

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

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 104 OF 2022

*(Appeal from the Decision of the District Court of Kigamboni in
Criminal Case No. 129 of 2019)*

YUNUS SELEMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

29th September & 07th October, 2022

BWEGOGGE, J.

The appellant herein above named was arraigned in the District Court of Kigamboni on a charge of armed robbery c/s 287A of the Penal Code [Cap. 16 R.E. 2019]. It was alleged by the prosecution that on 28th April, 2019, at Kimbiji Area within Kigamboni District, in Dar es Salaam City, the appellant herein had stolen cash Tshs. 17,000, the property of one Nelson Richard (henceforth the victim). And, it was alleged that immediately

before and after such stealing, the appellant herein did stab the victim with a knife to obtain and retain the said stolen properties.

The trial court, acting on the evidence adduced by the prosecution witnesses, found that the case was proved to the standard required in criminal proceedings, i.e., proof beyond sane doubts. The trial court had convicted the appellant and condemned him to languish in jail for thirty (30) years in prison. The appellant was aggrieved by the conviction and sentence and appealed to this court against both conviction and sentence.

In the first instance, the appellant had advanced five (5) grounds of appeal. In totality, the said grounds of appeal may be condensed to one ground of appeal that, the victim's injury was the aftermath of the brawling that arose in a contest for a call girl.

Later on, when this appeal was scheduled for hearing, the appellant had prayed this court to file supplementary grounds of appeal. This court had granted the prayer. The purported supplementary grounds of appeal, four (4) grounds in total, boil to two major grounds: First, the trial court had acted on the evidence of visual identification which didn't meet the scales of justice; Second, the prosecution case was marred by contradictions and discrepancies which rendered it too weak to ground his conviction. Since the supplementary grounds of appeal are substantially opposite to the

earlier version, this court shall dwell on the latter in the determination of this appeal.

The evidence brought by the prosecution and which was acted upon by the trial court largely emanates from the victim himself (PW2) and the investigator namely, WP 3864 (PW3). The prosecution case may be summarised as follows: On the fateful day of 28th April, 2019, the victim had spent considerable time drinking at GNB Bar, at Kimbiji – Kigamboni. He retired home at 00:00hrs. On his way home, he was stopped by a call girl, soon thereafter three men appeared, attacked him, and stole his money to the tune of Tshs. 17,000/= whereas the appellant herein had attacked him with a knife and fatally injured him on his back and head. He was left comatose to find himself at Kimbiji hospital later that day.

The victim had purported to have identified his assailants with the aid of light from the cement factory which was near the crime scene. The victim had mentioned his assailants namely, Yunus, the appellant herein, Kitale, and Juma. Following the identification given by the appellant, the suspects were arrested and the appellant herein and one Juma Hussein were prosecuted and eventually convicted and sentenced to suffer custodial sentence.

When the matter was brought for hearing, the appellant appeared in person and unrepresented. The respondent Republic was represented by Mr. Imani Nitume, State attorney. When the appellant was called upon to substantiate his grounds of appeal, he prayed for this court to act on his grounds of appeal as presented and afford him justice.

On the other hand, Mr. Nitume, from the outset, made it clear that he supports the appeal herein. The same had validated his opinion based on two premises: First, the medical practitioner who authored the medical report is not known. The same was recorded to have introduced himself as Clinical Officer. There is no record pertaining to his qualification to entitle him to examine the victim. More so, there is no record to indicate that the medical report was read in Court.

Second, the counsel reckoned that the supplementary grounds of appeal, all boil down to one ground of appeal to the effect that the evidence of identification was not proper to warrant the conviction of the appellant. That the victim had testified at the trial Court that he was returning home at midnight to find himself attacked, assaulted, and robbed by bandits. The purported source of light for identification is not well explained.

Further, the counsel submitted that the victim is recorded to have stated that he was familiar with the assailants, but there are no further particulars. The victim was returning home drunk but purported to have identified the offenders. And, PW3, the investigator, her testimony doesn't show whether she visited the crime scene to shed light on the setting thereof and clarify whether there was sufficient light to enable the identification of the offenders.

In concluding his submission, the counsel stated that PW3 had given contradictory evidence pertaining to what had transpired at the crime scene as PW3 acknowledged the fact that fracas had arisen at the crime scene with a sex worker at the epicentre. To his opinion, this fact indicates that there was something else apart from the alleged robbery. That, let alone the above contradictions, there are matters deposed by PW2 which contradict the evidence given by PW3. And, the Counsel opined that the trial court had acted on the weak evidence tabled by the prosecution.

Now, at this juncture, this court shall discuss the supplementary grounds of appeal simultaneously. The question is whether the evidence brought to the scales of justice was sufficient to ground conviction on the heinous charge of armed robbery levelled at the appellant

In criminal proceedings, it is a common ground that; the burden of proving the charge against the accused beyond reasonable doubts lies on the prosecution. Ignoring or forgetting this principle is said to be "*a peril not worth taking.*" See **Jonas Nkize v. Republic** [1992] TLR 213. In the same vein, there is no legal duty on the accused person to prove his innocence, save in a few exceptions such as where the accused advance the defence of insanity. See in this respect **Fakihi Ismail vs. Republic**, Criminal Appeal No. 146 "B" of 2017; [2019] TZCA 368. With regard to identification evidence, the law is well settled that the "*court should not act on evidence of visual identification unless all possibilities of mistaken identity are eliminated*" See **Waziri Armani v Republic** [1980] TLR 250. Likewise, it is a rule of law that "*it is not enough merely to look at factors favouring accurate identification, equally important is the credibility of witnesses.*" See **Jaribu Abdalla v. R.**, Criminal Appeal No. 220 of 1994 (unreported).

As aforesaid, the whole of the prosecution case at the trial court hangs on the thin thread of the testimonies of PW2 and PW3. It is common ground, that the appellant had consumed liquor for a considerable period of time before he retired home at midnight. This fact is ascertained by the testimony of the victim's friend namely, Brighton Sylvester (PW4), who

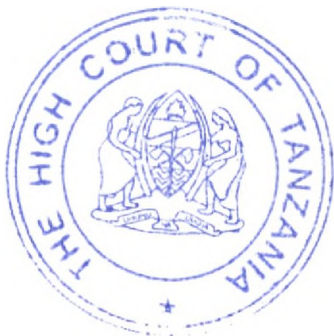
visited him at the hospital. He deponed to have found the victim at the hospital fatigued by the previous drinking. It is obvious that, let alone the wanting particulars as to the source and intensity of light at the crime scene, it is doubtful whether the victim was sane enough to have made a correct and reliable identification of his assailants. This court is on all fours with counsel for respondent Republic that the identification evidence given by the victim should not have been acted upon by the trial court to ground conviction.


Apart from the above observation, it cannot be discerned clearly that the victim had sustained the injury in course of the alleged armed robbery or brawling. The victim had deponed that he had been stopped by the call girl before he was attacked, robbed, and assaulted. PW3 had deponed in court clearly that the victim had made a statement before him, that before the alleged robbers attacked him, the sex worker had seduced him and he had accepted her services. This piece of evidence from PW3, coupled with the averment in the earlier version of the appellant's grounds of appeal that he fought the victim over a woman, leaves so much to be desired. This court finds substance in the supplementary grounds of appeal. It suffices to point out that the prosecution case left so many stones unturned. And this court can safely state that the prosecution case

was too weak to ground conviction for the heinous crime of armed robbery placed at the door of the appellant herein. The discussion above disposes both supplementary grounds of appeal advanced by the appellant herein

To sum up the above, this court finds the appeal preferred by the appellant herein with merit. This court is of the considered opinion that the prosecution case at the trial court was tainted by sane doubts. It could not procure conviction of the appellant herein for the alleged offence. The appeal is hereby allowed. The conviction and sentence imposed by the trial court are hereby quashed and set aside. The appellant is to be released from custody unless his freedom is otherwise lawfully assailed.

DATED at **DAR ES SALAAM** this 07th of October, 2022.




O. F. BWEGOGGE
JUDGE