

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

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 14 OF 2022

*(Originating from the decision of the District Court of Bagamoyo at Msoga in
Criminal Case No. 197 of 2020)*

SAHAU KONDO DIGALO APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of last order: 11/07/2022

Date of Judgement: 13/07/2022

JUDGEMENT

MGONYA, J.

The Appellant herein **SAHAU s/o KONDO @ DIGALO** before the District Court of Bagamoyo at Msoga was charged and convicted of **Armed Robbery c/s 287 (A) of the Penal Code, Cap. 16 [R.E. 2002]** and sentenced to serve **thirty (30) years imprisonment**. The appeal is against both conviction and sentence on the following grounds:

- 1. That, the learned trial Magistrate erred in law and fact by convicting the appellant relying on an incurably defective charge sheet ;***

- (i) The name of the person (s) threatened was not mentioned in the particular of offence; and***
- (ii) There is a variance between the items stolen listed on the charge sheet and evidence on record.***

2. That, the learned trial Magistrate erred in law and fact by convicting the appellant relying on the incredible unreliable visual convicting the appellant relying on the incredible unreliable visual identification of PW1 and PW3;

- (i) They failed to state the types of light (bulb, fluorescent tube). Its intensity, its position at scene of crime and size of area the same illuminated were during the incident to the person they first reported the crime to; and***
- (ii) There was variance between PW1 and PW3 regarding the number of bandits that they allege entered into their premises.***

3. That, the learned trial Magistrate erred in law and fact by convicting the appellant in a case where an identification parade wasn't conducted against the appellant taking into consideration PW1 and PW3 were not familiar with him;

- 4. That, the learned trial Magistrate erred in law and fact by convicting the appellant in a case where there was not oral or documentary evidence to show the seizure, transfer, handling and safe storage of Exhibit P1 collectively before tendering the same in court;***
- 5. That, the learned trial Magistrate erred in law and fact by convicting the appellant relying on the incredible and implausible evidence of PW2 as there is no evidence on record to show that he had received any prior information from PW1 or any other source regarding the alleged incident that took place so as to link the appellant with the said offence at the time of arrest and neither is there any evidence to show PW1 was the only person owning a shop in the area in order for him to link the alleged vouchers found on the appellant to PW1[; and***
- 6. That, the learned trial Magistrate erred in law and fact by convicting the appellant in a case that the prosecution failed to prove beyond reasonable doubt.***

From the above grounds of appeal, the Appellant prays that this Honourable Court allow the appeal, quash the conviction, set aside sentence and acquit him.

When the matter was called for hearing, the Appellant appeared in person and prayed the court to consider his grounds of Appeal as they have been presented before the court.

The Respondent was represented by **Ms. Rehema Mgimba** learned State Attorney, submitted that the grounds of appeal have merits as during trial Prosecution failed to prove their case beyond reasonable doubt. It is the Respondent's Counsel position that the identification of the Appellant was not done properly, hence was contrary to law. It was submitted that, the evidence adduced by PW1 and PW3 who were eye witnesses' states only to know the Accused without further description and there is no record on ID parade for identification to clear the doubt.

Further, the Respondent's counsel submitted on the **second ground of appeal** that the stolen property was common properties (Airtel vouchers), while during the admission in trial court, no certificate of seizure of said properties was produced, hence contrary to **section 38(3) of Criminal Procedure Act, Cap. 20 [R. E. 2019]**.

On the **last ground** that the stolen items were not differentiated from other vouchers, it is the Respondent's Counsel concern that the law requires that the properties which are in dispute or said to be stolen items, they must have description of special mark to be identified.

From the above submissions, the Respondent's counsel conceded that the case was not proved beyond reasonable doubt.

I have carefully gone through both parties' submissions being for and against the instant appeal, though the Respondent's counsel conceded the Appellant's grounds of appeal. Hence the main issue here is to whether the Appeal has merit.

In determining the **first ground of appeal**, that, the accused's identification was not done properly, the record on **page 9** of the trial court typed proceedings shows that the PW1 stated that he has lump on his corridor which was on for twenty-four hours. On the same line, the PW3 stated that the bandits did light up the lump, the PW1 and PW3 did not explained further the intensity of the light of the said lump. Further, it was further testified that, for some time, some of bandits were inside the house when PW3 was taken outside to open the shop for stealing. In that situation, it is not clear how PW1 and PW3 were concentrated and able to identify the Appellant from among the group of thieves without further explanation.

It is undeniable fact that the identification of the appellants at the time of the incident was primarily based on the visual identification of PW1 and PW3 as were the only witnesses who saw and identified the appellants at the scene of crime. It is trite

principle of law that evidence of visual identification is of the weakest kind and most unreliable which should only be acted upon cautiously when the court is satisfied that the evidence is watertight and that all possibilities of mistaken identity are eliminated. This was stated in the case of ***AMANI WAZIRI V R (1980) TLR 250***. Having taken the view of the matter along the line indicated above, it is my firm view that the prosecution failed to identify the Appellant at the scene of crime, hence **the ground of appeal is meritorious.**

I had also an opportunity of going through the records of the trial court, regarding the **second ground of appeal** as submitted by the Respondent's counsel that the stolen property was common properties and there was no certificate of seizure admitted in the trial court. From the record it showed that the event happened at 04:00 hours, and the Appellant was arrested at shamba area by the assistance of PW2 civilian who had no knowledge of issuing a certificate and signing the same. The said kind of arrest and the place where the Appellant was arrested did not suffice the issuance of certificate, hence the circumstance proved that there was no said contravention of the Law under **section 38 (3) of Criminal Procedure Act. This ground of appeal is founded properly.**

In determining the **last ground of appeal**, I had an opportunity too to peruse the records of the trial court, and found at **page 10** of typed proceedings that the Prosecution failed to differentiate the stolen goods from other goods. I am of the firm view that the procedure requires the witness to describes the items before he showed and admit that were those described, hence following the prayer to admit the same before the court. The said failure on the description of special mark or peculiarity to identify from others led to fatal for want of procedural irregularity. Upon the fall of prosecution evidence, then the **ground of appeal is properly founded**.

In the event therefore, **the Appeal is hereby allowed**. The **Sentence of 30 years' imprisonment is set aside, the conviction is quashed and the Appellant is hereby released forthwith unless otherwise lawfully held**.

It is so ordered.



L. E. MGONYA

JUDGE

13/07/2022

Court:

Judgement delivered in chamber in the presence of Ms. Sophia Bimbija State Attorney for the Respondent in the presence of the Appellant in person; and Mr. Richard RMA on this 13th day of July, 2022.



A handwritten signature in blue ink, appearing to read "L. E. Mgonya", is written above the printed name.

L. E. MGONYA

JUDGE

13/7/2022