IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MBAROUK, J.A., LUANDA, J.A. And JUMA, J.A.)

CRIMINAL APPEAL NO. 326 OF 2014

NYAITORE s/o MBOTA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Mwanza)

(De – Mello, J.)

Dated the 03rd day of September, 2014

in

Criminal Appeal No. 08 of 2014

JUDGMENT OF THE COURT

17th & 19th May, 2016

JUMA, J.A.:

This is a second appeal by Nyaitore s/o Mbota arising from the original judgment delivered by F.S. Kiswaga-RM of the District Court of Serengeti at Mugumu in Criminal Case No. 164 of 2011. The appellant was charged with armed robbery contrary to section 287A of the Penal Code as amended by Act No. 4 of 2004. The prosecution alleged that on 4/3/2010 at Mugumu Town in Serengeti District of Mara Region he stole a motorcycle (Reg. No. T245 BDN Toyo valued Tshs.

1,400,000/=) belonging to one Magutu s/o Kitera. It was further alleged that, in order to obtain or retain the motorcycle he had just stolen; he hit the complainant with a hammer. The appellant was convicted and sentenced to serve thirty (30) years in prison. His first appeal was dismissed by J.A. De-Mello, J., hence this second appeal.

The first ground of appeal put forward by the appellant in this second appeal contend that by placing reliance on visual identification evidence, the trial and the first appellate court erred in law and fact. **Secondly**, he contended that the circumstantial evidence which was relied upon to convict him did not form a complete chain to irresistibly point at his own guilt and subsequent conviction. **Thirdly**, he questioned the failure on the two courts below to evaluate and resolve contradictions in the evidence of the complainant. **Fourthly**, the appellant expressed his concern that the prosecution did not, to the required standard, prove the element of stealing in the offence of armed robbery.

The evidence upon which the appellant herein was convicted was briefly as follows. It was around 18:30 p.m. on 4/1/2010, the complainant Magutu s/o Kitera (PW1) had just parked his motorcycle

at a designated parking bay where he and fellow *"boda-boda"* operators would wait for passengers. Shortly, a passenger he did not know then, asked for a ride to an auction. They took off after agreeing on the fare. When they arrived at the intended destination, his passenger climbed down and gave the complainant Tshs. 5,000/= to deduct the agreed fare of Tshs. 1,000/=. While the complainant was searching his pockets to return the change, his erstwhile passenger fished out a hammer from his trouser pocket and hit the complainant on the head, felling him on the ground.

The bandit dropped down the hammer, climbed onto the motorcycle and began riding away. The complainant raised an alarm. Several motorcyclists who were plying between Burunga and *Mnadani* arrived to offer their assistance. According to the complainant, the bandit who had just stolen his motorcycle was about 100 metres away when he saw the approaching motorcyclists. Sensing imminent arrest, the bandit dropped the motorcycle down and ran away leaving the engine running. The complainant was taken to Mugumu Police Station where he reported his ordeal and was referred to hospital for treatment.

The news that the complainant had been attacked by a bandit whose clothes were described soon spread out amongst the *"boda-boda"* operators. The arrest of the appellant was a result of suspicions which Emmanuel Musa (PW2) had about a man he had accommodated overnight at his house. The day following the incident, PW2 informed the complainant about his suspicions. The villagers decided to visit PW2's house to check on his suspicious visitor. By the time the villagers arrived at PW2's house, his overnight guest had left. Later on, they traced him walking along the Mugumu-Tarime road. That is how the appellant was arrested and taken to Mugumu Police Station.

At the close of prosecution's case the appellant was placed on his defence. He gave sworn testimony, denying the offence. He contradicted the version of evidence that suggested that he was arrested the day following the incidence. He stated that he was wrongly arrested around 10 p.m. on 4/3/2010 upon his arrival from Tarime. He had just alighted from a public transport at Rung'abure village when a group of local *"boda-boda"* motorcycle operators stopped him. They remarked that he had a striking resemblance to a person who had a few hours earlier, attempted to steal a motorcycle

from their colleague. He was taken to the office of the Village Executive Officer (VEO) where the police later came over to collect him. At the police station he was severely beaten and forced to sign a document. He tendered his bus ticket to prove that he had just arrived from Tarime when he was arrested.

After considering the evidence from the prosecution and the defence, the trial court concluded that the appellant was properly identified. In addition, the trial court concluded that there was also circumstantial evidence that irresistibly linked the appellant to the offence of armed robbery.

At the hearing of the appeal, the appellant appeared in person to prosecute his appeal. Ms. Martha Mwadenya learned Senior State Attorney represented the respondent/Republic. The appellant adopted his Memorandum of Appeal and preferred to let the Ms. Mwadenya first respond to his grounds of appeal.

At the very outset Ms. Mwadenya, opposed the appeal and supported the conviction of the appellant. In her submission she combined the first and second grounds of appeal wherein the

appellant faulted the evidence of his identification and other pieces of evidence of circumstances which the two courts below regarded as forming an uninterrupted chain to link the appellant with the offence of armed robbery.

On positive identification, the learned Senior State Attorney submitted that the appellant hired the motorcycle at around 6:30 p.m. which was not yet night time. She also highlighted the opportunities which the complainant had to recognize his assailant. These include the moment when the appellant was carried as a passenger right up to the moment the appellant alighted from the motorcycle and paid out Tshs. 5000/=. She submitted that it was while the appellant was looking for the change when the appellant used a harmer to hit the complainant. Ms. Mwadenya was in no doubt that these evidential opportunities not only provided the occasion for face to face negotiations, but provided the complainant with ample opportunities to identify his assailant for later recognition. The learned Senior State Attorney pointed out that close encounters between the appellant and his victim enabled the complainant to identify which clothes the appellant wore that day.

Ms. Mwadenya urged us to see the irresistible link between the description of the clothes which the complainant made to his fellow motorcycle operators like PW2, and the subsequent arrest of the appellant. She referred us to the evidence of PW2 who, upon hearing description of the clothes which the appellant wore the previous day, realized the appellant who had asked for an overnight sleep at his house, wore the same clothes. That is how an earnest search was made that led to the arrest of the appellant.

The learned Senior State Attorney finally dealt with the fourth ground of appeal wherein the appellant had faulted the way the two courts below for convicting him as they did, of the offence of armed robbery, without proving "stealing" as an integral ingredient of armed robbery. She submitted that the appellant is wrong to think that the element of stealing was not proved beyond reasonable doubt. She referred us to the evidence on record which proved that the complainant had briefly lost possession of the motorcycle when the appellant took it away. The complainant only recovered his motorcycle after the appellant had dropped it down when he saw the approach of

the motorcyclists who were rushing to the scene of crime to help to the complainant.

When his turn came to respond, the appellant complained that the identification evidence of the complainant failed to state the intensity or source of light which assisted him to identify him. He urged us to ignore the way the complainant (PW1) purported to have identified the clothes he wore which also enabled PW2 identify him as his overnight guest. He complained that although the complainant had stated that his assailant wore "a trousers blue jeans and track-suit T-shirt" he did not explain which source of light enabled him to identify the clothing which the bandit wore. The appellant also expressed his doubt how the complainant who carried the bandit on back seat of his motorcycle, was able to identify his passenger.

The appellant urged us to disregard the credence of the evidence of PW2, who he did not know in the first. He submitted that the evidence of PW2 should also not be trusted because he claimed that the appellant was taken to his house by two people who were not called to testify. Further, he expressed his concern why PW2 who claimed to have accommodated him at his house the previous night

did not identify him when he was arrested, but it was the complainant who identified him. This, the appellant submitted, was proof that PW2 did not in fact know him.

As we pointed out earlier, this is a second appeal wherein the role of the Court is restricted on matters of law. Several decisions have clarified the few occasions when the Court may interfere with concurrent findings on facts. In **Wankuru Mwita vs. R.,** Criminal Appeal No. 219 of 2012 (unreported) the Court stated when sitting on second appeal:

> *"...the Court will not readily disturb concurrent findings of facts by the trial Court and first appellant Court unless it can be shown that they are perverse, demonstrably wrong or clearly unreasonable or are a result of a complete misapprehension of the substance, nature and quality of the evidence; misdirections or non-direction on the evidence; a violation of some principle of law or procedure or have occasioned a miscarriage of justice.."*

There is concurrent finding that the complainant (PW1) was robbed of his motorcycle on 4/3/2010 between 18:30pm and 19:00pm at *Mnadani* area of Mugumu town. There was also concurrent finding based on evidence of identification and corroborative circumstantial evidence that— it was the appellant who committed the offence of armed robbery as charged.

After perusing the record of proceedings before the trial court, and also the first appellate court, we do not see any reason to interfere with the concurrent finding that it was the appellant who travelled on the complainant's motorcycle but at agreed destination, fished out a make-shift hammer and hit the complainant, stole the motorcycle before he abandoned the same when he saw the approach of several people who had come in the wake of the complainant's cry for help.

The complainant was candid enough to acknowledge that apart from the description of the clothes which the attacker wore, he did not know his attacker by name or other description. But, it was the description of the clothing which he gave other *"boda-boda"* operators including PW2, which led to the arrest of the appellant. It is significant

to note that the next day when PW1 met the appellant for the second time, he immediately recognized him to be the bandit who was his passenger and who had attacked him the previous evening. This evidence of recognition is confirmed by the evidence of Kadagaa s/o Magoiga (PW3).

Just like the complainant, PW3 was a motorcycle operator at Mugumu town. He was part of the motorcyclists who cruised around Mugumu searching for the bandit. PW3 describes how the complainant recognized his assailant:

> *"...When we reached at Rung'abure village the victim Magutu Kitera (PW1) who was in front of all of us saw this accused, stopped motorcycle & showed us to the accused that is the one who robbed him. Magutu raised alarm we all went to the accused & arrested him. We took him to the Rung'abure village office. The village officers called the police...."*

The record shows that it was E9281 D/SSGT Yona (PW5) who was assigned the investigation file on 5/3/2010. This was the day

when the appellant was arrested by motorcycle operators after being recognized by the complainant. PW5 recalled the following about the appellant's arrest:

"...On the same date around 11:00 am OCCID told me that Nyaitore Mbota (the appellant) has been arrested he is kept in the office of VEO- Rung'abure Ward. I took one police D/Cpl Mauzi & other police officers up to Rung'abure Ward. There were other people including the complainant. Accused was detained in the office. There were so many people there including bodaboda. It was chaos. They wanted to set on fire to the accused. So we took accused to Mugumu Police Station.

On the same date around 14:00 p.m. I interrogated accused by cautioned statement. Informed allegations against him, complainant, I told him my name & I also told him he is at liberty to talk or remain silent. I also informed him whatever he will talk, will be used as evidence in court against him..... Accused then told me everything that on 4/3/2010 around 18:00-17:00 pm he

hired [the] victim to take him to Burunga. But when they reached at Mnadani area he ordered [the] victim to stop when he robbed him....."

The evidence we have revisited, which points at the appellant as the person who committed the offence of armed robbery, is corroborated in material particulars by the cautioned statement of the appellant which he did not object to before it was received as exhibit P3:

> ***"PP:*** *Prays the cautioned statement be admitted as exhibit.*
>
> ***Accused:*** *No objection. I was born in 1987 at Nyamoko village, Mugumu. ... I don't have objection.*
>
> ***Court:*** *Cautioned Statement admitted & marked 'exh. P3'.."*

We can safely point out that despite not offering any objection when the prosecution sought to tender his cautioned statement, the appellant's cautioned statement contains inculpating statements

corroborating in material particulars what the complainant (PW1), PW2, PW3 and PW5 had testified.

In his confessional statement, the appellant recalled how he hired the complainant's motorcycle upon an agreed fare of Tshs. 1,500/=. When he reached Mnadani area, which was also the place where his colleagues in crime were waiting, he asked the complainant to stop the motorcycle. He confirmed the evidence of prosecution that while the complainant was busy looking for change money to refund him, he took out a hammer and hit him on the head. He also disclosed that unbeknown to the complainant and those who had come to assist the complainant, it was the appellant's colleague who was waiting in hiding who failed to ride the motorcycle away forcing its abandonment since other motor cyclists were approaching.

The confession also confirmed that after the incident of armed robbery, the appellant spent the night at PW2's house till the following morning. He was arrested around 9.30 a.m. and taken to the village office from where the police picked him up.

Before we conclude, we wish to express ourselves on the question whether the ingredient of stealing in the armed robbery was proved. We agree with Ms. Mwadenya entirely on her submission that the "stealing" ingredient of the armed robber was proved beyond reasonable doubt. As this Court restated in **Meshaki Abel Ezekiel vs. R.,** Criminal Appeal No. 297 of 2013 (unreported) after referring to its earlier decisions, stealing always involves *asportation* i.e. the physical taking away of stolen item resulting in the owner losing possession. *Asportation* is invariably regarded to be complete when the owner or special owner of the stolen property loses full loss of possession, however brief that loss may be.

In the instant appeal, it seems clear to us that the ingredient of stealing in the offence of armed robbery was complete when the appellant hit the complainant with a harmer felling him down on the ground. Thereafter, he picked up the motorcycle and rode away with it. It did not matter that the appellant had shortly thereafter dropped down the stolen motorcycle when he saw the approach of motorcyclists. The fact that the possession of the motorcycle reverted

back to the complainant, did not affect the earlier complete loss of the possession.

In the upshot of what we have stated herein above, we find this appeal is devoid of merit and it is hereby dismissed.

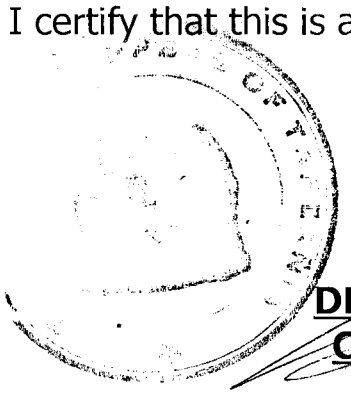
DATED at **MWANZA** this 18th day of May, 2016.

M.S. MBAROUK
JUSTICE OF APPEAL

B.M. LUANDA
JUSTICE OF APPEAL

I.H. JUMA
JUSTICE OF APPEAL

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



E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL