

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MTWARA)
AT MTWARA
CRIMINAL APPEAL NO 14 OF 2021**

(Originating from Kilwa District Court in Criminal Case No. 17 of 2020)

HEMEDI HAMISI KUNJELLENJE APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

Hearing date on: 09/6/2021

Judgment on: 18/6/2021

NGWEMBE, J:

Hemedi Hamisi Kunjelenje found himself in jail for nine (9) years upon being convicted and sentenced for all three counts, for three offences. He was charged jointly with three co-accused for conspiracy, burglary and stealing. Being dissatisfied with such conviction and sentence, he found his way to this court by issuing notice of appeal timely and later lodged six (6) grounds of appeal, which may be summarized into one, that the prosecution failed to prove criminality against the appellant.

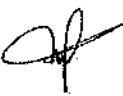
According to particulars of the charge sheet, the ordeal began at night on 19th March, 2020 in the house of Innocent Thomas Masawe where the

appellant and two others did conspire to commit an offence; they proceeded to break his house and managed to steal several properties including two sets of television, radio make Subwoofer with two speakers, remotes, and two cell phones all valued at TZS 2, 210,000/= property of Innocent Thomas Massawe.

All three accused persons were arraigned in court charged accordingly. In the cause of trial, the prosecution lined up six (6) witnesses who managed to build a case against two accused persons namely Hemedi Hamisi Kunjelenjele and Mohamed Abraham Kapinda, while the third accused Abdulkarimu Mohamed Mwichande was acquitted. The two convicts were found guilty on all three counts, hence were sentenced to three years in each count, thus constituting to nine (9) years imprisonment each of them, but the sentences run concurrently, meaning they will be jailed for three years.

On the hearing of this appeal, the appellant did not procure legal assistance, hence appeared in person and briefly asked this court to consider his grounds of appeal and acquit him.

In turn the learned senior State Attorney, Mr. Ndunguru supported the appeal on one ground that, all six prosecution witnesses, none of them came up with concrete evidence pointing to the appellant. The only evidence which touched the appellant was of PW5 who alleged that the driver was hired by two persons. The rest did not link their testimonies with the appellant on the alleged theft. Thus, Mr. Ndunguru supported the appeal as meritorious.



Perusing inquisitively on the whole prosecution evidences, it appears the only key witness who touched the appellant is PW5 who partly testified as follows:-

"I wake up I saw Kapinda and his wife....they have a sick child. They want to hire me to send them to Kivinje Hospital. I took 2nd accused and his wife, I sent them to their home. I saw one person standing near the wall I waited 2nd accused came with sulphate bag. That other person has a bag. I asked why not a child. 2nd accused responded if they told me is a sulphate bag then I could not agree"

Proceeded to testify that when they arrived at Kivinje, they stopped in one house, where he identified the appellant. This piece of evidence does not satisfy the legal requirements of proper identification, especially, during night hours. The issue of identification of the appellant, be it day light or during night is now settled, after having series of authoritative decisions of this Court and the Court of Appeal.

To recap, the genesis of proper and correct identification in cases whose determination hinges on the identification of the accused, was reiterated by the Court of Appeal for Eastern Africa way back in 1942 in the case of *Mohamed Alhui V. Rex (1)* when held:-

"In every case in which there is a question as to the identity of the accused, the fact of their having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the persons who gave the



description and purport to identify the accused, and then by the person or persons to whom the description was given.”

The holding of the court was adopted by the Court of Appeal of Tanzania in various decisions, including in the Case of **Waziri Aman Vs. R (1980) T.L.R 250** whereby the court reiterated on authenticity of identification by raising the following key issues:-

- *What kind of light was on at the scene of crime at the time;*
- *What was the intensity of that light;*
- *What was the distance between the source of light and where the witness was;*

On the same vein, the Court of Appeal in **Criminal Appeal No. 197 of 2008** (Unreported) at page 7 added other fundamental issues that:-

- *Whether the accused was known to the witness before the incident;*
- *Whether the witness had ample time to observe and take note of the accused without obstruction such as attack, threats and the like which may have interrupted the latter's concentration.*

In order to convict an accused person based on the identification at the scene of crime, all the above issues must be answered in affirmative, otherwise doubt may end up in favour of the accused.

In this appeal, PW5 did not describe the features of the appellant, dressing code, and whether he was known to him prior to the date of event. Also the most important issue is mentioning the name or names of the accused at the earliest possible time after the event, which was not done.



I would agree with the learned senior State Attorney that the prosecution evidences did not satisfy the required standard of law to prove criminality of the appellant. It has been repeated several times that in criminal cases, the prosecution evidences must link the accused with the offence charged. Failure to procure enough evidence pointing to the accused, obvious the criminality won't be proved against the accused. The evidence of PW5 lacked important particulars to link the appellant with the offence charged. As such, I would buy a leaf from the precedent in the case of **Joseph John Makune Vs. R, [1986] TLR 44** where the court held:-

"The cardinal principle of our law is that the burden is on the prosecution to prove its case; no duty is cast on the accused to prove his innocence"

This principal is a yard stick in determining criminal cases in our jurisdiction. The prosecution has uncompromised duty to prove its case beyond reasonable doubt. This requirement is statutory under section 3 (2) of the Evidence Act, [Cap. 6 R.E 2019]. The same position was amplified in **Criminal Appeal No. 205 of 2007 between Samson Matiga Vs. R,** (unreported) when held:-

"A prosecution case, as the law provides, must be proved beyond reasonable doubt. What this means, to put it simply, is that the prosecution evidence must be strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence".

In this appeal, the prosecution had a duty to prove criminality of the appellant to the standard required by law.

Above all, I find the evidence of PW5 mentioned the wife of the 2nd accused that the two on the fateful night went to the mother of PW5, looking for his motorcycle transport. If it is true that the two were the one went to PW5, I expected the prosecution either to join the wife of the 2nd accused or call her as a prosecution witness, but the prosecution took none of the two options.

Without laboring much on this appeal, I agree with the sentiments of the senior State Attorney that the prosecution failed to prove criminality of the appellant. Hence, this appeal has merit, consequently I proceed to acquit the appellant in all counts and order an immediate release from prison, unless held on other lawful cause.

I according Order.

Dated at Mtwara in Chambers on this 18th day of June, 2021


P.J. NGWEMBE
JUDGE
18/6/2021



Court: Delivered at Mtwara in Chambers on this 18th day of June, 2021 in the presence of the Appellant and Mr. Ndunguru, Senior State Attorney for the Respondent.

Right to Appeal to the Court of Appeal explained.


P.J. NGWEMBE
JUDGE
18/6/2021

