

TANZANIA / JUDGMENT

gasper beda lyimo vs republic

2021 tzhc 7566 15 november 2021

COURT
TZHCDECIDED
15 November 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA DISTRICT REGISTRY OF MOSHI
AT MOSHI CRIMINAL APPEAL NO. 56 OF 2021 (Original Criminal Case No. 141 of 2020 in the
District Court of Hai at Hai) GASPER BEDA LYIMO APPLICANT
VERSUS THE REPUBLIC RESPONDENT

JUDGEMENT

25/10/2021, 15/11/2021 MWENEMPAZI, 3 . The appellant has filed this appeal, challenging the decision of the trial court which decision convicted him with the offence of Armed Robbery contrary to section 287A of the Penal Code, Cap. 16 R.E.2019 read together with the Written Laws (Miscellaneous Amendment) Act, No. 3 of 2011. He was sentenced to serve a term of thirty (30) years imprisonment. The appellant has raised five grounds of appeal as follows:

1. That, the learned trial Magistrate grossly erred both in law and fact in failing to hold and appreciate that, the identifying witnesses were under the influence of alcohol, in a result of consuming a local brew (dadii) which its alcoholic volume is unpredictable. In that regard no one can say with certainty that they properly identified the appellant at the scene of the alleged crime.
2. That, the learned trial Magistrate failed to note that the identifying witnesses (PW1, PW2 and PW3) never identified their assailant at the crime scene. Since, they asserted that, the one whom they purported to be the appellant had put on a black cap. Therefore, it is hardly to recognize a person who have put on a cap in a sudden invasion, as this is among the unfavorable circumstances for a correct and unmistakable identification since the above mentioned witnesses themselves said that it was a sudden attack.
3. That the learned trial magistrate grossly erred in both law and fact in holding that the PW2 and PW3 had an ample time to see and recognize the appellant at the scene of crime despite the fact that the victim(PW1) testified that his fellow PW1 and PW2 got shocked and run away after the attackers had appeared on the crime scene.

4. That the learned trial magistrate grossly erred in both law and fact in replying on a contradictory and incredible evidence from prosecution witnesses to base the appellant's conviction. In that the PW1 said that his fellows run away, but PW2 stated the contrary by saying that there were exchange of words between him and the appellant Further PW1 said that he was admitted for one week but the PW4 (the medical doctor) said he admitted the PW1 for three
- (3) days only. Therefore the prosecution witnesses lied before the court in order to achieve a certain end against the appellant.
5. That, the learned trial magistrate grossly erred in both law and fact in convicting and sentencing the appellant despite the charge being not proved beyond reasonable doubt against the appellant and to the required standard by the law. In the trial court it was alleged that the accused(appellant) on the 17th day of September, 2019 at Kikavu Area within Hai District in Kilimanjaro Region, stole cash Money Tshs. 232, 000/= and a mobile phone make Itel worth Tshs. 50, 000/-; all making a total of Tshs. 282,000/= and immediately or after stealing those properties he cut one Cassian Suleman with a bush knife in order to obtain and retain the said properties. When the charge was read over to the accused person (the appellant herein) he denied the same. The prosecution paraded four (4) witnesses who testified in favour of the prosecution and the defendant (the appellant) testified alone for defence. At the hearing of the appeal the appellant informed the court that he had prepared memorandum of appeal and he has nothing to add. He prayed this court to consider the grounds of appeal. The respondent was being represented by Mr. Kassim Nassir, learned State Attorney. He informed this court that on behalf of the respondent, they are supporting the appeal by the appellant basing on the 1st and 2nd ground of the appeal. He submitted that they agree with the appellant that there was no proper identification at the scene of crime to satisfy the criteria put down by law. The opinion is based on the evidence of PW1 at page 11 of the proceedings. PW1 alleged that on the date of event it was during the night. PW1 and 3 other colleagues PW2 and PW3 were at the Liquor club where they sell local liquor "Dadii". They were drinking liquor starting at 18:00 hours. Suddenly the appellant came at the liquor club and attacked PW1 and robbed various assorted items mentioned by PW1. PW1 allege the event took about 2 minutes. The event was a sudden ambush. The appellant was wearing a hat/cap. The event happened at around 21:00 hours. The way the event was described due to the fact they were drinking liquor there is doubt the identification was proper without any mistakes. There were doubts. Due to that they support and agree on the 1st ground of appeal. The 1st ground is also supported with the second (2nd) ground of appeal with the same explanation. On the evidence as testified by PW2, Felist Calist Mushi whose testimony we believe was truthful, it gives us doubt on the identification of the appellant and truthfulness of the evidence. In the testimony at page 14 of the proceedings, PW2 informed the court that he asked the appellant "why are you attacking my colleague" the appellant said. "I have warned PW1 to stop dating my wife but he has refused to stop". This gives doubt on integrity of the said PW1. That is why they believe the identification was not proper. Due to that we are supporting the appeal on the

reasons just been advanced. The appellant when asked if he has anything to add he denied to have anything further. I have also read the record and heard the submission by the counsel for the respondent. Basing on the reasons stated I do also doubt identification was proper given the description of the event by the witnesses for the prosecution especially PW1, PW2 and PW3 who were drinking liquor together. It is plain also in the evidence by PW2 and PW3 that they never saw the assailant stealing. Thus, even if it was the appellant who attacked the victim, PW1 still it will be an assault not armed robbery. They both testified that they were told by PW1 that he had money Tshs. 232,000/= and a mobile phone. But they never saw the assailant stealing. Under the circumstances I find the appeal has merit and the same is hereby allowed. The judgement of the trial court is quashed and the sentence is set aside unless otherwise the appellant is lawfully being held for another offence. It is ordered accordingly. Dated and delivered at Moshi this 15th day of November, 2021 Y \\ T. M. M w S^ IPAZI ! ... I •-H' f v ! 1 •••. JUDGE Judgement delivered in court this 15th day of November, 2021 in the presence of the appellant and absence of the counsel for the respondent. T. M iZ I JUDGE V 5

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