

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**CRIMINAL APPEAL NO.12 OF 2020**

(Originating from the Judgment of the District Court of Muheza  
in Criminal Case No. 26 of 2016)

**SEVERINO S/O THADEI @ KOMBA ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

**MKASIMONGWA, J.**

Severino Thadei @ Komba and John Makuya (First and Second Appellants) stood before Muheza District Court charged with Armed Robbery Contrary to Section 287A of the Penal Code [Cap 16 R.E 2002] as amended by Miscellaneous Amendment Act, No 3 of 2011. They were convicted of the offence and sentenced to thirty (30) years imprisonment.

The two were dissatisfied by both the conviction and sentence imposed, hence this appeal in which they challenge the conviction and sentence. In a Joint Petition of Appeal the Appellants listed six grounds, as follows:

1. That the learned trial magistrate erred in law and in fact by failing to analyse that there was no proper identification of the appellant.
2. That the learned trial magistrate erred in law and in fact by failing to notice that there was no explanation in respect of the extent of intensity of light, so as to know the arresting officers were real able to differentiate between people who came out from victim's house (robbers) and the passerby during arresting time.
3. That the learned trial magistrate erred in law and fact by failing to consider that the evidence of visual identification was not water tight, hence in the circumstances of this case there was a need to conduct an identification parade since the scene of arrest at the gate of the victim's house there is road (according to the prosecution witnesses) which people pass away and carrying on their difference activities.
4. That the learned trial magistrate was not scrupulous to notice that there was palpable contradiction in the evidence of the prosecution witnesses in regard to the exactly house which invaded by bandits between at the house of Mzee Sebastian Charles or Mzee Shayo.
5. That the learned trial magistrate erred in law and in fact by failing to consider the defence of the appellants.

6. That the learned trial magistrate erred in law and in fact by failing to consider that the prosecution did not prove their case beyond reasonable doubt.

The appeal was objected by the Respondent Republic hence parties were invited to argue their, respective, cases. Before showing what the parties had submitted in the appeal, it is material worth to state briefly, the facts of the case. They are as that: Hilda Rumisha Maleko (PW2) is a businesswoman resident of Mkanyageni in Muheza District. On 24/02/2019 at 21:45 when she was at her home and taking a meal PW1 was invaded by bandits who had entered into the house through the kitchen door. One of the bandits was wearing a sweater and the other "*Baibui*" dress with masks. Again one of the bandits possessed a machete with which he threatened to cut her as they demanded to be paid money from her. PW2 gave to them a sum of Tshs. 400,000/= she had collected from her business. As the bandits were demanding for more money from PW1, there emerged peoples' noises from outside and the bandits ran outside where they were arrested by Police Officers there on the spot.

The facts, again, are as that on 24/02/2019 at 21:30hrs. Juma Gregory (PW1), a watchman at Shayo's premise was on duty when he was

attacked by two men armed with a machete who had entered into the fence. One of the two was wearing a black "*Baibui*" dress whereas the other was putting on a cap hiding his face. He was tied by ropes and forced to lie down on his stomach. Later he heard a person shouting demanding for money from the "mother's bed room". Suddenly there came police officers there at the scene and the invaders were arrested by the police at the gate when they were about to get outside. The Police Officers were Insp. Joseph (PW4), among others, and that they came to the place in response to the call from someone who informed that there was needed a Police Assistance at Mzee Shayo's premises at Mkanyageni. At the scene, PW4 arrested two suspects (Appellants) whose bodies were searched in the presence of Kabula Joseph Gonza (PW3), the Ward Executive Officer, PW1 and PW2. In the search, the bandits were found in possession of cash Tshs. 400,000/= and a machete among others. A Certificate of Seizure was prepared to that effect and the same was signed by the Appellants and the independent witness. The Appellants were therefore charged as aforeshown.

Sometime this Court was informed of the passing away of the first Appellant while he was in prison serving the sentence imposed by the trial

Court. Later on 16/04/2021, the Court was served with a photocopy of "*Kibali cha Mazishi*" (Burial Permit) issued at Bombo Hospital Mortuary to B. 2610 Sgt. Masaninga. The Permit shows that Severino Thadei died on 19/11/2020 from Asphyxia, Severe bronchi asthma. In that premise the 1<sup>st</sup> Appellant's appeal abated. On the date the Appeal was set for hearing, the Appellant one John Makuya appeared in person whereas Ms. Kazungu (SA) appeared for the Respondent.

In his submission the Appellant contended that he was arrested when he was on his way to the Bus Stand to receive his wife who was arriving at Mkanyageni from Dodoma. He was eventually taken to the Police Station where he was charged with of Armed Robbery with which offence he was convicted and sentenced to thirty (30) years imprisonment. Being aggrieved by the conviction and sentence he appealed to this Court. In the Appeal the Appellant came up with six grounds. He invited the court to determine the Appeal in his favour, based on the grounds and eventually quash the conviction and set aside the imposed sentence and he be released out from jail.

On her part Ms. Kazungu (SA) objected to the Appeal. She, instead, supported the conviction and sentence imposed by the Court. As for the

first, second and third grounds of the Appeal, Ms. Kazungu generally contended that the Appellant faults the judgment of the trial court on ground that there was no proper visual identification of the suspect at the scene of crime. The learned State Attorney submitted that the principles governing visual identification do not necessarily apply to the circumstances of this case. She added that the Appellant was arrested at the scene of crime committing the offence where he was also seen by PW1 and PW2 wearing a "*Baibui*" at the time of the crime. This testimony was corroborated by that of PW3 the Ward Executive Officer. Secondly, going by the Certificate of Seizure (**Exhibit P1**) prepared when the Appellant was searched by the Police, the same shows that the Appellant was among the persons who signed it which fact signifies that he was there at the scene of crime. As such an allegation that the Appellant was not properly identified is misplaced.

In respect of the fourth ground of appeal, Ms. Kazungu contended that the Appellant challenges the conviction by showing that there was no proof of the exact house where the alleged offence was committed and that there is contradiction among the prosecution witnesses as to where the offence was committed. Ms. Kazungu submitted that the contradiction

is not material. The fact that the Appellant was arrested at the scene of crime committing the offence defeats the effect of the contradiction. As such the ground is devoid of merit. She added that the evidence on record clearly shows that the appellant, while armed with a machete and immediately before stealing a sum of Tshs 400,000/= from PW2, he threatened to harm the victim using the machete in order to obtain the money. This evidence according to Ms. Kazungu proved the prosecution case beyond doubt which renders the sixth ground of appeal of no merit.

The learned State Attorney argued the fifth ground of Appeal in which case she said, contrary to what the Appellant states under the ground that the court failed to consider the defence case as made by the Appellant, the court did consider the case as it is clearly shown at Page 9 of typed the Judgment. From the given evidence in defence, the court was satisfied that the same raised no doubt on the prosecution's case.

Based on the above submission Ms. Kazungu prayed the court that it finds no merit in the Appeal and the same should be dismissed in its entirety.

In a brief rejoinder, the Appellant reiterated that the scene of crime was not clearly proved and that since the offence was committed during night, it was necessary for the prosecution to lead evidence on visual identification.

I have considered the submission. Going by the submission the court is obliged to respond to the following questions/issues.

1. Whether or not based on the adduced evidence it was necessary for the prosecution to have evidence on visual identification.
2. Whether or not it was necessary for the prosecution to prove certainly the scene of crime.
3. Whether or not the charges were proved beyond all reasonable doubt.

Going by the evidence on record, there is ample evidence which again was not punch holed by the Appellant during cross examination that on the material right, Juma George (PW1) while was at his work place as a watchman was attacked by two people who tied him with ropes and forced him to sleep on his stomach before they entered into the house where there was Hilda Rumisha Maleko (PW2) sitting and taking her meal. In the



house the lights were on. The thugs were armed with a machete and according to PW2. One of them (now the Appellant) was wearing a "*Baibui*". Upon being threatened by the bandits using the machete, PW3 gave Tshs. 400,000/= to them as they again demanded for money. There is ample evidence that Police Officers came to the scene of crime and the thugs were arrested there on the spot. On being searched, going by the Certificate of Seizure (Search Warrant- **Exhibit P1**) the thugs were met in actual possession of Tshs. 400,000/=:, machete, "*Baibui*" etc. PW2 identified the money to be the same robbed from her by the two. As to whether in the circumstance it was necessary for the prosecution to have evidence on visual identification been lead, I find the answer is no. Indeed the offence alleged was committed during night time. It is, however, important to note that it is not always necessary that since the offence was committed during night time, the prosecution should lead evidence on visual identification. Where a person commits offence during night time and that he is apprehended at the scene of crime when committing such a crime, the prosecution is not necessarily obliged to lead evidence on visual identification in the case. This is because; in such a situation an identification of a culprit is immaterial.

As to the second issue, that is whether or not it was necessary for the prosecution to certainly prove the house at which the offence was committed (scene of crime), indeed going by the testimony of PW1 the offence was committed at Shayo's house. This was again the story of PW4 and PW5 when were testifying to the court. In evidence PW3, the Ward Executive Officer told the court that he was called to witness a search at the home of Mzee Sebastian Charles where robbery was committed. It is the finding of the court, as shown herein above, that the Appellant was found and arrested in the course of committing the offence. This fact rendered the specific place of robbery not material and it is no wonder that the Appellant did not have any question in that respect put against the witnesses during cross examination.

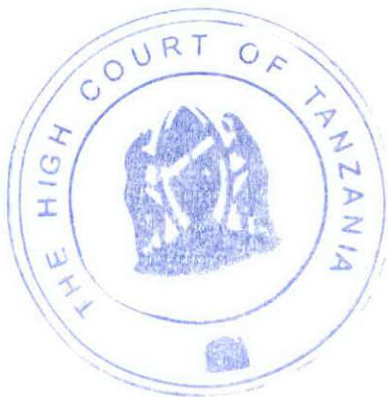
Last is whether or not the charge was proved beyond all reasonable doubt? In this regard, I have considered the evidence given by the prosecution witnesses which shows that PW1 and PW2 when were in a house, were attacked or invaded by people, who were armed with a machete. In the house the PW1 was tied with ropes whereas PW2 was threatened to be cut by the machete by the people. The testimony is also to the effect that the people (Appellant and his fellow) robbed a sum of

Tshs. 400,000/= from PW2 which money they were met in possession of, in a searched conducted to them upon being arrested when they were about to escape from the place. This fact is supported by the Certificate of Seizure (**Exhibit P1**) which the Appellant had signed. I will join hand with Ms. Kazungu in her submission that the evidence proved the case against the Appellant and that it proved it beyond reasonable doubt.

In the premise, I find no merit in the appeal against conviction. As for the sentence, I agree with the trial Magistrate that the term of 30 years imprisonment is the minimum sentence for the offence the Appellant was convicted of. As such the Sentence is left undisturbed.

In event, this appeal is not successful. The same is dismissed in its entirety.

**DATED at TANGA** this 29<sup>th</sup> of April, 2021.



  
E. J. Mkasimongwa

**JUDGE**

**29/04/2021**