

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 268 OF 2018

(Arising from Kinondoni District Court, Criminal Case No. 50 of 2017)

AKIDA YUSUPHAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 21/11/2019

Date of judgment: 20/03/2020

S.M. KULITA, J.

This is an appeal originating from Kinondoni District Court in the Criminal Case No. 50 of 2017. The appellant AKIDA YUSUPH (hereinafter to be referred as appellant) was convicted to serve 30 years imprisonment for the offence of Armed Robbery contrary to section 287A of the Penal Code [Cap. 16 RE 2002] as amended by the Written Laws (Miscellaneous Amendment) Act No. 3 of 2011. Being aggrieved with the decision of the said court, the appellant appealed to this court against the conviction and sentence.

Appellant submitted six grounds of appeal and two additional grounds of appeal which can be paraphrased into three grounds as hereunder;

1. That the trial Magistrate erred both in law and fact by convicting the appellant basing on incredible visual identification.
2. That the trial Magistrate erred in law and fact by convicting the appellant while there is variation in the charge sheet and the evidence adduced.
3. That the trial Magistrate erred in law and fact by convicting the appellant while the case was not proved beyond reasonable doubt.

A brief background of this matter is the allegation that on the 29th December, 2016 within the city of Dar es Salaam the accused (appellant) stole different items from the victims LOREEN ROTH and SONJA LINA and immediately before and after stealing he threatened them with the screw driver.

PW1 and PW2 who were the victims told the court that they arrived from Moshi on 29th December, 2016. Having reached at Dar es Salaam they were driven to the hotel by the appellant's taxi and agreed with the appellant to be picked by him on the next day to the ferry premise. On the following day, 30th

December, 2016 as they agreed, the appellant picked them but there was another man on the front sit of the taxi. The appellant did not drive to the ferry instead he took them to another place where two other men got into the car and started searching their bags where they took the victims' valuables and left them thereat. Then on the 6th February, 2017 they were called at the police station to identify their culprits.

In this appellate court the appellant who was unrepresented preferred to argue his appeal by way of written submissions while the respondent through the Learned State Attorney Ms. Jenifer Masue preferred to reply orally.

In his written submission with regard to the issue of defective charge sheet the appellant submitted that there was variance between the charge sheet and the evidence of PW1 and PW2 (the victims). He said that particulars of the offence in the charge sheet indicates that the appellant used the ***screw driver*** to threaten the victims in order to steal the alleged properties but the evidence of PW1 and PW2 did not indicate that the appellant used the screw driver to threaten them.

The appellant stated that there is also a variation of dates in the charge sheet and the evidence presented before the court

by the prosecution side and that renders the charge sheet defective and incurable. He submitted that according to the charge sheet the crime was committed on 29/12/2016 while the witnesses (PW1 and PW2) testified that the incident happened on 30/12/2016.

Submitting on the ground which relates to identification the appellant submitted that the evidence of PW1 and PW2 was not satisfactory that they identified the appellant.

The appellant concluded his submission by praying the court to allow his appeal and set him at liberty.

The Learned State Attorney, Ms. Jenifer Masue for the respondent conceded the appeal. Among the reasons behind is that there are variances between the contents of the particulars of the offence in the charge sheet and the evidence adduced before the trial court. She said that while the charge sheet indicates that the appellant used the screw driver to threaten the victims in the commission of the offence, the evidence of PW1 and PW2 at the trial court do not transpire the use of the said weapon. They just stated that they were slapped by the said assailant.

With regard to the defect of variation of dates in the charge sheet and the evidence of PW1 and PW2 the Respondent's

Learned Counsel submitted that the evidence shows that the appellant met the victims on two different days that is 29/12/2016 and 30/12/2016 but the robbery was committed on the later day, that is 30/12/2016 though the charge sheet shows that it was committed on 29/12/2016. Ms. Masue is of the view that the appellant was not fairly tried and with such defects the charge cannot be cured by section 388 of the Criminal Procedure Act. She supported her argument by citing the case of **MUSSA MWAIKUNDA V. R (2006) TLR 387** thus the whole proceedings are null and void.

She concluded her submission remarks by praying that the appeal be allowed.

In his rejoinder the appellant maintained his prayer that the appeal be allowed, conviction quashed and sentence be set aside.

Having carefully considered the submissions of both parties I went through the records of the trial court, particularly the testimonies given by PW1 and PW2 who testified to the effect that the on the fateful day one person who introduced as the appellant's friend slapped PW1 and threatened them to give them the valuables they had otherwise they would be in

trouble. It was not stated anywhere in the evidence that the appellant used screw driver to threaten the victims.

Section 287A of the Penal Code [Cap. 16 RE 2002] as amended by the Written Laws (Miscellaneous Amendment) Act no. 3 of 2011, defines the offence of armed robbery as;

"any person who steals anything and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument or is in company of one or more persons and at or immediately after the time of stealing uses or threatens to use violence to any person, commits an offence termed armed robbery....."

Therefore one can be convicted of ***Armed Robbery*** if it is proved that he ***did use any arm to commit stealing***. In the case of **SHABAN SAID ALLY V. R, Criminal Appeal No. 270 of 2018, CAT at Mtwara (unreported)** the court laid down three things which must be proved by the prosecution side for the offence of Armed Robbery as per aforementioned section to stand;

- 1. There must be proof of theft*
- 2. There must be proof of the use of a dangerous or offensive weapon or robbery instrument against at or immediately after the commission of robbery*

3. That the use of dangerous or offensive weapon or robbery instrument must be directed against a person.

As rightly submitted by Ms. Jenifer Masue, Learned Counsel for the Respondent that the prosecution side did not prove that the assailants really used weapon or instrument to commit stealing. In short the trial court did not address properly that the bandits were armed when it held that the offence of Armed Robbery was real committed.

The offence of Armed Robbery has not been proved but section 300 of the Criminal Procedure Act [Cap 20 RE 2002] allows the accused person to be convicted of a lesser/minor offence if the ingredients prove the said lesser offence but do not prove the cognate offence. As for the matter at hand I find it unnecessary to tune my mind into that aspect as the fact that the testimony of PW3, F 7337 DC KIJANGWA the one who had arrested the appellant is too remote, that he acted on the instruction of his boss who was also informed about the assailants by somebody else, informer. According to the records PW3 is the one who had gone to arrest the appellant at Corner Bar located at Africa Sana area, Sinza in Dar es Salaam after being so ordered by his boss who is the In-charge for the Investigation department that the informer would face him and show the assailant of the victims. However, the said In-charge

never turned up to court to prove that he real discharged the said duty to PW3, that he did send the informer to him(PW3) and that the person who was arrested is the intended one. Furthermore, contents of particulars of the offence in a charge sheet do not tally with the testimonies of the prosecution witnesses, not only on the date of commission of the offence but also on the fact that the allegation that a weapon had been used in the commission of the offence has never been stated in the prosecution case. The prosecution side at the lower court had an opportunity to amend the charge sheet after noting those defects but they didn't do so. It is therefore evident that the case was not proved beyond all reasonable doubts.

In upshot I find this appeal has merits, hence allowed. I hereby quash the conviction, set aside the sentence of the lower court and acquit the appellant forthwith. He is to be set at liberty unless otherwise held in other lawful cause.



A handwritten signature in black ink, appearing to be "S.M. Kulita".

S.M. KULITA

JUDGE

20/03/2020