IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., WAMBALI, J.A. And KOROSSO, J.A.)

CRIMINAL APPEAL NO. 281 OF 2017

SALEHE SIASA ..... APPELLANT

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mkasimongwa, J.)

Dated the 13th day of May, 2016

in

Criminal Appeal No. 4 of 2015

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JUDGMENT OF THE COURT

21st February & 16th March, 2020

WAMBALI, J.A.:

The District Court of Kisarawe that sat at Kisarawe convicted Salehe Siasa, the appellant of the offence of armed robbery contrary to Section 287A of the Penal Code [Cap 16 R.E. 2002] (The Penal Code). Consequently, he was sentenced to a statutory term of imprisonment for thirty years.

At the trial the prosecution case was supported by four witnesses, some of whom tendered two exhibits namely, the Motorcycle Registration No. T813 SCU make FEKON and the Police Form No.3 (PF3) containing the

medical examination report of the victim of the crime one Abdallah Salehe, which were admitted as exhibits P1 and P2 respectively.

Essentially, the substance of the prosecution evidence was to the effect that on the 1st March, 2014 at about 19.30 hours at Vikumburu Village within Kisarawe District Coast Region, the appellant stole one motorcycle valued at Tshs. 1,700,000/= the property of Abdallah Salehe and that immediately before or after such stealing he used a bush knife to threaten the victim in order to retain the said stolen property.

In reaching his finding with regard to the guilty of the appellant, the learned trial Senior Resident Magistrate relied heavily on the evidence of Abdallah Salehe (PW1) and Said Mohamed Mtambo (PW2) who he believed to have stated a fairly coherent story on what took place on the fateful day. He was fully convinced that the said witnesses proved beyond any reasonable doubt that it was the appellant who was fully involved in the commission of the offence. Noteworthy, the learned trial Senior Resident Magistrate was of the firm opinion that the evidence of PW1 which was corroborated by the evidence of PW2 remained unshaken at the end of the trial.

In his affirmed testimony when called upon to defend himself, the appellant raised the defence of alibi in which he stated that on the date of

the alleged armed robbery, he was hospitalized at Temeke District Hospital in Dar es Salaam Region. He maintained that he was thus not at the scene of the crime as alleged by the prosecution. That story did not find favour of the trial court. The learned trial Senior Resident Magistrate observed that, first, the appellant did not give the notice of his alibi at the earliest opportunity as required by section 194(4) of the Criminal Procedure Act, [Cap 20 R.E.2002] (the CPA). Second, that it was highly unlikely that the appellant could have been discharged from hospital without being given a discharge sheet.

It is noteworthy that the learned trial Senior Resident Magistrate was fully aware of the position of the law that an accused person has no obligation to prove his alibi as it is enough for him to raise a reasonable doubt as stated in **Rashid Ally v. Republic** (1987) TLR.97. Nevertheless, he was of the firm view that the appellant's alibi was not tenable as it was intended to deceive the court to disbelieve the cogent evidence of the prosecution. Consequently, at the height of the trial, the trial court was fully satisfied that the prosecution sufficiently proved that the appellant committed the offence of armed robbery in which he used a machete to attack PW1 in order to retain the motorcycle (exhibit P1). The appellant was thus convicted and sentenced as alluded to above.

On appeal to the High Court, the trial court's finding on the appellant's conviction and sentence was fully confirmed despite his strong petition of appeal that contained ten grounds of appeal, hence the present appeal.

To express his disagreement with the first appellate court judgment, the appellant has approached the Court through a Memorandum of Appeal composed of the four grounds of appeal:

1. *THAT, your Lordship the learned first appellate judge grossly erred in law and fact by sustaining conviction and sentence meted out to the appellant based on a charge sheet where the person to whom the violence or threat directed to not mentioned neither did the rightful owner of the property so robber (sic) disclosed.*
2. *THAT, the learned first appellate judge erred in law and fact by finding the appellant guilty in a case where one SHAIBU from where motorcycle Exh.P.1 was allegedly seized as arrested by PW.1 was not summoned to testify on material fact(s).*
3. *THAT, the learned first appellate judge erred in law and fact by convicting the appellant in a case where the prosecution failed to lead direct investigatory evidence as to how he was*

apprehended in connection with the crime at hand.

4. *THAT, the learned first appellate judge grossly erred in law and fact by convicting the appellant in a case where the prosecution failed to prove his guilty beyond any shadow of doubt as charged."*

At the hearing of the appeal, the appellant who appeared in person, unrepresented, with the leave of the Court orally added one ground which is to the effect that he was convicted without being sentenced contrary to the requirements of sections 235 and 312 of the CPA.

The respondent Republic was duly represented by Ms. Beata Kittau assisted by Mr. Genes Tesha both learned Senior State Attorneys who did not support the appellant's appeal.

In his brief explanation with regard to the first ground, the appellant submitted that the charge sheet that was filed at the trial court did not indicate the actual owner of the motorcycle which was allegedly robbed by him. He emphasized that the victim one Abdallah Salehe who is indicated therein denied to be the owner.

In addition, the appellant argued that the charge sheet did not indicate in the particulars of the offence the person on whom the violence

was directed during the robbery as required by law. To support his contention, the appellant urged us to be inspired by the decision of the Court in **Shida Lwanda Aidan @ Kaka and 2 Others v. The Republic**, Criminal Appeal No.445 of 2015 (unreported) and find that the disclosed defects rendered the charge incurably defective.

In response, Ms. Kittau submitted that although the actual owner of the motorcycle is Abdallah Salehe's brother, but it was the victim who was in charge of the said property when the same was robbed by the appellant. In her view, failure to mention in the charge sheet the actual owner did not occasion any injustice to the appellant as the evidence of the victim (PW1) and PW2 left no doubt that at the time of the incident, the motorcycle was in possession and command of PW1. The learned Senior State Attorney argued further that although the actual person whom the violence was directed to by the appellant was not mentioned in the charge, the said anomaly is cured by the evidence of PW1 and PW2 whose story concerning the issue was believed by the trial court and confirmed by the first appellate court.

In the circumstance, Ms. Kittau urged us to find that the said failure did not occasion any injustice to the appellant as stated by the Court in

Jamal Ally @ Salum v. The Republic, Criminal Appeal No. 52 of 2017 (unreported).

On our part, we have no hesitation to state that failure of the prosecution to indicate in the charge sheet the actual owner of the robbed motorcycle and the person to whom the violence was directed is remedied by the evidence in the record of appeal. As correctly submitted by Ms. Kittau, the evidence of PW1 and PW2 which found favour of the concurrent findings of the two courts below was to the effect that, at the time of the incident none other than the victim was in possession of the motorcycle and was the one whom the violence was directed.

In our settled opinion, PW1 clearly explained how he was in command of the motorcycle which the appellant enjoyed the ride after he hired to take him to another place, before he confronted PW1 and dispossessed him of the same. The testimony of PW1 was fully supported by PW2 who also enjoyed the ride and was later left at his house while PW1 and the appellant proceeded with the journey. Indeed, PW2 testified that while at his house he saw the appellant riding the said motorcycle few hours after the incident of robbery. As per the record of appeal, it is PW2 who escorted the appellant to Shaibu's house where the motorcycle was

abandoned by the appellant who disappeared to an unknown place after he suspected a possible arrest in connection of the crime.

In addition, we entertain no doubt that there is ample evidence that the violence was directed to PW1 who testified to have been injured by the machete which was held and used by the appellant. The evidence of PW1 on this matter is supported by Dr. Thomas Aloyce Matumla (PW4) who examined him after the injury and tendered the Police Form No.3 (PF3) that contained his medical report which was admitted as exhibit P2.

In the circumstances, we are settled that in view of the evidence in the record of appeal, failure of the prosecution to indicate in the charge the actual owner of the motorcycle and the person whom the violence was directed to during the robbery is fully remedied by the evidence of PW1 and PW2. We are supported in our position on this matter with the observation of the Court in **Jamal Ally @ Salum** (Supra). In the event, we find that the decision of the Court in **Shida Lwanda Aidan @ Kaka and 2 Others** (supra) relied by the appellant to support his position with regard to this ground of appeal is distinguishable with the circumstances of the present appeal. We therefore dismiss the first ground of appeal.

Submitting in respect of the second ground, the appellant critically wondered why the first appellate court confirmed his conviction and

sentence while a prosecution key witness one Shaibu whom the motorcycle was found abandoned at his house on allegation that it was sent by him was not summoned to testify to confirm the allegation.

To this end, the appellant implored us to find and draw an adverse inference to the prosecution case for the failure to call a key witness who would have explained the doubt as to whether the motorcycle (exhibit P1) was found at his house and who send the same to that place.

On her part, Ms. Kittau urged us to dismiss the appellant's complaint in this ground on account that the issue of how the motorcycle was found at Shaibu's house who was not also traced was fully explained by the testimony of PW2 who accompanied the appellant to that place.

On our part, as correctly stated by the learned Senior State Attorney, the evidence of PW2 who accompanied the appellant to Shaibu's house after he request him to do so left no doubt that it is the appellant who was involved in the robbery and also abandoned exhibit P1 at said house. It is noted that according to the evidence of PW2 the appellant abandoned exhibit P1 and disappeared after the former pretended to have gone to find fuel since Shaibu was not found at his home, while he in fact he went to report on the robbery incident so that the appellant could be arrested. There is also ample evidence that it was the appellant who led

PW2 to Shaibu's house for the purpose of getting money to buy fuel which had run out of the motorcycle. Unfortunately, as stated above Shaibu was not found and as the appellant sensed something fishy while PW2 had gone away, he disappeared. In any event Shaibu could not have appeared to testify that exhibit P1 was sent to his house by the appellant as according to PW2 he was not there when they went at his house. In the result, the second ground is equally dismissed.

Elaborating on ground three the appellant submitted that the evidence of the prosecution is contradictory as regards his proper day of arrest. He argued that the witness who allegedly arrested him did not appear to testify in court. In his submission, the evidence of a Police Officer WP 5872 D/C Bilenjo (PW3), that he was arrested after three days was not proper as it tends to show that he was interrogated even before he was arrested. The appellant strongly maintained that, the evidence of PW3 was not credible as he is not the one who arrested him.

In reply Ms. Kittau argued that the evidence concerning the arrest of the appellant was properly stated by PW3 and thus no contradiction exists on the date of arrest. She contended that the appellant was arrested on 2nd March, 2014 which was one day after he committed the offence. She thus pressed the Court to dismiss the appellant's complaint.

Admittedly, there is no direct evidence concerning the actual name of the police officer who arrested the appellant. However, it is not disputed that the appellant was arrested after a short period. According to the evidence of PW2 and PW3 the appellant was arrested on 2nd March, 2014 after PW2 disclosed the information and directed police officers at the police station on the possible area where the appellant was suspected to have gone to escape arrest in connection of the offence. There is no dispute as per the charge sheet and the prosecution evidence that the robbery occurred on 1st March, 2014 at 19.30 hours. It is further shown that PW3 was given the case file to investigate the incident on 3rd March, 2014 and interrogated the appellant on the same day. That was hardly two days after the incident of robbery was reported to the police station in which the appellant was named as the suspect. The evidence of PW3 on this matter was not shaken by the appellant during cross examination. The information on the arrest of the appellant was communicated to PW3 by PW2. It is PW2 who told the police that the appellant robbed PW1 of a motorcycle on 1st March, 2014 in the night and took the police to Chole area on 2nd March, 2014 where the appellant was hiding in the bush and was arrested and taken to the police station. This piece of evidence was not challenged by the appellant during cross examination. The testimony

on his arrest was amply supported by the appellant in his defence when he stated:

> *"..... They introduced to me as Police Officers and they arrested me and took me to Kisarawe Police Station. At the Police Station I was interrogated concerning the incidence of armed robbery occurred at Vikumburu Village on 1/3/2014. As I knew nothing about the alleged incident I said nothing about it. However, the Police preferred this charge against me on 4/3/2014 they brought me to court."*

It is clear from the appellant's defence that he was arrested on 2/3/2014 and thereafter interrogated and appeared in court on 4/3/2014. In the premises, the complaint of the appellant on why the person who arrested him did not appear to testify is baseless. From the evidence in the record of appeal, it is clear that he was arrested within a reasonable time after the commission of the offence and appeared at the trial court after two days. It follows that in view of the undisputed evidence concerning the appellant's arrest his complaint in the third ground has no justification and is accordingly dismissed.

In the fourth ground, the appellant complains generally that the prosecution failed to prove the case beyond reasonable doubt. However,

in his submission before us the appellant indicated that the basis of his complaint in this ground is that PW2 was not among the listed witness at the preliminary hearing. In his argument, the proper witness was Athumani Mwalimu who did not appear to testify. The appellant, therefore, maintained that the evidence of PW2 cannot be relied upon to convict him.

Unfortunately, in her response the learned Senior State Attorney did not comment on whether it was Athumani Mwalimu who was supposed to appear as the prosecution witness instead of PW2 as submitted by the appellant. Ms. Kittau, therefore, simply argued that all the prosecution witnesses who appeared at the trial proved the case beyond reasonable doubt and implored us to dismiss this ground of appeal.

We have examined the record of proceedings before the trial court and found that after the request of the prosecution to replace the name of Athumani Mwalimu with Said Mohamed Mtambo, the appellant objected to his inclusion. However, after the explanation of the prosecution, the trial magistrate ruled that the inclusion of PW2 at that stage did not intend to prejudice the appellant in anyway. Indeed, after that ruling it is in the record of appeal that PW2 testified and the appellant cross examined him.

Moreover, we note that after his conviction and sentence that was imposed by the trial court, the appellant did not raise this complaint at the first appellate court. In the circumstances, we find the complaint of the appellant to object to the inclusion of PW2 as a witness at this stage of the second appeal unfounded. Similarly, his general complaint in the fourth ground that the prosecution did not prove the case beyond reasonable doubt is not merited in view of what we have stated with regard to the totality of the prosecution evidence and that of the appellant in the record of appeal that supports the concurrent finding of both courts below. In the event, we dismiss the fourth ground of appeal.

Lastly, as we intimated earlier, before we commenced the hearing, the appellant with the leave of the Court complained orally that he was convicted without being sentenced. Although he did not explain properly the substance of his complaint, his submission is that at the end of the trial court's judgment at page 34 of the record of appeal he was convicted of the offence he was charged with but not sentenced. In his view, this offends the provisions of section 312 of the CPA which concerns the contents of the judgment.

Responding, Ms. Kittau stated that the appellant was sentenced as required by law. She argued that the only issue is that according to the

record of appeal the sentence of the appellant is indicated at another page which is separate from that which indicates his conviction. In her view, that anomaly which has been caused by the arrangement of the record of appeal cannot invalidate the judgment of the trial court and urged us to disregard the complaint.

We have perused the record of appeal and find that the only problem is the way the record is arranged. It is unfortunate that the record of appeal is arranged in such a way that at the end of the judgment of the trial court in which the appellant was convicted, there is no indication that he was sentenced as required by law. However, according to the same record of appeal, the appellant mitigated his sentence before he was sentenced as reflected at page 20. Moreover, according to the record of appeal, it seems the sentence of the appellant preceded his conviction which is at page 34. In short, it starts with the sentence followed by the judgment in which the appellant was convicted.

However, from the record, there is no dispute that the appellant was convicted on 14/8/2014 and thereafter on the same date he mitigated for the sentence and was sentenced by the trial court. Therefore, the only problem is the way the record of appeal which was prepared by the Registrar of the High Court is arranged. It is in

recognition of that fact that the appellant was convicted and sentenced on 14/8/2014 that in his notice of appeal to the High Court which he lodged on 15/8/2014 he appealed against both conviction and sentence. Besides, the appellant did not complain at the High Court on this issue in his grounds of appeal and the same applies to the grounds of appeal before this Court, save for his oral submission before us. In the result, we dismiss this ground of complaint.

In the end, we find that the appellant's appeal devoid of merit and we hereby dismiss it in its entirety.

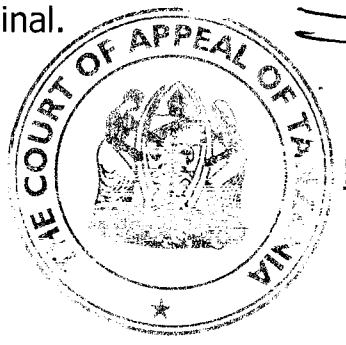
DATED at **DAR ES SALAAM** this 12th day of March, 2020.

S.A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 16th day of March, 2020 in the presence of the appellant in person and Ms. Beata Kittau, learned Senior State Attorney for the respondent is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL