IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOBA DISTRICT REGISTRY

~~**AT BUKOBA**~~

(PC) CRIMINAL APPEAL NO.11 OF 2020

(Arising from Criminal Appeal No. 12 of 2019 of Ngara District Court and Original Criminal Case No. 130 of 2019 of Kabanga Primary Court)

GILMAN GADI ..... APPPELLANT

Versus

VENATUS KATABAZI ..... RESPONDENT

JUDGMENT

13/08/2021& 30 /08/2021

NGIGWANA, J.

The Appellant stood charged before Kabanga Primary Court in Ngara District, with an offence of Robbery with violence contrary to sections 285 and 286 of the Penal Code [Cap 16 RE. 2019]. Particulars being that on 22nd day September, 2019 at 23 :30 hours at Kumuchiha Hamlet, Kabanga Village, Division of Kanazi within Ngara District In Kagera Region, the appellant invaded and used actual violence against Venatus Katabazi and robbed of his two Smartphones make Tecno and cash Tshs. 30,000/=all valued at Tshs. 430,000/=. Having been taken through full trial, he was convicted and sentenced to serve fifteen (15) years imprisonment.

Aggrieved, he unsuccessfully appealed to the District Court of Ngara hence this 2nd appeal. The grounds of appeal raised are as follows;

1. That the Hon. District Magistrate grossly erred in law for failure to quash and set aside the proceedings, judgment and resultant orders of the trial Primary Court which were nullity for want of jurisdiction.
2. That the Hon. District Magistrate grossly erred in law to uphold the conviction and sentence passed by the trial primary court under section 287 (2) of the Penal Code R: E 2002, the offence he was not charged with neither entered any plea and thus convicted on unheard in that unfair trial.
3. That the Hon. District Magistrate grossly erred in law to uphold the decision of the Primary Court without any sentilla evidence to prove the offence charged.
4. That the Hon. District Magistrate grossly erred in law to rely on the evidence of identification and that of accomplice which were tainted with contradictions, inconsistencies, incoherence, in cogent and thus unreliable to ground conviction of the appellant.
5. That the Hon. District Magistrate grossly erred in law for failure to nullify the proceedings and set aside the conviction and sentence on the apparent error on the record whereby the trial primary Court Magistrate framed the issue for determination being biased of declaring the appellant guilty before even the evidence was adduced and analyzed.

Wherefore the appellant prays that the appeal be allowed by nullifying the entire proceedings and set aside the sentence and conviction. The

prosecution side filed the reply thereto in which vehemently resisted this appeal, and prays for its dismissal for being devoid of merit.

The case, as presented by the prosecution in the trial court was that on 22nd day of September 2019 during night hours PW1, the complainant, herein was on his way back home and few meters before arriving at his home place, he was accosted by three young men who stole from him cash Tshs 30,000/= and two Smartphones make Tecno. That, he struggled with the appellant and other two young men in the banana farm for almost two hours, hence managed to identify the appellant as he managed to bite the appellant on the face and stretched his face accordingly. That, PW1 was rescued from the hands of the appellant by (PW2) Sadicky Hamidu. PW2 testified to have heard People fighting near his house on the material night, and upon his arrival at the scene of crime, found PW1 who mention to him that the one who fought him was the appellant and other young men.

Upon being put on his defense, the Appellant stated that on the material day, around 3:00 while at home sleeping, police arrived, knocked his door and then was put under arrest. The appellant disputed to have committed the offence and to have met PW1 on the material night.

At the hearing of this appeal the appellant had the services of Mr. Kabunga, learned counsel. On the adversary side, the respondent had the services of Mr. Lameck Erasto, learned counsel

Submitting on of this appeal, first and second grounds of appeal, Mr. Kabunga argued that, the Primary court had no jurisdiction to entertain the

case of Robbery with Violence, and the sentence imposed was not within the domain of the Primary Court. He added that, Section 285 of the Penal Code Cap 16 R: E 2019 was not included in Part 1 of the 1st Schedule to the Magistrates Courts Act Cap 11 R: E 2019. He also argued that, the sentence of 15 years imprisonment is found under section 287 (2) of the Penal Code, the provision which the appellant was not charged with, and for that matter the charge was defective. He referred the court to the case of **David Athanas @ Mkasi and Another,** Criminal Appeal No.168 of 2017 to stress that where the charge is incurably defective, proceedings become a nullity.

In reaction, Mr. Lameck submitted that the appellant was charged with the offence of Robbery with violence contrary to sections 285 and 286 of the penal Code, and the Primary court has jurisdiction. He added that, Mr. Kabunga, learned counsel for the appellant had made a reference to section 287 since the provision was never referred in the two lower courts. As regards the sentence of 15 years, Lameck cited section 5 of the Minimum Sentence Act Cap 5 R: E 2019 which provides for a minimum of 15 years for such offence, and to him the sentence was within the domain of the primary court.

It is trite law that the charge sheet being the foundation of the prosecution case, must involve the offence known to the law. The trial court must satisfy itself that it has jurisdiction over the offence. The charge must describe the offence and make reference to the section and the law creating the offence. It is obvious that incurably defective charge renders a

trial a nullity. In our case the offence involved was Robbery with Violence. As correctly decided by the trial court, and confirmed by the first appellate court and stated by Mr. Lameck, the Primary Court had jurisdiction over the matter. The sections referred were section 285 and 286 of the Penal Code. No where Section 287 was referred.

Section 285 (1) of the Code provides;

"Any person who steals anything and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of robbery".

Section 286 of the Code provides;

"Any person who commits robbery is liable to imprisonment for fifteen years....."

Again, I shake hands with both the lower courts and Mr. Lameck that, the sentence of 15 years imprisonment that was imposed against the appellant was within the domain of the primary court. Section 5 (a) (i) of the Minimum sentence Act, Cap 90 R: E 2002, is self-explanatory that the minimum sentence for an offence of Robbery with violence is 15 years.

It is undisputed that sentencing is a judicial function which should not be executed mechanically. It should be carried out judicially balancing many competing factors, mainly the legislative requirement, principles derived from case law, public interest and interests of the parties. Such a function

therefore, needs to be judicially exercised bearing in mind the well-established principle that sentencing remains pre-eminently within the discretion of the sentencing court.

However, it must be noted that, in our jurisdiction, where there is a prescribed mandatory minimum sentence, the normal sentencing discretion of a judicial officer to decide an appropriate level of sentence basing upon the particular circumstances of the offence and the offender and various mitigating factors are no longer individualized, as he/she cannot impose a sentence which is below the minimum sentence provided by the law. See **the case of Stuart Erasto Yakobo V.R, Criminal Appeal No.202 of 2004 –CAT (Unreported**). The 1st and 2nd grounds of appeal completely fails as they were baseless and unfounded.

Expounding the 3rd, 4th and 5th grounds of appeal, Kabunga, argued that the evidence in support of the charge was full of contradictions hence unreliable. He added as per trial court record, PW1 told the court that he suffered injuries, whereas he was issued PF3, but the same was never tendered in court. He also submitted that, the issue of identification was not free from doubt since PW1 said the fracas took place on the banana farm in which there was no light. That persons who were named by PW1 to have witnessed the incident have never testified in court.

Mr. Lameck on his side submitted that the witnesses were credible in which the evidence of PW1 was corroborated by the evidence of PW2 and PW3. The learned counsel referred the court to the case **of Godfrey Yahaya**

and Another, versus, R, Criminal Appeal No.277 of 2020 CAT (Unreported) where the Court of Appeal held that the trial court is at better position to assess the credibility of witnesses. He also said PW1 named the appellant to the police at earliest possible time. Here he made reference to the case of **Wangiti Marwa Mwita versus R** [2002] TLR 39.

The learned counsel added that the appellant was correctly identified through the help of the electricity light, the time spent by the appellant and the victim the fracas, the fact the appellant was not a stranger to PW1, and that they had conversation in that fracas. Wherefore prays for the dismissal of this appeal.

I am alive that a second appeal court is precluded from questioning the findings of the fact of the trial court, provided there was evidence to support those findings. It can only interfere where it considers that there was no evidence to support the finding of fact. In other words, in order for the second appellate court to interfere in concurrent findings of fact by the trial court and the first appellate court, it has to be shown that the first appellate court erred in law or in mixed fact and law to justify an intervention.

It must be noted that, the cardinal principle in criminal cases places on the shoulders of the prosecution the burden of proving the guilt of the accused beyond all reasonable doubt. The High Court of Tanzania speaking through Katiti, J (as he then was) in **JONAS NKIZE V.R [1992] TLR 213** *held that,*

"The general rule in criminal prosecution that the onus of proving the charge against the accused beyond reasonable doubt lies on the prosecution, is part of our law, and forgetting or Ignoring it is unforgivable, and is a peril not worth taking"

The test applicable was well stated in the famous South African case of **DPP VS Oscar Lenoard Carl Pistorious Appeal No. 96 of 2015,** as follows;

"The proper test is that an accused is bound to be convicted if the evidence establishes his [her] guilt beyond reasonable doubt, and the logical corollary is that he [she] must be acquitted if it is reasonably possible that he [she] might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be false; some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.

In this case, both the trial court and the 1st appellate court found that the evidence adduced proved the case beyond reasonable doubt. It is undisputed that the incident in the instant case occurred during night thus, the evidence on how the appellant was seen and identified is so crucial because generally, the evidence of visual identification has never been a reliable evidence. In **Waziri Amani v, Republic** [1980] TLR 250, it was held that;

"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is absolutely watertight"

The Court further stated that,

"*Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems dear to that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried. We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not"*

In **Raymond Francis v. Republic** [1994] TLR 100, the Court emphasized that:

"It is elementary that a criminal case whose determination depends essentially on identification evidence on conditions favoring a correct identification is of utmost importance."

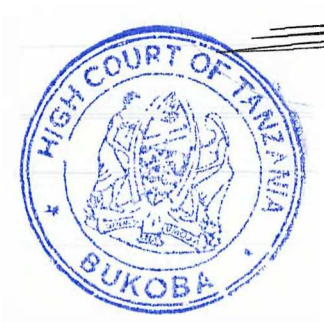
In revisiting the evidence of the two identifying witnesses, PW1 and PW3, this court found that PW2 in his evidence said that, on material night (22/09/2019) he did bite the appellant on the face but also scratched his face using fingernails. The appellant was arrested on the same date, but no evidence to prove that at the time of arrest, the appellant had bite marks and/ or fingernail scratches on his face. That piece of evidence would have assisted to link the appellant with the offence, taking into account that the incident took place in the mid-night. PW3 said, he identified the appellant visually but gave no descriptions and conditions which assisted him to identify the appellant on that night.

On his side, PW2 said he heard PW1 crying "**You are killing me! You are killing me!** However, PW1, in his evidence did not testify to have screamed in that way. The appellant denied to have committed the offence and/or to have met PW1 on the material night. Under the circumstances, it cannot be said that the evidence of visual identification was absolutely watertight to ground conviction.

Therefore, in absence of any other evidence, it cannot be said that, the prosecution had managed to discharge its duty of proving the case beyond reasonable doubt, as the principle that the accused can only be convicted of an offence on the basis of the strength of the prosecution case, and not on the basis of the weakness of the defense case had been established a long time ago. **See KERSTIN CAMERON V.R [2003] TLR 84, and** JOHN **S/O MAKOLOBELA KULWA MAKOLOBELA AND ERICK JUMA @ TANGANYIKA V.R [2002] TLR 296.**

Since the prosecution side had not proved the case beyond reasonable doubt, that is a sufficient reason to warrant this court to interfere with the findings of the trial court and the 1st appellate court. In the up short, I find merit in this appeal and I allow it, quash the conviction and set aside the sentence of fifteen (15) years imprisonment meted out against the appellant on 01/11/2019.The order for compensation is also set aside. Furthermore, I order the immediate release of the appellant Gilman Gadi from prison unless he is held there for other lawful purpose.

It is so ordered.

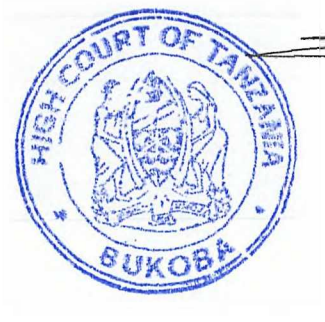


E.L. NGIGWANA

JUDGE

30/08/2021

Court: Judgment delivered this 30th day of August, 2021 in the presence of the Appellant and Mr. Frank J. Karoli, learned Advocate, Mr. E. M. Kamaleki, Judge's Law Assistant, but in the absence of the Respondent.



E.L. NGIGWANA

JUDGE

30/08/2021