

IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY
AT MWANZA
HC. CRIMINAL APPEAL NO. 132 OF 2021

(Original Criminal Case no. 110 of 2020 of the District Court of Misungwi District at Misungwi)

SHISHI S/O FUMBUKAAPPELLANT

versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

8th November & 10th December, 2021

RUMANYIKA, J:

With respect to offence of assault causing grievous harm c/s 225 of the Penal Code Cap. 16 RE. 2019, the appeal is against conviction and custodial sentence of four (4) years meted against Shishi Fumbuka (the appellant) on 16/03/2021 actually one having had been acquitted from the charges of armed robbery.

The six (6) grounds of appeal revolved around five (5) points essentially as follows:-

- (1) That the appellant wasn't actually identified.
- (2) That the prosecution evidence was too contradiction and inconsistent enough to ground a conviction.

- (3) That the PF3 (Exhibit P1) was improperly admitted in evidence therefore liable to be expunged.
- (4) That the appellant wasn't convicted therefore shouldn't have been sentenced.
- (5) That the trial court ignored the appellant's defence of alibi.

When the appeal was, by way of audio teleconference called on 8/11/2021 for hearing, Messrs Bakari and Lilian Meli learned counsel and state attorney appeared for the appellant and respondent/Republic. I heard them through mobile numbers 0753 676 505 and 0717 418 929 respectively.

Having had dropped two grounds of them, Mr. Bakari learned counsel submitted: **(a)** that if anything, one could not have properly identified the appellant under the circumstances in darkness at 8.00 pm much as the appellant was arrested say one month later. Therefore, the criteria in the case of **Waziri Amani v. R (1980) TLR 250** were not met **(b)** that Exhibit P1 (the police case file) was liable to be expunged because it was improperly admitted in evidence (case of **Robinson Mwanjisi & 3 Others v. R. (2003) TLR 218** **(c)** that the appellant wasn't actually convicted in law notwithstanding the words "I find him guilty" (case of

Gwandunni Mwaseba v. R, Criminal Appeal No. 57 of 2020 HC. at Mbeya (unreported) **(d)** That now that the prosecution had no enough evidence, unless they used the chances to fill in the gapes, the court had no ground upon which to order a retrial instead of simply quashing the conviction and set aside the sentence (case of **Kabunguza Macheмба v. R**, Criminal Appeal No. 157B of 2013) (CA) at Tabora unreported. That is all.

Ms. Lilian Meli learned state attorney submitted; **(1)** that actually the appellant was found guilty and accordingly convicted **(2)** that for the reason of improper admission of Exhibit P1 (the PF3) it could be expunged yes, but according to evidence of Pw1 sufficed the doctor's and Pw4's evidence that the victim had the eye permanently injured and replaced by official one (the 2nd count therefore was proved beyond reasonable doubts) **(3)** that the appellant was visually identified and recognized by Pw3 because the latter knew him say 30 years before one therefore could not have mistaken the former's identity after all during the incident the victim named the appellant not withstanding Pw3's failure to disclose source of light. That is all.

A brief account of the evidence would read as follows;

Pw1 Raymond Nyasebwa a medical doctor of Mitindo hospital Misungwi stated that as he was at work on 10.8.2021 he attended the victim who was in a blood stained shirt and the left eye ball ruptured. That the injury was so permanent that his vision was impaired (copy of the PF3 – Exhibit "P1". Now recalled, Pw1 stated that he filled in the PF3 on 18/08/2021 as he had waited for recovery of the victim.

Pw2 Ngalu Kishoni a petty businessman and peasant of Mwamanga Misungwi stated that on his way home from Bukombe on 10/8/2021 was invaded and attacked by Dw1 (the appellant) a neighbor with whom he had a land dispute before. That the appellant hit him in the left eye with a stick until such time his children rescued him but late as he had lost the eye and robbed shs 100,000/= cash. That too he identified him by voice on 18/08/2021.

Pw1 Nkwabi James a resident of Mwamanga stated that as, on 10/08/2021 at about 8.00 he heard the victim (father) scream for help and named the appellant the assailant and the latter now ran and threatened to finish the victim up, as Pw3 and others interrupted and inquired he ran away. That he knew the appellant from time in memorial and shared the

locality (nzengo). Then they rushed the victim to hospital where was admitted for 8 (eight) days. That is all.

Dw1 Shishi Fumbuka a peasant of Mwamanga Mission stated that from Misungwi he travelled by bus to Mpanda via Mwanza on 7/8/2021 and came back on 30/08/2021 (copy(s) of the bus tickets – Exhibit “D1” and “D2”) respectively but nevertheless he was arrested on 30/09/2020 and charged (according to records his notice of alibi having had been duly presented on 02/02/2021). That’s all.

The issue is whether the appellant was properly identified by Pw1 at night much as the prosecution case only hinged on the very piece of evidence whichever proximity within which Pw3 may have had caught the appellant red handed, for a couple of years pw3 knew him as neighbor therefore he readily recognized the appellant who ran away shortly. Also in the process the victim having had named him the appellant, but without explanation and counting for each day of the delay the appellant was arrested on 30/09/2021 say 1²⁰/₃₀ months later contrary to the rule in the (case of **Hamisi Yazidi v. R**, Criminal Appeal No. 381 of 2015 (CA) unreported where in effect the Court of Appeal Tanzania held that unexplained delay in arresting accused who was properly identified at the

scene of crime not only it goes to roots of credibility of the identify witness but also it shakes the prosecution case. It wasn't even in evidence said that for such long the appellant was wanted but he remained at large. It means therefore Pw3 may have had identified the appellant but possibly mistakenly suffices to hold that the latter's defence of alibi was sufficiently grounded and proved.

Now that the above stated points would sufficiently dispose of the appeal, the conviction and sentence are quashed and set aside respectively. The appeal is allowed. Unless he was held for some other lawful cause, the appellant be released from prison. It is so ordered.

Right of appeal explained.

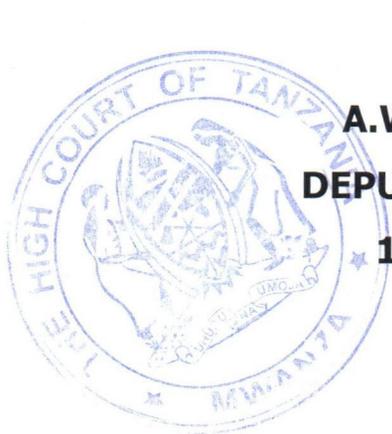


S.M. RUMANYIKA

JUDGE

01/12/2021

Judgment delivered under my hand and seal of the court in chambers
this 10/12/2021 in the absence of both parties.



A.W. MMBANDO
DEPUTY REGISTRAR

10/12/2021