IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

CRIMINAL APPEAL NO 48 OF 2019

(From Original Criminal Case No. 123/2018 of Urambo District Court)

SALUM MASOUD @ DULAYI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

Date of Last Order: *19/03/2021*

Date of Delivery: *19/07/2021*

AMOUR S. KHAMIS, J.

Salum Masoud @ Dulayi and Said Chinova @ Kashona were arraigned in the District Court of Uambo with three counts of causing grievous harm contrary to Section 225 of the Penal Code, Cap. 16, R.E. 2002.

It was alleged that on 10th day of April 2018 during night hours at Kanyalu Suburb, Ussoke Village, Urambo District, Tabora region, the two accused caused grievous harm to Sungura Ramadhan, Sada Issa and Issa Sungura by cutting them with a panga on various parts of their bodies.

The two caused pleaded not guilty and the matter proceeded to trial whereupon the trial Court was satisfied that the Prosecution case was proved beyond reasonable doubts.

Upon mitigation, Salum Masoud @ Dulayi and Said Chinova @ Kashoka were sentenced to twelve (12) months imprisonment for each count. The sentences were to run one after the other.

Aggrieved by both conviction and sentence, Salum Masoud @ Dulayi preferred the present appeal premised on three grounds, namely:

1. That the appellant was not positively identified at the scene.
2. That the evidence against the appellant is not water tight.
3. That the trial magistrate mis directed herself on her reasons for the decision with regard to the appellant.

When this matter was placed for hearing Ms. Flavia Francis held brief of Mr. Goodluck Benard, learned advocate for the appellant.

Ms. Jaines Kihwelo, learned State Attorney appeared for the Republic.

By consent the matter was disposed of by way of written submissions. However it was only the appellant who complied to a schedule set by the Court. No submissions were filed by the respondent.

Ms. Flavia Francis contended that the evidence of PW2 and PW3 depicts that they neither saw nor identified the appellant at the scene of crime and that their evidence reveals that the appellant did not even participate in the commission of the offence.

She alleged that PW 2 and PW 3 stated that they saw and identified the 1st accused and not the second accused.

Further Ms. Flavia Francis as stated that, the victims PW2 and PW3 did not mention the appellant to the people who gathered at the scene of crime, the evidence show that the appellant went to see the victims with other villagers and his phone was used to call the motorcycle rider who took the victims to police and later to hospital.

Ms. Flavia contended that it is vital in a case like this which its determination depends on visual identification at night time to state clearly among other things the intensity of light which enabled the witness to identify the accused person. She referred to the case of Raymond Francis vs R [1994] TLR 100 wherein it was held that:

> *".....it is elementary that a criminal case where determination depends essentially on identification, evidence on condition favouring a correct identification is of the outmost importance"*

As to the second ground of appeal, Ms. Flavia submitted that the prosecution failed to prove the charge against the appellant beyond reasonable doubt as no witness mentioned the appellant to have participated in cutting the victims.

Lastly, the learned counsel contended that the trial magistrate misdirected herself on her reasons for the decision with regard to the appellant. She pointed out that at page 6 paragraph 2 of the judgment the trial magistrate stated that DW2 agreed on the event and explained how the victims were injured and taken to hospital. It is her argument that the appellant was wrongly

convicted because he did not agree to have participated in cutting the victims.

The major issue for determination is whether the appellant was identified as a person who committed the offence of causing grievous harm to PW2 and PW3.

Admittedly in her testimony PW3 mentioned the appellant as she identified him together with his co-accused at the scene of crime. The proceedings show that a confrontation occurred in the victim's living room where there was solar light. The victim added that, she managed to identify the appellant and his co – accused because she knew them before the event.

On cross examination, PW3 reiterated that he saw the 2nd accused (appellant) inside the house and she did not know how he entered the house. She added that when the victims raised alarm, the second accused (appellant) came at the last moment.

Though the evidence suggests that all accused persons were identified at the scene of crime, the appellant's assertion that those facts were not communicated promptly to people who gathered at the scene of crime casts a lot of doubts on the prosecution's evidence.

The evidence show that, the appellant showed up at the scene of crime to join other villagers immediately after the incident but none of the victims promptly communicated to rescuers that they identified the appellant in the act. That omission casts doubt on the prosecution evidence.

This fact alone makes the whole story unbelievable because DW3 one Wambura Nyambele testified that he was the 3rd person to arrive at the scene. If the appellant was really identified at the

scene, this witness would have been the third person to receive information on the appellant's identification.

The evidence shows that the appellant was among those who took the victims to police and later to hospital. Common sense suggests that, if the victims had full information about the perpetrators of crime, they could have reported to Police the time the 2nd accused who is the appellant herein, was seen in their midst.

In ***MARWA WANGITI MWITA AND ANOTHER VS REPUBLIC [2002] TLR 39*** the Court stated as follows

> *"the ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability; in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry"*

In the event failure of the victims to promptly mention the appellant casts doubt which must be resolved in favour of the appellant. Since the prosecution evidence relied solely on evidence of identification, it is my view that this ground suffices to dispose of the appeal.

That being said and done, I hold that the appellant was not positively identified. I accordingly find that his conviction was not proper. I therefore quash the conviction and set aside the sentence metted against him. The appellant should be released from prison unless otherwise lawfully held for other reasons.

THE HIGH COURT OF TANZANIA

AMOUR S. KHAMIS
JUDGE
19/07/2021

ORDER:

Judgment delivered in Open Court in presence of Ms. Juliana Moka, Senior State Attorney for the Republic and Ms. Flavia Francis, advocate for the appellant. Right of Appeal explained.

AMOUR S. KHAMIS

JUDGE

19/7/2021