IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 385 OF 2015

GEOFREY LAURENT @ MBOMBO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Khaday, J.)

dated the 15th October, 2015
in
Criminal Appeal No. 21 of 2014

JUDGMENT OF THE COURT

17th ,& 22nd February,2016

KILEO, J.A.:

In the District Court of Muleba at Muleba the appellant was charged with and convicted of armed robbery contrary to section 287A of the Penal Code. He was sentenced to the mandatory term of 30 years imprisonment. He lost his appeal to the High Court hence this second appeal.

It was alleged as per charge sheet that on 24/11/2010 at about 19.30 hours within Muleba District the appellant did steal one motorcycle registration no. T 539 BEF make Bajaj valued at Tshs 1.5m among other properties, the property of one Edgar s/o Rogath, and at the time of such

stealing, the appellant did use actual violence by using a bush knife in order to obtain the said stolen property.

The brief facts of the case leading to this appeal show that on 24/11 2010 PW1 who had in his possession a motorcycle belonging to PW2 for hire was approached by the appellant who wanted to be taken to Rulanga. Arrangements were made earlier in the day that the trip to Rulanga would be at 7.00 pm. The appellant however returned to the victim at 6.00pm and asked him to take him to the agreed destination. PW1 obliged. Unknowing to the victim, the appellant had a panga hidden in his person. On their way the appellant turned on the victim cutting him with the panga. The victim had to abandon the motorcycle and run away in order to save his life. He temporarily lost consciousness and when he came to his senses he found the motorcycle and the appellant gone. He slowly made his way to a place known as Katongo centre. When he got there he again fainted only later to find himself at Kagongo hospital. PW1 claimed that the attack by the appellant resulted in one of his eyes being removed.

When PW2 got information about the incident he proceeded to Katongo and had the victim taken to Kagondo hospital. When PW1

regained consciousness he informed PW2 about the customer who cut him with the panga. Thereafter a search for the appellant was mounted.

PW3 and PW4 explained how the appellant had approached PW3 with a request to allow him to park his motorcycle at his premises, a request which was granted. When it transpired to PW3 and PW4 that the motorcycle which the appellant had parked at PW3's premises was stolen property they assisted the police and the owner of the motorcycle in the search for the appellant. When the appellant was finally apprehended he agreed to have changed the registration number plate of the motorcycle. When he was arrested he was found with the motorcycle's original registration number T539 BEF. It was in the evidence of PW5 that when the motorcycle was traced it bore registration number T. 817 AUG. The proper registration number was T539 BEF which was reflected in the registration card that was tendered in court as exhibit P2.

In his defence the appellant made a general denial of involvement in the commission of the crime asserting that the evidence against him was not sufficient to sustain a conviction. He listed 8 grounds of appeal. These grounds boil down to four main grounds namely:

1. *Inconsistency between the charge and the evidence*

2. *Insufficiency of identification*

3. *Credibility of witnesses and*

4. *Misapplication of the doctrine of recent possession.*

At the hearing the appellant appeared in person and fended for himself. The respondent Republic was represented by Mr. HashimNgole, learned Principal State Attorney.

When the appellant was called upon to address the Court he opted that the learned Principal State Attorney addresses us first.

Submitting on the inconsistency between the charge sheet and the evidence Mr. Ngole argued that the complaint had no merit as the complainant who was mentioned in the charge sheet was a special owner at the time the crime was committed against him, the motorcycle having been entrusted into his possession by PW2 so that he could operate it for hire. In support of his argument he made reference to section 258 of the Penal Code which provides:

Section 258 (1) "A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the

general or special owner thereof anything capable of being stolen, steals that thing.....

and "special owner" means any person who has lawful possession or custody of, or any proprietary interest in, the thing in question".

The appellant did not make any plausible counter argument to Mr. Ngole's assertion on this aspect. We agree with the learned Principal State Attorney. There is undisputed evidence in the present case showing that PW1 had lawful custody and possession of the motorcycle it having been entrusted into his possession by PW2.We find the ground on inconsistence between the charge and the evidence to be lacking in merit.

As for the rest of the grounds Mr. Ngole submitted that the courts below arrived at the right conclusion in finding that the appellant was the one who robbed PW1 of the motorcycle that had been entrusted to him for hiring. He pointed out that the appellant was known to PW1 previously and on the day of the incident he had approached the victim earlier and made arrangements with him to be taken to a certain destination later in the day. The learned Principal State Attorney also pointed out that the victim mentioned the name of the appellant at the earliest opportunity and

immediately a search for the appellant was carried on which eventually led to the discovery of the motorcycle and arrest of the appellant. As it turned out it was in evidence that it was the appellant who had taken the motorcycle to the spot where it was traced.

The appellant on the other hand refuted culpability on the ground that none of the witnesses said that he was found with the stolen motorcycle, but instead it was found with PW3. He also questioned the fact that PW1 and PW2 did not testify to the effect that the number plate and mudguard had been removed when the motorcycle was recovered but instead it was PW3 who mentioned that fact.

This matter need not detain us. Given the sequence of events as it was brought to light by the witnesses we are satisfied that it was the appellant who robbed PW1 of the motorcycle and had it parked at the residence of PW3. The appellant was found with the true registration number plate of the motorcycle after he had affixed a false one to avoid detection. Not only was the appellant well known to the victim prior to the incident but on the day of the incident the appellant had approached PW1 and made arrangements for hiring the motorcycle later in the day. Both PW3 and PW4 gave testimony to the effect that it was the appellant who

parked the motorcycle that later turned out to be the one that was robbed from PW1 at the residence of PW3. These witnesses as well as the rest of the prosecution witnesses were found to be credible by the trial magistrate, a finding which was upheld by the first appellate judge. The appellant challenged the testimony of PW2 where he stated in his evidence (at page 12 of the record) that he did not identify the motorcycle. The answer that PW1 was in response to a question asked in cross-examination. We do not know exactly what the question was but it should however be borne in mind that when the motorcycle was traced after it had been stolen it was found with a different number from its original one. We think this explains why the witness did not only stop at saying that he did not identify the motorcycle. He said: *"I did not identify the motorcycle but I identified you* "meaning that he identified the person they were looking for in connection to the theft of the motorcycle.

On the whole, we have found no reason to query the findings of the two lower courts with regard to credibility of the witnesses. It has been said time and again by his Court that the question of credibility is the domain of a trial court unless it becomes apparent that there was a misapprehension of the evidence by that court. This Court reiterated this

stand and discussed at length the question of credibility in **Salum Ally v. R**, Criminal Appeal No. 106 of 2013, cited by the learned Principal State Attorney. The Court stated:

> *"The first principle is that a second appellate court is required to be very slow in disturbing the concurrent findings of fact of the two courts below unless they completely misapprehended the substance, nature and quality of the evidence resulting into an unfair conviction....."*
>
> *The second principle is that, as often expressed by this Court in previous such situations, the privilege of assessing the demeanor of the witness resides in the trial court which had the advantage of seeing and observing any such witness testify.*
>
> *The third principle is that, on whether or not any particular evidence is reliable depends on its credibility and the weight to be attached to such evidence. We are aware that at its most basic, credibility involves the issue whether the witness appears to be telling the truth as he believes it to be. In essence, this entails the ability to assess whether the witness' testimony is plausible or is in harmony with the preponderance of probabilities which a practical and informed person would readily recognize as reasonable in the circumstances pertaining*

pass were best summarized by the Court in the case of ***Abdalla Teje @ Malima Mabula v. Republic, Cr. Appeal No. 195 of 2005,*** *CAT (unreported) as follows:-*

(i) Whether it was legally obtained,

(ii) Whether it was credible and accurate,

(iii) Whether it was relevant, material and competent, and

(iv) Whether it meets the standard of proof requisite in a given case otherwise referred to as the weight of evidence or strength or believability."

As already said, we find no reason to interfere with the findings of the two lower courts with regard to the reliability of the prosecution witnesses. The case against the appellant was straight forward. It showed that the appellant robbed PW1 of the motorcycle that had been entrusted to him by PW2 for hire. At first the appellant appeared as a genuine customer to the unsuspecting victim to whom he was well known. PW1 mentioned him as the assailant as soon as he regained his consciousness following the assault. Identification was sufficient. The appellant went with the motorcycle up to Luteme- Kimwani and parked it at the residence of PW3

after he had changed the proper registration number with a false one. The motorcycle was constructively found in his possession hardly a week after it had been robbed from PW1. The doctrine of recent possession was properly applied in the circumstances. The appellant was not only identified as the culprit but he was actually found with the stolen motorcycle. In the circumstances we do not see how he could avoid liability.

In the end we find that the appeal lacks merit and for this reason we dismiss it.

Dated at **Bukoba** this 20th Day of February 2016

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

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

E.F.FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL