

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CRIMINAL APPEAL NO. 160 OF 2021

*(Originating from the decision of the District Court of Kigamboni at Kigamboni in
Criminal Case No. 46 of 2019)*

BETWEEN

SELEMANI MUHIDINI MOHAMED ----- APPELLANT

VERSUS

THE REPUBLIC ----- RESPONDENT

Date of last Order: 04/10/2021

Date of Ruling: 11/10/2021

J U D G M E N T

MGONYA, J.

Before this Honorable Court lies an Appeal where the Appellant was found guilty of the charges against him and sentenced to a term of imprisonment of 30 years from the offence of Armed Robbery

Being aggrieved by the decision of the trial Court, the Appellant knocked the doors of this Court with ten (10) grounds of appeal being:

- 1. That, the Charge against the Appellant had been instituted based on a repealed law which the trial***

Magistrate erroneous relied on base his conviction. Hon. Judge, the Appellant charged with section of law has established only the offence of one Accused or person. The means Appellant charged with wrong provision of law. The said offence must established by the section 287 C of the Penal Code because it involved more than one Accused persons (that means gang robbery).this provision of law it was published in a special Gazette of the United Republic of Tanzania No. 4 vol. 92, dated 10th June, 2011, and it was assented on the same date. Hon. Judge, section 135 of the CPA, (Cap. 20 R.E 2019) "demands that charge shall contain a reference to the section creating the offence". Hon. Judge, please see in the REPUBLIC VS HASSAN SAID 1984 T.L.R 226 "held that substantial miscarriage of justice has not flown the defective". And see in the case of JAME KAGOMA & OTHERS VS REPUBLIC, Criminal Appeal No. 3 OF 2015 in High Court of Tanzania at Mbeya (unreported) due to the same reason the High Court of (T) acquitted them.

- 2. That, the Hon. Trial Resident Magistrate erred in law point and fact when convict and sentence Appellant by using the past law or outdated law. Hon. Judge,***

the provision of law section 287A of the Penal Code, [Cap. 16 R.E 2002] which the trial Magistrate used to pass his conviction and sentence against Appellant has been long changed or it replaced by a new law section 287A of the Penal Code [Cap. 16 R.E 2019]. That is means he used a wrong provision of law. This is acceptable un on the eye of the law.

- 3. That, the Hon. Trial Resident Magistrate erred in law point and fact when convicted and sentenced Appellant by believing the evidence of PW1 and PW2 who told the Court that they managed to identify Appellant at the scene of crime while the said incidence happened during night time. Hon. Judge, but PW1 and PW2 never told trial Court the intensity of the said light which assists them to identify properly me Appellant at the said scene of crime. Hon. Judge, fail to mention the source if light and its intensity that means it create a lot of doubt.***

Hon. Judge, please see in case of JIMMY ZACHARRIA VS THE REPUBLIC, in Criminal Appeal No. 69 of 2006 at Arusha (Unreported) the court held that "light is the primary factor which assists in

the identification of a person, others are mere secondary factors.”

- 4. That, the Hon. Trail Resident Magistrate erred in law point and fact when convict and sentence Appellant without consider that chain of custody was flown as the all exhibited were handled to the victims before they were tendered to the Court. Not only that but also the Prosecution side failed to tender before the court chain of custody form of the alleged stolen properties.***
- 5. That, the Hon. Trial Resident Magistrate erred in law point and fact when convicted and sentenced Appellant without consider that no any order or transfer which allow Hon. Trial Magistrates to transfer the case from one Magistrate to another and there was no any citation of the law which cited by them in order to transfer the case. Hon. Judge, the Hon. S. B. Fimbo – SRM, he proceed the case from 11/03/2019 up to 32/04/2019 when he decided to left it with unknown reasons, then Hon. A. Mchome – SRM from 16/05/2019 with unknown reasons he decided to proceed the case up to when***

he reached or decided to ground conviction and sentence to Appellant.

Hon. Judge, the act done by trial Magistrates is unacceptable on the eye of the law.

- 6. That, the Hon. Trial Resident Magistrate erred in law point and fact when convict and sentence Appellant by believing the evidence of PW1, PW2, PW3 and PW6 who told Court that I involved in committing the said offence of Armed Robbery without consider that no one among of them (witnesses) who told Court I handed up with anything among of the said stolen properties. Hon. Judge, I was arrested out of my residence with no nothing.***
- 7. That, the Hon. Trial Magistrate erred in law point and fact when convicted and sentenced Appellant by believing evidence of PW6 and by receiving the said cautioned statement as Exhibit "PW8" without consider that no any or relative or friend or lawyer who witnessed me when taken the said statement if I was free or not as required by the law. Not only that but also PW6 lies at the Court because told the Court that we stated to record statement at 8:20 a.m and he finished at 8:03 a.m then changed story***

and saying he finish writing statement at 8:29 am, please see on page 32 of the Proceedings. Hon. Judge, due to this contradictory that means evidence of PW6 and his Exhibit is un believable on the eye of the law.

- 8. That, the Hon. Trial Resident Magistrate erred in law point and fact when convicted and sentenced Appellant by believing the evidence of PW1 and PW2 and he received the said evidence without cite any section of law which allow him to receive an evidence. Hon. Judge, please see the end of evidence of PW1 and the end of the evidence of PW2. That is means their evidence is unacceptable on the eye of the law.***
- 9. That, the Hon. Trial Resident Magistrate erred in law point and fact when convicted and sentenced Appellant relying on prosecution side who left a lot doubt and totally failed to prove charge sheet and fact against me Appellant beyond reasonable doubt as required by the law.***
- 10. That, the Hon. Trial Resident Magistrate erred in law point and fact when convicted and sentenced***

Appellant without consider the defence evidence due to this weakness side.

Wherefore, the Appellant prays this Honorable Court to allow appeal, quash conviction and set aside sentence passed by the trial Court and release the Appellant from prison.

Submitting for the Appeal, Appellant prayed the Memorandum of Appeal be adopted for determination and pray that the Appeal be allowed and the court set him free from the prion as the matter at issue was not proved to the required standards in criminal offences.

Responding to the Appeal, **Ms. Imelda Mushi**, the learned State Attorney for Republic informed the court that, after they have gone through the 10 grounds of Appeal, it is the Republic's conviction and stand that they support the Appeal.

Submitting further it is Ms. Mushi's assertion that in support of the instant Appeal, she has focused her submission on the accused identification and the assets that the Appellant was caught with.

It is the counsel observation that during trial, PW1 in his testimony testified that the offence occurred at night and that he identified the Appellant through electric light as it was seen

in page 14 of the Proceedings. On the other hand, PW2 at page 18, stated that he was able to identify the Appellant through the light in his room and that he was also near him. From this assertion, it is the counsel's observation that the witnesses' identification did not meet legal standards and was not proved beyond reasonable doubt as they did not say the kind of light and its strength, the time they used to identify the Appellant, also they were not able to describe the Appellant's physical description. From the same, Counsel stated that, the standards of identification was not adhered to, hence not proved. In support of this anomaly, the ***Criminal Appeal No. 219 of 2018 of SALUM YUNUS NGONGOTI & 2 OTHES V. REPUBLIC***, was cited to cement the observation and ruled out that the evidence on identification was not water tight; hence not proved accordingly.

Further, it is the learned State Attorney view that thought the Appellant was identified also through identification parade, but since the visual identification was not proved, the identification parade cannot stand. This court was referred to the case of ***FLANO ALPHONCE MASALU & 4 OTHES VS. R., Criminal Appeal No. 366 of 2018***, in the Court of Appeal at Dodoma where the case of ***HAMAD HASSAN MARWA VS. R. Criminal Appeal No. 264 of 2015***.

It is further the Counsel's assertion that, the Appellant was also convicted because he was caught with some said stolen items such as telephone. In respect of the telephone, page 31 of the proceedings shows that PW1 said that he can identify the same since the screen protector had cracks with brown cover. The Counsel said, it is a fact that many telephones have cracks and also can have brown colour. The witness needed to identify more and be more specific to convince the Court on this. From the same, it was the Counsel's assertion that, in law, the witness did not prove that the items that were stolen was his.

From the above, the Counsel declared to support the Appeal for the above stated reasons.

Going through the grounds of Appeal and the Republic's submission; I am in line with the Republic's concern that the Appellant's identification was taken without taking into account the legal requirements. In the case of ***MOSES CHARLES DEO V. REPUBLIC, 1987 TLR 134 Court of Appeal at Dar es Salaam*** where the Appellant and two other persons were convicted with robbery with violence, rape and being in unlawful possession of offensive weapons. On appeal to the High Court, the conviction on rape was quashed because the trial court had convicted them on the basis of uncorroborated

evidence of the complainant. On further appeal to the court of Appeal, the appellant challenged the propriety of the identification parade and the basis of finding him guilty of unlawful possession of offensive weapons. It was held that:

"An extra judicial parade proceeding is not substantive evidence, it is only admitted for collateral purposes. In the majority of cases, it served to corroborate the dock identification of an accused by a witness in terms of section 166 of the Evidence Act of 1967."

Further on the identification of the stolen item, of which was the telephone in this case, I am also satisfied that the victim ought to have identified specifically on the special marks of the same. However, that was not the case as well said by the Republic's State Attorney. In the case of ***FADHILI MOHAMED V. REPUBLIC, 1974 TLR 5 at the High Court at Dar es Salaam***, Mwakasendo Ag. J. held that:

"As this court has repeatedly stated, it is of the utmost importance that before a court can place any reliance on any evidence of identification of property, that evidence must be satisfactory and credible."

.....person identifying goods in court, as being his should always be asked how he can distinguished them and his reasons recorded;

.....A court in considering evidence of identification should consider the truthfulness or otherwise of the witness and the possibilities of honest mistake."i.e. where no distinct features are present) and should also consider the possibility of similar articles existing in the locality."

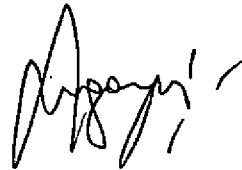
As the Prosecution case has been shaken to this extent, **I join hands with Ms. Mushi that the appeal before the court has merits. I proceed to declare that the PW1's testimony is hereby expunged for being taken contrary to the law.** Thus, I join hands with the Republic by declaring that Prosecution at the trial court did not manage to prove its case beyond reasonable doubt to command conviction and sentence for the above stated reason.

On those circumstances explained, am of the firm conviction that the Appellant was convicted without sufficient evidence. Therefore, **appeal has merits**, and it is for that reason, **I accordingly allow the Appeal.**

In the event therefore, the Conviction is hereby quashed, and sentence is set aside. The accused is set

at liberty, unless otherwise withheld with other offences.

It is so ordered.



L. E. MGONYA

JUDGE

11/10/2021

Court: Judgment delivered in the presence of Appellant in person, Ms. Imelda Mushi, State Attorney for the Respondent and Ms. Veronica RMA this 11th day of October, 2021.



L. E. MGONYA

JUDGE

11/10/2021