at the scene of crime and the trial Court did not consider his defence. It was from the above, the appellant urged this Court to allow the appeal.

Conceding to the issue of identification; Ms Kasala learned State Attorney submitted that, the appellant was not identified by PW1 at the scene of crime as the incident occurred at 00:00hrs that is, during night hours when conditions for easy identification are difficult.

As such; it was incumbent on PW1 to properly identify the appellant. The learned State Attorney cited the case of **WAZIRI AMANI vs. REPUBLIC [1980] T.L.R 250** where the Court of Appeal of Tanzania reiterated the conditions to be proved in order for a Court to act on visual identification.

Ms Kasala learned State Attorney narrated that, PW1 merely stated to have been familiar with the appellant before the incident and that he heard the appellant's voice while knocking the door. She further contended that, even PW1's testimony at page 10 of the proceedings about assertions that the torch he had assisted him to identify the culprits is insufficient to eliminate mistaken identification. As such; the learned State Attorney supported the appeal.

As correctly argued by both the appellant and Ms Kasala learned State Attorney, as the incident occurred at night, that highly requires the prosecution to clear all possibilities of a mistaken identification that a Court of law can confidently hold conviction against the accused.

It must be clear that, in spite of the fact that the appellant was known to PW1 the victim, yet; PW1 ought to have established as to what made him properly identify the culprit. There is a chain of authorities both by this Court and the Court of Appeal of Tanzania to that effect.

For instance; in the case of **MATHEW STEPHEN @ LAWRENCE vs. THE REPUBLIC**, Criminal Appeal No. 16 of 2007, the Court of Appeal of Tanzania underscored the following;

*"To exclude all possibilities of mistaken identity, the Court has therefore to consider the following. First, the period under which the accused was under observation by the witness. Second, **the distance separating the two during the said observation.** Third, **if it is at night, whether there was sufficient light.** Fourth, whether the witness has seen the accused before and if so, when and how often. Fifth, **in the course of examining the accused, did the witness face any obstruction which might interrupt his concentration.** Sixth, the whole evidence before the Court considered, **were there any material impediments or discrepancies affecting the correct identification of the accused by the witness**".*

Furthermore; if PW1 knew the appellant, considering that it was dark in the night, PW1 ought to have gone a step further and described the attire of the appellant at the scene of crime. In the premises, the appellant was not properly identified at the scene of crime. Further, even if PW1 had a torch at the scene of crime; that does not suffice to sustain conviction unless

there is strong evidence as to intensity of the torch light and the distance between the culprit and the identifying witness.

In respect of torch light; the Court of Appeal of Tanzania in the case of **BARIKI KINYAIYA, JACOB HUBERT & ELIAONI KINYAIYA vs. REPUBLIC**, Criminal Appeal No. 220 of 2007 reiterated that;

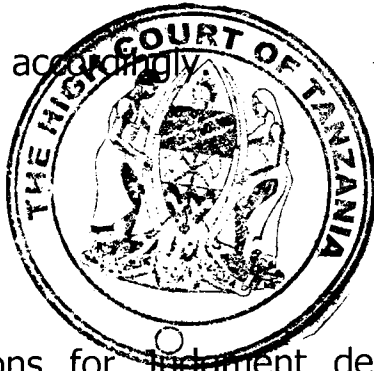
*"Ordinary human experience is that a person uses a torch, otherwise known as flashlight in American English to enable them to see an object or a person in front of the user **but without the user being clearly seen by the person shone at because of the blinding effect of such light on that other person.** It may be possible, however, for a person in front of the user of the torch who is not directly shone at to see and identify the person using the torch if the light from the torch is reflected by a shiny wall or object".*

Regarding assertions that PW1 heard the appellant's voice as to identification; that has less incriminatory effect as voice can even be imitated as observed by the Court of Appeal of Tanzania in the case of **ABURAHAM DANIEL vs. THE REPUBLIC**, Criminal Appeal No. 6 of 2007 that;

*" It was also said that the witness recognized the appellant's voice, **however someone's voice could be imitated and it is important to have other sufficient evidence connecting an accused to the crime before finding that the voice which was heard was no other but the accused person**".*

In view of the doubtful evidence paraded by the prosecution, this Court is forced to conclude that, the prosecution failed to establish the charged offence beyond reasonable doubts to warrant conviction and this is what made me to initially allow this appeal.

Order accordingly.



A handwritten signature in black ink, appearing to read "S.E. Mugasha".

S.E. MUGASHA
JUDGE
24/07/2013

Reasons for Judgment delivered in chambers this 24th July, 2013 in absence of both parties.

S.E. MUGASHA
JUDGE
24/07/2013