

IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

DC. CRIMINAL APPEAL NO. 140 OF 2016

*(ORIGINAL CRIMINAL CASE NO. 66 OF 2016 OF THE DISTRICT
COURT OF MANYONI AT MANYONI*

VICENT S/O DAUDI @ MPANDAGOYAAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

05/07/2017

&

02/08/2017

H. H. KALOMBOLA,J.:

Appellant herein is called VICENT DAUDI. His case started at the District Court of Manyoni, at Manyoni in Criminal Case No. 66/2016. He was convicted and sentenced to serve 30 years in jail having been found guilty of committing an offence of Armed Robbery an offence contrary to Section 287A of the Penal Code, Cap 16 Volume 1 of the Laws R.E. 2002 and Rape Contrary to Section 130 (1), (2) (a) and 131 (1) of the Penal Code Cap 16

Volume 1 of Laws R.E. 2002. The sentences were ordered to run concurrently.

The appellant was alleged on 9/2/2015 at or about 20:00hrs at Manyoni Township within Manyoni District, Singida Region, while armed with a machete, locally made pistol and clubs together with other four men who were not before the trial Court did steal cash Tshs 165,000/= seven mobile phones valued at Tshs. 290,000/=, M-pesa float money Tshs. 888,600/= and Tigopesa float money Tshs. 64,000/= all in total Tshs. 1,407,600/=the properties of Lucia d/o Adam and immediately before and after such stealing, appellant attacked and beat Lucia on several parts of her body in order to obtain and retain the said properties.

Having been aggrieved by the decision of the District Court, appellant now appeals on the following grounds:-

1. That, the trial Court erred in fact and Law in not finding there was no any Armed Robbery incident that took place on 9th day of February,2015 at Manyoni Township against one LUCIA ADAM thus wrongly convicted and sentenced the Appellant.
2. That, the trial Court erred in fact and Law in not finding as a fact that there was no any rape incident that took place on 9th day of February, 2015 at Manyoni Township against one LUCIA ADAM thus wrongly convicted and sentenced the Appellant.

3. IN THE ALTERNATIVE, that the trial Court erred in Law and fact in not holding that if the incidents took place then the identification of the culprits was marred with mistakes that wrongly associated the Appellant with the incidents.
4. That the trial Court erred in fact and Law in not taking adverse inference against the prosecution side not calling material witnesses to the case who could have uncovered the whole truth of the matter.
5. That, the trial Court erred in fact and Law in disregarding the defence of Alibi raised by the Appellant at trial which defence raised reasonable doubts to the prosecution case capable of acquitting the Appellant.

On the day of hearing, Mr. Sarara State Attorney started by supporting the appeal pointing at 3rd ground of appeal which is on identification. He said, five prosecution witnesses testified at the trial Court and principal witness being PW2 (as it is seen at pages 9-13 of the proceedings). It shows PW2 identified the appellant on the day of incident, at 8:00 night, while the appellant was with his colleagues. On page 10 of the proceedings 2nd paragraph appellant said it was by aid of moonlight and tube lights at the house of the District Commissioner that she managed to identify them. She explained further that she used to know the appellant. It is his view that the trial magistrate erred in convicting the

appellant without considering a fact that PW2 when cross examined by the Counsel for appellant she answered the moonlight was not very much shining. Further PW2 did not explain what was the distance between the place of incident to the District Commissioners house. She did not even explain the intensity of the light. Thus for reason that the light was not that much shining/clear it is doubted if PW2 testimony is true. It is doubtful if she clearly identified the appellant. They supported this argument with the Court of Appeal decision in Criminal Appeal No.2/2009 (CAT –ARUSHA) between GALUS FAUSTINE STANSLAUS and THE REPUBLIC. In this case identification was at issue, whether the witness testified the truth when he said he identified the appellant. It was found the witness did not speak the truth taken that the witness was ambushed, it was thus doubtful if he was able to identify the appellant. Mr. Sarara finally submitted the above is the reason of supporting the appeal.

Mr. Mkama who represented the appellant conceded to what was submitted by the learned State Attorney and find the case of NATHANIEL ALPHONCE MAPUNDA and BENJAMIN ALPHONCE MAPUNDA VRS REPUBLIC , TLR 2006, 395 relevant to the argument.

He further noted doubts on amount of money which is said to have been stolen, PW2 said it was Tshs. 888,600/= while PW5 said it was Tshs 880,000/=.

Another doubt is on a fact that who is the owner of the stolen money. The charge sheet mentioned Lucia Adam while PW3 mentioned JALED KASELA MAKONGORO, and PW5 mentioned ALOYCE LOY SOLOMON. It is surprising Lucia did not testify in Court to have been the owner. Moreover, Jaled Kasela and Aloyce Solomon were never called as witnesses. They made reference to the Court of Appeal Case of AZIZ ABDALLAH VRS REPUBLIC [1991] TLR at page 71 which found if material witnesses are not called, Court may draw adverse inference.

They went on to say on this point that even one Seif Saidi who it is said the money was transferred to was not called and even print out from Tigopesa was not brought to Court. It was not proved by prosecution that appellant bought the mobile phones.

In regard to rape it is their submission Exhibit PI which was tendered by a doctor (PWI) does not show if Siemens were detected in PW2 vagina, but PW3 who is PW2 friend stated to Court that PW2 had Siemens and she did not take bath (as it is shown at page 8 of the proceedings).

PW3 further stated PW2 pants were torned but it is stated the same were not brought in Court (see page 13 of the proceedings).

It is their submission the PF3 is doubtful as it does not disclose blood was revealed in the vagina. In consideration of their submission and that of the respondent/Republic, they pray the appeal be allowed, the appellant be set free.

In line with the submission of both sides, it is my considered view even without discussing at length other grounds of appeal, 3rd ground of appeal has weight to the extent of allowing the appeal straight away. At page 11 of the proceedings while PW2 was responding to defence Counsel questions she stated at last paragraph:-

"... The moonlight was out although it was not very sharp..."

With the above answer and with different authorities it is trite Law and settled that on visual identification Court should not act on it unless all possibilities of mistaken identity are eliminated. The Courts must be fully satisfied that the evidence clearly shows the conditions favouring a correct identification is accordingly watertight as it was the instance in the famous case of WAZIRI AMANI VRS REPUBLIC (1980) TLR. 250.

In the instant case the victim herself doubted the intensity of light which she said it favoured her to identify the appellant. Since she was the very one who faced the situation it is the view of this Court that she cannot be doubted when she said the light was not that much shining.

In view of the submissions and the record of the trial Court, I find the trial Court erred in convicting and sentencing the appellant for the alleged offences.

In the light of the above, I find the trial Court disregarded the contradictions found in PW2 statement while in examination in chief and while in cross – examination by the defence counsel, otherwise she could not have found that the evidence in regard to identification was watertight and the appellant's guilt was proved beyond reasonable doubt.

Having said so, the conviction is hereby quashed and the sentences imposed on him are set aside. The appellant is to be released forthwith from prison unless he is Lawfully held.

It is ordered.


(H. H. KALOMBOLA)

JUDGE

02/08/2017

DATE: 02/08/2017

Coram: Hon. Madam H. H. Kalombola,J.

Applicant: - Present.

-Mr. Mkama adv – Present.

Respondent: Ms Nsana State Attorney- Present.

C/c: F.Nkamirwa

MS. NSANA STATE ATTORNEY

We are ready to receive the judgment.

COURT

Judgment read today 2nd August 2017, in the presence of Appellant, his Counsel Mr. Mkama and Ms. Nsana the State Attorney for the Respondent/Republic.


(H. H. KALOMBOLA)

JUDGE

02/08/2017

COURT

Right of Appeal explained.


(H. H. KALOMBOLA)

JUDGE

02/08/2017