

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CRIMINAL APPEAL NO.50 OF 2022**

*(Appeal from the decision of the District Court of Ilala at Samora Avenue dated 29<sup>th</sup> August, 2022 Hon. W.S. Luhwago, RM in Criminal Case No. 274 of 2016)*

**SHARIFU S/O SHABANI @ SALEHE.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 29/09/2022*

*Date of Judgment: 5/10/2022*

**POMO, J**

The Appellant, together with other two persons who are not party to this appeal, were arraigned before Ilala District Court (the trial court) faced with the charge of Armed Robbery contrary to section 287A of the Penal Code [CAP 16 R.E.2002]. It was the particulars of the charge that, on 16<sup>th</sup>

day of September, 2016 at Buguruni ghana near alhamaza area within Ilala District in Dar es Salaam region, did jointly and together steal one radio call the property of one Tanzania Police Force, two mobile make LG and Sumsung worth Tshs. 310,000/-, identity card and cash money Tshs 40,000/- the properties of WP 2822 SGT ROSE MJEMA and before and immediately after such stealing did threaten **WP 2822 SGT ROSE MJEMA** with knife in order to obtain and retain the said stolen properties.

The appellant denied the charge as such the respondent republic paraded witnesses in court to testify in proving the charge. In its judgment which was delivered on 29/08/2018 the court was satisfied with the prosecution evidence hence the appellant was found guilty of the offence charged henceforth convicted and sentenced to serve thirty (30) years jail sentence while the rest co-accused were acquitted for lack of evidence. It is this conviction and sentence which aggrieved the appellant to file this appeal containing nine grounds of appeal. The grounds of appeal as hereby reproduced in the manner they stand presented: -

- 1. That the judgment of the trial court is null and void for lack of analysis and evaluation of the evidence recorded from both side i.e. prosecution*

*and defence evidence hence failure to show factual and point of law determined to reach its conclusion contrary to the procedural law*

- 2. That the learned trial magistrate erred in both law and fact to convict the appellant relying on dock identification of PW1 to the appellant for failure to conduct an identification parade to prove whether or not PW1 identified the Appellant at the scene of crime which is contrary to the law.*
- 3. That the learned trial magistrate erred in both law and fact to convict the appellant based on exhibit P1 the alleged stolen properties which were alleged to be recovered by PW2, PW4 and PW3 who witnessed the recovery but they didn't identify them in court to prove if are the same properties recovered at Malapa cemetery.*
- 4. That the learned trial magistrate erred in both law and fact by failing to give the appellant a chance to cross-examine PW4 over his evidence in chief after the ruling of the inquiry which is contrary to the law.*
- 5. That the learned trial magistrate erred in both law and fact by convicting the appellant based on incredible, tenuous, contradictory and uncorroborated evidence of prosecution witnesses.*
- 6. That the learned trial magistrate erred in both law and fact misdirected himself by concluding in his judgment that the appellant never disputed the testimonies of witnesses through cross-examination but the appellant cross-examined the witnesses as required by the law.*

197

7. *That the learned trial magistrate erred in both law and fact when he admitted exhibit P1 collectively without exhibit being tendered by the witness.*
8. *That the learned trial magistrate erred in both law and fact by convicting the appellant with a case that was not proved to the hilt.*
9. *That the learned trial magistrate erred in both law and fact by convicting the appellant based on Exhibit P1 which chain of custody was broken as no explanation was given as to how they went back to the hands of PW1 the alleged owner.*

When this appeal came for hearing on the Appellant appeared in court unrepresented while the respondent republic was represented by M/S Helen Moshi, the learned Senior State Attorney. The Appellant allowed the Respondent republic to begin arguing the appeal while reserving his right to rejoin

In arguing the appeal, the learned senior state attorney, supported the appeal and thereafter she advanced reasons as to why supporting the appeal. She submitted as follows: -

One, there was no identification parade in identifying the accused (the Appellant) carried out in accordance to the law and laid down procedures.

*10/11*

PW1 failed to give description of the appellant. No explanation that PW1 is familiar with the Appellant. PW1 didn't even make dock identification.

Two, exhibit P1 was tendered by PW1 **WP 2822 SGT ROSE MJEMA** the witness who only testified that her bag had only radio call, key for the car, driving license, cash Tsh 40,000/- and a cloth commonly known as khanga. These items were stated without mentioning/stating their special marks and descriptions.

Also, the items received as exhibits were un-procedurally received by the court as the trial court proceedings is silent as to who asked them to be tendered as exhibits in court.

In her further submission, she argued that the items so mentioned were seized by **PW2 F.6449 DC Francis** in presence of **PW4 G.766 DC Mateso**. These witnesses were called in court but didn't identify those items though they had a duty to identify them. Such failure to identify the items, according to her, created doubt as to whether the appellant is the one who was met with the items.

Submitting on the contradiction of evidence raised s ground of appeal, M/S Helen argued that while **PW2 F.6449 DC Francis** testified to have

managed to get the radio call, two cellular phone but failed to retrieve money because the appellant had already used them , referred the court to page 17 paragraph 4 line 3 & 4 of the typed proceedings, but looking at page 19 line 4 **PW3 JAMES KALINGA** testified to have only identified the Card, two cellular phone and Tsh 26,000/-. The two witnesses created contradictions in their testimonies as to the money

In her further submission, she argued that yet there are contradiction to the items/properties seized. PW1 testified the stolen properties to be police radio call; two handset Samsung; key for the car and driving license. These are the properties tendered after the alleged seizure. BUT, PW2 testified on items which were not tendered in court. These are bank cards, which is not among the items mentioned by PW1 and is not part of the exhibits in court. Also, PW1 tendered in court things/items which PW2 never mentioned them. PW2 never mentioned the car key neither a driving license. These contradictions bring confusion as to what was seized from the appellant. She concluded by submitting that such evidence raises doubt as such the appeal be allowed.

191

When the Appellant was asked to respond, being a lay person, had nothing usefully to contribute. He prayed to the court his appeal be allowed.

Having heard the submissions by the learned senior state attorney, this court, keenly, have gone through the trial court records and noted that what is submitted by the learned senior state attorney is a true reflection on the trial court records. The charge to which the appellant was arraigned before the court is in total variance to the evidence adduced. The charge sheet the Appellant face reads thus

"STATEMENT OF OFFENCE

*AMRMED ROBBERY: Contrary to section 287A of the Penal Code [Cap 16 R.E. 2002]*

PARTICULARS OF OFFENCE

*SHARIFU SHABAN @SALEHE and FIKIRI ABDALLA @ MNYANGE, on the 10<sup>th</sup> day of September, 2016 at Buguruni ghana near alhamaza area within Ilala District in Dar es Salaam region, did jointly and together steal one radio call the property of one Tanzania Police Force, two mobile make LG and Sumsung worth Tshs. 310,000/-, identity card and cash money Tshs 40,000/- the properties of WP 2822 SGT ROSE*

18/1

*MJEMA and before and immediately after such stealing did threaten  
**WP 2822 SGT ROSE MJEMA** with knife in order to obtain and retain  
the said stolen properties”*

As pointed out by the learned senior state attorney, the standards of identifying the accused were not met, no strong evidence were led to support the charge, unprocedural admission of exhibits is apparent in the court proceedings and lastly the witnesses testimonies and evidence contradicts and more so at variance with the charge sheet. The Court of appeal in **Jaffary Ntabita @ Nkolanigwa vs R, Criminal Appeal No.270 of 2016 CAT at Tabora (unreported)** at pp. 8 – 9 had this to state: -

*“It is important for the republic to lead evidence showing exactly the date the victim was raped. **The rationale is that when a specific date of the commission of the offence is mentioned in the charge sheet, the defence case is prepared and built on the bases of that specific date.***

*In Anania Turian (supra) the Court making reference to Christopher Maingu Vs Republic, Criminal Appeal No. 222 of 2004 (unreported) stated thus:*

10/1



*"If there is variation in the dates then the charge must be amended forthwith and the accused explained of his right to require the witnesses who have testified be recalled. **If this is not done, the preferred charge will remain unproved and the accused shall be entitled to an acquittal as a matter of right, short of that, a failure of justice will occur.**"*

It is on the basis of what is alluded above, this court finds that it was wrong for the trial court to convict the appellant on the charge which was not proved beyond reasonable doubt. As pointed out by the learned senior state attorney, doubts are many and have to be resolved in favour of the appellant.

That said, the appeal is hereby allowed. The trial court judgment and sentence meted to the Appellant are hereby quashed and set aside.

In the event, this court orders the Appellant be released from custody with immediate effect unless is otherwise lawfully held.

It is so ordered

Right of Appeal explained

Dated at Dar es Salaam this 5<sup>th</sup> day of October, 2022



A handwritten signature in blue ink, appearing to be "M.K. Pomo".

**Musa K. Pomo**

**Judge**

This Judgment is delivered on this 5<sup>th</sup> October, 2022 in presence of the Appellant and Florida Wencenslaus, the learned State Attorney, for the Respondent.

A handwritten signature in blue ink, appearing to be "M.K. Pomo".

**Musa K. Pomo**

**Judge**

**5/10/2022**

