IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO 57 OF 2019

(Arising from Criminal Case No. 235 of 2012 of District Court of Kahama at Kahama)

COSMAS S/O JULIUS.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Date of last order: 11.07.2019

Date of Judgement: 04.10.2019

Ebrahim, J.:

The appellant in this case was initially charged and convicted together with his co-accused namely Isaya Godfrey Mihayo for the offence of armed robbery c/s **287"A" of the Penal Code Cap 16 RE 2002**. In sentencing the second accused was sentenced to eight strokes of cane and he is not a subject of this appeal.

It was alleged by prosecution side that on 12th June 2012 at about 2100hrs at Mwime village within Kahama District in Shinyanga Region, he

stole a motorcycle make sanlg with registration number T689 BXJ, valued at Tshs. 1,850,000/- the property of one Rose Tango and in order to obtain and retain they threatened one Denis Emmanuel with a panga. To prove their case prosecution called a total of five witnesses and defense had two witnesses, the accused persons themselves.

After hearing the witnesses from both sides and evaluated the evidence presented before him; the trial magistrate convicted the appellant and his co-accused person. The appellant was sentenced to a mandatory sentence of thirty years imprisonment.

Aggrieved by the sentence and conviction, the appellant preferred this appeal raising six grounds of appeal which are all centered in challenging prosecution case that is based on hearsay evidence; and that defense case was not considered. Hence the case was not proved beyond reasonable doubt.

When the appeal was called for hearing the appellant who appeared in person, unrepresented adopted his grounds of appeal. He added additional grounds that the trial magistrate did not consider the ingredients of armed robbery; PW2 identification is not water tight; Prosecution

brought a person who was not the owner of the property contrary to the tendered receipt.

Responding to the grounds of appeal Mr. Jairo revisited the testimonies of prosecution witnesses which I shall not reproduce them here as they are in the record. He further contended that the appellant was positively identified by PW2 by the electricity light and that since they bargained the price, the incident took long time. As for the tendered registration card and the receipt – exhibit P1, he observed that the same were admitted without affording the appellant right to object, hence they should be expunged from the record. I out-rightly agree with him. Exhibit P1 was admitted into evidence without being tested as required by the law. I therefore expunge exhibit P1 from the record.

Before I proceed further, I would also like to comment on the identification done by PW2.

PW2 testified in chief that the appellant hired him around 2100hrs and they negotiated a price of Tshs.6, 000/-. He took him on his motorcycle until they were invaded by another person. According to PW2, the night the appellant hired the motorcycle was the first time PW2 saw him. He said he

identified the appellant by face when he went to the police as he had worn a green T-shirt and a cap. PW2 said when he went to the police the next day he was asked if he can identify the accused persons and he was left outside. The appellant was brought outside the lock up and he identified him. That was procedurally incorrect. Following the circumstances of this case, for a positive identification, there ought to be conducted an identification parade and not identifying the appellant the way it was staged.

Numerous decisions of the Court Appeal have emphasized the necessity of watertight identification of an accused person in eliminating possibilities of mistaken identity as a crucial element in proving a criminal charge particularly during night time- see the cases of **Waziri Amani V R.**, (1980) TLR 250 and **Said Chally V R.**, Criminal Appeal No. 65 of 2005 (unreported) to name but a few. In the case of **Omari Iddi Mbezi and Three Others V R**, Criminal Appeal No.227 of 2009 (unreported); Court of Appeal listed precautionary measures which depending on the facts of the case, a court can follow to avoid mistaken identities. Those are:

i. *In case of reliance on some light for identification, then a witness must describe the source and intensity of that light.*

ii. *The proximity that the witness was with the accused and time spent on the encounter.*

iii. *Witness should describe the culprit in terms of body build, attire, size, complexion or any peculiar features to the next person that he comes across and should repeat those description at the first report to the police on the crime, who would in turn testify to that effect to lend credence to such witness's evidence*

iv. *Then ideally, the police should conduct identification parade to test the witness's memory, and at the trial the witness should be led to identify him again.*

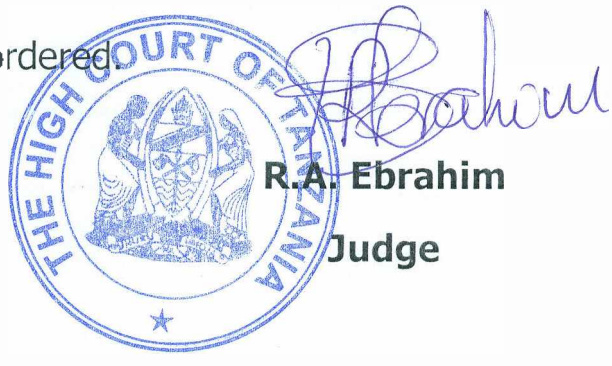
Coming to our instant case, first of all, PW2 identified the appellant on the dock and talked nothing about how he identified him during his examination in chief. He only spoke about identifying the appellant by face when he was asked during cross examination. He also spoke about electricity on re-examination. More-so he did not evidence to describe the appellant at the first person or even at the police. Again the intensity of light was not described nor the approximation of time that PW2 had the appellant under observation. Worse still, the appellant was taken from lock-up and paraded before PW2 and asked to identify him

whilst to lend assurance there was supposed to be conducted an identification parade as the law requires. In the circumstances therefore, I conclude that, the identification of the appellant done by PW2, the supposedly an eye witness was not water tight.

Submitting on the reminder of evidence brought by prosecution after expunging from the record exhibit P1; Mr. Jairo was of the firm views that PW1 identified the motor-cycle chassis no of which she mentioned it. Nevertheless, I find that in the absence of a purchase receipt and a registration card, the mentioning of a chassis number which she definitely read it from the card would not be a conclusive proof that the property was conclusively identified by the owner because the chassis number mentioned in the registration card would have probative value that it is the same motor-cycle and the registration matches the description of the purported motor-cycle. The receipt would also confirm the value of the motor-cycle indicated in the charge sheet in terms of **section 100 of the Law of Evidence Act, Cap 6 RE 2002** that where there is a written document, oral evidence would not be a substitute.

Having found that the identification of the appellant by the said eye witness was neither water tight nor the confirmation of the said stolen property, I find this appeal could be disposed of from those two main gaps. In the circumstances, I find the appeal to have merits and I allow it. The appellant to be released from prison forthwith unless otherwise lawfully held

Accordingly ordered.



R.A. Ebrahim

Judge

Shinyanga

04.10.2019