

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

CRIMINAL APPEAL NO. 53 OF 2021

JUMA OMARY MACHALE.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

*(Originating from the judgment of District Court of Rufiji in Criminal Case
No.165 of 2019)*

JUDGMENT

Date of last order: 23/11/2021

Date of judgment: 01/12/2021

LALTAIKA, J.

The appellant, **JUMA OMARY MACHALE** was charged before the District Court of Rufiji with the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 R.E.2019. The particulars that were laid down in a charge sheet unveiled that on the 3rd day of November, 2019 at Mparange area, Ikwiriri village within Rufiji District in the Coast Region, the appellant did steal two goats valued at Tshs. 120,000/= the property of Ramla Kassimu Nguru and that, immediately after stealing, he threatened her by using a panga in order to obtain the said property.

At the trial, the prosecution side paraded five witnesses and four documentary evidences, all in the quest to prove the case against the appellant. The appellant was found guilty, convicted and sentenced to 30 years' imprisonment. Aggrieved by both the conviction and sentence, the appellant has approached this court through a memorandum of appeal. Initially, the appellant fronted a total of five grounds of appeal. However, with leave of this court, he filed four additional grounds all aimed at challenging his conviction and sentence. I take the liberty not to reproduce here the grounds as penned down by the applicant.

When this matter was called for hearing, the appellant appeared in person whereas Ms. Mchami, learned State Attorney, appeared for the respondent Republic. In his submission on the first ground of appeal which centres on the issue of visual identification, the appellant submitted that the complainant and PW1 asserted that he identified him by a torch light however in their testimony, the type of flash light which enabled them to identify the appellant was not stated.

Arguing on the second ground of appeal, the appellant explained that he was not found with the alleged stolen goats. He stated that the goats were found with one Mwarabu whose whereabouts remain unknown from the occurrence of the incident to date.

The appellant further stated that when he was taken to court, the prosecution witness tendered an exhibit to the effect that the complainant had passed away. He explained that another prosecution witness tendered a document whose contents were not brought to his knowledge other than overhearing that it was the complainant's statement. The appellant stated further that through out the trial he insisted that he had not committed the offence and that no complainant has been brought

forth to testify. Never the less, at the closure of prosecution case, he was convicted and sentenced hence this appeal.

It was counsel for the respondent's turn to respond to the grounds of appeal. Addressing the first ground, Ms. Mchami conceded with the appellant that it was true that PW1 did not state the intensity of light that enabled her to identify the bandits. However, she maintains with forceful insistence that the accused person had been properly identified. To clarify, Ms. Mchami referred this court to page 10 of the typed proceedings where PW1 informed the court that she identified the appellant by mentioning his name after they broke into their house while holding panga.

The learned state attorney avers further that PW1 had stated that the appellant left with two goats. Ms. Mchami is of a strong view that even in the absence of an explanation on the intensity of the light, PW1 was able to identify the appellant by his name. To buttress her argument, the learned State Attorney referred this court to the case of **Marwa Wangiti Mwita vs R. TLR (2000)**. Drawing from the holding of the court in that case, Ms. Mchami stressed that the fact that PW1 identified the appellant at the earliest opportunity, clears any doubt as to whether the appellant was properly identified.

Arguing on the second ground of appeal Ms. Mchami submitted that the oral evidence of the prosecution clearly linked up the appellant with the offence committed. Ms. Mchami averred that as indicated in proceedings of the trial court, PW1 had informed PW3 on the occurrence of the offence. Ms. Mchami averred further that PW3 later accompanied PW1 to the residence of the appellant's uncle where they found other people attacking the appellant. Ms. Mchami insists that when PW3

interrogated the appellant, he confessed to have committed the offence but he indicated that the stolen goats were somewhere else.

Referring this court to page 17 of the typed proceedings, Ms. Mchami maintained that the appellant had shown PW1, PW3 and others the place where he had kept the said goats. To this end, Ms. Mchami submitted that the appellant's confession before PW3, a civilian and competent witness was sufficient to warrant conviction based solely on such a confession. To support her position, Ms. Mchami drew the attention of this court to the case of **Poloso Wilson vs Republic, Criminal Appeal No.613 of 2015**. Drawing from the holding of the cited case Ms. Mchami submitted that the appellant's confession before PW3 was sufficient to convict him.

With regards to admission of exhibit P1, P2, and P3 Ms. Mchami submitted that the said exhibit P1 was tendered by PW3 but there is no indication that the exhibit was read out loud in court as required by law. Ms. Mchami referred this court to page 17 of the typed proceedings of the trial court. In spite of such agreement with the appellant, Ms. Mchami maintains that notwithstanding the irregularity, this court can proceed to rely on the oral evidence of PW3 who, she alleges, was a competent witness.

On Exhibit P2, a certificate of inventory, Ms. Mchami stated that it was tendered by the investigator of the case as required and that it was read out loud and properly admitted in court. To this end, the learned State Attorney opines that it was tendered by a competent witness. Ms. Mchami cited the case of **DPP vs Mizrai Hajji & 3 Others Criminal Appeal No.493 of 2016 CAT**.

With regards to Exhibit P3 namely statement of the complainant, Ms. Mchami submitted that it was tendered in compliance with section 34B of Evidence Act. Drawing the attention of this court to page 22 of the typed proceedings, Ms. Mchami submitted that although the appellant had complained that he was not served with the statement of the deceased, (Exhibit P3) he did not explain how that omission affected his rights related to fair trial. To this end, she is of a strong opinion that the ground of appeal is with no merit.

On the third ground of appeal argued together with grounds one and four of the additional grounds of appeal Ms. Mchami submitted that exhibit P2 was properly tendered by a competent witness. The learned State Attorney expounded on the point thus, since the stolen goats were dead, the inventory certificate had an evidential value to prove the existence of the said goats. Ms. Mchami opined that the prosecution had proved the case against the appellant beyond any reasonable doubt.

In his brief rejoinder the appellant maintained the position in his submission in chief.

Having considered the grounds of appeal and submissions by both parties, I shall begin my deliberations with ground one, namely on the issue of visual identification. This court has, in several occasions, cautioned itself before relying on the evidence of visual identification as the basis of conviction. It is trite law that all possibilities of mistaken identity are eliminated before a court of law relies on the evidence of visual identification. See the case of **Waziri Amani vs R, (1980) TLR 250.**

The appellant had submitted that PW1 claimed to have identified him at night through the light of a handheld torch without further explanation on the intensity of such light. On her part, the learned State Attorney Ms. Mchami is of the opinion that because PW1 mentioned the appellant's name that was enough to prove that the appellant was properly identified at the earliest opportunity.

My findings on that aspect are, **one:** PW1 was under obligation to immediately give the description of the bandits when she first reported the matter to PW3 and **two:** since the event took place at night, it was important for PW1 to clearly establish the intensity of the light that illuminated the room clearly enough to enabled PW1 to identify the bandits. It does not occur to me that omission to state the intensity of light does not have any bearing since, as argued by the learned State Attorney, PW1 had mentioned the name of the appellant. I do not agree with this line of thinking. I am inclined to take the evidence of virtual identification with uttermost care. In the case of **Hamisi Ally & Others vs Republic, (Criminal Appeal No.596 of 2015) [2016] TZCA 320**, www.TanzLii.org the court arrived to a similar position and stated:

"Time and again this Court has insisted that when a case is centred on evidence of visual identification such evidence must be watertight before arriving at a conviction. This insistence is borne out of the fact that visual identification is of the weakest kind and hence the necessity of ruling out any possibilities of mistaken identity".

With regards to the second ground (argued simultaneously with the third additional ground of appeal) the appellant had stated that the

contents of documents tendered during the trial were not brought to his knowledge. He specifically referred this court to Exhibit P3, statement of the complainant which was tendered by PW5. Responding to this, Ms. Mchami registered her agreement although P3 was admitted as evidence in accordance with section 34B of the Evidence Act Cap 6, the same was not served to the accused as required by the law.

Ms. Mchami invited this court not to take into consideration such omission since, in her opinion, the appellant was nevertheless given a chance to defend himself. With all due respect, I do not buy into this argument by the learned State Attorney. I do hold that it was necessary for the appellant to be served with a copy of exhibit P3 because it is the same that implicated him with the offence. I do not want to sound speculative but it goes without saying that had the accused been saved with a copy of the statement of the complainant, he could use it to prepare his defence. I hold that this irregularity is fatal as it is tantamount to violation of the appellant's right to fair trial.

All said and done, I find these grounds of capable of disposing off the appeal on merit. To this end, I allow this appeal in its entirety. The conviction of the appellant is hereby quashed and the sentence of thirty years' imprisonment is set aside. The appellant is to be released forthwith from prison, unless otherwise lawfully held.



E.I. LATAIKA

JUDGE

1/12/2021