IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And KEREFU, J.A)

CRIMINAL APPEAL NO. 455 OF 2016

1. STEPHEN PAULO
2. CHARLES BOSCO ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ebrahim, J.)

dated the 28th day of September, 2016
in
(DC) Criminal Appeal No. 69 of 2015

.....

JUDGMENT OF THE COURT

16th & 18th December, 2020

MWARIJA, J. A.:

The appellants, Steven Paulo and Charles Bosco (the first and second appellants respectively) were charged in the District Court of Chato with two counts under the Penal Code, [Cap. 16 R.E 2002] (the Penal Code). In the first count, they were charged with the offence of conspiracy to commit an offence contrary to s.384 of the Penal Code. It was alleged that on 9/4/2014 at about 17:00 hrs at Nyankumbo Village within Geita District in Geita Region, they conspired to steal

motorcycle with Reg. No. T.634 CHB make SUNLG valued at TZS 1,900,000.00 the property of Emmanuel Richard.

In the second count, they were charged with the offence of armed robbery contrary to s.287A of the Penal Code. It was alleged that on 11/4/2014 at about 17:00 hrs at Nyabilezi Village within Chato District in Geita Region, the appellants stole motorcycle Reg. No. T.634 CHB make SUNLG value at TZS 1,900,000.00 the property of Emmanuel Richard (hereinafter "the motorcycle") and immediately before such stealing, by use of a machete, they injured the said Emmanuel Richard by cutting him at the back of his neck in order to obtain and retain the said property.

The appellants denied both counts and as a result, the case proceeded to a trial whereby the prosecution relied on the evidence of eleven witnesses and the appellants were the only witnesses in their defence. After a full trial, the trial court found the appellants not guilty of the first count. It found however, that the second count had been proved beyond reasonable doubt and therefore, convicted and sentenced each of them to thirty years imprisonment. Aggrieved by

that decision they unsuccessfully appealed to the High Court hence this second appeal.

The facts giving rise to the arraignment and ultimate conviction of the appellants can be briefly stated as follows: The victim of the offence, Emmanuel Richard (PW1) was until the material time a rider of a commercial motorcycle (bodaboda) conducting that business within Chato township. On 9/4/2014, he transported two persons to Nyabilezi Village. Having disembarked, those persons required him to collect them from that Village on a later date. They provided him with their mobile phone number so that they could call him when they were ready to return to Chato. On 11/4/2014, PW1 received a phone call from the phone number which was provided to him by those two persons who were his passengers on 9/4/2020. Without being aware of those persons' ill-motive, he rode to Nyabilezi Village expecting to do the business of transporting them back to Chato as they had previously agreed.

What happened after he had met them at Nyabilezi, near a forest where they had strategically stationed themselves waiting for him, was unfortunate. When he stopped the motorcycle and greeted them, one

of them suddenly drew a machete from his jacket and slashed him on the back of his neck. As a result, he sustained injury and pains which caused him to become unconscious for a period of time. When he regained consciousness, he found that the motorcycle and his money had been stolen. His mobile phone was not however, stolen and thus managed to call his brother, Moses Msomi Richard (PW3) who went to the scene and took him to Chato Police Station and after obtaining a PF 3, was taken to Chato District Hospital where he was admitted for treatment. According to the evidence of the Doctor who attended him, Dr. Pius Buchukundi (PW 10), PW1 suffered cut wound measuring 5x2x3cm caused by a sharp object.

Coincidentally, while PW1 was still admitted in the hospital, a motorcycle which was being rode by the second appellant and which beared Reg. No. T 63 CH, was involved in an accident. Having inspected and prepared a vehicle inspection report, the traffic police officer, No. F 3989 PC Rashid (PW8) issued a PF 3 to the said appellant. After treatment however, the second appellant did not return to Police Station. That conduct raised suspicion and because the robbery incident was already reported to the police, further inspection on the motorcycle was made by the Vehicle Inspector, No. E 3042 Detective

Corporal Issack (PW9). According to his findings, the motorcycle was the one which was involved in the robbery but its registration number T.634 CHB had been changed to T.63 CH. It was upon these facts that the appellants were arrested and charged.

In his evidence PW1 testified that the motorcycle was entrusted to him by Nicholaus Jonas Chogo (PW2) to operate the bodaboda business. He testified further that he identified the motorcycle and the appellant at Chato Police Station. According to his testimony, the appellants are the same persons who had hired him on 9/4/2014 and thus on the date of the incident, he met them for the second time at Nyabilezi Village. On his part, PW2 testified that he was the owner of the motorcycle. He produced the motorcycle registration card together with the receipt of its purchase and the same were collectively admitted as exhibit P1.

Evidence was also given by No. E.9032 Detective Corporal Osobio (PW4), No. 1251 Detective Sargent Majani (PW6) and Inspector Marrow Kenyenko (PW11). While on their part, PW4 and PW6 testified that they recorded cautioned statements of the second and first appellants respectively, PW11, who was at the material time the Police

Officer In-charge of Anti-robbery Unit, Geita District, testified on the concerted efforts done by the police at Chato and Geita, which finally led to the arrest of the appellants.

It is imperative to state here that the cautioned statements of the first and second appellants which were admitted by the trial court as exhibits P1 and P3 respectively, were expunged by the High Court on account that the same were improperly admitted in evidence.

The appellants' defence was brief. The second appellant disassociated himself with the commission of the offence stating that he was arrested on 14/4/2014 at Geita. It was his evidence further that at the time of his arrest, he was sick adding that, although it is true that he was involved in a motorcycle accident, the motorcycle with which he met the accident, is different from the one which is the subject matter of the charge.

On his part, the first appellant testified that he was arrested on 14/4/2014 in the morning. He disputed the evidence that he collaborated with the second appellant to commit the offence. It was his further testimony that he was not known to the second appellant and was therefore, surprised by the evidence tendered by the

prosecution that he was mentioned by the said appellant as having collaborated with him to commit the offence of robbery against PW1. He stated further that in his evidence, PW8 did not mention him as one of the persons who was found at the scene of the accident that took place on 14/4/2014.

As stated above, in its judgment, the trial court found that the prosecution evidence did not prove the offence of conspiracy to commit an offence preferred in the first count against the appellants and were, as a result, found not guilty and acquitted of that count. The learned trial magistrate was however, of the view that the second count had been proved beyond reasonable doubt. He found **first,** that the appellants were properly identified at the scene of crime by PW1, **secondly,** that they confessed to have committed the offence and **thirdly**, that the second appellant was found with the motorcycle and did not give reasonable explanation as to how it came into his possession.

On appeal to the High Court, although as stated above, the learned first appellate Judge expunged the appellants' cautioned statements, she agreed with the trial court that the appellants were

properly identified by PW1. She reasoned that on the material date, PW1 met the appellants for the second time and because the offence took place in broad daylight, he was able to identify them properly. In the circumstances, relying on the case of **Yusuf Abdallah Ally v. The DPP,** Criminal Appeal No. 300 of 2009 (unreported), she found that, it was unnecessary for the prosecution to conduct an identification parade. In addition, the High Court found that, since the second appellant was found in possession of the motorcycle, by operation of the doctrine of recent possession, the trial court rightly convicted the appellants.

In their joint memorandum of appeal, the appellants have raised six grounds of appeal. The same can however, be consolidated into three grounds as follows:

1. That the learned first appellate Judge erred in law in upholding the appellants conviction while the visual identification evidence acted upon by the trial court was not watertight.

2. That the learned first appellate Judge erred in law in upholding the appellants' conviction while the prosecution did not prove its case beyond reasonable doubt.

3. That the learned first appellate Judge erred in law in upholding the decision of the trial court which was erroneous for the learned trial Magistrate's omission to consider the appellants' defence.

At the hearing of the appeal, the appellants, who appeared through video conferencing facility linked to Butimba Prison, fended for themselves while the respondent Republic was represented by Mr. Hemedi Halfani, learned Senior State Attorney.

When they were called upon to argue their appeal, the appellants opted to let the learned Senior State Attorney submit in reply to the contents of their grounds of appeal with liberty to make a rejoinder thereto, if they would find it necessary to do so.

Submitting in support of the first paraphrased ground of appeal, Mr. Halfani argued that, when he found the appellants at the police station, PW1 identified them because he had seen them before the date of the incident when he transported them to Nyabilezi Village for the first time on 9/4/2014.

The learned Senior State Attorney contended that the identification evidence sufficiently proved that the appellants were the persons who injured PW1 with a machete at the scene of crime and

stole the motorcycle from him. According to the learned counsel, although in their evidence, PW1, PW3 and PW6 described the time at which the incident occurred as being in the evening, that meant that it was during the day and thus as held by the learned High Court Judge in her judgment at page 113 of the record of appeal, it was in broad daylight. He submitted therefore, that the appellants were properly identified and therefore, this ground of appeal is devoid of merit.

Mr. Halfani submitted further that the second paraphrased ground of appeal in which the appellants contend that the prosecution did not prove its case beyond reasonable doubt is also devoid of merit. According to their memorandum of appeal, the appellants asserted first, that their conviction was based on the proceedings which were marred by irregularities and secondly, that the evidence to the effect that they provided PW1 with their mobile phone number was not corroborated by the evidence of any witness from the providers of the relevant telecommunication companies.

The learned Senior State Attorney argued that there were no substantive irregularities committed by the trial court in its proceedings. Initially, he pointed out that although after admission of the

documentary exhibits tendered by PW2 and PW10, the same were not read out, the omission was not fatal. He argued further that although in the course of his evidence, PW1 identified the motorcycle which had not been admitted in evidence, the irregularity did not affect the prosecution case because the motorcycle was later admitted in evidence without any objection from the appellants. On the evidence of the mobile phone, he argued that he same was not acted upon to convict the appellants. However, when probed by the court on the omission to read out the exhibits after admission, Mr. Halfani admitted that such an omission to read out the documents relating to the ownership of the motorcycle (exhibits P1 collectively) was a fatal irregularity and that therefore, the same should be expunged from the record.

That notwithstanding, the learned Senior State Attorney went on to argue that, apart from being identified by PW1, the prosecution evidence has revealed that the second appellant was found in possession of the motorcycle shortly after the robbery incident and named the first appellant as the person with whom he collaborated in committing the offence and thus by operation of the doctrine of recent possession, the appellants' were properly convicted. On those

submissions, Mr. Halfani urged us to find that this ground is also lacking in merit.

On the third ground, it was the learned Senior State Attorney's argument that although it is true that the trial court did not consider the appellant's defence, the High Court undertook that duty. He referred us to the judgment of the High Court at page 119 of the record of appeal where the learned first appellate Judge looked at the appellants' defence and found essentially, that the same did not raise any reasonable doubt in the prosecution case.

On those submissions, the learned Senior State Attorney urged us not to interfere with the concurrent findings of the two courts below and proceed to dismiss the appeal for want of merit.

In their rejoinder, the appellants opposed the submission made by the learned Senior State Attorney. Reiterating the contents of their grounds of appeal, the first appellant maintained that the prosecution evidence did not prove that he was identified by PW1. He added that there was no evidence from any of the Nyabilezi villagers showing that the robbery incident took place in that village. On his part, the second appellant argued that the evidence did not prove that the motorcycle

with which he was involved in the accident is the one which is alleged to have been stolen from PW1. If that was the case, he went on to argue, he would not have been released after the police had inspected the scene of the accident. The appellants implored us to allow their appeal.

We have carefully reviewed the evidence and the parties' submissions. To begin with the first ground above, the crucial point for our determination is whether the appellants were properly identified. From the record, the direct evidence relied upon by the prosecution as regards the identification of the appellants is that of PW1. As pointed out above, the witness described the time at which the offence took place to be in the evening but did not specify exact time of that evening. "Evening" is defined in the **Collins Cobuild Advanced Learner's English Dictionary, 2006** as *"part of each day between the end of the afternoon and the time when you go to bed."* He did not however, describe the circumstances under which he managed to identified his assailants; whether in that evening there was sufficient light or not. He did not also give the description of those persons.

The position of the law as regards credibility of identification evidence was aptly stated in the famous case of **Waziri Amani v. Republic**, [1980] T.L. R 250. In that case, the Court stated as follows at pages 251 – 252:

> *"The evidence of visual identification is of the weakest kind and most unreliable. It follows therefore, that no Court should act on evidence of visual identification unless all possibilities of mistaken identify are eliminated and the Court is fully satisfied that the evidence before it is absolutely watertight."*

In this case, PW1 stated in his evidence that he identified the appellants when he saw them at the Police Station because he had previously seen them twice, first on 9/4/2014 when they hired him and secondly on the date of the incident on 11/4/2014. He did not however, state either in the trial court or to the police officer before whom he made the identification, the particular descriptions of those persons before he saw the appellants at the Police Station. The requirement that an identifying witness should give prior description of a suspect before he identified him is important in avoiding a mistaken identify. The Court underscored that principle in the case of **Yohana Chibwingu v. Republic**, Criminal Appeal No. 117 of 2015

(unreported). It cited the decision of the erstwhile East African Court of Appeal in **Republic v. Mohamed**, [1942] 9 EACA in which that court had this to say:-

> *"... that in every case in which there is a question of the identity of the accused, the fact of there having been given a description and terms of that description are matters of highest importance of which evidence ought always to be given first of all, of course by the person who gave the description, or purports to identify the accused and then by person to whom the description was given."*

On the salient deficiencies pointed out above as regards the identification evidence of PW1, it was improper for the two courts below to act on it to found the appellants' conviction. We thus agree with the appellants that such evidence was not watertight. The possibility of a mistaken identity was therefore not eliminated.

Turning to the second ground of the paraphrased grounds of appeal, the learned Senior State Attorney has conceded that there were irregularities in the proceedings of the trial court regarding admission of exhibit P1 collectively. Those exhibits were not read out after their

admission in evidence. As held in the case of **Robinson Mwanjisi and Three Others v. Republic** [2003] T.L.R 218;

> *"Whenever it is intended to introduce any document in evidence it should first be cleared for admission, and be actually admitted,* ***before it can be read out,*** *otherwise it is difficult for the Court to be seen not to have been influenced by the same."*
>
> *[Emphasis added].*

Since therefore, that procedure was not complied with, we hereby expunge those documents from the record.

Mr. Halfani maintained that, apart from that irregularity, the case was proved beyond reasonable doubt because the second appellant, who according to the evidence of PW6, named the first appellant as his accomplice in the commission of the offence, was found in possession of the motorcycle. He argued that on the basis of that evidence, the appellants were properly convicted.

The situations under which the doctrine of recent possession may be applied to convict an accused person were stated by the Count in the case of **Mkubwa Mwakagenda v. Republic,** Criminal Appeal No. 94 of 2007 (unreported). In that case, we observed as follows:

"For the doctrine to apply as a basis of conviction, it must be proved, ***first****, that the property was found with the suspect,* ***second*** *the property is positively proved to be the property of the complainant,* ***third****, that the property was recently stolen from the complainant and* ***lastly****, that the stolen thing constitutes the subject of the charge against the accused .... The fact that the accused does not claim to be the owner of the property does not relieve the prosecution to prove the above elements."*

The conditions stated in the above cited case must be cumulatively satisfied. Now therefore, the issue which arises from the evidence in this case is whether the second condition has been satisfied. In our considered view, the answer to this issue is in the negative. There are three main reasons for that finding. **First**, is the fact that, after having expunged the documents which were tendered to prove ownership of the motorcycle, the ownership by PW2 cannot be said to have been proved. **Secondly**, in the charge, it was stated that the stolen motorcycle was the property of Emmanuel Richard (PW1) not PW2. It was during the trial that evidence was led to the effect that the motorcycle belonged to PW2. Given the variance between the charge and the evidence adduced before the trial court, under s.234 of

the Criminal Procedure Act [Cap. 20 R.E 2002] (now R.E. 2019), the charge ought to have been amended but that was not done. Thirdly, although the evidence of PW6 was to the effect that the motorcycle which was involved in accident had its chassis number compared with the number appearing in the registration card of PW2's motorcycle, that number was not disclosed by PW6 or PW9 who inspected the motorcycle which was involved in the accident.

With these deficiencies in the prosecution evidence, it cannot safely be said that ownership of the motorcycle which was involved in the accident was positively proved to be the property of PW2. In the circumstances, the doctrine of recent possession could not be applied to found the appellants' conviction. For these reasons, we are constrained to interfere with the concurrent findings of the two courts below, having found that there was misapprehension of the evidence. We thus find merit in the second ground of the paraphrased grounds of appeal. The prosecution did not prove the case against the appellants beyond reasonable doubt. Since the finding on the second ground suffices to dispose of the appeal, we do not find any pressing need to consider the third ground above.

In the event, we allow the appeal and set aside the appellants' conviction and sentence. They should be released from prison unless they are otherwise lawfully held.

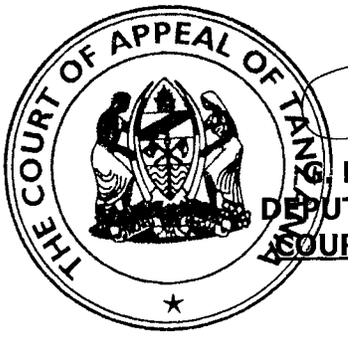
DATED at **Mwanza** this 18th day of December, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 18th day of December 2020, in the Presence of the Appellants in person via video link and absence of Respondent though duly notified, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL