

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF DODOMA
AT DODOMA**

CRIMINAL APPEAL NO.53 OF 2022

HARUNA SAID..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of Singida District Court -Kisoka, RM)

Dated the 08th of June, 2022

In

Criminal Case No. 40 of 2021

.....

JUDGMENT

24th April & 5th May, 2023

MDEMU, J.:

Haruna Said, the Appellant herein and one Emmanuel Jofrey @Mangi were charged with one count of armed robbery contrary to the provisions of section 287A of the Penal Code, Cap. 16 R.E 2019. It is in the particulars of offence that, in the night of 23rd day of May, 2020 at Manga area, within District and Region of Singida the two did steal Tsh. 8,500,000/=the property of Hamisi Juma and immediately before such stealing, they used a piece of iron bar to assault the victim on his head and eye in order to obtain and retain the said money. After full trial, the Court dismissed the charge against Emmanuel Jofrey Mangi and convicted and sentenced the Appellant to serve

thirty (30) years imprisonment. This was on 08th of February, 2022.

Aggrieved, the Appellant preferred an appeal on the following grounds:

- 1. That, I pleaded not guilty when the charge was read against me before the trial Court.*
- 2. That, the trial Court erred in law and fact for not addressing the identification issue properly, the assailants through the front light of the motorcycle coming behind them, while it was night, thus it is not possible to identify any person as the duration and intensity of the light was not said, also the light was switched off on arrival. Therefore, it was evident that, conviction and sentence was entered through assumption of the accused person and not proper identification.*
- 3. That, the trial Court erred in law and fact for not noticing that, during trial, no any prosecution witness said that the Appellant (accused) was familiar to him or mentioned any peculiar mark to identify in relation to the scene of crime. Under such circumstances, the trial*

Court acted upon mere story to enter conviction and sentence against accused(appellant).

4. That, the trial Court erred in law and fact for acting in the testimonies of PW1, PW2 and PW3 alleged that they managed to identify the Appellant on the material night because of his voice telling PW1 "achia begi" as one of them told the trial Court the peculiarity of his voice that distinguished it from other person, since they failed to do so, appellant was convicted and sentenced under shadow of doubt.

5. That, the trial Court erred in law and fact for giving its opinion that the prosecution evidence was based on identification through face and voice, while it is evident that none of the prosecution witness said he managed to identify the appellant by his face, identification through the alleged voice is questionable as all irregularities were not eliminated to prove that it was his voice on the material night, thus conviction and sentence entered against appellant was injustice.

6. *That, PW1, PW2 and PW3 didn't mention the persons who attacked them on the material night and the alleged incident was not reported in any leader of the area, under such circumstance.*
7. *That, the trial Court erred in law and fact for not believing the accused (appellant) defense even after creating sufficient doubt about how his national ID and voters ID got to the prosecution hands, by doing so it was the same as demanding the Appellant to prove his innocence beyond reasonable doubt.*
8. *That, the alleged incident took place at Manga area, but neither PW1,PW2 nor PW3 who reported the matter to the relevant authority(leaders) of the Manga area, in the material day or in the morning of 24/05/2020, but the next day PW4 and PW7 who is VEO of Manga Village went to the scene of crime, the question is who informed them the occurrence of the alleged incident? The alleged incident was never reported to any police station, how did they came to know about it? It is evident that the accused person*

was arrested, charged, convicted and then sentenced not because he participated in the commission of the alleged crime, but due to the voice resembling his at the scene of crime.

9. That, PW4 the Investigator of the case and PW7, VEO of Manga village went to the scene of the crime on 24/05/2020 where the accused alleged IDs were found (National ID and Voters ID). The question is who showed them the scene of the crime if PW1, PW2 and PW3 were not there? During drawing sketch map, there was people watching, why didn't they bring one person as an independent witness. The area has its chairman, ten cell leader, WEO, etc., why didn't they call even one of them to witness what they were doing? It is evident that this was a cooked case against appellant for the reasons best known to the prosecution side.

10. That, the scene of crime was a public road at Manga area, the road which is used by many people, those ID'S could be picked by any person, that is why none of the prosecution witness said, at what exact

time those ID'S were found, or PW4 and PW7 arrived in the alleged scene of crime, thus it is evident that those ID'S were taken by PW4 from accused home after being taken there to show them to prove that he is Tanzanian, PW4 used legal techniques as police investigation officer, connected accused (appellant) with the alleged crime, something which is injustice.

11. That the alleged motorcycle no. MC 668 WT which was found in hands of PW5 was never in my hands and the allegation by PW9, the owner of the alleged motorcycle that she gave me with contract for me to bring her money is not true as she never tendered the alleged contract before the trial Court before the trial Court to prove her allegation.

12. That, the trial Court acted biasly by saying that prosecution side failure to tender NONDO as an exhibit before it didn't shake prosecution case.

13. The trial Court erred in law to hold that the victim was injured though PF3 was not tendered in Court.

14. *That, the Court erred in convicting the Appellant as no arrest warrant was tendered to prove that the appellant was arrested at Kizota area, no independent witness saw such arrest and no written statement tendered to prove that the Appellant robbed the victim so as to be paid 2,020,000/=.*

15. *That, this was a cooked story against the Appellant as in testimony, PW4 didn't say that they found window mirror from the Appellant house and in reading the whole coy of judgement nowhere can be seen PW6 ten cell leader, of unknown area(street) giving his testimony of the alleged window mirror, thus appellant was convicted and sentenced from the shadow of doubt.*

The appeal was heard on 24th of April, 2023 in which, the Appellant fended for himself whereas the Respondent Republic had the service of Mr. John Kidando, Learned State Attorney. In support of his appeal, along with adoption of the contents of his grounds of appeal to form part of his submissions, the Appellant submitted that, evidence that his voter identity card was found at the crime scene is unfounded. He argued that, the said

card was at his residence, and it was seized after searching the house where they also seized glass windows. He added that, it was PW7 who said to have found that card at 11:00 hours with other villagers. However, he said, no any such villagers testified to that effect.

In reply, the Learned State Attorney did not resist the appeal. He summarized grounds of appeal in three groups; **One**, visual identification. **Two**, failure to consider the defence case and **three**, want of proof of the prosecution case.

On is visual identification, it was his submissions that, according to trial Court's record, particularly at pages 15 and 16 of the proceedings, PW1 stated to identify the Appellant through voice. He said that, voice identification is unreliable and also PW1 didn't describe how he identified the Appellant through such voice. He cited the case of **Nuhu Seleman vs. Republic** [1984] TLR 94 to support his submissions.

It was his submission further that, the Appellant was not named to any one at the earliest possible time. In this, he cited the cases **Jaribu Abdallah vs. Republic** [2003] TLR 271 and that of **Marwa Wangiti Mwita & Another vs. Republic** [2002] TLR 39. It was Mr. Kidando's submissions further that, at page 5 of the judgment, the trial Court had an observation that, visual identification and voice identification was not

watertight, thus case therefore was not proved beyond reasonable doubt.

This was his reasons for supporting the appeal.

Having considered the reproduced grounds of appeal, submissions of the parties and the entire record, issues to be determined are: **one**, whether the Appellant was properly identified and **two**, whether the offence against the Appellant was proved beyond reasonable doubt. With respect, I fully agree with the learned State Attorney that, the prosecution witnesses' testimonies on the identification of the Appellant was insufficient to sustain conviction. The evidence was not watertight to meet the principles laid down in the case of **Waziri Amani vs. Republic** [1980] TLR 250. The guiding principles laid down by the Court in **Waziri's case** as to the manner the trial Court should determine issues of contested identity are stated at page 252 to include:-

The time the witness had the accused under observation, the distance at which he observed him; the conditions in which such observation occurred, for stance, whether, it was a day time or night-time, whether there was good or proper light at the scene; and further whether the witness knew or had seen he accused before or not.

According to the record, PW1, PW2 and PW3 testified to have identified the Appellant by sight through the aid of light from motorcycle's

head lamp. However, they didn't describe the intensity of such light which aided them to make proper identification. This raises doubt on the credibility of their evidence. In the case of **Hassan Said vs. Republic**, Criminal Appeal No. 264 of 2015 (unreported), the Court of Appeal observed as follows on this subject: -

It is however, now settled that if a witness is relying on some source of light as an aid to visual identification, such witness must describe the source and intensity of such light in details. The Court has repeatedly in its various decisions in this respect; emphasized on the importance of describing the source and the intensity of the light which facilitated a correct identification of the Appellants at the scene of crimes.

Going by that authority, description of intensity of light was a vital requirement in this case since visual identification was made at night. Furthermore, PW1, PW2 and PW3 didn't describe the Appellant though they stated to know the Appellant prior to the incident.

There is another component in the evidence offered by PW1 and PW2 to have identified the Appellant by his voice. It is trite law that, voice identification is most unreliable as was stated clearly in the case of **Nuhu Selemani** (supra) that, voice identification by itself is not very reliable. This

position has been illustrated in the cases of **Jumapili Msyete vs. Republic**, Criminal Appeal No. 110 of 2014; **Frank Maganga vs. Republic**, Criminal Appeal No. 93 of 2018 and the case of **Stuart Erasto Yakobo vs. Republic**, Criminal Appeal No. 202 of 2004 (all unreported). In **Stuart Erasto's case** just one for illustration, it was held that: -

*The issue is whether voice identification is reliable in law. In our considered opinion, voice identification is one weakest kind of evidence and great care and caution must be taken before acting on it. We say so because there is always a possibility that a person may imitate another person's voice. **For voice identification to be relied upon it must be established that the witness is very familiar with the voice in question as being the voice of the person at the scene of crime.** (Emphasis supplied)*

Looking at the prosecution evidence, especially PW1 and PW2 at pages 15,16 and 21 of the typed proceedings, PW1 and PW2 didn't state as to whether they were familiar with the voice of the Appellant. They just stated to have identified the Appellant through his voice. Such mere assertion on voice identification may not be entertained.

On the basis of the reasons stated above, I am of the settled view that, had the trial Court properly scrutinized the evidence of PW1, PW2 and PW3

which was the only evidence on identification, would have found that, such evidence was not watertight. In the circumstances, the Appellant's conviction was based on insufficient evidence on visual and voice identification. As a consequence thereof, I find the appeal to have merits. This ground alone that the Appellant was not properly identified suffices to dispose of the appeal. A need for considering other grounds of appeal remain of no relevance.

In the event, I allow the appeal. The conviction of the Appellant is hereby quashed and the sentence imposed on him by the trial Court is thus set aside. The Appellant be released from prison forthwith unless held for some other lawful causes.

It is so ordered.



Gerson J. Mdemu
JUDGE
05/05/2023

DATED at DODOMA this 05th day of May, 2023



Gerson J. Mdemu
JUDGE
05/05/2023