

TANZANIA / JUDGMENT

HUKUMU Chacha Kitalaya

COURT
TANZLIIDECIDED
6 March 2020

Source: media.tanzlii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DAR ES SALAAM SUB-
REGISTRY AT DAR ES SALAAM CRIMINAL APPEAL NO 4570 OF 2024 Originating From Criminal
Appeal No 32 Of 2020 District Court of Temeke Mwamkenja SRM (Emanating from Criminal Case
No. 112 of 2020) Primary court of Mbagala Hon. S. Ahzia- PCM dated 6th day of March, 2020
CHACHA KITALAYA..... APPELLANT VERSUS JULIANA
DANIEL..... RESPONDENT

JUDGMENT

29th July & 30 Aug 2024 KIREKIANO J. This is a second appeal. The appellant here was tried in the Primary Court of Temeke at Mbagala with one offence of robbery contrary to sections 285 and 286 of The Penal Code Cap 16. It was alleged that the appellant robbed one Juliana Daniel, a handbag containing cash money TZS 650,000, cell phones and other items, all totalling TZS 3,930,000. 1 The primary court found that the offence was proved to the required standard. Accordingly, the appellant was convicted, and a minimum custodial sentence of 15 years in jail was inflicted. This decision aggrieved the appellant; he challenged it in the district court of Temeke, faulting the trial court's finding and lamenting on insufficient evidence to convict him. His appeal to the district was dismissed, hence this appeal. The material facts that led to the appellant's trial and conviction were based on the following. On 1.1.2020, when everyone rejoiced receiving the new year 2020, the victim, PW1 Juliana Daniel, thought she had a better option on how to celebrate. She went to a night celebration around 00:30 hrs she was on her way back home, according to her, she was stormed by a group of about 20 youths who robbed her of the said items; according to her PW2, Fredrick Geoffrey attempted to rescue her, but he was injured by a bush knife and lost conscious, she, however, identified the appellant as her assailant. The said PW2 Fredrick Geoffrey also testified that he attempted to rescue the victim, but he was assaulted by the appellant using a bush knife. 2 PW3 Soda Masamaki and PW4 Agnes Adolf also testified to the effect that on the very night they were on the way to receive the victim who was coming from the night celebration of the 2020 new year; they saw the group of about 20 youths who stormed the victim. It was their evidence that they identified the appellant as the assailant who robbed the victim. On his part, the appellant's case was completely denial; according to him, he was arrested at home on 27.01.2020 and was beaten by police who demanded TZS 600,000. He was detained at the police station for five days, and he was then accused of robbing PW1, which he denied. The appellant's complaint that he was arrested at home on 27.01.2020 and beaten was verified by DW2 Salome

Kagoto, the appellant's relative. Based on this evidence, the trial court found that the charge was proved to the required standard, convicted the appellant, and passed the sentence indicated. The first appellate court, while dismissing the appeal, reasoned that taking into account that the alleged offence took place at 00: 20 hrs, as established by PW1, PW2, and PW3 at the trial court, there was direct evidence that the appellant was identified; the witness's evidence was satisfactory, more assuring, and reliable. 3 Undaunted, the appellant preferred this appeal armed with seven grounds of appeal. However, during the hearing, he condensed the same into two major complaints: one, there was no sufficient identification, and two, the charge was not proved beyond reasonable doubt. The appellant was not represented; he filed a written submission. The respondent did not appear, and she could not be served directly. An attempt to serve her by substituted mode was made but proved futile. This appeal was thus heard *ex parte*. In support of the first complaint, the appellant submitted that there was no favourable condition for unmistakable identity; the appellant faulted the first appellate court for failure to evaluate the evidence of PW1, PW2, PW3 and PW4 on the type of light, its source intensity, position and the distance it was illuminating from to the point of alleged confrontation. He cited Kassim Said and two Others, Criminal appeal No. 208 of 2013 (Unreported), that when it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to see and positively identify the accused person. 4 He also argued that none of the witnesses described how the crime scene was lit; thus, the question of recognition does not arise in circumstances where conditions for identification were unfavourable. He cited Anael Sambo v. R, Criminal Appeal No. 274 Of 2007. On the second complaint, he cited the decision in Nathaniel Alphonse Mapunda and Benjamin Alphonse V.R, [2006] T.L.R 395, which held that in criminal charges, the prosecution always has the burden of proof, and the proof has to be beyond a reasonable doubt. The appellant argued that the prosecution's case was marred by inconsistency in the evidence of PW3 and PW4 regarding when exactly the offence was committed. As such, the evidence in the prosecution case was affected by the absence of the material witness, the officers who arrested the appellant, or the investigating officer who was not summoned to testify. According to the appellant, the evidence from those police officers was vital to tell what happened. In support of his contention, he cited Paschal George Paschal vs Republic (Criminal Appeal No. 647 of 2021) [2024] TZCA 534 (9 July 2024) held that the discretion of the prosecution to call the witnesses which they find most suitable to prove their case must be exercised judiciously to advance the cause of justice. 5 While I address the appellant's complaints, I know this is a second appeal. Thus, with all things perfectly done, this court will refrain from disturbing the concurrent finding of fact. In Jafari Mohamed vs Republic Criminal Appeal No. 112 of 2006, it was held: - "Where there are concurrent findings of facts by two courts, the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure." I will start with the first complaint on identification; according to prosecution evidence, the offence occurred at midnight, that is, 00:30 hrs. Under this circumstance, to find conviction, the two lower courts were enjoined to ensure that the evidence on identification was watertight, leading to an unmistakable identity. The guiding principle is discernible from a litany

of case laws, including the cases relied on by the district Court and those cited by the appellant, in *Waziri Amani Vs. Republic* [1980] TLR 250 is a celebrated case of visual identification. The Court stated, "...in a case involving evidence of visual identification, no court should act on such evidence unless all possibilities of mistaken identity are eliminated and that the court is satisfied that the evidence before it is absolutely watertight....." 6 While dismissing the appeal, the first appellate court did not align the above principle of identification with the evidence before it. There was no analysis done on the strength of the light at the scene, the number of assailants, which is about 20 youths and the circumstances that the assailants were armed and eventually assaulted PW2, causing him to lose consciousness. With respect, the analysis of evidence by the trial court was wanting and more so, the first appellate court did not sufficiently evaluate the evidence on this fact. This misdirection justifies this court stepping into the shoes of the first appellate court and re-evaluating the evidence on this aspect. Evidence from PW1 and PW3 showed that the appellant was identified and singled out from about twenty bandits. No evidence was tendered on the source and strength of light or features used to identify the appellant amongst 20 people at midnight. Considering the conditions stated, it was incumbent on the prosecution witnesses to explain what sort of light aided them and how they identified the victim assailant at the scene of the crime: Kassim Said and two Others (considered) Without good evidence of how the condition for identification was favourable, visual identification remains unsafe to be relied upon. 7 The court of appeal faced a similar situation, and it was clear that the issue of familiarity does not come into play where the conditions are not ideal for an unmistakable identity. *Kurubone Bagirigwa & Others vs Republic* (Criminal Appeal 132 of 2015) <https://tanzlii.org>, The court of appeal, citing *Chokera Mwita Vs. Republic* and *Issa Mgara @ Shuka Vs Republic* held. It was not enough for the witnesses to say they knew the appellants; mistaken identity is possible in recognition cases. It is on record that PW3 testified that the appellant was identified at the police station as the victim's assailant. No such evidence of identification parade or any sort was tendered to corroborate the evidence of identification. Assuming this evidence was there, it was necessary to confirm the evidence on identification. ` There was no evidence of how the appellant was arrested or whether there was a link between his arrest and the testimony of the witnesses alleged to have been at the crime scene. The appellant stated in his defence that he was arrested at home a few weeks after the alleged incident. In the absence of the arresting officer, It is unclear what led to his arrest. The officer who arrested him was certainly an important witness and should have been procured to cover the critical gaps to ensure with 8 certainty that it was the victim's assailant who was in the dock, and no doubt about it. I note that the respondent did prosecute the appellant in the primary court; this did not compromise the standard of proof. There is a settled principle that the prosecution's failure to line up important witnesses without reason will prompt the court to draw an adverse inference against the prosecution. In *Boniface Kundakira Tarimo v. Republic*, Criminal Appeal No. 351 of 2008 [2011] TZCA 194: [4 October 2011: the CAT held; "...It is thus now settled that, where a witness who is in a better position to explain some missing links in the party's case, is not called without any sufficient reason being shown by the party, an adverse inference may be drawn against that party, even if such inference is only a permissible one." I thus find merit in the first complaint that there was insufficient evidence to find a conviction against the appellant. On the second

complaint, the appellant faults the first appellate court that the prosecution did not prove the charge beyond a reasonable doubt. Based on what I have deliberated above, on insufficient evidence on identification I am inclined to merit this ground In the upshot, the appeal 9 is allowed, the conviction and sentence meted are set aside, and the appellant is to be released from prison unless otherwise lawfully held. A. J. KIREKIANO JUDGE 30.08.2024 COURT: Judgment delivered in the presence of the appellant and in the absence of the respondent. A. J. KIREKIANO JUDGE 30.08.2024 10

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE	https://media.tanzlii.org/media/judgment/315844/source_file/226f48fd7a57923a/HUKUMU_Chacha_Kitalaya.pdf
CASE PAGE	https://chat.esheria.ai/case-law/tanzania/chacha-kitalaya-v-juliana-daniel-robbery-tanzlii-2020--6a3ea5243b1caa9129819b4e

Prepared on 13 October 2026 · Esheria