IN THE HIGH COURT OF TANZANIA
MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 2 OF 2020

(Originating from the District Court of Tarime at Tarime in Criminal Case No. 152 of 2019)

BABU OGUNGO..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGEMENT

12th & 25th February, 2020

KISANYA, J.:

The appellant herein was indicted before the District Court of Tarime at Tarime for offence of armed robbery contrary to section 287A of the Penal Code [Cap. 16, R.E. 2002]. It was alleged that on 28th day of August, 2018 at night time, at Ngasaro Street within Rorya District in Mara Region, the appellant did steal, one Radio make Sun San valued Tanzania Shillings (TZS) 350,000, the property of Lightness Charles, and immediately before and after stealing, he threatened to cut the said Lightness Charles with machete in order to obtain the said properties.

As the appellant pleaded not guilty to the charge, the Prosecution marshaled four witnesses and tendered three exhibits to prove its case. After the hearing of the prosecution and defence case, the trial court was convinced that the prosecution had proved its case beyond all reasonable doubts. The appellant was then convicted of the charged offence and sentenced to serve thirty years imprisonment.

Dissatisfied, the appellant has appealed against the conviction and sentence on the following grounds, in verbatim.

1. *That, trial magistrate erred in law and fact 'by admitting evidence which is self contradictory and uncorroborated by prosecution witnesses which led appellant's conviction.*
2. *That, the trial magistrate erred in law and fact by convicting the appellant on as the proceeding and judgement which was biased and self contradictory.*
3. *That, the trial magistrate failed to evaluate evidence make critical analysis and scrutiny evidence and hand which led to reach in improper judgement.*
4. *That, the trial magistrate erred in law and fact by basing his conviction on the issues of identification while the appellant was not properly identified at the alleged scene of crime.*
5. *That, the trial magistrate erred in law and fact to base on evidence of PW1, PW2, PW3 and PW4 who were not credible witnesses.*
6. *That, the trial magistrate failed to discover that this case was framed and planted against the innocent appellant who was participated in the alleged matter which in issue PW1 managed to formulate two different cautioned statements while at Shirati Police Station, I pray to attach the said cautioned statement together with this appeal herein above*

and before this honorable court to prove my argument in ground 5 and 6 marked with A and B respectively.

7. *That, the prosecution side failed to prove its case beyond all reasonable doubts.*

At this juncture, let me highlight what transpired during trial. As stated herein, the prosecution called four witnesses who tendered three exhibits. It was the prosecution case that, the appellant committed the offence on 28/8/2018. The complainant of this case is Lightness Charles Mgaya (PW2). She testified that, on the fateful night, her door was broken. Thereafter, she headed to the lobby and switch on the electric tube light. Three persons, armed with a machete and clubs, entered the house. PW2 identified the appellant because he was known to her before. She described that the appellant was in black trouser and T-Shit. Upon entering the house, the appellant and his companion wanted the motorcycle. When PW2 told them that, the motor cycle was not there, they took a radio made SUNSUN. Before taking the said radio, they hit PW1 with a flat of machete. As the appellant and his companion left the house, PW2 raised an alarm. She told his neighbours who responded to the said alarm that, it is the appellant and his companion had invaded her.

The appellant was arrested at his on 29/8/2018 in the night by a police officer (PW4) who was led by the Street Chairman namely, Solomon Kidera (PW1). Upon searching the appellant's house, a radio stolen from PW2 was found. Therefore, Certificate of Seizure which was signed by PW4, PW1 and the appellant was tendered as Exhibit

P-3. Also, the radio and purchase receipt were tendered as Exhibit P-1 and P-2 respectively.

On the other hand, the appellant denied to have committed the offence. His evidence was to the effect that, he arrested on 27/7/2018 at 2200 hours and arraigned before the Court for offence alleged to have been committed on 28/8/2018.

When this appeal was called on for hearing, the applicant appeared in person, legally unrepresented while the Respondent enjoyed the services of Mr. Nimrod Byamungu, learned State Attorney.

In his submission, the appellant requested to adopt his grounds of appeal. He went on to submit that, there are contradictions on the prosecution's witnesses. The appellant pointed out that, while PW3 testified that the appellant was arrested on 30/8/2018, the complainant (PW2) testified to have identified the stolen property on 29/8/2018 at the police station. The appellant argued further that, while PW4 testified that he (appellant) was arrested 200 meters from his house when he was running away, PW1 told the court that, the appellant was arrested at the house. In this regard, the appellant insisted that he was arrested a month before, on 27/7/2018 but charged with offence committed on 28/7/2018 when he was in custody.

The appellant argued further that, PW1's house help was not called to testify in court and that the signature appearing on the Certificate

of Seizure is not his. Therefore, he urged this Court to allow the appeal, quash the conviction and sentence and set him free.

In his rely submission, Mr. Nimrod Byamungu, learned State Attorney, supported the appeal. He argued that, the prosecution failed to prove its case beyond reasonable doubts due to the following reasons:

First; the chain of custody regarding the radio alleged to have been found in the appellant's house was not maintained. The said radio was tendered by PW2 without showing how she came into its possession because it was taken to the police station as per Certificate of Seizure. **Second**; PW2 identified the radio by its colour without stating distinctive mark or feature. **Third**; there are contradictions on evidence of PW1, PW2 and PW3 as pointed out by the appellant. **Fourth**; the visual identification of the appellant by PW2 is doubtful because, she did not state whether the electricity light used to identify the appellant was inside or outside the house. **Fifth**; the certificate of seizure was tendered by PW4 without adhering to established procedure. Citing the case of **Robinson Mwanjisi vs R** [2003] TLR 218, Mr. Byamungu argued that, PW4 identified his signature on the said exhibit while the certificate of seizure had not been cleared.

In the light of the above grounds, Mr. Byamungu urged me to set aside the conviction and sentence under section 369(1) of the Criminal Procedure Act [Cap. 20, R.E. 2002]. The appellant had

nothing to submit in the rejoinder. He just urged this Court to set him free

Basing on the submissions made by both parties, I find that the main issue is whether the prosecution proved its case at the required standard. I will dispose this issue by looking at the grounds of appeal and the submissions of both parties.

According to PW1, the offence was committed in the night. This brings us to the issue whether the appellant was properly identified on the fateful night. It is trite law that visual identification is of a weakest point. This position has been stated in many cases including the case of **Waziri Amani vs Republic** [1980) TLR 250 referred to by the trial magistrate. In order to rely on evidence of visual identification, the surrounding circumstances of the offence should be shown on the record. One of the matters to be considered is the conditions in which the accused was observed, including the issue whether there was good or poor lighting and the time the witness had the accused under observation.

In the present appeal, PW2 testified that on 28/08/2018 at night, she saw through the window three people passing at his house. It is in evidence that, PW2 saw them by using an electric light which was outside. Her evidence reads follows:

> *"..I recall on 28/8/2018 at night I was at my home slept, while there I heard the bangs of people and I woke up and peeping through a window upon I saw three people are passing there at*

my home there is a passage and I managed to see them as there was electric outside and later returned to sleep."

With the above evidence, it is clear that PW2 did not testify as to whether the appellant was among of the persons who passed at her house. However, the trial court considered that the appellant was identified when it held:

"In the instant case PW2 told the court that she managed to see them as there was electric light outside."

Therefore, I find that the trial court misdirected itself in considering that the appellant was among of the persons identified by PW2 with a help of electric light outside the house. Furthermore, it appears that there was a passage near PW1 house. Thus, even if the appellant was identified by PW1, he was entitled to pass there.

Another evidence which suggests that the appellant was identified is deduced from PW2, when she stated:

"After five minutes I heard my door being broken, I got out my bedroom and headed to the lobby where upon I lit electric tube light. Three people entered in the house.....I managed to identify the accused person one Babu Ogungo as I knew him before and he had a black trouser and T-shirt. The electric was bright...."

As rightly argued by by Mr. Byamungu, PW2 did not state whether the electric tube which she switched on was lighting inside or outside

the house. Further, PW2 did not state as to whether three persons whom she saw outside the house by using electric light, are the same persons who entered inside. Lastly, PW2 did not state the time which the incident took and the appellant remained under her observation. Therefore, since these issues were not clarified and cleared during trial, I find that the prosecution failed to prove how the appellant was identified in the fateful night.

The second issue is on identification of stolen property. The trial court was convinced that the appellant was found in possession of a radio stolen from PW2. For the doctrine of recent possession of stolen property to apply, it must be established, among others, that, the property was found with the suspect and that the property is positively the property of the complainant (See the case of **Joseph Mkubwa and Another vs Republic,** Criminal Appeal No. 94 of 2007, CAT (Unreported), which was also cited by the trial court). Further, in the case **Mustafa Darajani vs Republic**, Criminal Appeal No. 242 of 2008, CAT at Iringa (Unreported), the Court of Appeal held that before an exhibit is tendered in court, the chain of custody must be established.

In the case at hand, PW1, PW3 and PW4 testified that the radio stolen from the complainant was found in the appellant's house and taken to the police station. However, as rightly submitted by the learned State Attorney, the said radio was tendered by PW2 without stating how she came into its possession after being recovered by

the police from the appellant's house. Failure to maintain chain of seizure and custody as in the matter hand raises doubt as to whether the radio was found with the appellant.

Furthermore, the radio was handed over or returned to PW2 for safe custody upon giving her evidence. Thus, when PW1 testified in court, the radio was not shown to him. Likewise, when PW3 and PW4 testified, the radio was not in court. Therefore, all prosecution's witnesses save for PW2, did not confirm whether they were testifying on the same radio. In such a case therefore, it was unsafe for the trial Court assume that, the said witnesses were referring to the radio found in the appellant's house.

Another defects on evidence related to the radio alleged to have been found in the appellant's house is the Seizure Receipt which was tendered by PW4. The procedure of tendering exhibits in court was stated in the case of **Robinson Mwanjisi vs R** [2003] TLR 218 cited by Mr. Byamungu, that:

> *"Whenever it is intended to introduce any document in evidence, it should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same"*

In the matter at hand, PW4 was allowed to identify the certificate of seizure at the time when it had not been cleared for admission. This is reflected in the proceedings as follows:

"....We took the accuse person to Police Station for further action. Later we informed the complainant to come to identify the stolen properties,

PP: I pray my witness to identify a certificate of seizure.

COURT: prayer granted.....

PW.4: Continues:

I have identified it because it bears my signature: I pray to tender it as an exhibit.

Court: The accused person is asked if he has an objection in respect of the certificate of seizure and he replies:

Accused: I have no objection.

COURT: Certificate of seizure is admitted and marked as exhibit P.3."

An exhibit which is tendered contrary to the established procedure cannot be relied upon. Such irregularity goes to the root of justice because, it is not clear as to whether the witness was acquainted with facts related such exhibit. Therefore, I hereby expunge Exhibit P-3 from the record.

Another weakness in the case at hand is that PW2 identified the radio by colour. She did not describe any mark or distinctive feature. However, the trial court was convicted that she identified the radio to be hers. It is trite law that identification of stolen property by color alone is the weakest sort of evidence (See the case of **George Mingwe vs Republic** [1989] TLR 10. Therefore, appellant ought not to have been convicted on such evidence.

Lastly, there are contradictions on prosecution's witnesses as pointed out by the appellant and Mr. Byamungu. The first contradiction is the date on which the appellant was arrested. While PW1, PW2 and PW4 state that the appellant was arrested on 29/8/2018 in the night, PW3 states that the appellant was arrested on 30/8/2018. Another contradiction is on the date which the PW2 went to the police station to identify the stolen properties. PW2 states that, she identified the radio on 29/8/2018 while the investigator (PW3) of this case mentions 30/8/2018. Further, PW1 states tha,t the appellant allowed the police officers to enter and search the house but PW4 testified that the appellant ran away upon seeing the police and that, he was arrested about 150 meters to 200 meters from his house. I find that the said contradictions raise doubts on the prosecution case. They go to the root of the case. This is when it considered that the appellant's defence is that, he was arrested on 17/7/2018 and that the alleged offence was committed when he was in custody.

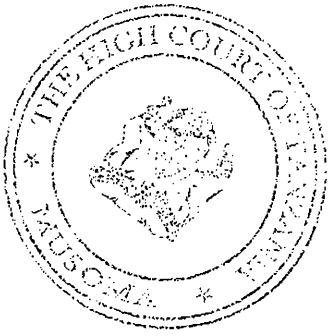
For the aforesaid reasons, I find that the prosecution failed to prove its case beyond reasonable doubts and that appellant's conviction was not proper. I accordingly allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set free unless he is otherwise lawful held.

Order accordingly.

Dated at **MUSOMA** this **25th** day of **February, 2020.**

E. S. Kisanya
JUDGE
25/2/2020

Court: Judgement is delivered this **24th** day of **February, 2020** in the presence of the Appellant and Mr. Nimrod Byamungu, learned State Attorney for the Respondent.



E. S. Kisanya
JUDGE
25/2/2020