

**IN THE HIGH COURT OF TANZANIA**

**(DODOMA DISTRICT REGISTRY)**

**AT DODOMA**

**(APPELLATE JURISDICTION)**

**(DC) CRIMINAL APPEAL NO. 140 OF 2019**

(Original Criminal Case No. 23 of 2019 of the District Court of  
Bahi at Bahi)

**MTUNDU JONAS ..... APPELLANT**

**VERSUS**

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

*6/5/2020 & 27/5/2020*

**JUDGMENT**

**MASAJU, J**

The Appellant, Mtundu Jonas, was charged with, and found guilty of Armed Robbery contrary to section 287A of the Penal Code, [Cap 16] but convicted under section 235 (1) of the Criminal Procedure Act, [Cap 20]. He was sentenced to thirty (30) years imprisonment by the trial Court, the District Court of Bahi at Bahi, hence this appeal to the Court. His Petition of Appeal is made of seven (7) grounds of appeal including but not limited to, thus;

- "1. THAT, the trial Court erred in law and fact when failed to consider that the prosecution side has failed to prove the case beyond reasonable doubt in the circumstances of the case.*
- 3. THAT, the trial Court erred in law and fact in convicting the appellant based on very weak and mostly unreliable visual identification. Please refer the case of RAYMOND FRANCIS V. R (1994) TLR 100.*
- 6. THAT, the trial Court erred in law and fact when convicted the appellants relying in the judgment which is inconsistency with section 312 (1) of the Criminal Procedure Act, [CAP 20 R.E. 2020]."*

When the appeal was heard in the Court on the 6<sup>th</sup> day of May, 2020 the layman Appellant appeared in person and adopted his grounds of appeal to form his submissions in support of the appeal in the Court as he prayed the Court to allow the appeal accordingly.

Ms. Ngolo Dabuya, the learned State Attorney, who appeared for the Respondent Republic contested the appeal in its entirety arguing, *inter alia*, that the prosecution case against the Appellant was proved beyond reasonable doubt in the trial Court, for the Appellant was unmistakably identified at the scene of crime by the victim of crime, Timothy Muyombo (PW2) where the Appellant used a machete to cut the victim of crime. That, Dr. Nuru Mponzi Taragimbuza (PW4) testified that the victim of crime had cut wound, caused by sharp object. That, the alleged discrepancy between PW2 and PW4 on the date the armed robbery incident took place

was negligible and that the same was made right during cross examination of PW2 by the Appellant. That, the victim of crime (PW2) amply identified the Appellant at the scene of crime by aid of the phone torchlight and solar light, since the offence was committed at 2000 hours. That, the Appellant was known to both (PW2) and Stephano Daudi (PW3) an eyewitness of the incident in the material night. The Respondent Republic prayed the Court to dismiss the appeal in its entirety. That is all, by the parties.

The victim of crime, Timoth Muyombo (PW2) testified that he was armed robbed by the Appellant at 2000 hours at Zamahero village on the 12<sup>th</sup> day of February, 2019. That, he identified the Appellant by the aid of phone torchlight and solar power light and that he knew the Appellant by face. That, they had walked with him for quite long way. That, at the scene of crime there was also his friend, Stephano Daudi (PW3) who eyewitnessed the armed robbery incident. He further testified that when his colleague arrived at the scene of crime they went to the nearby house to ask for assistance. Then they went to a nearby Police Station where he was given a PF3 and ultimately went to Zanka Medical Centre. He later on in the course of cross examination by the Appellant testified that he was armed robbed (beaten) on Sunday the 3<sup>rd</sup> day of February, 2019 at 2000 hours. That, the Appellant, ran away when his friend came at the scene of crime. The victim eventually testified that the offence was committed at about 2100 hours or 2200 hours.

Stepheno Daudi (PW3) the allegedly the eyewitness of the armed robbery incident testified that the offence was committed on the 3<sup>rd</sup> day of February, 2019 at 2100 hours at Zamahero village. That, the Appellant is

the one who armed robbed the victim of crime (PW2). He identified him by the aid of solar light. That, after the incident they walked for 30 Kilometers to the neighbouring house away from the scene of crime for assistance. That, the Appellant was known to him by face.

The prosecution witness Dr. Nuru Mponzi Taragimbuza (PW4) testified that he medically attended Timoth Muyombo, (PW2) the victim of crime on the 4<sup>th</sup> day of February, 2019 at Zanka Christian Hospital. That, the victim's wounds had been inflicted upon him by use of sharp instrument about 8 hours earlier.

On his part, the Appellant defended himself that he did not commit the crime he had been indicted for before the trial Court and that he was seriously beaten up by Sungusungu when he was arrested. That, the said Sungusungu took his property (phone and money).

The Armed Robbery charge sheet dated the 10<sup>th</sup> day of April, 2019 read that the offence was committed on 12<sup>th</sup> day of February, 2019 at 2100 hours at Zamahelo Mayamaya village within Bahi District.

That said, the Court is of the considered reasoning and position that the prosecution case against the Appellant was not proved beyond reasonable doubt for the following reasons thus;

Firstly, the purported visual identification evidence at the scene at crime is questionable, for want of proof of solar power light thereat. Had there been solar power at the scene of crime, the victim (PW2) and his friend (PW3) couldn't have gone to seek assistance from neighbouring

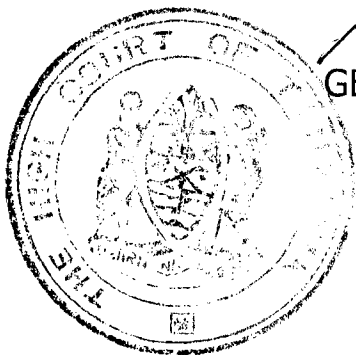
house 30 km far away from the scene of crime. The alleged solar power light and the phone torchlight was not described of its intensity. Indeed, if at the scene of crime there was solar power light then the phone torch light would be redundant. The purported visual identification of the Appellant was too weak and unreliable to ground convictions as per **Waziri Amani V. R [1980] TLR 250.**

Secondly, the victim of crime (PW2), self-contradicted himself on the date the offence was committed and the time thereof. He initially testified that the offence was committed on the 12<sup>th</sup> day of February, 2019 at 2000 hours. Later on he testified that the offence was committed on the 3<sup>rd</sup> day of February, 2019 either at 2100 hours or 2200 hours. The Armed Robbery charge sheet reads that the alleged offence was committed on 12<sup>th</sup> day of February, 2019 at 2100 hours. The eyewitness of the armed robbery incident, Stephano Daudi (PW3) testified that the offence was committed on the 3<sup>rd</sup> day of February at 2100 hours. The victim of crime (PW2) was medically attended by PW4 on the 4<sup>th</sup> day of February, 2019. The evidence adduced in support of the charge was therefore at variance with the charge sheet so much that it creates serious doubts on the credibility of the prosecution case.

The Appellant was found guilty of the offence of Armed Robbery contrary to section 287A of the penal Code, [Cap 16] but he was not convicted of the offence under the said provision of the law as per section 312 (2) the Criminal procedure Act, [Cap 20]. He was instead convicted under section 235 (1) of Criminal Procedure Act, [Cap 20], which section of the law he had not been charge with, let alone the fact that the said

section of the law neither creates offence nor provides sentence thereof. The trial Court's judgment was indeed incompetent.

The meritorious appeal as per highlighted grounds of appeal is hereby allowed accordingly. The Appellant's conviction and the sentence of thirty (30) years imprisonment, respectively, are hereby quashed and set aside. The Appellant shall be released from prison forthwith unless otherwise there is lawful cause.



  
GEORGE M. MASAJU

**JUDGE**

27/5/2020