

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM
CRIMINAL APPEAL NO.33 OF 2019**

(Originating from Criminal Case No. 1017 of Temeke District Court)

ABDUL ALLY CHANDE..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

Date of last Order: 07/10/2019

Date of Ruling 28/10/2019

J U D G E M E N T

MGONYA, J.

The Appellant being aggrieved by the decision of the Temeke District Court at Temeke in **Criminal Case No. 1017/2017**, The Appellant sought for an appeal before this Court with 6 grounds of appeal being:

- 1. That the learned trial Magistrate erred in holding on un-credible visual identification of PW1 against the Appellant at the "LOQUS IN QUO".***

- 2. That the learned trial Magistrate erred in convicting the Appellant where none of the Police Officer(s) to whom the offence was first reported to ever testified to the effect that he was the prime culprit.***
- 3. That the learned trial Magistrate grossly erred in holding that the Appellant admitted to committing the offence where his former statement if any was not tendered to establish the same.***
- 4. That the learned trial Magistrate grossly erred in holding to a panga exhibit P3 where the prosecution failed the same to have any connection to the offence.***
- 5. That the learned trial Magistrate erred in failing to realize huge contradiction between PW3 and PW4 as from where the Appellant was apprehended from.***
- 6. That the learned trial Magistrate grossly erred in holding that the prosecution proved its case against the Appellant beyond reasonable doubt as charged.***

Appellant presented his written submission in support of his grounds of Appeal. Further, before this Court he reiterated his

submission in chief; and pray for this Honorable Court's lenience to set him free so as he can again join his family.

In reply to the appeal the **learned State Attorney Ms. George** averred that they have gone through the grounds of Appeal, proceeding and Judgment and from the outset, Republic supports the conviction and sentence by the Appellant.

On the 1st ground of appeal on false identification by PW1, the learned State Attorney objected this ground and is of the view that PW1s' testimony was identification of the Appellant before the court. In his testimony he said on 15/09/2017 around 20:99 hours while from work, he met **ABDUL CHANDE** with his 4 colleagues at Charambe Kwambiku area invaded the victim with intention to rob him, where Abdul Chande took out a machete and the same was directed towards the head of PW1 where in preventing himself, he got hurt by his three fingers being cut off his palm.

Ms. George learned State Attorney further submits that, the Appellant and colleagues were able to rob the victim of his Samsung cell phone and Tshs. 80,000/=. PW1 testified to have identified the Appellant since it was at the road where there was enough light coming from the frames (shops) which were there. He also informed the Court that the event took place for about 15 minutes and that he also identified the Appellant's jersey – yellow

one No. 15 he fully identified him since they were very close with the Appellant.

Moreover Ms. George learned Sate Attorney submitted that PW1 went to report the Appellant to his father, to the Police and also he is the one who made his apprehension. In the event therefore, his identification was very clear. Learned Sate Attorney therefore prayed for court to dismiss this ground.

On the 2nd ground that there was no any Police who went to court to testify Ms. George for the Republic informed this Court that this is not the time, you may wish to refer to pg. No. 20 of the (proceedings) where you will find F9129 DC Ayubu who was an investigator who investigated that case who went to testify on the event, but also since he was the one who apprehended the Appellant. The witness testified that they apprehended him on **13/10/2017 at 23:00 Hours** where they saw the accused sleeping with a machete at the pillow where the same was taken for evidence. Therefore, this ground is meritless since there was a person who went from Police to testify on that matter therefore this ground too is mantles.

The learned State Attorney on the 3rd ground that there was no cautioned statement tendered before the court; this ground is hopeless since the Magistrate did not convict the Appellant using cautioned statement. Instead he used the testimony of PW1, PW3

and PW4. Therefore he didn't use cautioned statement this ground too is meritless.

On the 4th ground that there was no any connection of the machete he had at home and an incident that has occurred, it is time that there is no connection because, we cannot use machete as evidence since there is no proof that the same was used to hurt PW1. However, the identification of the Appellant was an identity as it stated above. Therefore we again say that this ground is meritless.

On 5th ground that the Magistrate used testimony of PW3 and PW5 since there was contradiction on which were Appellant was apprehended it is not true that there was contradiction between PW3 (Father of the victim) and PW4 – Police. Where PW3 told the court that they find the Appellant apprehended him at 23:00 accordingly. We are of the view that this ground too is meritless.

On the last ground 6th that Republic didn't prove their case without leaving any doubt this reason too is baseless since the entire case through PW1 the Accused was well known; further he saw the Appellant since they were very close so it would be easier to identify him. Further, on identity of Appellant's attire. So it was easy for him to identify. Moreover, the witness (PW1) managed to report the incident to his father and later Police.

From the above, the State Attorney prayed for conviction and sentence of the Appellant be upheld.

Having gone through the grounds of appeal and submission of the parties, I therefore heed forth in determination of the same.

On the 1st ground of Appeal on identification, the identification of the Appellant by PW1 falls in all four requirements of identification being. The time as to which the event took place was a span of 15 minutes as testified by PW1 within which it was possible to identify the Appellant for he was also known by the Victim for he was a close person to the victim, The distance within which the Appellant was a close range as per the facts availed by the Victim and therefore it also necessitated identification of the Appellant, the means light that was used to assist PW1 in visual identification was the lights from the frames of the shops and that it was enough light to identify the Appellant, Lastly the PW1 was even able to identify the attire of the Appellant as he was dressed in a yellow in color jersey that had number 15 on it. In the case of **MUSSA RAMADHANI @ KAYUMBA VS REPUBLIC, Criminal Appeal No. 487/2017 CAT**, the above four guide lines were observed with reference to the famous case of **WAZIRI AMANI VS REPUBLIC [1980] TLR 250.**

On the 2nd ground of appeal, the Appellant states that there was no police officer that appeared before the Court to testify. I took time to visit the records before the Court. At pg.20 - 23 of the proceedings the record shows that the Police officer that investigated this matter appeared before the Court and testified. And it is the same officer that apprehended the Appellant and at the time of apprehension he was found in possession of a machete under his pillow which was also taken as evidence, hence this ground is baseless and ***lacks merit.***

On the 3rd ground of Appeal, that the court erred on admitting that the Appellant admitted the offence while there was no statement that was tendered before the Court. The Prosecution submitted that the conviction the Appellant was not based on a caution statement but the testimony of PW1, PW3 and PW4 and not otherwise. The Court under **pg. 6 to 8** has clearly analyzed the evidence by the prosecution and stated that the evidence of PW1 was water tight and that the same was corroborated by the evidence of PW3 and it from there Court Convicted the Appellant. The appellant is in total despair as to be behind the records of the Court for slipping on evidence that warranted his Conviction. It is from the records at hand that the assertions of the appellant in this ***ground lack merit.***

Moreover the **4th ground that**, the Magistrate erred in holding to a panga where the prosecution failed to connect to the offence. The prosecution in there submission state not have used the panga for there is no proof that the same was used in the event. But it was identification that was the testimony that was employed in evidence and it being water tight as per the case of ***MUSSA RAMADHANI @ KAYUMBA VS REPUBLIC, Criminal Appeal No. 487/2017 CAT (supra)***. Since exhibit P. 3 is said not have been used for it having no proof the ground before me is **meritless**.

On the **5th and 6th ground**, basing on the evidence of the prosecution case on discrepancies of witnesses as to his apprehension and failure of proving the case beyond reasonable doubt. It is the prosecutions averments that the same is baseless the Appellant was arrested at 2300 hrs. And that these grounds are baseless. It is my view that the prosecution via the evidence on identification was watertight to warrant the Appellants Conviction for the Appellant was known by the victim and hence eased his identification on top of all other evidence. The most important matter is the identification of the Appellant at the crime scene and it is he who committed the crime against the victim. His apprehension does not form part of the ingredients of the

offence hence being a weak point to have relied on. This is enough to say that the prosecution did prove its case beyond reasonable doubt.

In the result the conviction was justified and I can find no ground to interfere. Accordingly the Appeal is dismissed in its entirety.

Order accordingly.


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