

**IN THE HIGH COURT OF TANZANIA
TABORA DISTRICT REGISTRY
AT TABORA**

**CONSOLIDATED DC. CRIMINAL APPEALS NO. 84, 85
AND 86 OF 2019.**

[Originating from Criminal Case No. 206 of 2010 at the
District Court of Bukombe]

**BARAKA KHAMIS.....1ST APPELLANT
SHABANI NJALI.....2ND APPELLANT
KAVULA WILLIAM.....3RD APPELLANT**

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of Last Order: 09/07/2021

Date of Delivery: 13/8/2021

AMOUR S. KHAMIS, J.

This is a consolidated appeal from Dc Criminal Appeals No. 84, 85, and 86 which were filed separately and originating from Criminal Case No. 206 of 2010 of the District Court of Bukombe.

The case goes back to 15/11/2010 when the three appellants and one Maduka Pauline were arraigned in the District Court of Bukombe and charged with armed robbery contrary to Section 287 "A" of the Penal Code, Cap. 16, R.E. 2002.

The prosecution alleged that on 4th day of November 2010 at about 02.00 hours in Kabuhima Village, Bukombe District,

Shinyanga Region, the four accused stole Tsh. 2,145,000/= property of Emmanuel Pauline and immediately before and after the time of stealing, they threatened one Zawadi Omary with a panga, axe and sticks in order to obtain and retain the said money.

The case had a full trial and all accused were convicted as charged and sentenced to thirty (30) years imprisonment.

Aggrieved by the trial Court's conviction and sentence, Baraka Khamis, Shabani Njali and Kavula William appealed to this Court.

It should be noted that at the time of the arraignment, trial, conviction and sentence, Bukombe District and the whole of Shinyanga Region fell under the jurisdiction of this Court hence these appellate proceedings.

On the date of hearing this appeal, the appellants fended for themselves while the respondent was represented by Mr. Robert Kidando, learned Senior State Attorney.

Being laymen, the appellants opted to respond to Mr. Kidando's submissions.

Mr. Kidando exhaustively addressed this Court on the issue of identification which featured in each petition of appeal filed by the appellants.

According to him, the prosecution did not sufficiently prove visual identification of the appellants.

He contended that the relevant evidence is found in page 7 and 8 of the proceeding of the Bukombe District Court which relates to witnesses who were present at the scene.

The learned Senior State Attorney revisited the evidence of PW1 who stated that he identified the appellants at the scene as

were known to him before the incident and PW2 who alleged to have recognised the second appellant Shabani Njali. He submitted that such identification was wanting.

To buttress his point, the learned counsel pointed out several weaknesses found in the area of identification.

To start with, he said PW1 and PW2 who allegedly identified the attackers were expected to report the identification to a first person they met immediately after the incident but did not do so.

He cited the case of **MARWA WANGITI & ANOTHER V REPUBLIC 2002 TLR 30**, in which it was held that ability of a witness to identify (name) the assailant at the earliest opportunity is an assurance that he correctly identified the assailants.

He contended that since PW 1 and PW 2 did not do so, it creates doubts on whether these witnesses identified the assailants.

Secondly, the learned counsel asserted that PW1 and PW2 neither described features of the assailants nor the intensity of lights at the scene.

Mr. Kidando added that the prosecution witnesses did not disclose the time during which they stayed with the attackers to enable them make correct identification.

To that end, he referred this Court to the principles obtained in the case of **WAZIRI AMANI V REPUBLIC (1980) TLR 250.2**

The counsel also questioned the duration of time taken to arrest the appellants after the incident which he said was too long in the circumstances of the incident.

According to him, Baraka Khamis was arrested four days after the incident and upon being shown by the husband of PW 1 who was not at the scene during the incident.

He explained that there were no details as to why PW 1's husband named Baraka Khamis as the assailant.

The counsel applied the same reasoning to Kavula William who was arrested on 11/11/2010 and Shaban Njali arrested on 10/11/2010 whereas the incident happened on 1/11/2010 and the suspects were in the same village, Kabulimba.

He capped that in such circumstances, the evidence of identification was not water tight.

Finally, the Senior State Attorney submitted that the evidence on record did not prove the prosecution case beyond reasonable doubts and urged this Court to acquit the appellants.

He asserted that another convict, Maduka Pauline, was found guilty on a cautioned statement that was illegally admitted as the trial magistrate did not conduct an inquiry.

In their turn, all appellants were in full agreement with the Republic's submissions and adopted contents of their respective petitions of appeal.

This appeal is largely grounded on one issue which sufficiently dispose the whole of it, whether the appellants were properly identified?

Having scanned the records before me and specifically proceedings of the trial Court, I am in full agreement with Mr. Kidando that the evidence of PW 1 and PW 2 on identification is wanting.

These witnesses did not name the appellants immediately after the incident and did not describe the attackers.

PW 1 and PW 2 further failed to disclose the intensity of light which helped them identify the appellants but gave a blanket statement of having identified them with aid of solar light whose intensity was not disclosed.

It is a settled principle of law that in any case involving visual identification as evidence, no Court will act on such evidence unless all possibilities of mistaken identity have been eliminated and the Court is satisfied that the evidence before it is absolutely indisputable.

In the case of **WAZIRI AMANI V REPUBLIC [1980] TLR 250** the Court of Appeal established necessary descriptions to be made in identifying suspects such as the length of time he had with the accused under observation, the distance from which the witness had accused under observation, if there was any light then the source and intensity of such light, description of attire, whether he was tall or short and whether he knew him before or was his first time to see him and so forth.

Since the onus of proof in criminal cases lies upon the prosecution as well stated under Section 110(1) and (2) of the Evidence Act, It is evident that the evidence of PW 1 and PW 2 did not meet the legal threshold.

In the case of **REPUBLIC V ELIA SEBWATO [1960] E.A 174** it was held that;

"Identification evidence must be watertight in order to sustain conviction and exclude possibility of mistaken identity. "

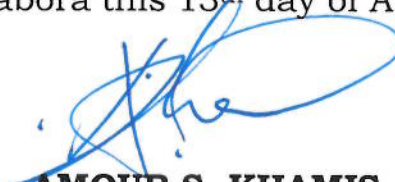
For the reasons stated above, I hold that the prosecution failed to prove its case beyond reasonable doubt and the appeal is meritorious.

In the event, the appellants' conviction is hereby quashed and their sentences are set aside. The appellants are to be released from prison forthwith unless otherwise lawfully held for other lawful cause(s).

Exercising the revisional powers of this Court, I make similar orders for Maduka Pauline who was not a party to this appeal.

It is so ordered.

Dated at Tabora this 13th day of August 2021.



AMOUR S. KHAMIS

JUDGE

13/8/2021

ORDER:

Judgment delivered in open Court in presence of Mr. Miraji Kajiru, Senior State Attorney for the Republic and all appellants in person. Right of Appeal explained.



AMOUR S. KHAMIS

JUDGE

13/8/2021