

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT MORORGORO

CRIMINAL APPEAL NO. 108 OF 2021

*(Originating from Kilombero District Court in Criminal Case No 406 of
2020)*

Before Hon. L. O. KHAMSINI, SRM

Dated 27th MAY, 2021

SHAMTE OMARY@MIGOI@CIIIMBA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

last order: 20.09.2022

HASSAN, J

The appellant Shamte Omari@Migoi@ Chimba, was charged with Armed Robbery C/S 287A of the Penal Code [Cap 16 R.E 2019], he was convicted and sentenced to served 30 years imprisonment by Kilombero District Court in Criminal Case No. 406 of 2021 of which he now serves.

The particulars of the offence is that on the 21st day of November, 2020 at or about 20:00 hours at Kibaoni within Kilombero District in Morogoro Region did steal one motorcycle make Haojue with registration No. MC 352 CPW valued at Tshs. 2,350,000/=, one mobile phone makes

infinix valued at Tshs. 250,000/= and cash money Tshs.18,000/= . Altogether valued at Tshs. 2,618,000/= the property of Sixberth S/O Kachoko and immediately before such stealing you used wooden club to assault the said person for the purpose of obtaining the properties mentioned hereabove.

Being aggrieved by the decision, the appellant preferred this appeal. Thus, the appellant filed the petition of appeal on 26th day of June, 2021 which was grounded with ten grievances. Again, on 28th day of June, 2021 he filed another petition of appeal with 10 grievances to which, the court find them to be similar in its material contents except the date of filing. Merged into one, the grounds read as follows:

- 1. That, the Prosecution evidence is not strong enough to warrant conviction to the appellant as required by the law. Honourable Trial magistrate erred in law and upon facts by convicting appellant relying on tin collaborated evidence of PW1 one Sixbert Kachoko.*
- 2. That, no caution statements were taken from the accused person (now appellant) as required by the Law of which its refusal is fatal and goes to the root of the case. This leaves doubt as to whether appellant testified the same way as stated on the day he was*

arrested. This is voluntary negligence by prosecution which led to unfair conviction.

3. That, no object or instrument tendered before the Court to justify the allegations. This to say the prosecution story' leaves doubts to warrant.

4. That, DW1 informed the Court that I used to be bodaboda driver, my boss asked me to find the customer and since 10/08/2020 I advertised the selling of the said Motorcycle. PW1informed the Court that the robbery took place on 21/11/2020. Your Honour, there is variance of time of more than 3 months. The trial magistrate erred in reasoning.

5. That, appellant was not accorded enough time to call witnesses to disprove the charge. Since my boss (the owner of the Motorcycle that I was using for bodaboda purpose) was not aware of the case, the Court could involve its power to call him as independent witness. Despite my request Honorable Resident Magistrate did not consider it.

6. That, PW1 stated that he used to be a bodaboda driver on the fateful date of incident. He said he identified Appellant has a scar on left hand and that the matter happened during night. Your

Honour how can someone riding Motorcycle be able to identify marks on body of appellant? The Police Officers are the one who cooked this case against appellant and the trial Magistrate erred in reasoning.

7. That, PW1 stated that he got his Motorcycle but did not clarify as to whom or where he got back his Motorcycle which was stolen on the fateful day. All these irregularities leave doubts and affected appellant.

8. That, no search was conducted to find out whether there is anything that connect appellant with the offence charged.

9. That, PW1 informed the court that appellant was arrested by Ladislaus Chiwalanga (at page 5 of the proceedings). Your Lordship, the said witness who could have been competent to assist the court in judgement was not called. This creates doubts as to prove this case where by Honourable Resident Magistrate erred in her reasoning

10. That, PW1 informed the court that the Motorcycle stolen is Haojue black in colour registered MC 352 CPW but the same was not tendered before the court during the trial despite the fact that PW1 informed to have it back. Your Lordship, the Motorcycle 1

advertised for selling is Haojue red in colour second release which is very different from what prosecution alleged. Your Lordship appellant is very innocent in this case suffering punishment for offence not committed.

When appeal was called up for hearing on 30th September, 2022, the appellant was linked with court through video conferencing facility from Ukonga Prison unrepresented. On the other side, Mr. Edger Bantulaki, the Senior State Attorney who enter presence for Republic was in court linked together with appellant.

Arguing in support of his appeal, Mr. Shamte Omari @Migoi@ prays in general that, the Court should consider the reasons for his appeal as they have been lodged through petition of Appeal. He further submitted that, he trusts the court that will do justice, hence craved to the court to allow the appeal, quash conviction and set aside the sentence of 30 years imprisonment.

On the other side, Mr. Edger Bantulaki, the learned Senior State Attorney representing the respondent Republic. In his submission, he readily conceded that there were incurable errors in the evidence of prosecution at the trial court. In his submission, the learned Senior State Attorney preferred to submit only one ground out of ten. That is ground

number six which raise the issue of visual identification. On this ground he submitted that, the offence had happened on 21/11/2020 at 08:00 pm where according to Pw1, on that material day the appellant has rented his motorcycle with another man. He took them to Kibani Sec. School where they have asked to be dropped. On the way they stopped him and injured him by beating. He submitted further that PW1 was able to identify the appellant that he was among the two guys who had injured him and robbed his motorcycle. He was able to identified the appellant due to the light and moon.

To strengthen his submission the learned Senior State Attorney referred the court to the case of **Amani Waziri v. Republic, (1980) TLR, 250** which shows that the evidence of visual identification has to be water tight especially when offence occurred at night time. He went on submitting that PW1 failed to describe the source, intensity and the time used to observe the appellant. such kind of evidence is weak to prove identification. He finally concluded that, the argument was weak, since there is no any other witness who had been called to corroborate that evidence. And for this reason, and for the grounds which the appellant has lodged, he conceded that there was an error to convict the appellant. He prays to the court to quash the conviction and set aside the sentence meted in the subordinate court.

In his rejoinder, the Appellant concurred with submission fronted by Senior State Attorney and he did not have anything to add.

Even though this appeal is not resisted by the Republic, I am certain that conceding to the Appeal by the Republic is not automatic for the Court to share the same. An extra effort needs to be taken with a view to ascertain the position. That being the case, I find it important to peruse what was actually transpired during Trial.

My perusal of the record of proceeding and judgment led me to the conclusion that, the visual identification have not met the standards set out in our law. Advancing from **Waziri Amani's case** (Supra) the law is well settled on the significance of visual identification and conditions for relying upon it and for a court to find conviction. Decisions of this Court have held that such evidence should not be relied upon unless the court is satisfied that the evidence is watertight and all possibilities of mistaken identity are eliminated see also the case of **Emmanuel Luka and Others vs Republic**, Criminal Appeal No. 325 of 2010, **Omari Iddi Mbezi and 3 Others vs Republic**, Criminal Appeal No. 227 of 2009 and **Taiko Lengei vs Republic**, Criminal Appeal No. 131 of 2014 (All unreported). In the case of **Waziri Amani vs Republic** (supra), it laid down some guidelines for consideration in

establishing whether the evidence of identification is impeccable. These include;

- *the time the culprit was under the witness observation,*
- *witness's proximity to the culprit when the observation was made,*
- *the duration the offence was committed,*
- *if the offence was committed in the night time,*
- *sufficiency of the lighting to facilitate positive identification,*
- *whether the witness knew or had seen the culprit before the incident and description of the culprit.*

Adding to that, In the case of **Kasim Said and Two Others v. Republic, Criminal Appeal No. 208 of 2013 CAT Arusha (Unreported)**, the appellant averred that the question of Identification was unclear to him. Addressing the matter, the Court had the following to state, among others:

- i. Evidence of visual identification is of the weakest kind and most unreliable and should not be acted upon unless all possibilities of mistaken identity are eliminated and the Court is satisfied that the evidence before it is absolutely watertight;
- ii. When it comes to the issues of light, clear evidence must

be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witness was reasonably bright to enable the identifying witnesses to see and positively identify the accused person. Bare assertion that **"there was light"** would not suffice.

In the instant appeal, prosecution evidence shows that offence occurred at 08:00pm as it appears in the charge sheet as well as PW1 testimony in page 5 of proceedings. In his evidence PW1 stated that **"there were some light and moon light as well"** that is all.

As rightly pointed out by the learned Senior State Attorney, the prosecution evidence did not observe the guidelines set forth to guarantee proper identification as shown hereinabove. PW1's mere evidence that he relied on some light and moon light to recognize the appellant is clearly not enough. This is because one, there was no evidence provided on the intensity brightness of the light relied upon, that is from some light and moon light as provided by PW1. Two, point at which the said light exists, say it at the first point of their trip or at the point of attack? This was not cleared in the evidence by prosecution.

Taking all this evidence into consideration, I am of the view that the evidence on identification was not watertight, and with due respect

had the trial court properly analyzed the evidence related to identification, it would not have arrived at the conclusion they did.

I am of firm view that my findings in determination of the ten grievances identified herein are sufficient to determine the appeal. I find no pressing need to deal with remaining grounds.

In the upshot, I allow the appeal, quash the conviction and set aside sentence imposed to the appellant.

I order the immediate release of the appellant from custody unless he is held therein for any other lawful purpose.

It is so ordered.

DATED at MOROGORO this 6th day of October, 2022




S. H. HASSAN
JUDGE
06/10/2022

Judgment delivered at my hand and Seal of the Court via video conferencing facility this 6th day of August, 2022 in the presence of the appellant who appeared in Court by remote through video conferencing

and Mr. Emmanuel the learned State Attorney who entered appearance
for respondent Republic.



A handwritten signature in blue ink, appearing to read "S. H. Hassan", is written over the printed name.

S. H. HASSAN
JUDGE
06/10/2022