IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 134 OF 2014

[Original Criminal Case No. 838 of 2011 in the District Court of Kinondoni at Kinondoni]

SALUM Ally @ DAME . . . . APPELLANT

VERSUS

THE REPUBLIC . . . . RESPONDENT

Date of last order - 21/12/2015
Date of Judgment - 11/4/2016

JUDGMENT

Kitusi, J.:

SALUM ALLY @ DAME, hereinafter the appellant was charged before Kinondoni District Court with a count of Conspiracy to commit an offence c/s 384 and another of Armed Robbery c/s 287 'A' both provisions of the Penal Code [Cap 16 R.E 2002]. It was alleged that the appellant jointly with another person who was not in Court, conspired to commit the offence of Armed Robbery; and that subsequent to that on 8/4/2011 at about 20.15 hours at Magomeni Quarters area within Kinondoni District the appellant committed robbery of a motorcycle Registration No. T.480 BPW the property of Mdachi s/o Juma. The appellant allegedly used a knife to injure one Ashraf Hussein in order to obtain the said motorcycle.

The appellant pleaded not guilty, but at the end of the trial he was convicted of the Armed Robbery and sentenced to thirty (30) years imprisonment.

The evidence on which the appellant's conviction was based is as follows:

Mdachi Juma Mshana (PW1) is an enterprenuer resident of Kigamboni area within the city of Dar es Salaam. He owns a motorcycle Reg. No. T480 BPW which he runs commercially for carrying passengers around the City. Such motorcycles are commonly referred to as '*Bodaboda*'.

Unfortunately for PW1 this business was short lived for, he purchased the motorcycle from a Chinese shop in Dar es Salaam on 23/2/2011 as evidenced by a copy of the Registration Card (Exh. P1), and it was stolen on 8/4/2011, hardly two months later, while in the hands of Ashraf Hussein (PW2) who had been employed to operate it.

PW1's account of what happened is that he used to operate from a place known as Kigamboni Ferry together with others. On 8/4/2011 at around 7.00 P.M a person known as Samir hired him to take him to Magomeni Usalama area within the City. When they reached Magomeni Usalama, Samiralighted and informed PW2 that he was taking something (luggage) from around that place and

would be back shortly after. He that went off only to return in the company of another person whom he introduced to PW2 as his relative. Then when the unsuspecting PW2 was about to leave with Samir, the latter's companion or relative grabbed him (PW2) by the neck and pulled him off the motorcycle.

A struggle ensued as PW2 used his helmet to fight back the two, but he lost the motorcycle to them when Samir cut PW2's ear and stabbed his stomach to overpower him. When PW2 was given assistance by a passerby he reported the incident at a near police station of Usalama. In his report, PW2 stated that he knew Samir just by that name and that he was familiar with him. When cross examined by the appellant, PW2 intimated that Samir is the appellant and he goes by many names including Samir, Samny and Anold. He said he knew him before because he too used to operate a bodaboda from Kigamboni Ferry before.

The investigation of the case was done by Detective Ssgt Abdallah (PW4) who interrogated some people who saw the incident and were prepared to identify the culprit. It was from among them that PW4 learnt on 22/6/2011 that the culprit had been arrested and was being held at Kilwa Road police station. On 23/6/2011 the culprit (appellant) was handed over to Magomeni Police Station where PW4 recorded his cautioned statement. This cautioned statement was admitted in evidence after an inquiry had been

conducted and the learned Magistrate got satisfied that it was voluntarily made.

On 27/6/2011 PW2 was summoned to an identification parade that had been prepared by Assistant Inspector Gofrey (PW3) and he identified the appellant.

In defence the appellant claimed having committed the alleged armed robbery and alleged bad blood between him and PW4 as the essence of this case. The essence of the bad blood is allegedly a woman with whom the appellant was cohabiting, catching PW4's eye. PW4 got interested and started an affair with her and became jealous whenever the appellant showed continued interest in her.

PW4 threatened to fix the appellant for this behavior. PW4 fabricated many cases against the appellant but they all ended in appellant's favour, that is acquittal. Appellant's case is that this is also a fabricated case.

He challenged the prosecution evidence of visual identification and said none of the witnesses identified him. He criticized the Identification Parade for not complying with laid down procedures. He challenged the cautioned statement first because it was repudiated and also because no stolen item was recovered as a result. He denied to have been familiar with PW2 before the case.

In a very brief judgment the learned Resident Magistrate who tried the case found the appellant guilty and convicted him with Armed Robbery on being satisfied that he was identified by PW2 and he confessed in his cautioned statement.

1) He challenges the conviction based on the uncredible evidence of visual identification of PW2
2) He challenges the reliance on the identification parade conducted by PW3 in clear violation of P.G.O. Rule 2.1 since PW2 knew the culprit before
3) He challenges the conviction based on a retracted confession which was admitted after an irregular inquiry.
4) He alleges contradiction between PW1 and PW2 regarding the actual date of the commission of the alleged offence.
5) He challenges the prosecution for their failure to prove how they apprehended him in connection with the present offence.
6) That the prosecution failed to prove the offence beyond reasonable doubts.

The appellant presented supplementary grounds of appeal to the following effect;

7) The court should have drawn an adverse inference against the prosecution for their failure to call material witnesses

who allegedly told the investigator (PW4) that they identified the appellant during the robbery.

8) That the procedure for admitting the cautioned statement (Exh. P4) was violated because it was not read over to him.
9) The court erred in not evaluating the procedure in which the identification parade was conducted.

During the hearing of the appeal the appellant was unrepresented while the respondent Republic was represented by Ms Johaveness Zacharia, learned State Attorney. The learned State Attorney addressed the court first after the appellant expressed his choice to hear her before making his submissions. The learned State Attorney quickly announced that she did not oppose the appeal.

She agreed with the appellant's attack appearing on the first ground of supplementary grounds of appeal. She submitted that the persons who allegedly assisted the victim, that is Aziz Rashid and Athuman ought to have been summoned as witnesses. She submitted that PW2's evidence is evidence of recognition but it was not sufficient to ground a conviction.

The learned State Attorney discounted the evidence of the cautioned statement for being improperly admitted and acted upon. She went on to submit that there was no need to conduct the identification parade because the victim had already named the

appellant. However she added that PW2 mentioned several names as being appellant's but the prosecution failed to prove that they were call indeed appellant's names.

When it was his turn to submit the appellant simply said that he was in support of the submissions that had been made by the learned State Attorney.

I will start by dealing with grounds No. 2 and 9 related to the identification parade. As rightly submitted by the learned State Attorney, an identification parade is unnecessary where the witness is familiar with the suspect, [**Peter Sengerema & Anor V.R**. HC Appeal No. 101/2004, Mwanza Registry (unreported)]. In this case PW2 said he knew the appellant well, therefore the exercise of the identification parade and the evidence in reference thereto are of no value. The same are discounted, and I find merits in the second and ninth grounds of appeal.

The next to consider are grounds No.1 and 7 which relate to sufficiency of evidence of visual identification. It has been submitted by the learned State Attorney that the evidence of PW2 in this regard is insufficient. It has also been submitted that the two eye witnesses who allegedly saw the appellant rob PW2 ought to have been summoned to testify.

As a first appellate court, I have the power to review the evidence and make my own findings. To begin with I remain guided by the principle that every witness is entitled to be believed unless there is something to suggest that he should not. See the case of **Goodluck Kyando V.R.** Criminal Appeal No. 118 of 2003 Court of Appeal (unreported).

PW2 testified that he was familiar with the appellant as a person who used to operate commercial motorcycle transport popularly known as "*bodaboda*" from Kigamboni Ferry area. I note that the appellant was, according to PW2, operating a "*bodaboda*" from Kigamboni Ferry where PW2 was operating from and that they used to meet. It is in PW2's evidence that when he took the appellant as a passenger from Kigamboni to Magomeni he was dealing with a familiar person. Therefore, although on the authority of **Issa Mgara @ Shoka V.R**. Criminal Appeal No. 37 of 2005 (unreported) mistakes are known to exist even in recognition of close relatives and friends, I am not prepared to agree with the learned State Attorney that PW2 had no opportunity to positively recognize the appellant in this case. This is because PW2 saw the appellant at a very close range at Kigamboni Ferry when the two discussed the trip to Magomeni. They rode together for the whole distance from Kigamboni Ferry to Magomeni which I take judicial notice of to be not less than ten Kilometres. Then at Magomeni when the appellant alighted, he informed PW2 that he was going to pick something from his relative. This was another close range

encounter. The third opportunity was when the appellant returned to PW2 and introduced to him his companion. For people who were familiar to one another these opportunities eliminated the possibilities of mistaken identity. To that point I disagree with the learned State Attorney.

However the foregoing would only be valid if the witness, in this case PW2, was trustworthy. I doubt, however, if it would be safe to take PW2's word wholesale and one important aspect of his testimony has raised my eyebrows. This is in respect to the owner of the motorcycle. While Mdachi Juma Mshana (PW1) testified that he was the owner of the motorcycle, PW2's statement recorded at the police indicated that the owner of the motorcycle was one Zahra Mziray. This was revealed during cross-examinations by the appellant. When he was re-examined by the Public Prosecutor, PW2 said that PW1's other name is Zahra Mziray. I note that Zahra is a female name and from the charge sheet which shows Mdachi s/o Juma Mshana and from the proceedings dated 7/5/2012 indicating PW1 as a man, there is no rationale for PW2's mistake.

It is my finding that PW2 lied on a very significant point and I hold it to have been unsafe to take his word unreservingly on the issue of identification. To this end I agree with the learned State Attorney that the testimonies of the named eye witnesses would have resolved the doubt. I share the learned State Attorney's view on this not because the circumstances did not allow positive

identification by PW2 but because the latter's testimony consisted of untruthful evidence on some points.

This is more so in the light of the assertion that these eye witnesses are the ones who allegedly informed the investigation machinery that the appellant was being held at Kilwa Road Police Station. It means therefore that these witnesses were available and there is no reason why they were not called to testify. The law on the consequences of failure to call material witnesses is clear. It was stated in the case of **Azizi Abdallah V. Republic** [1991] TLR 91 quoted with approval by the Court of Appeal in **Mashimba Dotto @ Lukubanija V. Republic** Criminal Appeal No. 317 of 2013 Mwanza sub registry (unreported)

> "*(iii) the general and well known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify to material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw inference adverse to the prosecution*"

It is finally my finding that the prosecution's failure to call the eye witnesses to the alleged robbery has weakened the evidence of visual identification. Since the points so far discussed are sufficient

to dispose of the appeal, I see no point of discussing the rest of the grounds of appeal.

Consequently and for the reasons shown this appeal is allowed, the conviction is quashed and the sentence is set aside. The appellant to be set at liberty unless otherwise held lawfully.

I.P. Kitusi

JUDGE

11/4/2016

11/4/2016

Coram: Hon. Kitusi, J.

For the Appellant: Present in person

For the Respondent: Frank Tawale – SA

C.C.: Eveline

Frank Tawale: The case come for judgment.

Court:

Judgment delivered in court in the presence of the appellant in person and Mr. Tawale for the Republic, this 11th day of April, 2016.

I.P. Kitusi

JUDGE

11/4/2016