

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF BUKOBA  
AT BUKOBA**

**CRIMINAL APPEAL NO. 09 OF 2021**

*(Originating from Karagwe District Court in Criminal Case No. 53 of 2017)*

**ALID PAUL.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*26<sup>th</sup> November & 03<sup>rd</sup> December 2021*

***Kilekamajenga, J.***

At the District Court of Karagwe, the appellant was charged with three counts namely, armed robbery contrary to section 287A of the Penal Code, Cap. 16 RE 2019; Kidnapping or abduction with intent to harm contrary to section 250 of the Penal Code, Cap. 16 RE 2019; and unlawful entry into the game reserve contrary to section 15(1) and (2) of the Wildlife conservation Act, No. 5 of 2009. It is alleged that, the appellant together with other persons, abducted PW1 (Daniel David) who was sleeping at his kraal on guard to his cattle. After the abduction, the victim was taken to Burigi game reserve where the abductors demanded a huge amount of money from the victim's relatives. In fear of losing their loved one, the victim's relatives agreed to pay Tshs. 4,000,000/= for the victim to be set free. However, a snare was devised to arrest the abductors at the point of giving the money. Finally, the appellant was arrested in the game reserve at a point identified for receiving the demanded amount of money.

During the trial, the prosecution had five witnesses to prove the case to the required standard. For the purposes of re-evaluating the evidence, I take the opportunity to recap the evidence adduced during the trial. PW1 who was the victim of the alleged abduction, knew the accused person. He recalled to have been abducted on the night on 20<sup>th</sup> February 2017 at his kraal. The appellant who was accompanied with other persons abducted PW1, beat him and they demanded Tshs. 12,000,000/=. He was later rescued by the game officers while in the game reserve.

PW2, who was the relative of the victim, received a call from the victim who informed him about the abduction and that the abductors needed Tshs. 12,000,000/=. PW2 informed the abductors that he was ready to pay Tshs. 8,000,000/=. He (PW2) was directed to a point where he could deliver the money. On the way to the point of delivering the money, he met the game officers; he informed them about the incident, they escorted PW2 to that point where they found the appellant who started running away. The appellant was arrested; he took PW2 and the game officers to the place where they held the appellant. They found the victim handcuffed and held in the cave. Later, the police from Karagwe were informed and came to fetch the appellant.

PW3 was the Ward Executive Officer who recorded the appellant's confession. PW4 (D/CPL Kengele) recorded the appellant's caution statement who admitted

to have participated in the abduction of PW1. PW5 was the game reserve officer who patrolled in the game reserve. He testified that on 22<sup>nd</sup> February 2017 during the patrol, he met two people riding a motorcycle. He stopped them and asked them why they were in the game reserve without permission. In response, they told him about their relative who was kidnapped two days ago and they had reported the incident at Kayanga police station. Therefore, they were in the forest searching for their kidnapped relative. These two persons told PW5 about the point they were supposed to deliver the money. PW5 together with other person went and surrounded that point and arrested the appellant. The appellant agreed to lead them to the place where the victim was held. PW5 found the appellant with a Nokia Mobile Phone which was used to communicate with the victim's relatives which was tendered as an exhibit during the trial.

In his defence, the appellant simply denied being involved in the abduction. He further alleged that he was found in the game reserve where he was looking for his boss's lost cows.

After the full trial of the case, the appellant was finally convicted and sentenced to serve thirty years in prison for the 1<sup>st</sup> count; ten years for the 2<sup>nd</sup> count and three years for the 3<sup>rd</sup> count. Aggrieved with the decision of the trial court, he appealed to this court armed with three grounds of appeal coached thus:

1. *The Magistrate erred in law by convicting the appellant basing on the evidence of visual identification which not proved beyond reasonable doubt.*
2. *That, the magistrate erred in law and fact to convict the appellant while the prosecution did not prove their case to the required standard by law.*

The appellant also filed seven additional grounds of appeal as follows:

1. *That, the trial magistrate did wrong to convict and sentence the appellant basing on tendered exhibit (mobile phone and clothes) P3 while no seizure certificate tendered to prove that were seized from accused (appellant).*
2. *That, trial Court did wrong to convict the accused (appellant) basing on exhibit P3 while now here the victim proved his ownership to those properties neither by sale agreement nor by receipts.*
3. *That, trial Court erred in law and facts to convict the accused (appellant) on offence of armed robbery while prosecution failed to prove the ingredients of the offence as they failed to tender the weapons used in commission of offence or even the money purported to be stolen from the victim.*
4. *That, trial Magistrate did wrong to convict the accused relying in caution statement taken and tendered in Court un-procedural by the police officer who was involved in arresting, investigations and down the statement unlawfully as required by laws.*
5. *That, trial Court erred in law to convict and sentence the appellant basing on confession statement taken un-procedural.*
6. *That, trial Court did wrong to convict the accused (appellant) basing on fact that the victim was armed by astick and taken to hospital while no prove neither by tendering PF3 nor by doctor's expertisim testimony in Court.*

*7. That, trial Court did wrong to convict and sentence the appellant basing on visual identification at night, unproved by prosecution.*

When the parties appeared to argue the appeal, the appellant appeared in person and without representation whereas the learned advocate, Mr. Joseph Mwakasege appeared for the respondent, the Republic. In his oral submission, the appellant argued that the trial court erred in relying on exhibit 3,4 and 5 while there was no certificate of seizure and the exhibits were not listed during preliminary hearing. He further argued that, he was accused of abducting the victim using a stick but such a stick was not tendered as exhibit. Also, during the interrogation before the police, he was not informed of his rights and that he was forced to confess. He also queried the act of taking him to the Ward Executive Officer for recording the extra-judicial statement while leaving behind the nearest Primary Court. He further argued that, the extra judicial statement and caution statement was not read in court after admission. Furthermore, the victim failed to indicate how he recognised the appellant during the night.

In response, the learned State Attorney was of the view that the trial court was correct in sentencing and convicting the appellant because the prosecution proved its case beyond reasonable doubt. On the issue of lack of certificate of seizure, it was Mwakasege's submission that, the appellant was arrested by the game officers who also seized some of exhibits; the police who came later could

not have issued the certificate of seizure. Also, it is not mandatory to list the exhibits during preliminary hearing. As evidence proved that the victim was abducted, there was no need to tender the weapon used during the abduction. The learned State Attorney conceded to the fault that the caution statement was admitted but not read in court; he however urged the court to consider the remaining evidence even after the expulsion of caution statement from the record of the trial court. He referred the court to the case of **Robinson Mwanjisi and 3 others v. R [2003] TLR 218**. However, while the caution statement was not read the extra-judicial statement was admitted and read in court. Mr. Mwakasege argued that the distance from the police to the office of the Ward Executive Officer does not affect the extra judicial statement and therefore devoid of merit. Also, failure to tender the victim's PF3 did not fault the prosecution's case because so far expert's evidence does not bind the court.

On the issue of identification, the victim was abducted at night; he stayed with the appellant from 20<sup>th</sup> February 2017 until on 22<sup>nd</sup> February 2017 when the appellant was finally arrested. Therefore, the victim identified the appellant. Generally, the defence failed to shake the prosecution's case and this appeal is devoid of merit.

When rejoining, the appellant urged the court to consider the grounds of appeal and make the decision.

In determining the instant appeal, the major issue for determination is whether the prosecution proved its case to the required standard. This principle of law is provided under **section 3 (2) (a) of the Evidence Act, Cap. 6 RE 2002** where it provides:

*'A fact is said to be proved when—*

*(a) in criminal matters, except where any statute or other law provides otherwise, the court is satisfied by the **prosecution beyond reasonable doubt** that the fact exists;'*

This position of the law is amplified in a number of cases including the case of **Haji Ally Nkane v. R, Criminal Appeal No. 21 of 2007**, CAT at Mtwara (unreported). For instance in the case of **Hemed v. Republic [1987] TLR 117** the Court held that:

*'...in criminal cases the standard of proof is beyond reasonable doubt.*

*Where the onus shifts to the accused it is on a balance or probabilities.'*

In this case, on the second count, as already stated above, the evidence of the five prosecution witnesses pointed towards the fact that the appellant abducted PW1 and took him to the game reserve and demanded some money. The prosecution evidence leaves no any doubt that the appellant, in one way or the other, was involved in the abduction of PW1. The prosecution evidence shows that, after the arrest of the appellant in the game reserve where he was waiting for the money at an agreed point, he led the game officers to the cave where

the victim was held. Thereafter, the appellant was taken to the police where he confessed to participate in the abduction of PW1. He was also taken to the Ward Executive Officer for an extra-judicial statement where he also confessed to commit the offence of abduction PW1. Though the caution statement was not read in court and therefore suffers the consequences of being expunged from the record of the trial court, the extra-judicial statement was read in court and it is further corroborated with oral evidence from the prosecution witnesses. On the second count, the prosecution evidence is strong against the appellant.

On the third count, there is no doubt that the appellant was found in the game reserve waiting for the money. Entry into the game reserve without authorisation is an offence by itself unless it is proved that the appellant was just travelling through the game reserve. On this count I also find strong evidence proving that he, actually, entered into the game reserve unlawfully.

On the first count, there is dearth of evidence proving that the appellant committed the offence of armed robbery. For clarity, I wish to reproduce section 287A of the Penal Code under which the appellant was charged. The section provides:

*287A. A person who steals anything, and at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or immediately before or after stealing uses or threatens to use violence to any person in order to obtain or retain the stolen property,*



*commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a term of not less than thirty years with or without corporal punishment.*

The above provision of the law has two important elements for the offence of armed robbery to stand. **First**, there must be stealing of any property capable of being stolen. **Second**, the accused, during the time of stealing, he/she must be armed with any dangerous or offensive weapon or instrument. **Third**, the accused, before or after the act of stealing, threatens to use violence in order to retain or obtain the stolen property. In the instant case, the evidence adduced before the trial court did not prove whether the appellant did actually steal Tshs. 742,000/=. Though PW1 stated that the appellant took that amount of money before the abduction, it is only the evidence of PW1 that mentions that amount of money. At the time when PW1 was abducted, he was found with other two persons who were however not called for the testimony. Therefore, there is shaky evidence whether the appellant stole money before or after the abduction. This being a criminal case which demands a higher standard of proof, there was need to provide sufficient evidence on whether the appellant stole the money from PW1 while armed.

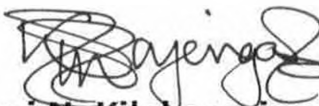
On the issue of identification as argued by the appellant, this court should not be detained by an obvious point because the victim (PW1) was abducted at night. The appellant stayed with the victim for almost two days until the time when the

victim was rescued by the game officers at day time. Therefore, the victim had an ample time to see the appellant who was also known to him even before the abduction. In conclusion, the first count was not proved to the required standard whereas the 2<sup>nd</sup> and 3<sup>rd</sup> counts were proved beyond reasonable doubt. I partly allow the appeal and set aside the conviction and sentence of thirty years passed against the appellant on the 1<sup>st</sup> count. I however, I uphold the conviction and sentence of ten (10) years and 3 three years for the 2<sup>nd</sup> and 3<sup>rd</sup> counts. The sentences should run concurrently from the date when the appellant was sentenced by the trial court. It is so ordered.

**DATED at BUKOBA** this 03<sup>rd</sup> day of December, 2021.




**Court:**

  
**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**03/12/2021**

Judgment delivered this 03<sup>rd</sup> December 2021 in the presence of the appellant present in person and the learned State Attorney, Mr. Joseph Mwakasege.



  
**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**03/12/2021**