IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

CRIMINAL APPEAL NO. 36 OF 2021

DWASI MKINGA @ KOMANYA .....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of Bariadi District Court)

(C.E.Kiliwa,SRM)

Dated the 4th day of March,2021

In

Criminal Case No.65 of 2020

JUDGMENT

01 & 03 March, 2022

A. MATUMA, J.

The Appellant Dwasi s/o Mkinga @ Komanya stood charged in the District Court of Bariadi District at Bariadi of an armed robbery case contrary to section 287A of the penal Code, Cap. 16 RE. 2019.

He was alleged to have on the 8th May, 2020 during night hours robbed the victim Nilah s/o Igombe Tshs. 300,000 and used a panga to assault the said victim in order to retain the stollen money. During hearing of the case at the trial court, the prosecution arraigned four witnesses the victim (PW1), Magembe Mayenga (PW2), Mohamed Abas (PW3) and D/sgt James (PW4).

The Appellant entered his defense alone without calling any witness nor tendering any exhibit.

After the conclusion of the trial, the learned trial magistrate found the Appellant guilty of the offence, convicted him and sentenced him to suffer thirty years jail term.

The Appellant being aggrieved with the conviction and sentence opted to file this appeal with three grounds mainly complaining that;

i. ***He was not properly identified.***
ii. ***That he was wrongly convicted as the provisions of the law were not complied.***

At the hearing of this appeal, the Appellant appeared in person while the Respondent Republic was represented by Salome Mbughuni, Senior State Attorney. The Appellant had nothing to submit regarding to his grounds of appeal rather than praying his appeal be considered and determined in his favour according to his grounds of appeal.

The learned Senior State Attorney for the Respondent Republic, in her submission, supported the appeal. She argued that, according to the record of the trial court, Section 211(1) of the Criminal Procedure Act Cap.20 R.E 2019 was contravened. That the evidence of PW3 and PW4 was given in the absence of an interpreter while it is on record that he was not conversant with Swahili Language. To her, the Appellant was denied the right to be heard when the evidence of PW3 and PW4 was taken. She cited the case of ***Dastan Makwaya and Jovith Mtagaywa***

Jovin V. The Republic, Criminal Appeal No.179 of 2017 to support her point that failure to comply with section 211(1) of the CPA is fatal.

She further submitted on the issue of identification of the appellant. She argued that the identification of the Appellant depended solely on the evidence of the victim alone. The victim named the Appellant as among the people he identified at the crime scene being familiar to him. She submitted that despite the victim to have mentioned the source of light (torch) which enabled him to identify the assailants, she did not state the intensity of such light. Relying on the decision in the case of ***Felix Lazaro V. Republic, Criminal Appeal No.41 of 2003,*** the learned State Attorney argued that although the Court of Appeal accepted touch light as among good source of light for the purposes of identification, it held that the intensity of such light must be stated. She also cited; ***Vumilia Daudi Temi V. Republic, Criminal Appeal No.246 of 2010,*** *and* ***Emmanuel Chigoji V. Republic,Criminal Appeal No. 355 of 2018*** to that effect.

Having been probed by the court on whether the victim named the appellant to the people who rescued him that night and spend with him the whole night with him until the next day when they escorted him to police, the learned Senior State Attorney quickly pointed out that the

victim did not name the assailants at the earliest possible time. She thus concluded her submission by urging the court to allow the appeal and the Appellant be acquitted.

Having carefully considered the grounds of appeal by the Appellant, submission of the Respondent and the evidence on record, I find this appeal to have been brought with sufficient cause on both grounds of appeal. I will start with the second set of complaint that the Appellant was convicted without the provisions of the law having been complied with. Although he could not elaborate the ground, I probed the learned Senior State Attorney to address me on whether the provisions of the law relating to interpretations of the language of the court into the language understood by the accused during trial throughout the proceedings were complied with. She submitted as herein above indicated that it was not.

I agree with her. It is on record that on 3/8/2020 when the prosecution was about to call in the witness dock their first witness, the Appellant declared that he was not familiar with Kiswahili language at page 6 of the trial proceedings. The Appellant stated that; ***"I am ready for hearing though I don't know Swahili properly"***

The learned trial magistrate Hon. M. P. Mrio (SRM) called in one Ayubu s/o Ntobi as an interpreter of Swahili language into Sukuma and vice versa. The interpreter was dully sworn for the purpose and the

evidence of two witnesses were taken. The learned trial Magistrate was then transferred as per records which necessitated Hon. C. E. Kiliwa (SRM) to take over the proceedings. It seems she did not read the records of the predecessor magistrate because she recorded the evidence of PW3 Doctor Mohamed Abas without the aid of an interpreter against the appellant's favor. Such witness gave his evidence and tendered the victim's PF3 without even the appellant having been given opportunity to object its admissibility or not.

At the end of his evidence, the Appellant is recorded to have not cross examined the witness, probably because it is on record that he was not conversant with Kiswahili language and did not follow the proceedings when PW3 was testifying. Then came in PW4 who also gave his evidence without the presence of an interpreter. When he finished his testimony, the appellant was invited to cross examine him. He is recorded to have lamented; ***"I am not fluent in Kiswahili; I can speak Sukuma language".***

It is when the trial magistrate adjourned the proceedings for ten minutes to trace an interpreter just for the appellant to cross examine the witness. One Sai Mabula was obtained as an interpreter but wrongly sworn as a witness instead of taking oath as an interpreter in accordance to the law. The appellant was thus subjected to cross examine on the evidence he did not follow due to language barrier. In the circumstances, the evidence of PW3 and PW4 were illegally taken and could not be used to convict. The same is liable to be expunged in terms of section 169 (1) of the criminal procedure Act, Cap. 20 R.E 2019 and the case of ***Janta Joseph Komba and others versus Republic, criminal Appeal No. 95 of 2006.***

As for failure to properly sworn an interpreter, the Court of Appeal of Tanzania in the case of ***Havyalimana Azaria and 2 others versus Republic, criminal Appeal No. 539 of 2015*** held that, an interpreter must take an oath to faithfully translate the proceedings and or evidence and that failure to do so is fatal. In this case the interpreter was sworn as a witness giving evidence. An interpreter is not a witness nor the evidence he interprets, his. With all these I allow the second ground of complaint that the provisions of the law were violated in the conviction of the Appellant and accordingly expunge the evidence of PW3 and PW4.

Back to the first ground of appeal, it is apparent on record that, the only identifying witness was PW1, the victim. This witness during trial alleged to have identified the appellant by the aid of torch light. That he recognized him by names and face. After the assault he took refuge at the homestead of Mayenga Kilulu where he killed the night until the next day when he reported the incident to police.

In his evidence PW1, did not state whether he named the Appellant to the people he met immediate after the alleged attack or even to the person where he slept that night.

PW2, the son of the said Mayenga Kilulu was strait in his evidence that the victim did not name his assailants to them; ***"He said nothing on who has beaten him".***

Even during cross examination PW2 positively responded that the victim did not name to them his assailants; ***"He never told me who has beaten him"***

In the circumstances, the victim did not name the Appellant at the earliest possible time when he met the first people who rescued him and later took him to police, failure to name the suspect at the earliest possible time puts the prudent court to an inquiry about the credibility of the witness. See; ***Maswa Wangiti Mwita & Another versus Republic, (2002) TLR 39***.

Even if it might be argued that the victim named the Appellant to police at the time of reporting the incident, there should have been explanation as to why he did not name him to the people he first met before getting to police. I therefore doubt the credibility of PW1, as far as identification of the Appellant is concerned.

Not only that but also the records are silent as rightly argued by the learned Senior State Attorney on the intensity of the alleged torch beams which assisted the victim for identification of the assailants at the crime scene.

In the case of **Issa s/o Magara @ Shuka vs. Republic Criminal appeal No. 37 of 2005** (unreported) the court of appeal held that;

> *"...it is not sufficient to make bare assertion that there was light at the scene of the crime....Hence the overriding need to give in evidence sufficient details* ***the intensity*** *and size of the area illuminated.. Clear evidence on* ***the sources of light and its intensity*** *is of* ***paramount importance.***"

The court of appeal then stated the reason why should there be sufficient explanation as to the source of light and its intensity;

"This is because as occasionally held, even when the witness is purporting to recognize someone he knows as was the case here, mistakes in recognition of close relative and friends are often made."

In the circumstances that the victim did not name the appellant at the earliest possible time despite of having known him prior to the crime and that the intensity of the light was not stated in evidence, the Appellant's identification cannot be said to have eliminated all the possibilities of mistaken identity. I thus agree with both parties that, the Appellant was not properly identified at the crime scene for the herein above stated anomalies. I find this appeal to have been brought with sufficient cause. The same is hereby allowed.

The Appellant's conviction is quashed and the sentence of 30 years meted to him is set aside. I order his immediate release from prison unless held for some other lawful cause. Right of appeal to the court of appeal is explained. It is so ordered.

A. MATUMA
JUDGE
01/3/2022

COURT; Judgment delivered this 3rd day of March, 2022 in the open court in the presence of the Appellant in person and M/S Salome Mbughuni learned State Attorney for the Respondent/ Republic. Right of Appeal explained.

Sgd. A. MATUMA
JUDGE
03/3/2022