

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE SUB-REGISTRY OF SHINYANGA)

AT SHINYANGA

CRIMINAL APPEAL NO. 0438/2024

*(Originating from Criminal Case No. 35/2023 from the District Court of Bariadi District at
Bariadi)*

MASHAKA SHINJEAPPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

Date of Last Order:27.4.2024

Date of Judgment:30.04.2024

MWAKAHESYA, J.:

In the District Court of Bariadi at Bariadi, the appellant, Mashaka Shinje was tried with: Burglary c/s 294(1)(a) and (2) of the Penal Code; Rape c/s 130(1), (2)(b) and 131 of the Penal Code; and Stealing c/s 265 of the Penal Code. The case for the prosecution was that, on the 6th of June, 2023 night time at Mkuyuni-Dutwa village within Bariadi District in Simiyu

Region, the appellant broke into the house of "MS" and raped her. He also made away with about twenty (20) kilograms of cotton the property of MS. MS was able to identify the appellant through a torch with "sharp light", the appellant being known to MS before the incident as a village mate.

During trial the prosecution paraded five (5) witnesses, MS inclusive (PW1), while the appellant was the sole witness for the defence. The appellant denied committing the crimes and raised an alibi that at the material time he was at home tending to his sick mother. At the end of the trial, the trial court convicted the appellant of the offences of burglary and rape but acquitted him on the charge of stealing. On the charge of burglary, the appellant was sentenced to five years imprisonment, while on the charge of rape he was sentenced to thirty years imprisonment. The sentences are to run concurrently. He was also ordered to compensate MS TZS 500,000/=. Dissatisfied with the convictions and sentence the appellant has preferred this appeal which is predicated on four grounds. The same are to the effect that:

1. The learned trial court erred in law and in fact to hold conviction on circumstantial evidence which was adduced by PW2;



2. The prosecution side failed to prove the essential elements of stealing which is asportation thus left a shadow of doubt;
3. The trial court erred in law and fact to hold conviction on weak visual identification by using torch light where by the victim did not describe in court the source and intensity of the light; and
4. The trial magistrate court erred in law and in fact to pass sentence on a defective charge.

At the hearing of the appeal, the appellant appeared in person while the respondent republic was represented by Ms. Nyamnyaga Magoti, learned State Attorney. The appellant prayed to adopt his grounds of appeal and opted for the respondent to reply while reserving his right to make a rejoinder if needed.

Ms. Magoti made it clear that, the respondent was resisting the appeal and thereby supporting the conviction and sentence meted by the trial court.

After hearing the parties with regards to the appeal, this court directed them to address it on the propriety of the trial after the first witness for the prosecution had testified. This was after observing that on



14.08.2023 after PW1 had testified (PW1 had testified on 31.07.2023), the charge was amended. Prior to the amendment, the date of commission of the offences was alleged to be 06.06.2023 and after amendment the date was put at 06.07.2023. It should be noted that PW1 had testified that the crimes took place on 06.07.2023, and therefore, undoubtedly, the amendment was in order to bring the date of the commission of the offences specified in the charge in line with the testimony of PW1.

However, the prosecutor informed the court that the amendment did not affect the charge sheet and the court continued with the hearing of the case without addressing the accused in terms of section 234 of the Criminal Procedure Act.

Here is what the prosecutor said at page 6 of the typewritten proceedings:

"We pray to proceed with hg, the amendment does not affect the charge sheet."

The appellant was of the view that he was not informed of the right to recall the prosecution's witness after the charge was amended. In contrast, the learned State Attorney was of the view that section 234(2)(b)

of the Criminal Procedure Act does not give the court the duty to the court to recall witnesses but rather puts the onus on the accused person to demand for recall of a witness(s).

However, when pressed by the court, the learned State Attorney pointed out that case law gives the duty to the court to inform the accused the right to recall witnesses and failure to do so renders the proceedings a nullity. And as to the way forward, having observed that the trial court failed to discharge its duty, Ms. Magoti prayed for this court to quash the conviction of the trial court, set aside the sentences and order of compensation and order a retrial. The appellant was of the view that a retrial was unnecessary, and he should be set free.

I have opted to begin with this matter of law because I am of the view that it is enough to dispose of the appeal.

I will start off by reproducing section 234 of the Criminal Procedure Act. It reads:

234.-(1) Where, at any stage of a trial, it appears to the court that the charge is defective, either in substance or form, the court may make such order for alteration of the charge either by way of amendment of the charge or by substitution or addition of a new charge as the court thinks necessary to meet

the circumstances of the case unless, having regard to the merits of the case, the required amendments cannot be made without injustice; and all amendments made under the provisions of this subsection shall be made upon such terms as the court shall seem just.

(2) Subject to subsection (1), where a charge is altered under that subsection-

(a) the court shall thereupon call upon the accused person to plead to the altered charge;

(b) the accused person may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross examined by the accused person or his advocate and, in such last mentioned event, prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination; and

(c) the court may permit the prosecution to recall and examine, with reference to any alteration of or addition to the charge that may be allowed, any witness who may have been examined unless the court for any reason to be recorded in writing considers that the application is made for the purpose of vexation, delay or for defeating the ends of justice.

(3) N/A

(4) N/A

(5) N/A

In construing the true meaning of section 234(2)(b) various decisions of the Court of Appeal have held that the court has the duty to inform the accused that he has that right. In **Ezekiel Hotay v. The Republic**,

Criminal Appeal No. 300 of 2016, CAT (unreported) it was held (at page 7) that:

"...it is absolutely necessary that after amending the charge, witnesses who had already testified must be recalled and examined. In the instant case, having substituted the charge the five prosecution witnesses who had already testified ought to have been re-called for purposes of being cross-examined. This was not done. In failure to do so, rendered the evidence led by the five prosecution witnesses to have no evidential value."

It was imperative for the trial court to recall PW1 to be further cross examined by the accused and failure of the trial court to do so rendered her testimony valueless.

I was tempted to order a retrial, but having considered the evidence adduced by the prosecution I became hesitant. The prosecution's case is hinged on identification. As submitted by the learned State Attorney, **Waziri Amani vs Republic [1980] T.L.R 250** laid down the criteria to be established by a witness when it comes to proper identification. The same are:

- 1. The time that the witness had the accused under observation;*
- 2. The distance at which the witness had the accused under observation;*
- 3. If there was any light, then the source and intensity of such light; and*
- 4. Whether the witness knew the accused prior to the incident.*

Although PW1 testified that, the whole incident took about 40 minutes, the amount of time that she had the assailant under observation was not specified by her. The 40 minutes she referred to was in relation to the whole time it took for the rape and theft to occur. Therefore, the first condition in **WAZIRI AMANI** (supra) was clearly not met. It was crucial for the period under observation to be specifically mentioned so that the court could be satisfied that there was no chance of mistaken identity.

On top of that, although PW1 had stated that she observed the appellant with the aid of a torch light, she was not explicit if the said light was shone to the appellant or rather on the appellant's face which enabled her to identify the appellant. It will be dangerous for the court to assume that the torch was pointed at the appellant's face thus enabling his recognition, since he was known to PW1, while the witness had not testified to that effect.

Guided by the principle about re-trials laid down in **Fatehali Manji vs Republic** [1966] E.A. 343 I am inclined to refuse a re-trial. In the cited decision it was held that:



"In general, a retrial may be ordered only where the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for purposes of enabling the prosecution to fill in gaps in its evidence at the first trial... each case must depend on its own facts and an order for retrial should only be made where the interests of justice require it."

In the instant appeal, ordering a re-trial might only serve to allow the prosecution to fill in gaps that appeared in the trial and have now become apparent.

I, therefore, allow the appeal, nullify the proceedings of the trial court, quash the conviction, set aside the sentences imposed on the appellant including the order for compensation and order the immediate release of the appellant unless he is being otherwise lawfully held.

It is so ordered.

DATED at **SHINYANGA** this 30th day of April, 2024




N.L. MWAKAHESYA
JUDGE
30/04/2024