IN THE COURT OF APPEAL OF TANZANIA
AT MBEYA

(CORAM: NDIKA, J.A., SEHEL, J.A., And KENTE, J.A.)

CRIMINAL APPEAL NO. 326 OF 2018

RENATUS EXAVERY MWINUKA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Resident Magistrate's Court of Mbeya at Mbeya)

(Mutaki, SRM. – Ext. Juris)

dated the 5th day of September, 2018
in
Ext. Juris. Criminal Appeal No. 13 of 2018

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JUDGMENT OF THE COURT

14th & 17th September, 2021

NDIKA, J.A.:

By this appeal, the appellant Renatus Exavery Mwinuka assails the judgment of the Resident Magistrate's Court of Mbeya at Mbeya (Hon. Mutaki, SRM – Ext. Juris) dated 5th May, 2018 by which it affirmed the judgment of the District Court of Mbarali at Rujewa dated 21st June, 2016 convicting him of armed robbery and sentencing him to the mandatory thirty years imprisonment.

It was alleged at the trial that the appellant, on 29th November, 2015 at about 19:45 hours at Iheha village within Mbarali District in Mbeya Region, stole one motorcycle bearing registration number T.852 DAT,

Yamaha make, valued at TZS. 2,200,000.00 from Aidain s/o Waya and immediately before or immediately after the time of stealing, threatened to kill the said Aidan s/o Waya by using a knife in order to obtain or retain the said property of Martin s/o Marcus Waya.

To establish its case, the prosecution relied upon the testimonies adduced by seven witnesses of whom PW1 Aidan Waya, the victim of the crime, was the chief witness.

PW1 was a motorcycle taxi rider popularly known as *bodaboda*. He operated a motorcycle bearing registration number T.852 DAT, Yamaha make, red in colour, which his father, PW2 Martin M. Waya had entrusted to him. According to PW1, on 29th November, 2015 at 19:45 hours, the appellant, whom he knew well, accompanied by a confederate he then did not know, approached him at a usual *bodaboda* pickup point at his Mkunywa village. The place was moonlit and so, he saw them well. After exchanging greetings, the appellant asked to be ferried along with his colleague to the nearby Mapogora village. Initially, PW1 hesitated to transport them as it was somewhat late and unsafe but the appellant allayed his fears, telling him *"... you know me very well ...."* After haggling over the charge for about thirty-five minutes, PW1 finally agreed and carried both of them. On the way at Iheha village, the appellant and his friend turned against him and

proceeded to execute their sinister mission. They suddenly attacked him using a knife, stabbing him so repeatedly. Finally, they made away with the motorcycle, leaving him for dead. A compassionate passer-by who found him lying in pain took him to Mahango Hospital where he was initially attended. He was subsequently referred to Ikelu Hospital where he was hospitalised for two months. The victim told the trial court further that after the incident was reported to his father (PW2) and then to the police that fateful night, a police officer visited him at Mahango Hospital. He named the appellant as the assailant to the said police officer and PW2 as well as fellow *bodaboda* operators who visited him including PW4 Justine Joseph Mahole. It turned out that PW4 also witnessed PW1 and the appellant haggling over the trip on the fateful night at the pickup point.

While the police investigations were still going on, PW6 Blastis Minza, the Village Executive Officer of Mabadaga village, received the appellant and a certain Mr. Mangala at his office. The pair wanted him to draw up and attest an agreement for the sale of a motorcycle by the appellant to the said Mr. Mangala. The appellant brought the motorcycle to the office but because he did not produce the registration card as proof of ownership, PW6 did not process the agreement. The motorcycle remained at the office as the appellant went away to collect the card.

By happy chance, John Chove (PW7), a friend of PW2 who had learnt of the robbery on PW1, visited PW6's office on 9th March, 2016 whereupon he saw the motorcycle that the appellant had left at the office. He recognized it as the one stolen from PW1 with which he was familiar having hired it from PW2 previously on a number of occasions. PW2 was then informed of the matter. A trap was set up and the appellant appeared later at the office in the presence of PW1, PW2, PW6 and PW7. He was asked if he had the registration card with him but he said he had none. Both PW1 and PW2 confirmed that the motorcycle was the one stolen on the fateful evening. There and then, the appellant was arrested and taken by the police to Rujewa Police Station along with the motorcycle.

At the police station, police officer No. E.8265 Detective Corporal Roman recorded the appellant's cautioned statement (Exhibit P.3) by which admitted to have been in possession of the stolen motorcycle which he had allegedly bought from a certain Mr. Waseme Seleman Mwakilongo.

The prosecution also tendered in evidence the motorcycle recovered from the appellant (Exhibit P.1) as well as the motorcycle's registration card (Exhibit P.2) showing PW2 as the owner. PW5 Jane Sumare, a medical officer who attended PW1 at hospital, tendered a medical examination

report (PF.3) on PW1 (Exhibit P.4) declaring that he suffered severe injuries to the neck and chest.

While in his defence the appellant denied to have robbed PW1 of the motorcycle, he admitted to have taken the motorcycle to PW6's office with the intention of selling it. He claimed to have bought it from a certain Mr. Waseme Mwakilongo at the price of TZS. 1,500,000.00. Following his arrest on 9th March, 2016, he added, the said Waseme Mwakilongo admitted to the police to have sold the motorcycle to him but he was surprisingly released by the police on the following day.

In cross-examination, the appellant said that his purchase of the motorcycle was witnessed by the Village Chairman of Uturo village whom he named as Mr. Josephat Mwakilongo.

There was further evidence from Bazil Mwongoka, a person called by the trial court as a material witness in terms of section 195 (1) of the Criminal Procedure Act, Cap. 20 R.E. 2002 (now R.E. 2019). He was then the sitting Village Chairman, Uturo village. He told the trial court that there had never been a village chairman by the name of Josephat Mwakilongo ten years previously. Moreover, he denied to have witnessed any sale agreement involving the appellant whom he said he did not know.

The trial court (Hon. A.E. Ringo – RM) was impressed by PW1's evidence and found that the appellant was recognized as one of the two assailants that attacked and robbed the victim. Besides, based on the testimony of the court witness, he rejected the appellant's version on how he came by possession of the motorcycle. On that basis, he invoked the doctrine of recent possession to infer that the appellant was the perpetrator of the charged offence.

On appeal, Hon. Mutaki, SRM – Ext. Juris was unimpressed. He was satisfied, based on PW1's testimony, that the appellant was positively identified at the scene as the person who robbed PW1. Accordingly, he dismissed the appeal thereby upholding the conviction and sentence.

The present appeal is predicated on three grounds of appeal whose thrust is two complaints: **one**, that the evidence of identification was not watertight; and **two**, that the charged offence was not proven beyond reasonable doubt.

At the hearing of the appeal, the appellant, who was self-represented, adopted his grounds of appeal without highlighting them and urged us to allow his appeal.

For the respondent, Ms. Mwajabu Tengeneza, learned Senior State Attorney, strongly opposed the appeal. At the forefront, she reviewed the

victim's testimony on his encounter with the appellant on the fateful night and urged us to find that the appellant was recognized at the scene based on several grounds. First, she contended that PW1 knew well the appellant who greeted him at the pickup point in a manner suggesting familiarity between them as the latter said in Swahili, *"Za siku nyingi",* to which the former replied, *"Nzuri."* She also referred us to page 6 of the record where the appellant's confederate urged his colleague that they should kill PW1 after he realised that he (PW1) knew the appellant by name as he was pleading with them for his life.

Secondly, the learned Senior State Attorney argued that PW1 bargained with the appellant from close range for over thirty-five minutes in a moonlit area. Thirdly, she reasoned that although the witness did not describe the appellant's attire or physical features, it was sufficient that he named the appellant to PW2, PW4 and the police officer that fateful night while he was at the hospital. In line with our decision in **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014 (unreported), she submitted, naming a suspect without describing him or his attire is sufficient in cases of identification by recognition.

The learned Senior State Attorney went on to contend that PW1's pointing of an accusing finger at the appellant at the earliest opportunity

assured the credibility of his account as held by the Court in **Marwa Wangiti & Another v. Republic** [2002] TLR 39; and **Riziki Jumanne v. Republic**, Criminal Appeal No. 370 of 2019 (unreported).

Turning to the appellant's undisputed possession of the stolen motorcycle, Ms. Tengeneza supported the application of the doctrine of recent possession in the instant case as elaborated in our decisions in **Akili Chaniva v. Republic**, Criminal Appeal No. 156 of 2017; and **Selemani Nassoro Mpeli v. Republic**, Criminal Appeal No. 3 of 2018 (both unreported). She contended that the motorcycle found in the appellant's possession (Exhibit P.1) was sufficiently identified by PW1 and PW2 to be the one stolen from PW1. That, based on the testimonies of PW6, PW7 and the court witness, the appellant did not offer a sufficiently exculpatory explanation as to how he came by possession of the said property. She was clear-cut that the appellant failed to call the said Waseme Mwakilongo, from whom he allegedly bought the motorcycle, to support his case. Nor was he able to produce the said Josephat Mwakilongo, the alleged Uturo Village Chairman, who witnessed the appellant's purchase of the motorcycle. In the premises, the learned Senior State Attorney advocated that the appeal be dismissed.

Rejoining, the appellant insisted that he was not identified at the scene and reiterated his earlier prayer that his appeal be allowed.

We have examined the record of appeal and taken account of the contending submissions and the authorities relied upon. This being a second appeal, in terms of section 6 (7) (a) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019, our mandate is mainly to deal with issues of law, not matters of fact.

From the contending submissions, we think that the appeal turns, in the main, on whether on the evidence on record, the offence of armed robbery was proved beyond reasonable doubt. In dealing with this main question, we are enjoined to determine, at first, whether the appellant was recognised at the scene as one of the robbers, and two, whether his possession of the stolen motorcycle could lead to an inference of guilt against him.

Starting with the first issue, we think it would be instructive to recall what we stated in our seminal decision in **Waziri Aman v. Republic** [1980] TLR 250, at pages 251 to 252, that the evidence of visual identification is of the weakest kind and most unreliable and that it should not be acted upon "unless all possibilities of mistaken identity are eliminated and the court is

fully satisfied that the evidence before it is absolutely watertight." The Court stated further, at p. 252, that:

> *"Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried.* ***We would, for example, expect to find on record questions as the following posed and resolved by him: the time the witness had the accused under observation; the distance at which he observed him; the conditions in which such observation occurred, for instance, whether it was day or night-time, whether there was good or poor lighting at the scene; and further whether the witness knew or had seen the accused before or not.*** *These matters are but a few of the matters to which the trial Judge should direct his mind before coming to any definite conclusion on the issue of identity."* [Emphasis added]

In **Said Chaly Scania v. Republic**, Criminal Appeal No. 69 of 2005, we stressed that visual identification evidence must be clear and complete:

> *"We think that where a witness is testifying about identifying another person in unfavourable circumstances, like during the night, he must give clear evidence which leaves no doubt that the identification is correct and reliable. To do so, he will need to mention all the aids to unmistaken identification like proximity to the person being identified, the source of light and its intensity, the length of time the person being identified was within view and also whether the person is familiar or a stranger."*

See also **Raymond Francis v. Republic** [1994] TLR 100; **Philipo Rukandiza @ Kihwechembogo v. Republic**, Criminal Appeal No. 215 of 1994; **Issa Mgara v. Republic**, Criminal Appeal No. 37 of 2005 and **Jumapili Msyete v. Republic**, Criminal Appeal No. 110 of 2014; (all unreported).

Applying the guidelines stated above to the case at hand, we are persuaded by Ms. Tengeneza that the evidence on record is absolutely watertight as all possibilities of mistaken identity were eliminated. We so hold because, although the incident occurred at night, the pickup point where the appellant approached the victim was moonlit and that both of them were familiar to each other. Ms. Tengeneza is correct that the familiarity between the victim and the appellant is confirmed by the

following: one, the manner in which they exchanged greetings; two, the fact that when PW1 hesitated to transport the appellant and his associate as it was somewhat late and unsafe, the appellant allayed his fears, telling him *"... you know me very well"*; and, three, the detail that the appellant's associate hysterically urged that the victim be killed upon realising that he knew the appellant. As a matter of fact, the concerted attempt to kill PW1 so as to hide their crime confirms that at that point the appellant and his partner-in-crime were well aware that PW1 had recognised the appellant. On that basis, it was sufficient that PW1 named the appellant without having to describe his physical features or the attire he wore that night – see **Jumapili Msyete** (*supra*) cited by Ms. Tengeneza.

Further assurance of the identification was rightly based on the evidence that the appellant and the victim bargained from close range for over thirty-five minutes in a moonlit area. Such proximity and duration, in our considered view, provided the witness sufficient time to observe the appellant with whom he was familiar. We also accept, on the authority of the cases cited by Ms. Tengeneza, that PW1's pointing of an accusing finger at the appellant at the earliest opportunity assured the credibility of his account. In the premises, we find the complaint under consideration bereft of merit. We dismiss it.

We now turn to the issue whether based on the appellant's possession of the stolen motorcycle, an inference of guilt against him was properly drawn.

At first, it is worthwhile to reiterate that it is a settled rule of evidence that an unexplained possession by a suspect of the fruits of a crime freshly after it has been committed is presumptive evidence against the person in their possession not only for the charge of theft but also for any other offence however serious – see **Mwita Wambura v. Republic**, Criminal Appeal No. 56 of 1992; **Joseph Mkumbwa & Another v. Republic**, Criminal Appeal No. 94 of 2007; and **Mussa Hassan Barie & Another v. Republic**, Criminal Appeal No. 292 of 2011 (all unreported). The doctrine is applicable if it is proved that, **one**, the stolen property was found with the accused; **two**, that the recovered property was positively identified to be that of the complainant; **three**, that the property was recently stolen from the complainant; and **four**, the property constitutes the subject of the charge.

As stated earlier, the trial court invoked the doctrine of recent possession after it had rejected the appellant's version on how he came by possession of the motorcycle. Unfortunately, the first appellate court did not direct itself to this issue.

Based on the evidence on record, it is without dispute that the stolen motorcycle was found in the appellant's possession, that it was positively identified by both PW1 and PW2 as being the property of PW2, and that it was stolen from PW1 on the night of 29th November, 2015. In view of the nature of such property that it does not change hands easily, we have no doubt that it was rightly deemed to be "recently stolen property" following its recovery on 9th March, 2016, which was about three and a half months after it was robbed. Furthermore, it is common cause that the said property was the subject of the charge against the appellant at the trial. On these findings there arose the presumption of guilt against the appellant, which could only have been rebutted had he given an exculpatory explanation on how he came by possession of the motorcycle.

Having weighed the appellant's claim that he bought the motorcycle from the said Waseme Mwakilongo against the testimonies of PW6, PW7 and the court witness, we agree with Ms. Tengeneza that the appellant's version was far-fetched, if not an outright lie. It stands to reason why he neglected or failed to call the said Waseme Mwakilongo to support his claim. Further, his failure to produce the said Josephat Mwakilongo, the alleged Uturo Village Chairman, who allegedly witnessed his purchase of the motorcycle remained unexplained. The document by which the purchase

was made under the direction of the said Josephat Mwakilongo was also never tendered in evidence. To crown it all, based on the court witness' account, the said Josephat Mwakilongo was a fictitious person; he must have been a figment of the appellant's own imagination. That said, we dismiss the grievance under consideration as we firmly hold that the appellant's version was manifestly a vain rebuttal.

In sum, we find that the appellant's conviction was soundly based upon unassailable evidence of recognition and the doctrine of recent possession. The sentence of thirty years' imprisonment, being the statutory minimum, was properly levied. In the premises, we hold that the appeal is unmerited. It stands dismissed.

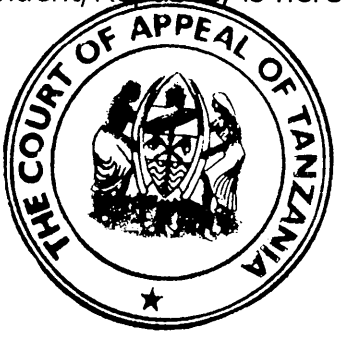
DATED at **MBEYA** this 16th day of September, 2021

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

This Judgment delivered this 17th day of September, 2021 in the presence of the Appellant in person and Ms. Irene Mwabeza, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



H. P. Ndesamburo
DEPUTY REGISTRAR
COURT OF APPEAL