

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

AT DAR ES SALAAM

CRIMINAL CASE NO. 72 OF 2023

*(Appeal from the Judgment of the Decision of the District Court of Mkuranga at
Mkuranga given before Hon Mwailolo, SRM, dated 27th day of December 2022 in
Criminal Case No. 312 of 2022)*

MUSSA HAMIS @ PAZI APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

17th May & 28th June 2023

MWANGA, J.

The appellant above was charged in the District Court of Mkuranga at Mkuranga with the offense of armed robbery contrary to Section 287 A of the Penal Code, Cap 16 R.E 2019. He was subsequently sentenced to 30 years imprisonment.

Being aggrieved with the above decision, he appalled this court on the following grounds;

1. The chargesheet was not proven to the tilt regarding the material date of the incident, particularly PW1 and PW7 and other prosecution witnesses.
2. Visual identification of the appellant by PW1 was insufficient as he did not explain the intensity of light and described the appellant in terms of morphological appearance, clothes, height etc.
3. The identification parade was not conducted to prove the alleged visual identification of the appellant by PW1.
4. There was no plausible explanation as to why the prosecution did not tender in court PF3 and the bag to prove the case in issue.
5. The prosecution did not identify and or subscribe to the alleged stolen mobile phone(TECNO) in court to prove his narration
6. The evidence of PW3, W4, and PW5 was a mere suspicion as the said weapons(panga) had no blood stains; hence no club(rungu) was seen in possession of the appellant.
7. Defence evidence was disregarded even though it raised a reasonable doubt on the prosecution side.

8. Exhibit P2 was not read over in court to enable the appellant to understand its contents.

9. The prosecution case was never proven to the required standard.

The facts and evidence leading to the charge against the appellant were that, on the 18th day of December 2021, at Vingunguti village within Mkuranga District in Coast Region, one mobile phone making TECNO valued at 350,000/=, the property of one Mohamed Said.

It was alleged that immediately before such stealing injured the victim on the forehead by using a club to obtain and retain the property according to PW1, on a fateful day at 2:00 hours while heading from work around the Vingunguti Primary School area, the appellant, who was armed with Panga threatened him the other person accompanying the appellate had a dub “rungu” they started beating the victim. Therefore, the victim collected PF3 at the police station and went to the Hospital for treatment.

The appellant was arrested and taken to the police station. Upon the arrest, the appellant and his co-suspect were found with two machetes. During cross-examination, the victim (PW1) told the court that he could identify the appellant as he was at a distance of 1.5 meters and as there was

moonlight. Also, he identified him since the appellant was arrested soon after the incident. One Abdallah Genda Kijazi just told PW2 about the incident and that he was the person who carried the victim on a bodaboda and brought him home.

According to PW2, the victim describes the suspected robbers as one wearing a pinkish jacket; he had a "rasta," and when the victim saw them, he managed to identify them.

PW3 testified that after they had received the news about the murder, they passed the crime scene at around 05:00 hours, where they found a small bag hanging on the ground. Within no time, the appellant appeared and picked it up; then, they apprehended him with such a bag.

Upon search, they found two bush knives hidden in his trouser. While standing there, the other suspect appeared. The appellant called him "mjomba mjomba." After that, they arrested him and took him to the police station. That was also the evidence of PW4 and PW5 that while at the scene of the crime, they saw the appellant picking up a bag, and later, the other suspect appeared, and he was observed after he was found with some blood stains connected with the robbery incident.

PW6 was the investigative officer stating that the appellate denied the accusations. Still, the victim explained to him how the offense was committed as he identified the appellant immediately after the commission of the crime. PW4 evidence was that his investigation revealed that the appellant and his co-suspect committed the offense. PW7 was also a police officer who received the appellant and co-suspect at Mkuranga police station. He prepared a certificate of seizure of the two pangas and a small bag that the appellate signed and the chairperson.

The appellant denied that charge in his defense, stating that the prosecution had not produced any evidence connecting him with the offence charged.

He told the court that he was not found with the stolen mobile phone, no receipt was produced to show that the victim had the said mobile phone, and the PF3 was not produced in the court of evidence when the appellant appeared in person. He asked this court to adopt his written submission, which he had prepared earlier. Mr. Emmanuel Maleko, Senior State Attorney, represented the respondent.

The learned state Attorney supported the appeal on the following grounds: principles regarding visual identification were not adhered to. **Two**, the appellant was not identified by the victim. **Three**, on matters of identification, the court should have considered the heading in the case of **Waziri Amani**. **Four** were present at the scene of the crime, which does not mean that such a person is the one who committed the offense. **Five**, PW1 made dock identification. **Sixth**, panga and clothes with blood stains of the appellant and fellow appellant were not subjected to DNA tests. In the results, the learned Senior State Attorney invited the court to set aside the conviction and sentence.

I have seriously gone through the proceedings of the trial court and the submission of the parties and authorities regarding the subject matter; it is revealed that the incident occurred during the night, that is, around 02:00 hours, and the appellant, together with his fellow assailant, was arrested at around 03:00 hours. In the circumstances, the possibility of mistakes identified ought to be eliminated, **first**, by victim PW1 providing detailed descriptions of the suspects/appellants before their arrest. **Second**, at the time of arrest, the victim (PW) was not present, and the records are silent as to whether he had described the suspects to PW3 – PW6 before the arrest.

Therefore, I agree with the lead Senior State Attorney that the identification of the appellant was not done according to law. Had the description been given, the identification parade would have been conducted to remove any possibility of the mistaken identity. See the case of **Waziri Aman Versus Republic**, Criminal Appeal No. 55 of 1979[1980] TZA 23.

The second thought is that the appellant was arrested based on the incident's circumstances. In **Hamida Mussa v. R** [1993] T.L.R. 123, the Court stated:

"Circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

The evidence indicates that a tiny bag was found hanging around at the crime scene at around 03:00 hours, then the appellant appeared and went straight to collect the bag. The bag had a razor blade, knife, and the same papers. But the appellant himself was found with two bush knives "sime" hidden in his trousers. The other assailant was found with blood stains on his clothes.

Given the above, one expected the instigations to have DNA tests from the clothes, which had blood stains, and even the two bush knives found if used in the robbery. That would have helped to hold that the appellant and fellow assailant were arrested just being present at the scene of a crime. In the case of **Francis Alex Vs R**, Criminal Appeal No. 185 Of 2017 (unreported), the trial court rejected circumstantial evidence, which relied on evidence of trails of blood found at the compound of the appellant because the prosecution did not make any effort to ascertain whether the blood was of a human being and more so of the deceased. In the present case, no link is established between the appellant and the blood found in the appellant's clothes. Section 110(1) of the Evidence Act provides that whoever alleges the existence of specific facts must prove it. Section 110 (1) of the Act reads that: -

"Whoever desires any court to give judgment as to legal liability dependent on the existence of facts which he asserts must prove that those facts exist."

Because of the above, the standard of proof, which is beyond reasonable doubt, was not met by the prosecution.

That being said and done, the appeal is allowed. Conviction and sentence set aside, the appellate shall be released from prison unless he is lawfully held for any other lawful purpose.

Order accordingly.



A handwritten signature in black ink, appearing to read "H. R. Mwanga".

H. R. MWANGA

JUDGE

28/06/2023

COURT: Judgment delivered in Chambers this 28th day of June 2023 in the presence of Mr. Emmanuel Maleko, learned Senior State Attorney, and the Appellant in person.



A handwritten signature in black ink, appearing to read "H. R. Mwanga".

H. R. MWANGA

JUDGE

28/06/2023

