

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**BUKOB A SUB-REGISTRY**

**AT BUKOB A**

**CRIMINAL APPEAL NO. 71 OF 2023**

*(Arising from Criminal Case 58 of 2023 District Court of Missenyi)*

**AMON NGWANDAMO @ MASUMBUFU.....APPELLANT**

**VERSUS**

**THE REPUBLIC..... RESPONDENT**

**JUDGMENT**

24<sup>th</sup> and 30<sup>th</sup> April, 2024

**BANZI, J.:**

The appellant, Amon Ngwandamo @ Masumbufu with five other persons were arraigned before the District Court of Missenyi charged with the offence of kidnapping a child with intent to steal contrary to section 252 of the Penal Code [Cap. 16 R.E. 2022]. They were jointly alleged to kidnap the victim (name withheld to protect the child's identity), a girl of four (4) years with the intention of taking dishonestly Tshs.15,000,000/= from Thadeo Rwabusagara. The alleged offence was committed on 28<sup>th</sup> March, 2023 at Bubale village, within Missenyi District in Kagera Region.

Briefly, the historical background of this matter indicates that, on the fateful day around morning hours, PW1, the victim's mother prepared the

victim and her sister and the duo went to school. Around 11:00 PM, the victim's sister returned home alone and upon being asked, she informed PW1 that, the victim was abducted by Edson who used to work for them as cattle header. PW1 informed her neighbours and a search party began. On the same date, Edson telephoned the victim's father (PW4) and demanded a ransom of Tshs.15,000,000/=. They bargained and agreed at Tshs.5,000,000/=. On 30/03/2023, PW4 sent PW2 to the place directed by Edson with Tshs.1,000,000/=in the bag. After reaching at the barrier of Kagera sugar, PW2 put the bag on the road as directed whereby, one man took it and left. According to PW2, the said man was short.

On 02/04/2023, Edson called PW4 and told him that, the victim is at Bushenyi forest. Villagers including PW5 went there but found nothing. Later, Edson told PW4 that, his child was with Amon. PW5 with other villagers went to the forest and found people living there. They searched many houses and in the middle of the maize farm, they found a hut. When they approached it, one person came out and run away. Then another person namely Amon (the appellant) came out of the hut. They entered inside and managed to find the victim. On 12/04/2023, identification parade was conducted by PW6 whereby, the appellant was identified by PW2 as the person who took the ransom money on 30/03/2023.

In his defence, the appellant denied to have committed the alleged offence. He further testified that, on 02/04/2023, he saw a child at his farm and he informed his ten-cell leader (DW2) who told him that, he should not move from his house. Immediately thereafter, he was invaded by group of people and arrested. According to DW2, on 02/04/2023, the appellant called him and informed him that, he saw a child with school uniform at his farm. At the time when DW2 went to appellant's farm, he found the said child had already been taken by police.

At the end of the trial, other five persons were acquitted while the appellant was convicted and sentenced to five years imprisonment. Being dissatisfied with such findings, he lodged this appeal containing four grounds which centred on one grievance that, the prosecution side failed to prove the case beyond reasonable doubt.

At the hearing, the appellant appeared in person unrepresented whereas, the respondent was represented by Mr. Erick Mabagala, learned State Attorney. Being a lay person, the appellant had nothing to say and he urged this court to consider his grounds of appeal and set him free.

On his side, Mr. Mabagala supported the appeal. Expounding his stance, he submitted that, the evidence of PW1, PW2 and PW3 shows that,

the victim was kidnapped by Edson. Unfortunately, the said Edson has never been arrested, instead, it was his young brother, the second accused who was arrested but later acquitted by the trial court. He added that, PW7 and PW9 being police officers did not explain the reasons for failure to arrest Edson. According to him, failure to arrest Edson while he was mentioned by all witnesses as a kidnapper casts strong doubt on prosecution case. He also argued that, the fact that the victim was found in one of the appellant's houses, is not a conclusive proof that, the appellant was a kidnapper.

Apart from that, he submitted that, PW2 did not give prior description of the appellant before he had opportunity of identifying him at the identification parade. Besides, PW2 did not explain the distance between him and the appellant and the time he took to observe him. He supported his submission by the case of **Raymond Francis vs Republic** [1994] TLR 100. He added that, the procedure of conducting the identification parade was flawed because the provisions of PGO 232 were contravened as the officer conducting it has failed to inform the appellant the purpose of the parade and failed to give him his right of having a lawyer, relative or friend. Equally, he did not ask the appellant to comment about the parade and such comment should be reflected in PF 186. He further argued that, there is unexplained delay in conducting the said parade after the arrest of the

appellant. He concluded that, all these flaws make the said parade to be of less value and he supported his submission by citing the case of **Andrea Agustino @ Msigara and Another vs Republic** [2020] TZCA 1948 TanzLII. He finally prayed for the appeal to be allowed as the case against the appellant was not proved beyond reasonable doubt.

Having carefully considered the grounds of appeal and the submission of the learned State Attorney in the light of evidence on record, the main issue for determination is whether the case against the appellant was proved beyond reasonable doubt.

It is undisputed that, the person who was with the victim at the time of the alleged kidnapping, informed PW1 that, the victim was kidnapped by Edson. As conceded by learned State Attorney, the said Edson was never arrested. Worse enough, none among the prosecution witnesses give evidence to explain the connection between Edson and the appellant. Apart from that, the evidence of PW2 concerning identification of the appellant leaves a lot to be desired. It is undoubted that, the appellant was a stranger to PW2. The position on identification of a stranger was settled by the defunct Court of Appeal for Eastern Africa way back in 1942 through the case of **Mohamed Alhui vs Rex** [1942] 9 EACA 72 where it was stated that:

*"In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description given are matters of the highest importance of which evidence ought always to be given; first of all, of course, by the persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given."*

This position was fortified by the Court of Appeal of Tanzania in the case of **Raymond Francis vs Republic** (*supra*) where it was held that:

*"Since all the witnesses admitted seeing the appellant for the first time during the incident that day it was necessary in their evidence of identity to describe in detail the identity of the appellant when they saw him at the time of the incident."*

What I gathered from the extracts above is that, whenever the witness sees the accused at the crime scene for the first time, that witness is supposed to give a detailed description of the accused to the persons to whom he/she first reported about the incident before he/she had a chance of seeing the accused thereafter. The description would be on appearance, colour, height and on any peculiar mark of identity. In the instant case, PW2 claimed to identify the appellant by giving his description that, he was short.

However, such description was too general and can fit to any person not necessarily being the appellant. Moreover, according to his testimony, there is nowhere he mentioned to give such description to police officers to whom he first reported the matter as required by law. Apart from that, there is nothing in PW6's testimony disclosing that, the appellant was informed his rights prior and after conclusion of the identification parade as required under PGO 232. In addition, PW6, PW7 and PW9 did not assign any reason for delay in conducting the identification parade in question which makes the same to be unreliable and hence, it cannot corroborate the evidence of PW2.

Furthermore, the fact that the victim was found in one of the houses of the appellant is not the conclusive proof that, it was the appellant who kidnapped the victim considering that, the appellant has reported to DW2 who is his local leader about the victim being seen at his farm. Besides, it can be recalled that, according to PW5, upon reaching the appellant's hut, someone got out and run away. This indicates that, there was a possibility that, the person who run away was the one who kidnapped the victim and took her to the appellant's hut. He would not have run away if he was not responsible for alleged offence.

Basing on the shortcomings mentioned above, it is obvious that, the prosecution had failed to discharge its duty of proving the case against the

appellant beyond reasonable doubt. Thus, I find the appeal with merit and I hereby allow it by quashing the conviction and setting aside the sentence meted against the appellant. I order his immediate release from prison, unless otherwise lawfully held.

It is accordingly ordered.



**I. K. BANZI**  
**JUDGE**  
**30/04/2024**

Delivered this 30<sup>th</sup> April, 2024 in the presence of Mr. Erick Mabagala, learned State Attorney for the respondent, the appellant in person, Mr. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala, RMA. Right of appeal duly explained.



**I. K. BANZI**  
**JUDGE**  
**30/04/2024**