IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 37 OF 2020

(Originating from Criminal Case No. 295 of 2018, District Court of Ilala dated 19th September, 2019 before Hon. F. MUJAYA-RM)

SAMWEL SOSPETER NDALAWA ..... **APPELLANT**

VERSUS

THE REPUBLIC ..... **RESPONDENT**

JUDGMENT

18th May & 12th June 2020.

E. E. KAKOLAKI J

Before me is an appeal by the appellant from the decision of the District Court of Ilala in Criminal Case No. 295 of 2018. Indicted before the court the appellant was facing a charge of Armed Robbery contrary to section 287A of the Penal Code, [Cap. 16 R.E 2002] as amended by Act No.3 of 2011, consequently convicted and sentenced to 30 years jail. Disgruntled he is before this court by way of appeal equipped with thirteen grounds of appeal praying the court to allow the appeal by quashing the conviction and setting aside the sentence and acquit him forthwith.

The facts giving rise to this appeal stated briefly are as follows. On the 15/05/2018 at Karakata area within Ilala District in Dar es salaam Region, at around 6.00 am the victim PW1 had set out to escort her child to board a school. On her way back home close to the shopping frames and houses was suddenly attacked by one man who had put on short, T-shirt and hat who stubbed her with a screwdriver on her forehead. The attacker also pulled out a knife and threatened her demanding money before he robbed her one mobile phone make Tecno C9 worth Tshs. 250,000/= and cash money Tsh. 3,000/=. As that place was not populated while bleeding profusely she went close to the nearest house for assistance. When asked the description of her attacker she mentioned the same to have put on a hat, rubber shoes and carried a bag before she heard someone who was inside a close house saying that must be Samwel. The matter was reported at Sitaki Shari Police station and who later on called PW2 a trained militia (Mgambo) through his mobile phone asking him to arrest appellant. Upon his arrest on 16/05/2018 he recorded his cautioned statement at Police Exh. P 2. The victim was issued with PF3 Exh. P1 and later on 18/05/2018 participated in the Identification parade Exh. P3 by identifying the appellant. The appellant was then taken to court. When the charge was read to him he entered a plea of not guilty, the plea which moved the prosecution side to parade five witnesses in a bid to prove prosecution case. In return the defence side called three witnesses the appellant inclusive to protest the appellant's innocence. Conviction of the appellant was grounded on visual identification of PW1, PW2 and PW5 as well as the PF3 Exh. P1, Caution statement Exh. P2 and Identification parade register Exh. P3.

The thirteen appellant's grounds of appeal can be reduced down to four grounds which I am prepared to determine. First, that the trial court erred by convicting the appellant basing on defective charge (dead law). Secondly, that the trial magistrate erred when convicted the appellant relying on the incredible and unreliable visual identification evidence of the PW1, Pw2 and PW5. Thirdly, that the trial magistrate erred by convicting the appellant relying on Exh. P2 and Exh. P3 without assessing their validity as they were obtained in contravention of mandatory provisions of Criminal Procedure Act, [Cap. 20 R.E 2002] now R.E 2019 and Rules (1),(2)(k)(q) and (s) of the PGO No. 232. And fourthly, that the police officer who received a first report never testified to the effect that the appellant was a prime suspect/culprit and is the one who was first reported at police by PW1 before his arrest.

Due to Covid19 pandemic on the 18/05/2020 hearing of this appeal proceeded through video conference. The appellant who was unrepresented on hearing date appeared from the prison whereas the Republic was represented by Mr. Adolf Kisima learned State Attorney. In arguing his appeal the appellant prayed court's leave to allow the Republic/Respondent respond to his grounds of appeal first before he could make his reply. Granted leave to take the floor first Mr. Kisima responded to grounds of appeal one by another.

It was Mr. Kisima's submission on the first ground that the charge with which the appellant was charged with and convicted is not defective as it is based on proper citation of the law and the particulars of the offence were clearly stating what the appellant had committed. That the appellant when committing the offence he stabbed the victim with a screwdriver and also used a knife to threaten the victim before he robbed her the

mobile phone and money Tshs. 3,000/=. Thus this ground has no merit, he submitted. On the second ground by the appellant faulting the reliance of the court on unreliable and incredible evidence of visual identification by PW1, PW2 and PW5, he was of the view the same were credible and reliable witnesses. That as per PW2's evidence it is clear that when on patrol at around 6.15 encountered the appellant who was running from the scene of crime where alarm was also coming from and identified him. That the appellant had put on T-shirt and rubber shoes the evidence which is confirmed and corroborated by the victim PW1. That PW1 stated that at about 06.00 was attacked by the appellant who had put on a Tshirt and rubber shoes. And that it is PW2 who arrested the appellant and took him to Sitaki shari police station. So the appellant was properly identified. With regard to PW5 he conceded that his evidence should not have been relied on to base conviction of the appellant as he did not identify him even in court.

With regard to the third ground on the validity and credibility of the evidence in Exh. P2 and Exh. P3 allegedly obtained in contravention of the law, Mr. Kisima observed that the same was obtained in accordance with the law as the procedures were followed. He had it that with regard to the Identification Parade register Exh. P3 PW4 testified on how he properly followed the procedures when conducting it and therefore it was proper and safe for the trial court to rely on them to convict the appellant. Lastly on the failure by prosecution side to parade as witness the police officer who received the first information from the victim to prove that he was the culprit to be arrested, he submitted that the prosecution is not forced to bring witness as it has a liberty if choosing the relevant ones to prove the charge. For the foregoing he prayed the court to find the

appellant's grounds of appeal unmeritorious and dismiss his appeal. The appellant being a lay person had nothing material to reply to the Republic's submission apart from praying the court to allow his appeal.

Having summarized the submissions I now turn to consider and determine the four grounds of appeal by the appellant as reduced from thirteen grounds. The assertion by the appellant that the charged with which his conviction was based in my opinion is unfounded. I am in agreement with Mr. Kisima that the same is not defective. The appellant has not shown as to how the same is defective and is founded on dead law. This ground has no merit. With regard to the second ground on the reliance of the court on visual identification evidence of PW1, PW2 and PW5 to convict the appellant Mr. Kisima submitted that the same is credible and reliable save for that of PW5 whom he conceded that he did not identify the appellant in court. The appellant asserted that the said evidence is incredible and unreliable so ought not to have been relied on by the court to convict him. I think this ground has merit as the faulted evidence contain inconsistencies and contradictions. It is trite law that where a criminal case hinges on visual identification evidence conditions favouring that identification must be considered. This was the position in the case of **Raymond Francis Vs. Republic** (1994) TLR 3 the Court said:

> *"It is elementary that in criminal case, whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of utmost importance."*

Further to that it is clear law that any court before basing conviction on visual identification must make sure that all possibilities of mistaken

identity are removed. This was also the position in the case of **Siku Saleh Vs. Republic** (1987) TLR 193 where the court said:

> *"Before basing conviction solely on visual identification, such evidence must remove all possibilities of mistaken identity and the Court must be satisfied that conviction is watertight...".*

In this case having gone through the evidence adduced and the challenged judgment I have noted that the trial court did not adequately address the issue of mistaken identification the duty which this court being the first appellate court is prepared to do. PW1 and PW2 in their evidence stated that when attacked it was 06.00 and/or 06.15 hours which in my opinion was still dark or it was about to get down. There is no evidence from both witnesses telling from what source of light they managed to identify the appellant as PW1's assailant. The trial magistrate on this assumed that there was light that enabled the witnesses to identify the appellant something which is wrong. It follows therefore that even the assertion by PW1 that she observed the appellant for 5 minutes when they were under fracas thus a clear identification is doubtful as being under threat and fear and in that state of darkness conditions the possibility of mistaken identity could not be overruled. As for PW5 I agree with Mr. Kisima and hold the view that he never identified the appellant in court apart from stating that he saw PW1's assailant but took hid behind the tree. I would therefore hold that this ground has merit as the appellant was not clearly identified at the scene of crime.

On the third ground I am not in agreement with Mr. Kisima's contention that the cautioned statement Exh. P2 and Identification Parade Register Exh. P3 were free from any violation of procedures when recorded and

conducted. To start with the cautioned statement the same violated the provision of section 50(1)(a) of the Criminal Procedure Act, [Cap. 20 R.E 2019] that makes it mandatory that cautioned statement must be recorded within four hours after arrest of the suspect. In this case the appellant was arrested on 15/05/2018 but had his cautioned statement recorded on 16/05/2018 at 21.00 hours. No extension of time was sought as per section 51(1)(a) and (b) of the CPA failure which in my view rendered the said statement incredible regardless of its contents. With regard to Exh. P3, PGO 232 rule 2(s) of the Police General Orders as rightly raised by the appellant in his grounds of appeal makes it mandatory that the officer conducting parade has to ask the witness making identification in what connection is he/her identifying the suspect and record the answer. I quote:

> *"2(s). The officer conducting the parade will note carefully in his Identification Parade Register any identification or degree of identification made and any material circumstances connected therewith including any wrong identification, and any remark or objection made by the suspect.* ***He shall ask the witness who makes, the identification; "In what connection do you identify this person?" and shall similarly record precise details of the witness's reply.*** *No other questions are permissible."* (emphasis supplied)

The purpose of this rule under PGO 232 is two folds. One, to provide assurance to the officer conducting the identification parade of the true suspect being identified and secondly to be sure of the offence in which the suspect is connected to. In Exh. P3 this mandatory requirement was not complied with. Further to that after the process of identification was

complete entries of participants were made in the Identification Parade Register PF 186. However, only 3 participants of the parade signed to signify and prove that they actually participated in the said exercise. The glaring question is where are signatures of the rest of the participants who allegedly attended the identification parade exercise to meet the requirement of the law as testified by PW4 the officer who conducted the identification parade? All these unanswered questions leave doubts as to the compliance of procedures for conducting the said identification parade. The two documents having violated the mandatory procedures of the law in my view lacked credence and therefore became unreliable evidence. When considering the two document the trial court found out that the same were not objected when tendered in court thus it was proper to rely on them to ground conviction of the appellant. I would hold that placing reliance on such unreliable evidence the trial court's conviction was not justified and therefore the court erred. This ground has merit also.

On the fourth and last ground of failure by the prosecution to call the police officer who received the first report from PW1 it was Mr. Kisima's argument that prosecution is not forced to parade all witnesses but rather few and relevant ones who can prove the case. It is common law that no particular number of witnesses is required for the proof of any fact. See section 143 of the Evidence Act, [Cap. 6 R.E 2019] and the case of **Yohanis Msigwa Vs. Republic** [1990] TLR 24 (CA). It is the appellant's complaint that the fact that PW1 reported him at police as her assailant remained unproved because no descriptions were given at police to enable the police officer arrest him. This complaint has merit. It is true there is no evidence indicating that PW1 as victim mentioned or gave

description of the person who attacked him before he was arrested. As to how was he arrested PW2 stated that he received a call from unmentioned head of Staki Shari Police Post giving him Report Book number (RB) and asking him to arrest the accused. When cross examined PW2 said he was asked to arrest one Samwel Tall. When cross examined further contradicted himself by saying that the RB had no name. If so what led him to arrest the appellant. There is no answer to this question. It was expected of the prosecution to call either the police officer who allegedly ordered PW2 to arrest the appellant or the investigator would have testified on the facts of whether PW1's assailant descriptions were given or not and tell who directed PW2 to arrest the appellant. I am therefore in agreement with the appellant's contention that it was important for the police officer who received the first information or investigator to testify in order to clear the doubts raised. This ground has merit too.

In the circumstances and for the foregoing reasons I would find that prosecution evidence that grounded the appellant's conviction was so wanting. This appeal is therefore meritorious and is hereby allowed. Conviction of the appellant is hereby quashed and sentence set aside. It is ordered that the appellant should be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED at DAR ES SALAAM this 12th day of June, 2020.

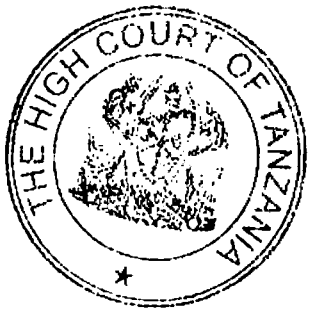
E.E. KAKOLAKI

JUDGE

12/06/2020

Delivered at Dar es Salaam today on 12th day of June, 2020 in the presence of the Applicant from Ukonga Central Prison through video conference necessitated by Covid19 pandemic, **Mr. Ramadhani Kalinga** learned State Attorney for the respondent and Miss Monica Msuya, Court clerk.

Right of appeal explained.



E. E. Kakolaki

JUDGE

12/06/2020