

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

CRIMINAL APPEAL NO 161 OF 2019

(Original Criminal Case No 42 of 2017 of the RM's Court of Mwanza District at Mwanza
Before Hon. Sumaye)

ISSACK NYAMBUSI SASIAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

19.02 & 27.02.2020

RUMANYIKA, J.:

The appeal is against conviction and custodial sentence of thirty (30) years for offence of Armed Robbery C/s 287 A of the penal Code Cap 16 RE. 2002 (the Code).

The particulars of which will read that Tryphone Cosmas Lugendo @ Charles, Issack Nyambus Sasi @ Uzulu, Amduni Idd Ibrahim @ Abdul @ Duni and George Sayi Mabula @ Tali (the 1st, 2nd, 3rd and 4th accused) respectively did on 17.11.2016 at Nkurumah street Nyamagana district and municipality of Mwanza steal cash 1.6M, Airtime vouchers of shs. 800,000/= and five mobile phones of shs. 200,000/=. That immediately before they threatened Astelia Peter Chami and Fikiri Esibo Bugombe with

a gun shooting in the air. For the purposes of this judgment, only the 2nd accused preferred the appeal.

The 5 grounds of appeal revolve around points; (1) that the appellant wasn't properly identified, (2) that the identification parade was improperly mounted. (3) that cautioned statement of the 4th accused was improperly recorded and tendered in evidence. (4) that the prosecution case wasn't proved beyond reasonable doubts.

Whereas Ms. Mwanahawa Changale learned state attorney appeared for the respondent Republic, the 2nd accused (the appellant) appeared in person.

The appellant had nothing additional to his memorandum of appeal.

Ms. Mwanahawa Changale learned state attorney argued the grounds together. That all the prosecution witnesses were reliable and credible. Much as also, the appellant was properly identified at the scene. Given the favorable conditions. Leave alone the subsequent properly mounted identification parade.

PW1 Marcus Kundadi a businessman and electronic mechanic of Nkurumah street in the city is on record having stated that just as he had arrived at the scene (shop) at about 20:20 hours, and suddenly heard a gunshot, a number of thugs invaded and put them under arrest. That before he took a hide in store, he saw one of the thugs hold a gun and observed him say for five (5) seconds. That by aid of electric lights he identified one.

PW2 Aurelia Peter Chami stated that she was a business woman of Nkurumah street in town, she owned the shop and had Asteria Peter and Fikiri the shop assistants but she was at the material time away at Moshi and from there she learnt about the incident through neighbor's cellular phone and she came back to Mwanza on 20.11.2018.

PW3 Asteria Peter Chami, sister of Pw2 and a shop assistant thereof stated that just as she was at the material time busy attending customers Pw1 inclusive, she heard a gunshot around which took a woman's life. That they were invaded by, and the thugs took assortment of items with them. That electric lamps shone in and out but she identified nobody. That shortly, some policemen arrived.

Pw4 F. 8361 D/C Benson of police CID Nyamagana stated that as he was at work place (Nyakato station) on duty on 1.1.2017, but following the incident, he interrogated and duly recorded the 1st accused's cautioned statement (Exhibit "P1"). That is all.

Pw5 Sgt Magori the Deputy OC-CID Nyamagana stated that as he was on 14.12.2016 away at Bariadi – Simiyu region on duty, a person at the scene having had identified the 4th accused, through a mobile phone he was informed that they had apprehended the said the 4th accused. That during interrogation and the appellant having confessed to the charges, he led to recovery of a gun make SMG NH 201661 (Exhibit "P3") and three magazines. One with 41 rounds, one with 30 rounds and the other one with 11 rounds (copy of the respective certificate of seizure – Exhibit "P2"). That the appellant also implicated and led to arrest of the 3rd accused at away at Geita and the 4th accused on 17.12.2016.

Pw6 P 4199 A/Inspector Magari of police CID Nyamagana stated that following the incident, now at the scene of crime on 18.11.2016 at 10:30 and having interviewed the respective shop assistants and Pw1, he also recorded the 4th accused's cautioned statement. That is all.

PW7 A/ Inspector Mwaiponde of the RCO'S office Mwanza stated that following the incident, he in ordinary course of business supervised identification parade on 18.12.2016 where only the appellant was identified by PW1 (copy of the identification parade register – Exhibit "P5").

PW5 G. 1724 D/C Michael of police CID – Ngudu stated that as he was, during the time working with Nyamagana police, but following the incident, he interrogated and recorded the 3rd accused's cautioned statement on 17.12.2016 at 10:00 am. (Exhibit "P6").

PW6 Boniventure Naftal at the time a guard of Mike Security Company around stated that following the incident, and having been invited by one Magari a policeman; he lined up on the material identification parade as the 12th participant whereby the appellant was identified.

The appellant is on record only having denied the charges. That if anything, with respect to the gun he was arrested on 13.12.2016. That irrespective of his denial, the policemen tortured him so severely that he could not resist it any more. That he confessed and forcefully signed the purported cautioned statement. That is all.

The prosecution case hinges on the evidence of visual identification at night by Pw1. The central issue therefore is whether the appellant was

properly identified. Until when the trial magistrate had put a question to him, the eye witness Pw1 during examination in chief had not singled out any culprit. In fact his evidence was as general and doubtful as under:-

...the voice was of bullet. It hits fridge and after few minutes, people came and ordered us to seat down ... I saw a man with gun ...I run inside the store in the shop. The person who hold a gun had put on clothes. When I turned up I saw a man with a gun. At the scene there was electricity lights tube lights therefore I identified the person. The time I took to look that man is approximately 5 secondsdistance from me to the person with gun is not more than one metre

Like her fellow eye witness, Pw3 couldn't have identified the appellant. Given the terrifying situation and the only alleged 5 seconds that she (Pw1) may have observed the appellant.

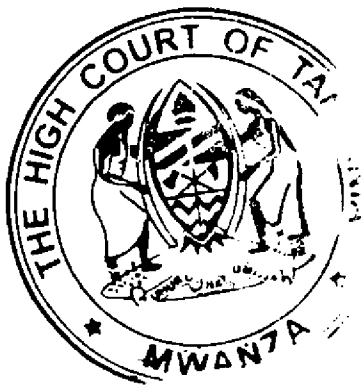
Secondly, one might have not known the appellant before yes, but there was no single person in court to whom at the earliest possible opportune the Pw1 had described the appellant. It is settled law that ability of a witness at the earliest to name or describe the accused also tells a lot about his credibility and reliability. It means therefore tha the Pw1's evidence at the police identification parade which was mounted say one year plus later possibly it was after thought.

Thirdly, the appellant may have, during the police interrogation confessed to the charges and he led to arrest of co – accused yes! But for

the said improper visual identification. Much as it is also on record that substantially, the appellant repudiated his cautioned statement (Exhibit "P4"). Now that for the above stated reasons the appellant's cautioned statement needed corroboration and it lacked one, his guilty was not beyond reasonable doubts proved. Suffice the points to dispose of the appeal.

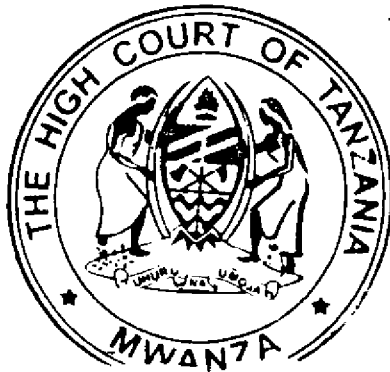
Now that the appellant wasn't properly identified and for that reasons his cautioned statement (Exhibit "P4") is gone, the conviction and sentence are quashed and set aside respectively. The appeal is allowed in its entirety. It is ordered accordingly.

Right of appeal explained.




S. M. Rumanyika
JUDGE
23.02.2020

Delivered under my hand and seal of the court in chambers. This 27.2.2020 in the presence of the appellant and Miss. Lilian Meli, learned state attorney for the respondent.



F.H MAHIMBALI
DEPUTY REGISTRAR
27.02.2020