

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE SUB - REGISTRY OF SHINYANGA**

AT SHINYANGA

CRIMINAL APPEAL NO. 10 OF 2022

JOSEPH LUHENDEAPPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the Decision of District Court of Shinyanga at Shinyanga.]

(Hon. C. S. Langau RM)

dated the 25th day of January, 2022

in

Criminal Case No. 62 of 2021

JUDGMENT

27th July, 2023 & 26th January, 2024.

S.M. KULITA, J.

This is an appeal from Shinyanga District Court. The appellant herein above was charged with Armed Robbery, contrary to section 287A of the Penal Code [Cap 16 RE 2019] at Shinyanga District Court. He was convicted and sentenced to serve the imprisonment of 30 (thirty) years.

Aggrieved with both conviction and penalty the appellant lodged this appeal with 9 (nine) grounds which can be summarized into 7 (seven) as follows;

1. That, the case at the trial court was not proved beyond all reasonable doubts.
2. That, the identification parade was not conducted to monitor the possibility of mistaken identity.
3. That, confession at the Police Station was accompanied with inducement and that the appellant was not taken to the Justice of Peace thereafter.
4. That, the assailant was not properly identified at the scene.
5. That, the Caution Statement and Seizure Certificate were not properly admitted by the trial court.
6. That, a long time had passed before the Appellant was arrested and accused to have committed the offence.
7. That, the evidence of PWI (victim) was not corroborated with the testimony of any other person, like a House Girl whom the said PW1 alleged to have been together with, at the scene, while the crime was committed.

The matter was argued through oral submissions. While the Appellant appeared in person, the Respondent (Republic) was represented by Ms. Gloria Ndoni, State Attorney.

In his submission in the support of appeal, the Appellant sought for the court to adopt his grounds of appeal as the submissions for his appeal. He concluded by praying for the appeal to be allowed.

In her reply to the appellant's submission, the State Attorney, Ms. Gloria Ndoni, replied on the grounds relating to the proof of the case at the trial court, that it was beyond all reasonable doubts. She referred this court to the testimony of the victim (PW1) who testified to the effect that, she and her family were invaded by the bandit who was armed with machete and sururu. That, the said bandit threatened them with the machete and stole her money, glasses, phone, TV, Radio and the bag with some other properties therein. The Counsel added that the victim managed to identify the bandit being the Appellant herein. The reason behind was that she has been knowing him as he was her servant at her bricks making industry. Therefore, he was not a stranger to her. The counsel further stated that, some of the victim's properties that had been robbed on the material date were found in possession of the Appellant during the search at his residence.

The same applied to the weapons that he had used in threatening the victim during the incident, that is machete and sururu. The counsel alleged that for those pieces of evidence, the trial Magistrate at the trial court was right to declare that the case was proved beyond all reasonable doubts.

As for the ground that, a long time had passed before the Appellant had been arrested and charged for this matter, the State Attorney submitted nothing on it.

For the reasons that I am going to state hereinafter, before noting down the summary of other submissions made by the State Attorney, I hereby start to analyze the above noted submissions. The Appellant herein disputed to have committed the offence. In his defense during trial, he narrated that the case at hand was fabricated by the victim herein, one Hadija Iddy (PW1) for the grudge that she had against him. He alleged that he was the Servant for PW1 in her bricks making industry. He said that, it happened that the said PW1 paid him Tsh. 400,000/= for making bricks but he didn't execute the agreement.

In my further analysis on the issue of proof of the case at the trial court, I also prefer to ascertain on the period of time that had passed from the date

of commission of the offence, that is 2nd day of April, 2021 and the date that the Appellant was arrested for this matter, that is 2nd day of June, 2021. According to the record and submissions of both parties, the appellant and the victim are familiar to each other for the said business relationship that they had.

Actually, the record and submissions transpire that the appellant was arrested on the 2nd day of June, 2021 while the crime is alleged to have been committed on the 2nd day of April, 2021, that is, about two months back. The question that triggers my mind is that, if the victim's assailant was the Appellant herein, whom the victim alleged to have identified at the scene, and that he is a person known to her as her servant in bricks making industry, why it took such a long time to arrest him? Keeping in mind that they all live in Shinyanga District as per the records. Worse enough, there were no reasons advanced by the prosecution witnesses on that. The implication here is that this matter was instituted on the afterthought ideas. It might be a revenge by PW1 against the appellant herein, for the above said allegation as alleged by the Appellant.

Further, according to her testimony, as it can be read in the record, PW1 reported the matter at the Police Station. But that piece of evidence does

not transpire if she (PW1) did mention the appellant herein as the one who had committed the crime. The only testimony by PW1 that touches name of the bandit is that, she notified the Police on 2nd June, 2021 when she saw the assailant/appellant at his father's residential house. But that evidence by PW1 does not show that she had mentioned the appellant as her assailant, when she was reporting the matter at the Police Station on that material date, the 2nd day of April, 2021.

That scenario renders this court to make reliance on the doctrine of failure of the victim, as a witness, to mention the assailant earlier. It is the principle of law that the witness should name the Assailant as earlier as possible, otherwise the adverse inference should be drawn against him/her. See the case of **SADICK HAMIS @ RUSHIKANA & 2 OTHERS V. R, Criminal Appeal No. 381 of 2017** in which it was held;

"Failure on the part of a witness to name a known suspect at the earliest available and appropriate opportunity renders the evidence of that witness highly suspect and unreliable"

In her reply to the issue of caution statement, the State Attorney submitted that, during trial, the Appellant had no objection for its admission. Hence, it

was right for the trial Magistrate to rely on it in convicting the Appellant. I agree with the Counsel that, it is in the record that the Accused's Caution Statement (exhibit P4) was tendered and admitted to court without objection from the Appellant. But, the fact that the testimony of PW1 (victim) concerning the involvement of the Appellant in the commission of the offence is doubtful, that, her testimony lacks the reason for delay of about two months in arresting the Appellant, there is no evidence that can be used to corroborate the said caution statement. Basically, the Caution Statement alone, without any other evidence to corroborate its evidential weight, cannot be relied upon to convict the purported author.

From what I have endeavored to explain herein above, I find a shadow of doubts in the prosecution case on the involvement of the appellant in the commission of the alleged crime. It is my conclusion that the case at the District Court was not proved at the required standard. The evidence was insufficient to convict the appellant. Impliedly, the case was not proved beyond all reasonable doubts.

That reasoning being sufficient to dispose of this matter in its entirety, I find no need to deal with the other grounds of appeal, which could include this

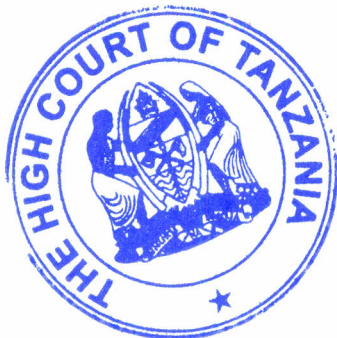
court noting down the summaries of other submissions that have been by the State Attorney and this court, unnecessarily, make analysis thereon.

In upshot, the **appeal is hereby allowed**. The appellant is therefore acquitted. He should thus be released from the prison house, unless he is held for any other lawful cause.



S.M. KULITA
JUDGE
26/01/2024

DATED at **SHINYANGA** this 26th day of January, 2024.



S.M. KULITA
JUDGE
26/01/2024