IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 317 OF 2018

(From the decision of the District Court of Temeke at Temeke in Criminal Case No. 184 of 2015 passed by Hon. TARIMO (S.R.M) dated 22nd day of August, 2016)

HATIBU SAID KABWELE @ TOSHA.........................APPELLANT

VERSUS

THE REPUBLIC...RESPONDENT

JUDGMENT

Date of last order 10/10/2019
Date of Judgment 17/10/2019

NGWALA, J.

The appellant in this appeal, one Hatibu Saidi Kabwele @ Tosha, was found guilty and convicted of the offence of Armed Robbery contrary to section 287 "A" of the Penal Code [Cap. 16 R. E. 2002] as amended by Misc. Written Laws Amendment. Act No 3 of 2011. He was sentenced to thirty years imprisonment.

In the judgment of the trial court, the Resident Magistrate states that:-

"I have therefore been satisfied that the accused person did steal from PW1 and he used the knife as a weapon to injure PW1 and to stop him from getting back his properties. It is for the foregoing, I find the accused person guilty and I hereby court as charged".

It is from that quoted extract of the judgment, in the grounds of appeal, the appellant is complaining that the trial magistrate grossly erred in convicting the appellant when there was neither evidence to prove the offence of Armed Robbery nor any case against him proved beyond reasonable doubt.

The appellants' other ground is that, the trial magistrate erred in taking account, the unprocedural visual identification and admission of the caution statement. Exhibit "IDI" that caution statement was taken or recorded three days after his apprehension contrary to the provisions of Section 50(1) of the Criminal Procedure Act.

In this appeal there was no resistance to the grounds of appeal, as the learned State Attorney Mr. Mwaitenda who represented the Republic supported the appeal. He

stressed there was a contradiction in the prosecution evidence. PW1 failed to provide the description of the appellant because the incident took place during the day time.

Besides that, the learned State Attorney supported the appellants complaint on the grounds of appeal put foward, that there was no Police Officer to whom PW1, the victim had reported first the incidence of the offence who testified to the effect that the appellant was the prime culprit.

In support of these grounds of Appeal Mr. Mwaitenda, argued that, it is clear from the Proceedings of the trial court that the appellant was arrested by the militiamen and the local Government Chairman (*Mwenyekiti wa Serikali ya mtaa*). The militiamen should have been summoned in court to testify.

After considering very careful the brief submission in support of the appeal, on the face of the evidence on record, I have found myself not in agreement with the brief line of argument by the learned State Attorney. I could only agree with the learned State Attorney if reference to the record of the trial court showed and proved clearly that no offence was commited.

The testimonies of PW4, and PW2 vividly show that the appellant caused grievous harm to the victim PW1. It is in evidence that after the accused had stabbed PW1 on the back, PW1 fell down and became unconscious. When the victim fell down his properties were taken by the mob of people that came to rescue their fellow who was restrained after being apprehended by people. It is also in the record that a PF3 was tendered and admitted that showed the nature of injury was grivious harm. The charge of armed robbery instead of Grivious Harm was preferred by Police, however pursuant to the advice or instructions by the State Attorney's office, a charge of Armed Robbery was laid down.

Furthermore, there is no tangible evidence to prove the offence of armed Robbery, and the corroborative evidence in the trial court's record that the accused had stabbed PW1 the complainant on the back does not show that, he did so in order to steal. This fact is supported by the a PF3 (exhibit P1) that described the nature of the injury, sustained as deep cut wound on the back suspected to have been inflicted by a sharp object, which is grivious harm.

In the circumstances, as the offence of armed robbery was not proved, but the adduced evidence proved a lesser offence of Causing Bodily Grivious harm Contrary to Section 225 of the Penal Code. In my considered opinion the justice of this case, should have been for the accused person to be convicted of the offence of Grivious Harm Contrary to Section 225 of the Penal Code, [Cap.16 R.E. 2002]. Accordingly, in terms of section 372 of the Criminal Procedure Act, [CAP. 20 R.E 2002] in exercise of the revisional powers of this court, the conviction of the offence of Armed Robbery is substituted to Grivious Harm contrary to section 255 of the Penal Code, [CAP. 16 R.E. 2002].

Accordingly the sentence thirty (30) years imprisonment is varied and substituted to a term of five (5) year imprisonment from the date of conviction. The appeal is party allowed.

A.F. Ngwala

JUDGE

17/10/2019

17/10/2019

Coram: Dr. A. F. Ngwala, J.

Appellant: Present

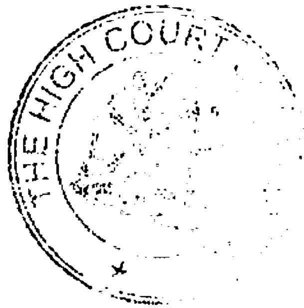
For Respondent/Republic - Miss Doroth Massawe

(Senior State Attorney)

B/C Miss Monica

Court: Judgment delivered in Court.

Court: Right of Appeal to Court of Appeal explained.



A.F. Ngwala

JUDGE

17/10/2019