

**IN THE HIGH COURT OF TANZANIA**

**(DODOMA DISTRICT REGISTRY)**

**AT DODOMA**

**(APPELLATE JURISDICTION)**

**(DC) CRIMINAL APPEAL NO. 125 OF 2020**

(Original Criminal Case No. 165 of 2019 of the District Court of  
Iramba at Kiomboi)

**BAHATI LEONARD..... APPELLANT**

**VERSUS**

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

*16/12/2020 & 21/12/2020*

**JUDGMENT**

**MASAJU, J**

The Appellant, Bahati Leonard, was charged with, and convicted of Armed robbery contrary to section 287A of the Penal Code, [Cap 16 R.E 2002] before and by the District Court of Iramba at Kiomboi. He was sentenced to serve thirty (30) years imprisonment, hence the Appeal to the Court against both his conviction and sentence. The Appellant's Petition of Appeal is made of six (6) grounds, including grounds of mistaken identification, non-proof of the offence and non-proof that the properties

found at the Appellant's residence, i.e the TZS, 130,000/= and the two call phone Vodacom and Airtel Simcards (Lines) belonged to the alleged victim of crime, Kitundu Lyanga (PW1).

When the Appeal was heard in the Court on the 2<sup>nd</sup> day of December, 2020, the layman Appellant appeared in person and adopted his grounds of appeal to form his submissions in support of the Appeal as he prayed the Court to allow the appeal accordingly.

The Republic contests the Appeal. The learned State Attorney, Ms. Mwajuma Mkonyi, who appeared for the Respondent Republic submitted that the prosecution case against the Appellant before the trial Court was proved beyond reasonable doubt for the Appellant and his colleague were identified at the scene of crime by aid of electricity light and that the Appellant was later on arrested at the very day in possession of some of the property stolen from the scene of crime, including TZS 130,000/= and two cell phone Vodacom and Airtel simcards lines, which belonged to Kitundu Lyanga (PW1), the victim of armed robbery.

The Republic argued that the fact that the Appellant was known to the victim of crime (PW1) prior to armed robbery incident, was a factor in

his unmistakable identification at the scene of crime pursuant to **Abdallah Rajab Waziri V. Republic (CAT) Criminal Appeal No. 116 of 2004, Tanga Registry (Unreported)** where the Court held, that where the identifying witness knew the Appellant prior to the event even a match box light would be sufficient for proper identification. The Respondent Republic also argued that the elements of Armed Robbery as stated by the Court in **Makolobela kulwa Makolobela @ Tanganyika V.R [2002] TLR 296** were met accordingly in the instant Criminal Appeal. The Respondent then prayed the Court to dismiss the appeal in its entirety for want of merit. That is all by the parties.

The Court is of the considered position that in this case the prosecution did not prove the case against the Appellant beyond reasonable doubt. This is because the alleged identification of the Appellant by Kitundu Lyanga failed the test of unmistakable identity of the Appellant. The said Kitundu Lyanga PW1) testified in the trial Court that he identified the Appellant and his accomplice, one Daudi, by the aid of electrical light but at the same he also testified that the Appellant and his accomplice had disconnected the electrical wires at the scene of the crime. It is therefore not so certain that there was electrical light at scene of

crime for the Appellant's unmistakable identification. The said Kitundu Lyanga, also did not testify on all the criteria for unmistakable visual identification of the Appellant at the scene of the crime as per **Waziri Amani V.R [1980] TLR 250**. Indeed, the victim of crime, Kitundu Lyanga, (PW1), himself testified before the trial Court when he was cross examined by the Appellant thus:

*"I never saw you committing the same offences"*

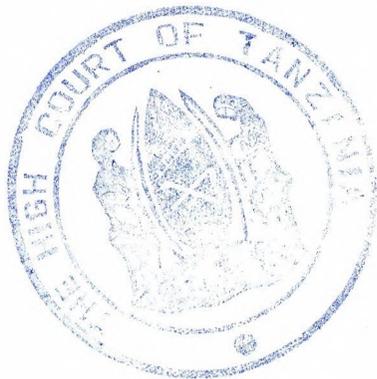
Secondly, there was no proof that TZS, 130,000/= and the two Vodacom and Airtel Simcard lines that were allegedly found at the Appellant's residential premises belonged to the victim of the crime, Kitundu Lyanga (PW1). This is because there was no proof that the telephone numbers in the Simcards had been registered in the name of the said Kitundu Lyanga (PW1) let alone, the fact that even their cellular numbers were not disclosed to the trial Court. There was no proof that TZS 130,000/= was the proceeds of the Armed robbery crime where some TZS 1,300,000/= is alleged to have been stolen from the victim of crime, Kitundu Lyanga (PW1). The Appellant who owns a motorcycle for transport was capable of owning such amount of money. Again, the said money was not tendered before the trial Court as exhibit, but the Record of

search order to that effect which record just contained the numbers of the banknotes thereof, which was admitted in evidence as prosecution Exhibit P3. The said Exhibit did not mention the alleged Vodacom and Airtel Simcards that allegedly belonged to Kitundu Lyanga (PW1) but Machete. The machete is not mentioned by the victim of crime Kitundu Lyanga (PW1) that was used in the commission of the crime. The said witness testified that the armed robbers were armed with bush knives. The said Record of search was not signed by the Appellant. In addition to the said areas of improvement on the said exhibit, the same was not read over to the Court so that the Appellant could be well informed for cross examination of Insp. Richard Kimoro (PW4) for his own defence. The said Exhibit "P3)" is therefore hereby expunged from the record of evidence accordingly for such incurable irregularity, which prejudiced the Appellant.

There was also no proof that the victim of the crime Kitundu Lyanga, (PW1), had been beaten (assaulted) on shoulder and forehead with a bush knife by the Appellant at the scene of crime. This is because there was no any medical Examination Report (PF3) to that effect that was tendered and admitted in evidence by the prosecution. One Daud, who allegedly was in the company of the Appellant during the commission of the offence,

escaped from police custody. Other things being equal, he could be responsible for the alleged armed robbery incident.

That said, the meritorious Appeal is hereby allowed accordingly. The conviction and sentence of thirty (30) years imprisonment against the Appellant is hereby severally quashed and set aside respectively. The Appellant should be released forthwith from prison unless there was lawful cause to the contrary.



  
GEORGE M. MASAJU

**JUDGE**

21/12/2020