

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 35 OF 2019

*(Originating from Criminal Case No. 28 of 2017 of the Resident Magistrate
Court of Morogoro at Morogoro)*

BOSCO AUGUSTINE @ LAWANDA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of Last Order: 28/10/2019

Date of Judgment: 28/10/2019

J U D G M E N T

MGONYA, J.

The above mentioned Appellant, **BOSCO AUGUSTINE LUWANDA** is appealing against the Judgment and Decree of the Morogoro, RM's Court in **Criminal Case No. 28/2017**.

In this Appeal, the Appellant presented six grounds of Appeal as herein below:

- 1. That the Honourable Judge the learned trial Magistrate grossly erred where he found the***

Appellant guilty and convicts him on basis of a defective charged.

- 2. That the learned trial Magistrate grossly erred by holding to un-credible and un-reliable visual identification of PW3 against Appellant at locus in quo, where no advanced detail descriptions of the perpetrator was given. Worse still, no identification parade was conducted for the witness to identify the Appellant as required by law.***
- 3. That the learned trial Magistrate grossly erred by convicting the Appellant, where the Police Officers to whom the offence was first reported never testified to the effect that, the Appellant was the prime culprit.***
- 4. That the learned trial Magistrate erred in law and fact when based the Appellant conviction on exhibit P1 (PF3), despite it being tendered by presiding state attorney who un-procedurally assumed the role of PP and a witness at the same time.***

- 5. That the learned trial Magistrate grossly erred by convicting the Appellant based on un-justified corroborated prosecution evidence.**
- 6. That the learned Magistrate erred by holding that the prosecution proved their case the Appellant beyond reasonable doubt as charged.**

During hearing, the Appellant was representing himself while the Republic was represented by Ms. Faraja George the learned State Attorney.

Presenting his grounds of Appeal, Appellants prayed this court to consider his grounds of Appeal as presented before the court and set him free.

From the outset supported the Appeal, in her respective submission, Ms. George the learned State Attorney said it is through the two grounds of Appeal that the Republic came up with the decision of supporting the instant Appeal.

The 1st is on the 2nd ground of Appeal on wrong identification of the victim; and 2nd is on the 4th ground on tendering of PF3 of which the same was wrongly tendered by the State Attorney instead of the Doctor who examined by the victim.

On the issue of identification, Ms. George told the court that, the one who identified the victim was not the person who is

alleged to have witnessed the offence; who was PW4 instead of PW3 who is alleged to be an eye witness.

On this matter, I have carefully gone through the record and support the assertion since, indeed from the record, PW3 is the one said to have witnessed the offence but she was not given any chance neither to identify the perpetrator nor to narrate his outlook to cement his identification. This kind of identification by the person who was not an eye witness is dangerous to be used in serious matters like the one in this litigation.

Indeed, the PW3 was supposed to identify the Appellant if she claimed to see him. The person who didn't witness cannot identify or rely on the matter which she was told; hence hearsay.

Under all the circumstances, the wrong identification stands to benefit the Appellant, hence it was contrary to the Law. It is on that explanation, this ground is **meritious**.

On the 4th ground, the PF3 is considered to be report from the Expert, in this matter as a Doctor who examined the victim. The Law is that, the person who performed the examination on victim, is the one competent to tender the said report as Expert as clearly stated in the provisions of the **Evidence Act, Cap. 6 [R. E. 2002]**.

The State Attorney obvious is not an Expert who performed an examination to the victim, hence incompetent to tender the said Exhibit **PF3**.

It is from the above, the **said PF3 is hereby expunged from the court's record.**

Moreover, since the Dr. (PW6) who testified later using the said PF3 did testify relying the expunged document (PF3) his testimony too is soundless powerless. In this event, this ground too have merit.

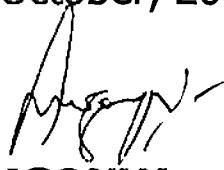
In the event therefore, it is obvious that Republic failed to prove the case before the court taking into consideration that the evidence form the victim was not favourable to convict the Appellant under the circumstances which were surrounded by a number of illegal proceedings.

All said and done, **this Appeal succeeds and I proceed to release the Appellant from prison unless he is held with another cause.**

It is so ordered.


L. E. MGONYA
JUDGE
28/10/2019

COURT: Judgment delivered in the presence of Ms. Faraja George, State Attorney for the Respondent, the Appellant, and Ms. Veronica Bench Clarke in my chamber today 28th October, 2019.



L. E. MGONYA
JUDGE
28/10/2019