

IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: MSOFFE, J.A., KAIJAGE, J.A., And MUSSA, J.A.)

CRIMINAL APPEAL NO. 303 OF 2012

**1. EMANUEL ADAMU KESSY }
2. AMEDEUS WILFRED }APPELLANT**

VERSUS

THE REPUBLICRESPONDENT

(Appeal From the Judgment of the High Court of Tanzania

at Moshi)

(Mzuna, J.)

Dated the 4th day of February, 2011

in

Criminal Appeal No. 56 of 2009

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JUDGMENT OF THE COURT

20th & 24th June ,2013

MUSSA, J.A:

The appellants, along with two others, stood trial in the District Court of Hai upon a two counts indictment. Their co-accused persons were, namely, Martin Mrema and Isdor John, respectively, the third and fourth accused persons. On the first count, the appellants, along with the third

accused person, were jointly arraigned for armed robbery, the allegation being that on the 29th December, 2007 at Sanya Juu, within Hai District, the appellants and their co-accused stole a saloon car, registration No. T610 AJX, property of Barakaeli George. As regards the second count, the fourth accused was arraigned alone for receiving a car battery, speaker and radio from the second appellant, knowing or having reason to believe that the items were stolen or otherwise unlawfully acquired.

At the close of the case for the prosecution, the third and fourth accused persons were acquitted on a no case to answer. The appellants had to face the full length of the trial and, in the end, they were convicted and each was sentenced to a term of thirty (30) years imprisonment with corporal punishment of six strokes of a cane. Their appeal to the High Court was dismissed (Mzuna, J.) hence this second appeal. The background giving rise to the appellants' arrest, arraignment and their subsequent conviction, may be narrated briefly.

From a total of four prosecution witnesses, it was common ground that the allegedly stolen car was property of Barakael George @ Mmary (PW1), who used to operate it as a taxi. Evidence was to the effect that on the alleged date and place, around 10.00 am, PW1 was approached by

the second appellant who requested to be transported to Kileo coffee farm at Ngumbaru Village. The transaction was agreed at a charge of a sum of shs. 40,000/=, but the second appellant requested PW1 to pick a colleague in the neighbourhood, who was to join him in the journey. The accompanying colleague who turned out to be the first appellant, was picked at a nearby Makondeko bar and upon embarkation, he took a rear seat in the taxicab. The second appellant was on the front passenger's seat, abreast PW1. At a certain spot, in the course of the journey, the first appellant directed PW1 to drive towards a tree that was in the immediate vicinity. As he reached the tree, all of a sudden, the first appellant wrapped a sisal rope around PW1's neck from behind, and tightly strangled him with it. In an effort to free himself from the stranglehold, PW1 ejected himself from the car through its window, but the first appellant did not loose his grip. Eventually, the first appellant drew out a pistol and fired a shot in the air, whereupon PW1 gave up the confrontation. He then heeded a command to drive on but, upon reaching Kidire minor settlement, the car ran out of fuel. Next, the first appellant snatched away a siemen mobile phone from PW1's pocket and proceeded

to fetch gasoline within the locality. The second appellant remained, ostensibly, to keep guard.

A little later, having obtained a gallon of petrol, the first appellant joined the others, following which PW1 was commanded to drive towards Arusha. They made a brief stop at Maji ya Chai settlement, where PW1 complained that the car was running out of fuel. By then, it was already 10.00 pm. Once again, the first appellant fetched and brought the fuel but; as the appellants were in the process of refueling the car, PW1 picked the chance and slipped away from the carjackers. For quite a good while, he took a hiding inside a road caravat, in which he had to endure the company of a seemingly insane person. Much later, around 3.00 am, PW1 came out of hiding and travelled back to Sanya Juu where he reported the occurrence at the police station.

The investigations of the reported episode were assigned to a Detective Constable No E8958, namely, Casper. At the outset, a siemen mobile phone was retrieved at Kidire, KIA junction, from Abdi Makone (PW3). From his testimony, it came to light that he was the one who supplied the gallon of petrol to the first appellant after the latter had pledged the phone as security for a subsequent payment. Apparently,

PW3 was not previously known to the first appellant but was introduced to him by Baraka Zuberi (PW2) who thoroughly knew him. During the trial, the retrieved mobile phone was claimed by PW1 to be his belonging and adduced into evidence as exhibit P1.

On the 31st December, 2008, PW4 was led by PW1 to the carjacking scene where he collected a used cartridge of a pistol (exhibit P5). While he was inspecting the scene, PW4 was tipped by a whistle blower that it were the appellants who perpetrated the carjacking incident. Following the tip-off, the second appellant was apprehended on the 7th January, 2008, whereupon he orally confessed involvement in the carjacking incident and, actually, led PW4 to the fourth accused where a car speaker, radio and battery were retrieved. The second appellant informed PW4 that he had dismantled the items from the robbed car and pledged them to the fourth accused to secure a loan of shs. 30,000/=. The car speaker, radio and battery were admitted into evidence, respectively, as exhibits P2, P3 and P4.

As regards the first appellant, PW4 told the trial court that he was arrested at Arusha and handed over to him on the 12th January, 2008. When questioned about the whereabouts of the carjacked vehicle, the first

appellant led PW4 to the third accused who, in turn, confirmed having received it but claimed that it was, eventually, passed to a certain Mushi. The said Mushi could not be found and, apparently, all efforts to trace the ill-fated car ended in futility.

Against the forgoing prosecution version, both appellants adopted the rare option of remaining silent by abstaining any reply in defence. It is, perhaps, additionally noteworthy that, rather astonishingly, throughout the conduct of the trial, both appellants did not cross-examine any of the four prosecution witnesses. As hinted upon, the appellants are aggrieved upon a five grounded joint memorandum which may be condensed under three headings:-

- 1. That the allegedly robbed vehicle was not adduced into evidence to prove the occurrence (ground No. 4)*
- 2. That the first appellate court erred in upholding the conviction which was grounded on a dock identification of the appellants by PW1 who did not even give a detailed description of them (grounds No's 1 and 2)*
- 3. That PW4 contradicted pw1 in his claim that he retrieved the empty cartridge at Kileo estate, as against the latter's testimony to the effect that the gunshot was fired at Kidire KIA(grounds Nos.3 and 5)*

At the hearing before us, the unrepresented appellants fully adopted their memorandum with a rejoinder that the trial Magistrate refused to avail to them the complainant's police statement that would have facilitated an effective defence. The respondent Republic was represented by Mr. Haruni Matagane, learned State Attorney, who fully supported the conviction and sentence. In his submission, given the fact that the episode took a duration of twelve hours, the identity of the appellants by PW1 was beyond question. Mr. Matagane further contended that the second appellant made a confession that led to the retrieval of a car battery, radio and speaker which were dismantled from the stolen vehicle. Finally, the learned State Attorney submitted that prosecution version remained unchallenged, particularly since none of its witnesses was cross-examined.

Addressing the points of contention, we need not detain ourselves in the grievance about the trial Magistrate refusing the appellants access to the complainant's police statement. To say the least, the complaint is not borne by the record and neither was it raised in the memorandum of appeal.

Dealing with the other complaints raised in the memorandum of appeal, we propose to begin with the grievance relating to the stolen car

not being tendered to prove the occurrence. As already intimated, the stolen car was not traced and, on the premises, it could not have been availed for tendering. Nonetheless, the testimonial account of PW1 clearly established that he was violently dispossessed of the motor vehicle on the 29 December, 2007. As correctly observed by the learned State Attorney, the account by PW1 was not challenged at all.

In their first and second grounds of appeal, the appellants criticize the first appellate court on account that it erroneously upheld a conviction that was grounded on a dock identification by PW1 who, additionally, did not give a detailed description of them. In this respect, we entirely subscribe to Mr. Matagane's submission that in view of the fact that PW1 encountered the appellants for a good twelve hours, he had ample opportunity to identify them. Furthermore, his positive reference to the appellants as the carjackers was not challenged by the appellants by way of cross-examination. In this regard, we wish to reiterate what was stated in the unreported Criminal Appeal No. 67 of 2010- **Nyerere NyagueVs**

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*As a matter of principle, a party who fails to cross-examine
a witness on a certain matter is deemed to have accepted*

that matter and will be estopped for asking the trial court to disbelieve what the witness said.

Finally, in their third and fifth grounds of appeal, the appellants allege that PW4 contradicted PW1 in his claim that he retrieved the empty cartridge of a pistol at Kileo estate, as against PW1's claim that the gunshot was fired at Kidire settlement (KIA). To express at once, it is not true that PW1 testified to the effect that the gunshot was fired at Kidire. According to his testimony, the shot was fired as they were approaching Kileo farm at a tree known as *Mkuyu*. After he gave up the confrontation with the appellants, PW1 was then commanded to drive on until when the car ran out of fuel at Kidire.

To this end, we are fully satisfied that the appellants were sufficiently implicated for the armed robbery. PW1, we should repeat, was not challenged and was consistent in his account. His telling, for instance, that the gunshot was fired at the carjacking scene, was supplemented by the fact that an empty cartridge was retrieved by PW4 right there. Furthermore, his account that a Siemens mobile phone was snatched away from him by the first appellant who left with it at Kidire, is consistent with

the testimonies of PW2 and PW3. The conviction and sentence were fully justified and, accordingly, this appeal is dismissed in its entirety.

DATED at ARUSHA this 22nd day of June, 2013.

J. H. MSOFFE
JUSTICE OF APPEAL

S. S. KAIJAGE
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

MALEWO, M. A.
DEPUTY REGISTRAR
COURT OF APPEAL