

IN THE HIGH COURT OF TANZANIA

(SONGEA DISTRICT REGISTRY)

AT SONGEA

CRIMINAL APPEAL NO. 49 OF 2019

(Originating from Criminal Case No. 122 of 2018 of Mbinga District Court)

WALARICK KOMBAAPPELLANT

VERSUS

REPUBLIC RESPONDENT

Date of last Order: 02/03/2020

Date of Judgment: 23/03/2020

JUDGMENT

I. ARUFANI, J.

The appellant, Wallarick Komba was arraigned before the District Court of Mbinga with the offence of causing grievous harm contrary to section 225 of the penal code [cap 16 R. E. 2002]. It was alleged in the particulars of the offence that, on 4th day of November, 2018 at CCM street, within Mbinga District in Ruvuma region, the appellant did unlawfully attack one Gift Mbuya and beat him with an empty bottle of beer on his face and mouth and caused grievous to him, to wit his two upper teeth were fractured. After full hearing of the case the appellant was convicted and sentenced to serve six (6) months imprisonment and

ordered to pay Tshs. 500,000/= to the victim as a compensation after serving the imprisonment sentence. Being aggrieved by the decision of the trial court the appellant filed in this court the instant appeal basing on the following ground:-

- 1. That, the trial court erred in law and in facts to convict the appellant on the case which was not proved beyond reasonable doubt as the accused was not identified at all at the scene of the crime even in the court, he was not identified by his name as he was identified as Bonge, considering the event took place at night.*

When the appeal came for hearing the appellant was represented by Mr Dickson Pius Ndunguru, learned advocate and Miss Hellen Chuma learned state attorney appeared for the respondent. The advocate for the appellant argued in relation to the above ground of appeal that, the trial court erred in law and in facts to convict the appellant on the case which was not proved beyond reasonable doubt. The appellant's advocate told the court that, the typed proceedings of the trial court shows from its page 10 to 16 that the event occurred at 22:00 hours. However, there is no any evidence led to prove how the appellant was identified as the person who hit the victim with the empty bottle of beer and caused grievous harm to him.

He argued that, it was not stated what source of light was at the scene of the crime. He said it was not said if there was light or moon which enabled identification of the appellant as the person who beat the victim with an empty bottle of beer. He said it was also not stated what was the distance from where the appellant stood up to the victim and it is not clear whether the bottle was thrown by the appellant. He also said there was no any description which was given to show the appellant was identified as the person beat the victim with a bottle of beer. He said further that, even before the trial court the appellant was not identified by his name by the victim and his witnesses who testified as PW2 and PW3 as all of them identified him as Mzee Bonge.

It is the further argument by the counsel for the appellant that, the charge sheet shows the accused person's name was Walarick Komba and not Mzee Bonge and the name of Mzee Bonge was not indicated in the charge sheet as one of the appellant's name. He submitted that, the identification of the appellant was not watertight and said there was big mistaken identity of the appellant as a person caused grievous harm to the victim. He said the raised doubt was supposed to be determined in favor of the appellant.

The counsel for the appellant supported his argument with the case of **Nurdin Mohamed @ Mkula V. R**, Criminal Appeal No. 112 of 2013,

CAT at Iringa (unreported). He submitted that, the appellant was entitled to be acquitted as it was not said if there was light at the scene of the crime. He prayed the court to take cognizance of the position of the law as laid in the case of **Waziri Amani V. R**,[1980] TLR 150 which sets the condition for eliminating mistaken identity of an accused person. He said it was also held in the case of **Raymond Francis V. R**,[1994] TLR 100 that, it is elementary in criminal cases that, where determination depends essentially on visual identification evidence on condition favoring a correct identification is of at most important.

The appellant's counsel continued to argue that, all the evidence adduced before the trial court did not satisfy the conditions stated in the above cases. He argued further that, it was not enough for the trial court to say the victim and his witnesses knew the appellant before. He said there must be an evidence to show the person committed the offence was the appellant. Finally he prayed the court to find there was reasonable doubt which would have warranted the appellant to be acquitted and not to be convicted and prayed the appeal to be allowed.

In reply the learned State Attorney opposed the appeal and supported the decision made by the trial court. She states that, the prosecution side managed to prove the case beyond reasonable doubt. She argued that, it is true that the event occurred at night and it is true that it

was not stated in the proceedings of the trial court which source of light was used to identify the appellant. However, the State Attorney submitted that, the appellant was properly identified. She argued that, the evidence adduced before the trial court shows in the place where the event occurred there were only three people who were the appellant, PW1 and PW2.

She said the evidence shows PW1 and PW2 were watching football match at the place of event from 19:00 hours and after the match they continued staying at that place of event drinking beer up to 22:00 hours when the appellant beat the victim (PW1) with an empty bottle of beer. She said the person who was serving beer to the victim and his friend was the appellant. She went on arguing that, as PW1, PW2 and the appellant stayed together for such a long period of time and they knew each other as the appellant was the neighbor of PW1 for three years their evidence was watertight and managed to prove the person beat PW1 with the bottle of beer was the appellant.

The State Attorney argued further that, even PW3 who was given information of the event said that, when he arrived at the place of event the door was opened for him by the appellant. She said that shows there was no doubt that the appellant was properly identified without any doubt that is the one beat PW1 with a bottle of beer. The State Attorney argued that, it is true that the appellant was charged by using the name of

Walarick Komba and he was taken to the trial court by using that name and there was no any other name indicated in the charge sheet. However, she said the person who was before the court and identified by all three prosecution witnesses as Mzee Bonge was the appellant.

The learned State Attorney added that, despite the fact that the prosecution witnesses adduced their evidence and pointed their finger to show the appellant who was identified by the name of Mzee Bonge was the one beat PW1 with a bottle of beer but the appellant's counsel did not cross examine the prosecution witnesses about the appellant being identified by the name of Mzee Bonge instead of Walarick Komba. She submitted that, failure to cross examine the prosecution witnesses about the name of Mzee Bonge shows the appellant accepted he was also being known by the name of Mzee Bonge. She prayed the court to find the appellant's counsel's submission in respect of the appellant to be identified by the name of Mzee Bonge instead of Walarick Komba is an afterthought.

She argued that, the case of **Nurdin Mohamed @ Mkula V. R,** (supra) cited by the counsel for the appellant is distinguishable from the case at hand. She said the time the witnesses in the case at hand stayed with the appellant watching football match and drinking beer and as were only three people shows the issue of identification of the appellant had no any mistake. She submitted that, basing on the evidence of the said three

prosecution witnesses it is crystal clear that the appellant was properly identified hence the prosecution case was proved beyond reasonable doubt and prayed the appeal be dismissed and the conviction entered against the appellant by the trial court be confirmed.

In his rejoinder the counsel for the appellant stated that, it is not true that, the victim and his friend were with the appellant in the room when is alleged the appellant beat the victim. He said firstly, that is not the way of identifying a person at night hours. He said if there was darkness and there was another person it might be such person was the one beat the victim and hide behind the back of the appellant and said the person beat the victim was Mzee Bonge.

He said the evidence that, they were watching football match was not true as it was not stated they were watching football match in which device. He said it was not said if it was through the phone or television as the evidence is silent on that. The appellant's counsel argued that, the argument by the State Attorney that the victim and the appellant knew each other for three years and are neighbors is not enough to establish the appellant was identified as the victim was required to state how he identified the appellant. He went on arguing that, being present at the scene of the crime is not enough to convict a person. He said there must be evidence to prove the appellant committed the offence. He said further

that, the evidence of PW3 that the appellant is the one opened the door of the bar for him has no connection with the event of the appellant beating the victim as when he arrived at the scene of the crime the victim had already been beaten.

He argued further that, they had no reason to cross examined the prosecution's witnesses about the name of Mzee Bonge as they knew that would have been assessed by the trial court when assessing reliability of their evidence and its relevance. He said if the prosecution initiated the proceedings showing the victim was beaten by Walarick Komba and the victim came to court to say the person beat him was Mzee Bonge it is obvious that the evidence of the victim was not reliable or identification of the appellant was not proper. He argued that, the prosecution was not required to rely on their cross examination to fill the gap in their case. To bolster his argument he referred the court to the case of **John Makolobela Kulwa Makolobela and Another V. R**, [2002] TLR 296 where it was held a person is not convicted because of the weakness of his defense but because of the strength of the evidence of the prosecution.

He said if the prosecution found the appellant was being referred as Mzee Bonge they were required to conduct identification parade in order to identify the person committed the offence. He said as there was only one person in the dock the witnesses would have not shown any other person.

He argued further that, the law requires a known person to be identified by his name before being taken to the court and not to be identified at the dock. He supported his argument with the case of **Nurdin Mohamed @ Mkula** (supra) which set out the conditions required to exist in identifying a person at night. He prayed the court to refuse to accept the State Attorney's submission as is not supported by any authority and finally he prayed the appeal be allowed and the decision of the lower court be quashed and the sentence imposed to the appellant be set aside.

After considering the submissions from both sides and going through the record of the trial court, the court has found the issue to be determined in this appeal is whether the prosecution proved beyond reasonable doubt that the appellant was properly identified as the person beat the victim with a bottle of beer on the date of event and caused grievous harm to him. The court has found as rightly argued by the counsel for the appellant and without being disputed by the State Attorney the event which led to the framing of the charge leveled against the appellant occurred at night of 22:00 hours.

That being the time of occurrence of the event it was incumbent upon the prosecution to prove the appellant was properly identified as a person beat the victim with a bottle of beer and caused grievous harm to him. In order to know if the appellant was properly identified as a person

beat the appellant and caused grievous harm to him this court which is the first appellate court is required to re-evaluate the evidence adduced before the trial court by both sides to see if there is a need to interfere with the finding of the trial court. The task of re-evaluating the evidence adduced before the trial court will be done by this court as the first appellate court under the principle of law laid in different cases decided by this court and the Court of Appeal of Tanzania. Some of the cases are **Juma Kilimo V. R**, Criminal Appeal No. 70 of 2012 and **Crosperry Gabriel & Another V. R**, Criminal Appeal No. 232 & 233 of 2014 CAT at Bukoba (All unreported).

Before starting to consider the submission made to the court by the counsel for the parties and re-evaluate the evidence adduced before the trial court the court has found proper to state at this juncture that, the position of the law in relation to the question of visual identification of a person suspected to have committed an offence at night has been stated in number of cases decided by the Court of Appeal of Tanzania and this court. Some of those cases include the cases of **Nuridin Mohamed @ Mkula V. R**, **Waziri Amani V. R**, and **Raymond Francis V. R**, cited to the court by the counsel for the appellant. The court of Appeal of Tanzania stated in the famous case of **Waziri Amani V. R**, (supra) that:-

"no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence is watertight."

The Court of Appeal of Tanzania listed some factors to be taken into consideration when determining whether a person suspected to have committed an offence was properly identified in the above case of **Waziri Amani V. R.** The factors listed in the above cited case were reproduced in the case of **Frank Christopher @Malya V. R.**, Criminal Appeal No. 182 of 2017, CAT at Dodoma (unreported) where the Court of Appeal of Tanzania stated that:-

"the following factors has to be taken into consideration; the time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance whether it was day or night (whether it was dark if so, was there moon light or hurricane lamp etc.), whether the witness knew or had been seen the accused before or not."

Under the guidance of the above quoted principle of the law, the court has gone through the record of the trial court and consider the submissions made to the court by the counsel for the parties for the

purpose of being satisfied if the appellant was properly identified as a person beat the victim with a bottle of beer and caused grievous harm to him. The court has discovered that, although there is no any evidence adduced to show which source of light was at the scene of the crime to enable the victim and other prosecution's witnesses to identify the appellant (who was identified before the trial court as Mzee Bonge) as the person injured the victim but the victim and his friend, PW2 said they were with the appellant at his bar from 19:00 Hours up to 22:00 hours when the event occurred.

The victim and his friend, PW2 said the appellant was well known to them and the victim said the appellant was their neighbor and he knew him for three years. In addition to that, PW1 and PW2 said the appellant was the one who was serving beer to them up to when the event occurred. The victim, PW1 and his friend, PW2 stated in their evidence that, before the victim being beaten by a bottle of beer the appellant demanded them to depart as he wanted to close the bar but the victim told him to wait them to finish their drinks and that was the source of PW1 to be beaten by the appellant by using a bottle of beer. The court has also found as rightly argued by the State Attorney the evidence of PW1 and PW2 that PW1 was beaten by the appellant was corroborated by the evidence of PW3.

PW3 who was the brother of PW1 said in his testimony that, after going to the place of event following the phone call made to him by PW1 he found the door of the bar closed and it was opened for him by the appellant. PW3 said that, when he asked PW1 what happened to him he told him he was beaten by the appellant and when he asked the appellant as why he beat PW1 the appellant told him that, PW1 is a criminal and told him PW1 is not above the law. The evidence of the above mentioned prosecutions' witnesses shows all of them were firm that they managed to identify the appellant as a person beat the victim and caused grievous harm to him.

The court has considered the submission by the counsel for the appellant that, the appellant was not properly identified by the prosecution's witnesses as they identified him by using the name of Mzee Bonge while his name as appearing in the charge sheet is Walarick Komba. The court has found it is true that is how the appellant was identified by the prosecution's witnesses. However, the court has found as rightly argued by the State Attorney when the prosecution's witnesses were identifying the appellant before the trial court by the name of Mzee Bonge instead of Walarick Komba appearing in the charge sheet the counsel for the appellant did not cross examine any of the prosecution's

witness about the use of the name of Mzee Bonge to identify the appellant instead of using the name of Walarick Komba.

The said failure to cross examine the prosecution witnesses about the name used to identify the appellant when he was before the court make the court to find that, the appellant and his counsel had no dispute about correctness of identifying the appellant by using the name of Mzee Bonge instead of the name of Walarick Komba. The court has arrived to the above finding after seeing that, the position of the law in relation to a party who fails to cross examine a witness on a certain matter has been settled in different cases decided by the Court of Appeal of Tanzania and this court. Some of those cases include the cases of **Damian Ruhele V. R**, Criminal Appeal No. 501 of 2007, **Nyerere Nyague V. R**, Criminal Appeal No. 67 of 2010 and **Issa Hassan Uki V. R**, Criminal Appeal No. 129 of 2017 (All unreported). The Court of Appeal of Tanzania stated in the case of **Nyerere Nyague** that:

"As a matter of principle, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said."

Therefore the act of the counsel for the appellant to fail to cross examine the prosecution's witnesses about the correct name of the appellant between Mzee Bonge and Walarick Komba implies they accepted the name of Mzee Bonge was also the name of the appellant hence is now estopped to deny the name of Mzee Bonge is not the name of the appellant. The court has also considered the defence made before the trial court by the appellant that Mzee Bonge is not his name and come to the finding that, as rightly argued by the State Attorney that is an afterthought which would have not raised any doubt in the evidence of the prosecution's witnesses.

The court has also considered the further argument by the counsel for the appellant that, as held in the case of **John Makolobela** (supra) the prosecution was not required to rely on the weakness of the defence of the appellant to fill gaps in their case but failed to see which prosecution's gap was filled by the weakness of the defence of the appellant. To the contrary the court has found the decision of the trial court was based on credibility found by the trial court in the evidence of the prosecution's witnesses which this court has no justification of interfering with it.

Basing on what has been stated hereinabove the court has come to the view that, under the circumstances of the appellant's case where PW1 and PW2 said they stayed with the appellant at his bar from 19:00 up to

22:00 hours when the event occurred and the appellant was known to PW1 for three years as he was their neighbor and he was the one who was serving beer to PW1 and PW2 at the place of event, it cannot be said he was not properly identified as a person who beat the victim with a bottle of beer. This make the court to come to the settled view that, all the factors listed in the case of **Waziri Amani V. R** (supra) and referred in the case of **Frank Christopher @Malya V. R** (supra) as quoted hereinabove together with other factors given in other cases were fulfilled by the evidence of the prosecution's witnesses.

In the premises the court has come to the conclusion that, the ground of appeal filed in this court by the appellant and the arguments made to the court by the appellant's counsel to support the appeal have failed to convince the court the appellant was not properly identified as a person who beat the appellant with a bottle of beer. Consequently, the appeal is hereby dismissed in its entirety for want of merit. It is so ordered.

Dated at Songea this 23rd day of March, 2020.



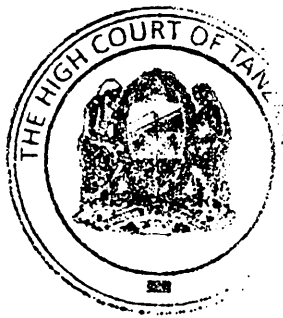
I. ARUFANI

JUDGE

23/03/2020

Court:

Judgment delivered today 23rd day of March, 2020 in the absence of the appellant but in the presence of his advocate, Mr. Jackson Mpangala and Ms. Juntwa Tulibake, Senior State Attorney is present on behalf of the respondent. Right of Appeal is full explained.



A handwritten signature in black ink, appearing to read "I. Arufani".

I. ARUFANI

JUDGE

23/03/2020