

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

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 48 OF 2019

*(Originating from Criminal Case No. 372 of 2018 in the District Court of
Temeke atTemeke)*

HAMAD HUSSEIN RAJABU..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

Date of last Order: 09/09/2019

Date of Judgement: 28/10/2019

J U D G E M E N T

MGONYA, J.

Aggrieved by the decision of **Temeke District Court in Criminal Case No. 372/2018** the Appellant in this matter sought for an appeal before this Honorable Court with 6 grounds of appeal against the conviction and sentence , as herein below:-

1. That, the learned trial Magistrate grossly erred in holding to PW2's visual identification vide parade conducted by PW3 where the victim asserted to have

known the Appellant from before in contravention of rule's and regulations' of P.G.O No. 232 Rule (21).

- 2. That, the learned trial Magistrate erred in convicting the Appellant where none of the Police Officer(s) to whom the offence was first reported ever testified to the effect that the Appellant was the prime culprit.***
- 3. That the learned trial Magistrate grossly erred in failing to note that no evidence was led to suggest the Appellant's man hunt immediately after occurrence of the offence considering he was known by the victim and reside in the same vicinity.***
- 4. That the learned trial Magistrate grossly erred in failing to realize that the prosecution did not establish the Appellant's apprehension in connection with the offence.***
- 5. That the learned trial Magistrate grossly erred in not appraising the prosecution evidence objectively before relying on it as basis for the Appellant's conviction.***
- 6. That the learned trial Magistrate grossly erred in not appraising the prosecution evidence objectively before relying on it as basis for the Appellant's conviction.***

When the Appeal was placed before me for hearing both parties appeared and the Appellant appeared unrepresented while the Republic herein was represented by Ms. George, learned State Attorney. The Appellant submitted to this Court by requesting this Court to accept his written submission in respect of the Appeal after reading the explanation of the grounds of appeal in advance.

Ms. George, State Attorney informed this Court that they have gone through the grounds of Appeal and record of the lower court (proceedings). From the outset, they are of the view that the Appeal has merits, hence we support the same.

Further they support for the major reason on the 1st ground that his conviction based on identification of which was illegal, this case based on **IDENTITY** and **CAUTIONED STATEMENT** of the Accused/Appellant.

It is averred by the learned State Attorney that, on identity it is acceptable that PW2's identification was ambiguous at pg. 11 (one Beatrice Kanoni). Where the same stated that the event took place at 21:00 hours on 02/04/2018 she claims to meet 2 people while she was walking on the road. Those people invaded her and stole her telephone **NOKIA** and **70,000/= Tshs** and her handbag.

Also that those people injured her with the base of machete on her back and they ran. That was end of her testimony.

Ms. George learned State Attorney submits that when PW1 testified, she stated that she identified one of those people to be **HAMADI BAIBUI** since there was enough light. I see this awkward since, if she knew the Appellant, she could have mentioned him from the very early stage in her testimony when she started to identify those 3 people but she came later to mention the Appellant.

Further, she said that she identified Appellant since there was light although she didn't say what kind of light she used to see the victim. Taking into account that they were on the road, the kind of light had to be explained.

In addition the learned State Attorney went on stating the issue of identification has been an issue insisted by the Court of Appeal before any conviction, especially on incidents occurring at night. On this I wish to refer to the case of **SCAPU JOHN & another VR. Criminal Appeal No. 197 of 2008** on pg. 7 of the same, sitting Judges itemized the ingredients of the proper identification.

Failure of the same, identification was improper hence the identification parade too was a nullity. It is for that

reason, this ground has merit and we pray your Honourable Court to take it for consideration.

It is the learned State Attorneys submission that the evidence on cautioned statement at pg. 10 it is seen PW1 Detective James presented before the court was denied but later admitted. We are of the opinion that his kind of evidence needed to be collaborated to have weight but that was not the case. It is for that reason; we are of the view that, cautioned statement cannot be used to convict someone. In the event therefore we are of the fact that, these grounds too have **merit**.

Having summarized the submissions and arguments of the parties before this Court and in reference to the grounds of Appeal I am now in the position to determine the grounds of Appeal before me. In my determination I will argue the 1st ground of appeal separately as it appears and further consolidate the 2nd, 3rd and 4th grounds of appeal because they are intertwined, also consolidate 5th and 6th ground of appeal as they appear to be equally identical.

The Appellant on the 1st ground of appeal states that it was in error to have held unto PW 2s' testimony on identification at the parade held by PW3, where the victim had claimed to have known the Appellant before. It is in records under pg. 2 of the

judgment that the victim claimed to have identified the Appellant by the assistance of electrical light.

Identification in criminal cases is a very serious matter which ought to have been taken very seriously for the court to reach justice in the absence of mistaken identity, this was settled in the famous case of ***Waziri Amani v R. [1980] TLR, 250*** in that case the Court at page 251- 252, observed:

"... Evidence of visual identification, as Court in East Africa and England has warned in a number of cases, is of the weakest kind and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolutely water tight.

[Emphasis is added]

It is well settled that when a court intends to rely on the evidence of visual identification hence source, intensity, distance and position must be established. The case of ***ISSA S/O MGARA @ SHUKA VS REPUBLIC, Criminal Appeal No. 37 of 2005 (unreported)*** the Court emphasized on sufficient details on the intensity of the light and size of the area illuminated. In the case at hand the victim testified that she managed to identify the Culprit by the assistance of electrical light which was in that area.

for the conviction, the evidence by the prosecution ought to be watertight and weighed with care to enable the prosecution warrant a conviction. However the Appellant on this ground did not specify on what specific point is he referring too and hence makes the ground of appeal to be one with a wide sphere to consider and argue the same.

However the Learned State Attorney in the Submission averred to have argued on the aspect of Identification and Caution statement. I do not see that aspect of Caution statement arising from the grounds of appeal but since it is sported by the prosecution I took effort to peruse for the same in the records and found an irregularity in procedure when there is a caution statement and the same is objected, it is the duty of the Court to conduct an inquiry to ascertain the objection and not jump that hurdle and proceed without an inquiry. In this instant case the same was not conducted.

In the case of ***TWAHA S/O ALI and OTHERS vs REPUBLIC, Criminal Appeal No. 78 of 2004 CAT (Unreported)*** the court observed inter alia;
If that objection is made after the Court has informed the accused of his right to say something in connection with the alleged confession, the trial Court must stop everything and proceed to conduct an inquiry (or trial

within trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence.”

It is in matter at hand as informed by the Learned State Attorney that the Caution statement was admitted and yet an inquiry was not conducted. The Court ought to have conducted an inquiry, to ascertain its voluntariness.

In the final analysis therefore, I **allow the appeal**, quash the conviction and set aside the sentence of thirty years. The Appellant is to be released immediately unless he is being held lawfully for another cause.

Order accordingly.



**L. E. MGONYA
JUDGE
28/10/2019**

Court: Judgment delivered in chambers in the presence of Ms. Faraja George, State Attorney for the Respondent, the Appellant and Ms. Veronica RMA, this 28th day of October, 2019.



**L. E. MGONYA
JUDGE
28/10/2019**