

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 25 OF 2020

NYABOHE NYAGWISI NYAGWISI _____ APPELLANT

VERSUS

THE REPUBLIC _____ RESPONDENT

(Arising from the decision and orders of the district court of Tarime at Tarime, Hon. Mugendi RM, in criminal case number 33 of 2018 dated 02.01.2019)

JUDGEMENT

Date of last order: 21.04.2020
Date of judgment: 22.05.2020

GALEBA, J

This appeal arises from the decision and orders of the district court in criminal case number 33 of 2018. In that case, the appellant was jointly charged with **MKANA MGAYA MWITA, STEPHEN MTIBA NYAHUCHO** and **CHACHA MTIBA NYAHUCHO** (the other accused persons) on one count of armed robbery contrary to **section 287A of the Penal Code [Cap 16 RE 2002] (the Penal Code)**. At the end of the trial, **STEPHEN NYAHUCHO** and **CHACHA NYAHUCHO** were acquitted, and **MKANA MWITA** was discharged. However the appellant, **NYABOHE NYAGWISI NYAGWISI**, was found guilty and was convicted of the offence of armed robbery. Consequently he was sentenced to serve a term of thirty (30) years in prison as a legal remedy.

The facts leading to prosecuting, convicting and the ultimate imprisonment of the appellant, according to the prosecution was that on 10.08.2017 at night, together with the other accused persons the appellant invaded the home of one **MGAYA MATAIGA CHOMETE** (the complainant) at Nyagisese village in Tarime district and stole his 35 herds of cattle valued at Tshs. 17,500,000/=. It was also the case of the prosecution that in the process of ensuring that the illicit act was to succeed without any resistance from the complainant, the appellant shot him by side and injured his ribs. By the Grace of God, the complainant was alive during the trial and he testified as **PW1**.

The charge was denied by the accused persons, so the prosecution called eight witnesses to prove the case and at the end of the trial, as stated above, the third accused person who is **NYABOHE NYAGWISI**, the appellant was convicted and sentenced as appropriate. The appellant was aggrieved by both the conviction and sentence hence the present appeal in which he raised a total of six grounds of appeal to challenge the judgment of the district court.

The complaints in the respective grounds of appeal may be paraphrased as follows;

"1. The conviction was unlawful as it was based on poor dock identification.

2. The appellant was convicted based on poor visual identification.

3. The prosecution did not adduce evidence of favorable conditions of identification including the source of light.

4. That there was no evidence to show that the complainant mentioned the appellant to anyone immediately after the crime was committed.

5. It was unlawful for the court to convict the appellant without there being tendered any exhibit.

6. The trial court disregarded the strong evidence of the defence and instead it considered the uncorroborated evidence of the prosecution."

This appeal was heard in the absence of appellant due to the corona virus outbreak. The appellant had approved that the appeal be heard in his absence in a letter of reference **No.112/MAR/1/XX1V/57** dated 17.04.2020 from Musoma prison to the Judge Incharge of this Registry. The respondent was permitted to file written submissions in objecting to the appeal.

On the 1st, 2nd and 3rd grounds, Mr. Frank Nchanila learned state attorney for the respondent submitted briefly that identification was made under favorable conditions and **PW1** and **PW3** evidence proved existence of favorable conditions of visual identification as they identified **NYABOHE NYANGWISI** as wearing a black jacket and holding a fire arm and a machete. They testified that they knew him well before the date of the incidence as they lived in the same street. They were able to identify him as there was solar tube light and the appellant was standing in the foreground close to them. Mr. Nchanila referred to **CRIMINAL APPEAL NO. 551 OF 2015; CHACHA JEREMIA MURIMI AND OTHERS V. REPUBLIC** CA (unreported) at page 18.

Evidence of identification of the appellant was tendered by **PW1** and his wife **PW3, JUSTINA MGAYA** at the scene of the crime and also partly by **PW4, RYOB A ZAKARIA**. At page 15 of the typed proceedings **PW1** stated;

" I did identify him using solar tube light which was shining to the area Nyagwisi Nyagwisi is not new to me we reside in the same street and by that time he had a " Mzuzu" before he have (sic) shaved the same"

PW3 at page 13 of the proceedings **PW3** identified the appellant very well. She states;

"I saw really a group of people outside, as the solar light was lightening the area but I manage to identify Nyabohe Nyagwisi , I identify him as he is not new to me ..."

Even **PW4, RYOB A ZAKARIA**, a neighbor identified the appellant as he hid along the pathway through which the cattle were being driven away from the complaint's home.

I have gone through the submission and I agree with Mr. Nchanila that the visual identification met the favorable conditions. The prosecution witnesses knew the appellant before the incident and they lived in the same place. They were a few paces from where the appellant was standing outside in their compound and where **PW1** and **PW2** were, in the house and they saw him through the door; they saw what he was carrying and wearing. There was the

solar tube light illuminating the area where the appellant and other bandits were standing. This court is convinced that the appellant was properly identified. In this case all the three witnesses, **PW1**, **PW3** and **PW4** identified the appellant as having been in a black jacket and he had a long beard and he is a person they all knew well before the robbery. There was no indication why they would all lie against him. There was no reason on record that could be inferred that all three of them could have conspired to fix him. Based on the above discussion the 1st, 2nd and 3rd grounds of appeal are hereby dismissed.

The 4th ground was that the appellant was not mentioned to anyone by the victim that he is the one who committed the crime. In reply, Mr. Nchanila submitted that identification was not made by a single person, because he was identified by **PW1** and **PW3** and their evidence was corroborated by that of **PW4**. He submitted that in such circumstances there was no need to necessarily name the appellant to the next person. He submitted that the requirement of a witness to name a suspect at an earlier possible opportunity is for assurance of reliability of his evidence as provided in the case of **MARWA WANGITI MWITA & ANOTHER V. REPUBLIC, CRIMINAL APPEAL NO.6 OF 1995 (UNREPORTED)**.

Indeed, mentioning the person who was seen committing the offence by the victim is not a requirement in every circumstance, and it is not a requirement without which a conviction must be illegal. In this case, **PW1** and **PW2** saw the appellant at the same time and also **PW4** heard him talk and saw him. It is the holding of

this court that, the evidence of the prosecution witnesses was both credible and reliable. In the circumstances, this ground is dismissed for want of merit.

The appellant's complaint in the 5th ground of appeal is that it was wrong to convict him of the robbery while he was not found with any exhibits, that is, any of the 35 herds of cattle stolen. In reply to that complaint Mr. Nchanilla submitted that there is no legal requirement that the accused person has to be found with exhibits and each case depends on its own facts. He submitted that an exhibit is not one of the ingredients of the offence of robbery under section 287 A of the Penal Code as amended by Act No. 3 of 2011. In this case, the point is whether or not the offence of robbery was proved. On this ground this court is in agreement with the respondent's position, that there is not legal requirement that a person who steals cattle must be found with the cattle and such cattle must be tendered as evidence. After all the appellant was not being charged with cattle theft. This ground of complaint has no merit and the same is dismissed.

Lastly the appellant's complaint is that the court disregarded the appellant's evidence and relied on the prosecution evidence which was dubious and uncorroborated. In reply to that complaint Mr. Nchanilla submitted that the prosecution evidence was watertight as tendered by **PW1, PW3, PW4** and **PW7** but if the court finds that the defence was not considered, it may step into the shoes of the lower court and consider the evidence of the

appellant and make good the anomaly. To back his submission on that aspect he cited the provision of **section 366(1)(a) of the Criminal Procedure Act [Cap 20 RE 2002]** (the CPA). On this point I agree with Mr. Nchanila and indeed that is the best and short cut route to tread along because the other way of achieving the same goal is a long way involving remitting the file back to the trial court for it to consider the evidence and redo the decision. Therefore this court will not take that option, because that option will take everything back close to square one. So this court will analyze the evidence and come up with its own view and that is the next following part of this judgment.

First at page 4 of the judgment of the trial court in treating the evidence of the appellant, the court highlighted;

"DW3 denied all allegations against him and stated that on the material date and time he heard an alarm from the victim's house and he went to help but unfortunately DW3 did not bring any witness."

It is notable that the trial magistrate considered defense evidence and stated why she did not believe it, because the court ruled, the appellant did not bring another witness. The point that the court was supposed to consider is whether that defense shook the evidence of the prosecution, to the extent of creating any useful doubt. The appellant's defense was that when he heard an alarm at the complainant's house he also appeared and together with others, they followed footprints of the cattle. The point is, suppose that is true, can it be said that only because he responded to the alarm then, he did not participate in the theft? My answer is no.

That is my answer because of the evidence on record and also because the two events took place at different times. That means even if his defense was to be analyzed, it would still give the same results. With the above consideration, this court finds that this ground lacks merit and the same is dismissed.

Since all constituent grounds of the appeal have been dismissed, the whole appeal stands dismissed.

DATED at MUSOMA this 22nd May 2020




Z. N. Galeba
JUDGE
22.05.2020

Court; This judgment has been delivered today the 22nd May 2020 in the absence of parties but with leave not to enter appearance in chambers following the corona virus outbreak globally and the medical warning to maintain social distance between individuals.

Order; Sufficient copies of this judgment be deposited at the Judgment Collection Desk for parties to collect their copies free of charge.




Z. N. Galeba
JUDGE
22.05.2020