

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

AT BUKOBA

CRIMINAL APPEAL No. 24 OF 2022

(Arising from RM. Criminal Case No. 51 of 2022 of the Resident Magistrate's Court of Bukoba at Bukoba)

YASIRI HARUNA----- APPELLANT

VERSUS

THE REPUBLIC----- RESPONDENT

JUDGMENT

Date of Judgment: 08.07.2022

A.Y. Mwenda, J.

Before the Resident Magistrate Court of Kagera at Bukoba, the appellant stood charged for armed robbery C/S 287A of the Penal Code, [Cap. 16 R.E 2019]. It was alleged that on 22nd day of February 2022 during night hours at Bubale Village within Misenyi District in Kagera Region the appellant stole a motor cycle with Reg. No. MC 943 Cx2 from one Anord Laurent Laurean @ Sekibula and immediately before such stealing he stabbed the victim with a knife in order to obtain the said motorcycle.

When the charge was read over to the appellant before the trial court, he pleaded not guilty. As a result the prosecution's side was called to prove its case. Four witnesses were lined up and one documentary exhibit, the victim's PF-3 was

tendered in court. When the prosecution's side closed its case, the appellant defended his case by calling three witnesses.

Having analyzed the evidence, the trial court was satisfied that the prosecution's case was proved beyond reasonable doubts. The appellant was thus convicted and sentenced to serve a term of 30 years jail imprisonment.

Aggrieved by the conviction meted against him, the appellant through the services of Mr. Mswadiq, learned counsel lodged this appeal with twelve (12) grounds. At the hearing of this appeal the appellant was represented by Mr. Muswadiq while the respondent republic was represented by Mr. Emmanuel Kahigi, learned State Attorney.

When invited to make submission in support of grounds of appeal, Mr. Muswadiq informed the court that he was going to argue the 1st and 3rd grounds of appeal together, the 4th, 5th, 6th and 9th grounds of appeal together, and 2nd and 10th ground of appeal together. As for the 7th and 11th grounds he informed the court that he was going to argue them separately. With regard to the 1st and 3rd grounds of appeal Mr. Muswadiq submitted that in criminal jurisprudence, it is the duty of the prosecution's side to prove its case beyond reasonable doubt. He said PW1's (the victim's) evidence is doubtful when compared to that of PW2, PW3 and PW4. He said while the victim (PW1) testified that at the scene of crime he was beaten until he became unconscious and regained consciousness while already at the

hospital, PW2 testified that when he heard the news on what befell the victim (PW1), he went to his homestead where he found him sleeping, and took him to hospital and that while along the way to the hospital the victim informed him (PW2) that he was attacked by the appellant and one person going by the name of Dali S/O ?. The learned advocate said if the victim lost consciousness, how then did he manage to communicate with PW2?. He was of the view that with the said doubt the same should be resolved in favour of the appellant.

With regard to the 4th, 5th, 6th and 9th grounds of appeal the learned counsel for the appellant submitted that the incident took place at night and the victim did not state conditions which favored identification of his assailants. He said the principles advanced in the case of Waziri Amani vs. Republic [1980] TLR 250 regarding identification at night were not met as he failed to describe the intensity of the source of light (moonlight).

With regard to 11th ground of appeal the learned counsel for the appellant submitted that the trial magistrate erred when he concluded that along the way the so called Dali S/O ? was communicating with the appellant while there was no proof of the print out from mobile service companies. According to him this gap weakened the prosecution's case.

With regard to the 7th ground of appeal, the learned counsel for the appellant submitted that the appellant's defence was not considered by the trial court. He

said DW1 (the appellant) testified that during the night in question he was at his home sleeping with his wife and to support his point he called DW2 (his wife). He said, the trial court concentrated in analyzing the prosecution's evidence only which is fatal and as a result it vitiates the whole proceedings. He supported this point by citing the case of LEONARD MWANASHOKA VS. REPUBLIC TLS [2016] CA.

In conclusion the learned counsel for the appellant prayed this appeal to be allowed, conviction to be quashed and sentence meted by trial court to be set aside.

In reply to the submission by Mr. Muswadiq, Mr. Emmanuel Kahigi, learned State Attorney submitted that the Respondent Republic supports the appeal. He said he subscribes to what was submitted by the counsel for the appellant. He however informed the court that his argument will center in the 1st and 5th grounds of appeal as they are capable of disposing this appeal.

The learned State Attorney submitted that the incident occurred at night, and the principles regarding identification at night ought to be considered by the trial court. He said, during hearing before the trial court, the victim said he identified his assailants through the help of moonlight but failed to describe its intensity and the time spent during the fracas and according to him the prosecution's case was shaken. He thus prayed this appeal to be allowed.

I have examined the records, the grounds of appeal advanced by the appellant and arguments by the learned counsels of both parties, and the issue is whether the present appeal is meritorious.

From the trial court's records it clear that the incident occurred at night. The victim who testified as PW1 said a person going by the name Dali S/O ? (who was not arrested), hired him with a view to ferrying fire woods from Kasamoya village to Mashule by using his motorcycle (bodaboda). On their way and upon reaching at Kiburara village, (at around 00:00hours) they stopped as the said Dali S/O ? wanted to ease himself from the call of nature. Suddenly the said Dali S/O ? attacked him and stabbed him with a knife. He said while the fracas was going on, another person came from the bushes and hit him on the back of the neck. He said, he identified that other person as the present appellant and he did so by the help of moonlight. He said, after being hit on the back of the head he became unconscious.

It is trite law that the evidence of identification at night is one of the weakest kind and the same cannot be considered unless conditions for mistaken identify are cleared. In the case of WAZIRI AMANI VS. THE REPUBLIC [1980] TLR 250 it was held inter alia that:

"It is now settled that the evidence of identification is the weakest kind of evidence and the courts of law should

not rely on it unless it is satisfied that it is water tight. Particularly, one must consider conditions such as the time spent in observations, distance between the assailants and the identifier, source and brightness of light as well as whether there was impediments at the scene of crime or not."

While applying the principle regarding visual identification as stated in the case of WAZIRI AMANI VS. Republic [SUPRA] the court of appeal in the case of JUMA MARWA AND TWO OTHERS VS. THE REPUBLIC CRIMINAL APPEAL NO. 91 OF 2006, the court of held that;

"...it is elementary that in criminal case where determination depends essentially on identification, the evidence on conditions favouring a correct identification is of the ut most importance"

In the present case, the victim did not describe the brightness of the source of light which is the moonlight. Also, he did not state if he knew the appellant before and again he failed to state the time he spent in observing his assailant. On top of that there is also a likelihood that the victim did not see the second assailant whom he purported to come from the bushes while he was already under attack by one Dali S/O?. This is so because according to the victim, the 2nd attacker came from


the bushes and hit him at the back of his neck. This entail the said 2nd attacker came from his behind. Again after he was hit on the back of the head he said he became unconscious, which means if at all he saw him (which he did not) then it was in a very short span of time.

From the foregoing analysis, this court is of the view that the conditions at the scene of crime did not favour correct identification. Since this ground is capable of disposing this appeal, I find no reasons to discuss the remaining grounds of appeal.

This appeal therefore succeeds by quashing conviction against the appellant. The sentence imposed against the appellant is hereby set aside. The appellant should be released from prison unless he is otherwise lawfully held.

It is so ordered.




A.Y. Mwenda

Judge

08.07.2022

Judgment delivered in chamber under the seal of this court in the presence of Mr. Muswadiq learned counsel for the Appellant and in the presence of Mr. Emmanuel Kahigi learned State Attorney for the Respondent.




A.Y. Mwenda

Judge

08.07.2022