

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

CRIMINAL APPEAL NO. 49 OF 2022

DANIEL SAMWELI @ MAGUHA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

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

(Hon. C.E. KILIWA SRM)

dated the 13th day of April, 2022
in
Criminal Case No. 12 of 2021

JUDGMENT

13th September, 2023 & 2nd February, 2024.

S.M. KULITA, J.

This is an appeal from Bariadi District Court. The appellant herein together with two others, were charged for Armed Robbery, contrary to the provisions of section 287A of the Penal Code [Cap. 16 RE 2019]. It is in the particulars of offence that, on 21st January, 2021 at Nkololo Village within Bariadi District in Simiyu Region, the appellant together with two others, stole cash money, Tshs. 5,800,000/=, the property of Iluminata

Mashaka and that immediately after the stealing, they used panga to threaten the Watchmen Kulwa Thomas and Peter Masunga.

In a nutshell, the prosecution case as was unfolded by its seven witnesses is that, on the material date, one of the Watchmen heard a knocking sound from one of the shops which they use to guard. He had to find out what was it, when he was drawing closer, he saw the appellant dropping from the wall of the M-Pesa business shop, the property of Iluminata Mashaka. He tried to chase him, but the appellant showed him a panga, contending that, if he insisted following him, he would be chopped.

This Watchman stated that, he managed to identify the appellant as there was enough light. The witness went further contending that, as he was going back again to the shop, he met with two other bandits who had the iron bar and panga on their hands. They also threatened him. As for these ones, the witness stated that, he did not know them. They were strangers to him.

Following that act, the Watchman informed the owner of the shop who inspected it and found out that, the safe was broken and Tshs. 5,800,000/= was missing. The incident was reported to Police and the appellant herein was arrested. That, in interrogation, the appellant

mentioned the other two bandits as his accomplice. They were arrested too. When they were searched, the appellant herein was found in possession of cash money amounting Tshs. 3,100,000/=.

In his defense, the appellant stated that, on 23rd January, 2021, he was at Mkula area where he had taken his television for repair. He went further stating that, as he was drunk, he engaged himself in a quarrel whereby he used an abusive language. For that matter, he was taken to the Police Station. He added that, his house was actually searched and his properties including the said Tshs. 3,100,000/= were taken by Police.

Though he denied to have committed the offence, at the conclusion of the trial, save for the other two accused persons who were acquitted, the appellant herein was accordingly found guilty, and upon conviction, a 30 (thirty) years' imprisonment sentence was met to him. This was on 13th April, 2022.

Aggrieved with that decision, the Appellant preferred the instant appeal with 4 (four) grounds which may be summarized as follows; **One**, conviction was wrongly entered basing on a weak identification; **two**, had PW3 raised an alarm people would have responded to it; **three**, no independent witness who witnessed the search was called to testify; **four**,

prosecution failed to prove that the properties which were taken from the appellant's house have connection with the complainant's properties.

In actual fact, all grounds of appeal tend to fault the trial court that, it convicted the appellant while the prosecution failed to prove its case beyond all reasonable doubts.

The Appeal was heard on 13th September, 2023. On that date, the Appellant appeared in person whereas the Respondent, Republic, had the service of Ms. Caroline Mushi, Mr. Gudluck Saguya and Ms. Happy Chacha, the learned State Attorneys who resisted the appeal.

Submitting in support of the appeal, the appellant attacked the trial court to convict him basing on weak evidence of identification which was testified by PW3.

In reply to this ground, Ms. Chacha stated that, identification was proper through electrical lights. She added that, PW3 who is the identifier was close to the appellant, at a distance of only 7 (seven) meters away and that, he knows him before the act. Ms. Chacha went ahead contending that PW3 knows the appellant by name, face, the works he does and where he lives. To her, possibility of mistaken identity would not be there, thus the conditions set in the case of **Waziri Amani V. R,**

Criminal Appeal No. 55 of 1979, CAT at Arusha were met. Additionally, Ms. Chacha cemented that, PW3 managed to properly identify the appellant, that is why he managed to mention him at the earliest possible time.

I agree with the principle that, whenever proper identification is done, it follows therefore that, mentioning of the bandits must be done as soon as possible. Delay to mention the same, raises doubts, that, identification was not properly done. And in case of such doubt, the matter should be resolved in favor of the accused. See, **Marwa Wangiti Mwita and Another v. Republic, Criminal Appeal No. 6 of 1995** (unreported) the Court of Appeal had this to say;

"The ability of a witness to name a suspect at the earliest opportunity is an all important assurance of his reliability, in the same way as an unexplained delay or complete failure to do so should put a prudent court to inquiry. "

In **Peter William V. Republic [2009] TLR 327**, this Court held;

"It is trite law that where there are contradictory accounts of the same incident, the resulting doubt must be resolved in favor of the accused. "

While testifying in Court, as per page 8 of the typed proceedings of the trial court, PW1 who is the complainant stated that the alleged identifier, PW3, had mentioned names of all three bandits, including the appellant herein, who were then the accused persons at the trial court, meaning thereby he had identified them during the incident and that he mentioned them earlier.

In the same scenario, PW2, the PW1's Shopkeeper, who was also awakened at the night of the incident by the Watchman (PW3) stated as per page 11 of the typed proceedings that, the Watchman narrated to her that, after he had seen the bandits with weapons, he (PW3) decided to escape. PW2, went on stating that, the guard/watchman then mentioned the names of all three bandits.

Still considering the same point, PW7 who is the Investigator of the case stated, as it can be read at page 35 of the typed proceedings that, while taking statement of the guard (PW3) he was told by him that, on the material date he saw three people with weapons at the shop premises. Those people threatened him not to shout until they finish their business of stealing. He went ahead stating that one of them entered the shop through the roof and the rest two, remained watching the scene.

Those, three testimonies are different from the testimony of the Watchman (PW3) who stated that, he heard a knock, he went closer and found a person dropping out of the wall of the complainant's shop. He added that he identified him. He started following him but that person threatened to cut him with panga if he kept on following him. PW3 further testified that by the time he started turning back, he saw two other people, with weapons, running towards him. He said that, he did not identify these two people's names, but their faces only.

These stories of four prosecution witnesses concerning identification differ tremendously. The difference is too great. The court is thus left unaided as to whether, PW3 when he saw the bandits with weapon, he escaped or he was kept under control by the bandits till when they finished their business of stealing or chased them till when they threatened to cut him by panga.

This contradiction, is not minor, that we can say, it does not affect the root of the case. This alone brings doubts as to whether, PW3 properly identified the appellant at the scene of crime. His credibility is totally questionable. That being the case, PW3 is taken to have testified untruth.

Though in **Raymond Francis V. Republic [1994] TLR 100** the Court of Appeal held;

"It is elementary that in a criminal case whose determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance. "

Yet, in **Jaribu Abdalla V. R, Criminal Appeal No. 220 of 1994**, it was added that;

".....in matters of identification it is not enough merely to look at the factors favouring accurate identification. Equally important is the credibility of witnesses. The conditions of identification might appear ideal but that is no guarantee against untruthful evidence.... "

To cement it, had PW3 identified the appellant at the scene of crime, this court expected to have found testimonies to the effect that, the police officers, who were informed of the incident on the very night of 21st April, 2021 and, or, the mwano people, to have tried to arrest the appellant at his house. As this story is not featured in the whole proceedings, then it follows that, from 21st April, 2021 when the incident had occurred, no one went to the appellant's house in search of him, till when they arrested him on 23rd April, 2021. This shows that, PW3 did not identify the appellant at the scene of crime, but, the case rests on the strength of a guess work.

As alluded earlier in the case of **Peter William (supra)**, so long as the evidence of PW3, the alleged identifier, has been seen to have contradictory accounts of the same incident, those resulting doubts, must be resolved in favor of the accused/appellant.

For that matter, and, as long as the appellant had not been found possessing any property identified to have direct connection with the ones alleged to have been stolen from the complainant's shop, I find it that, prosecution side failed to prove its case at the required standard. That being the case, there is no need to deal with the other grounds of appeal.

On that account, **I allow the appeal**, quash the conviction and set aside the sentence imposed against the appellant. I further order for an immediate release of the appellant, unless held for any other lawful cause.



S.M. KULITA
JUDGE
02/02/2024

DATED at SHINYANGA this 2nd day of February, 2024.



S.M. KULITA
JUDGE
02/02/2024

