IN THE COURT OF APPEAL OF TANZANIA

AT IRINGA

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

CRIMINAL APPEAL NO. 441 OF 2019

AMBWENE MLIGO @ AMBWENE LUOGA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Kente, J.)

dated the 28th day of October, 2019
in
(DC) Criminal Appeal No. 61 of 2018

JUDGMENT OF THE COURT

17th & 28th September, 2021

MWAMPASHI, J.A.:

The appellant, Ambwene Mligo @ Ambwene Luoga was convicted by the Resident Magistrate's Court of Njombe at Njombe of two offences, to wit, armed robbery and doing grievous harm, contrary to sections 287A and 225 respectively, both of the Penal Code [Cap. 16 R.E. 2002; now R.E. 2019] (the Penal Code). Consequently, he was sentenced to a term of imprisonment for thirty years on the offence of armed robbery and twelve years on the offence of doing grievous harm. The sentences were ordered to run concurrently. Aggrieved, the appellant unsuccessfully

appealed to the High Court of Tanzania at Iringa hence this second appeal.

It was alleged on the first count of armed robbery that on 31st December, 2016 at Mfeleke Village within the District and Region of Njombe, the appellant stole one motorcycle with Reg No. MC. 960 BEW make SANLG the property of one Moses Mlowe and that immediately before and after such stealing, he threatened and attacked the said Moses Mlowe by using a cable wire and a four inches nail, in order to obtain and retain the said property. As on the second count the prosecution alleged that on the same day and place, the appellant unlawfully grievously harmed Moses Mlowe.

The facts of the case as it can be deduced from the witnesses who testified before the trial court can be summarized as hereunder. Moses Mlowe (PW1) was a driver dealing in motorcycle (*bodaboda*) hire business who at the material time and for that purpose, had been entrusted a motorcycle with Reg. No. MC 960 BEW, belonging to one Fadhil Said (PW5). It was his testimony that on 31.12.2016 at about 06.30 am, the appellant who was not a stranger to him as he had been his passenger on six other different occasions, called and asked to be taken from Chaugingi area to his potato farm at Mfeleke. On their way, the appellant,

using a cable wire and a screw driver, attacked and stabbed him on his head, chicks and chest and got away with the motorcycle. Thereafter, PW1 called one Lunogelo Mgimba, a street council member, and who according to PW1, saw when the two were leaving Chaugingi to Mfeleke. The said Lunogelo Mgimba, however, did not testify. Sometime later, Lunogelo Mgimba with other *bodaboda* drivers got at the scene, whisked PW1 to the police station and then to Kibena Hospital where he was hospitalized for nine days. PW1 claimed also that while at the police station he gave the appellant's phone number to the police. At the hospital, PW1was attended by Dr. Marcus Lwila (PW4) who observed that PW1 had sustained cut wounds on his head and chest. He posted his observations in a PF3 which was tendered in evidence as Exhibit P2. PW1's evidence was also to the effect that on 10th January, 2017 he was asked to report at Njombe Police Station where he was shown a motorcycle which he identified as the same motorcycle the appellant had robbed him on the material morning. The motorcycle in question was tendered by PW1 and was received in evidence as Exhibit P1.

The prosecution evidence against the appellant also came from PW1's brother, Augustino Mlowe who testified as PW2 telling the trial court that a day before the fateful morning he was with PW1 at

Idundilanga when the appellant who introduced himself as PW1's customer, approached them and asked for PW1's phone number from him. He further testified that on 01st January, 2017 he was tipped that a person who had attacked and robbed PW1 had been spotted at Mavala village in Ludewa. Having so informed he recruited a number of his fellows including Jackson Mtega (PW3) and proceeded to Mavala where they managed to find the motorcycle which had been abandoned by the appellant who managed to flee. PW2 did also testify that before getting at Mavala village they reported the incident at Mlangali Police Station where they were allowed to proceed with their mission of pursuing the appellant. PW2 narrated that when they got at Mavaia they engaged some villagers and that the village chairperson is the one who allowed them to take the abandoned motorcycle. PW2's evidence was supported by PW3 who added that the abandoned motorcycle was found in the bush. On his party, Fadhil Said Nanjonga (PW5) told the trial court that the motorcycle belongs to him and that he had given it to PW3 for *bodaboda* business. He tendered the motorcycle registration card in evidence as Exhibit P3.

In his sworn defence the appellant dissociated himself with the charges levelled against him. He denied any involvement in the robbery in question and he attacked the prosecution witnesses contending that

they told lies against him. The appellant insisted that the motorcycle in question was not found in his possession and that the case against him was not proved to the required standard.

At the conclusion of the trial, the appellant was found guilty of both offences and was accordingly convicted and sentenced as we have alluded to earlier. In its judgment the trial court found that the case against the appellant had been proved to the hilt. The trial court found established **first,** that the appellant was known to PW1 before the material day, **second**, that before the material day the appellant was given PW1's phone number by PW2 who also saw when the appellant was boarding PW1's motorcycle on the material morning and **third,** that the motorcycle was found and recovered from the appellant's home village after the appellant had fled. Having found so the trial court concluded that there was enough evidence proving that the appellant was the one who committed the offences against the appellant.

As alluded on earlier, being dissatisfied with the trial court conviction and sentence, the appellant appealed to the High Court. To his dismay, the trial court's decision was confirmed by the High Court in its entirety hence this second appeal by him on six grounds which are paraphrased as hereunder:

1. *That, the first appellate Judge erred in law and fact in failing to consider the grounds of appeal raised before the High Court.*
2. *That, the first appellate Judge erred in law in upholding the conviction based on uncorroborated identification evidence of PW1.*
3. *That, the first appellate Judge erred in law and fact in failing to see that the evidence from PW2 and PW3 was hearsay evidence from family and business associates.*
4. *That, the first appellate Judge erred in law in upholding the trial court finding that the appellant was identified whilst the prosecution witnesses failed to disclose the appellant's phone number which they allegedly used to communicate with him.*
5. *That, the first appellate Judge failed to observe that the prosecution witnesses were not credible or reliable.*
6. *That, both lower courts erred in law and fact in failing to see that the charge was not proved as the charge and evidence were at variance regarding the ownership of the stolen motorcycle.*

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas the respondent Republic was represented by Ms. Rehema Mpagama, learned State Attorney. When asked to argue his

appeal, the appellant let the State Attorney begin and respond to the grounds of appeal first. He however reserved his right of reply if need would arise.

When Ms. Mpagama took the stage, she, at the outset, made her stance clear that she was resisting the appeal. Beginning with the first ground of appeal it was submitted by her that the High Court Judge considered all of the grounds raised before the High Court. She referred us to pages 77 to 80 of the record of appeal arguing that in the judgment all important and relevant issues raised in the appellant's grounds on identification and possession of the motorcycle, were considered by the High Court. When prompted by us, she however, conceded that some of the grounds were not considered by the High Court. She agreed that grounds 3, 5 and 6 were not considered. As on what should be the way forward, it was Ms. Mpagama's view that the matter be remitted to the High Court for the grounds to be considered. Alternatively, she urged the Court to step into the High Court's shoes and consider those grounds.

On the second ground of appeal, it was argued by Ms. Mpagama that the appellant was properly identified by PW1 and that his evidence was supported by evidence from other four prosecution witnesses. She

contended that the High Court did not sustain the conviction on PW1's evidence only but on other pieces of evidence too.

As regards the third ground of appeal, basically the appellant's complaint is that the evidence from PW2 and PW3 came from family members who had interests to save. It was contended by Ms. Mpagama that while it is true that PW2 and PW3 were related to PW1, the said two witnesses were the ones who recovered the motorcycle from the appellant. She submitted that PW2 and PW3 were credible witnesses who had no interests to save. She further argued that the law does not exclude evidence from family members or colleagues.

Turning to the fourth ground of appeal where the appellant is still resisting that he was not properly identified, Ms. Mpagama reiterated her stand that the appellant was positively identified. She argued that though it is true that PW1 and PW2 did not tell or disclose the appellant's phone number by which they claimed they had been communicating with him, still that did not water down the prosecution evidence that the appellant was positively identified. She pointed out that the incident happened during the day and that PW1 named the appellant immediately after the robbery in question. On this, we were referred to the case of **Baruani Hassan v. Republic**, Criminal Appeal No. 580 of 2017 (unreported).

Submitting on the fifth ground of appeal, Ms. Mpagama insisted that the prosecution witnesses, were credible. She argued that, PW2 and PW3 involved local area leaders in pursuing the appellant and in recovering the motorcycle. She further submitted that there was no need of calling the case investigation officer because section 143 of the Evidence Act [Cap. 6 R.E. 2019] does not require any specific number of witnesses to be called. She insisted that civilian witnesses called sufficiently proved the case against the appellant.

In respect of the sixth ground of appeal, it was argued by Ms. Mpagama that the there was no material variance between the charge and the evidence as complained by the appellant. She contended that the question on the ownership of the motorcycle was sufficiently explained in that it belonged to PW5 but at the material time it was entrusted to PW1. She further argued that the fact that the particulars of the charge show that PW1 was the owner of the motorcycle is curable under section 388(1) of the Criminal Procedure Act [Cap. 20 R.E. 2019] (the CPA). She contended that the irregularity of the charge can also be cured by the Court by ordering a retrial.

In rejoinder, the appellant maintained his stance that the case against him was not proved to the hilt. He argued that key witnesses like

the police investigator, were not called and that the case was framed against him. He contended that the motorcycle was not found in his possession and that PW1 who did not know him or his phone number because he did not disclose it, did not properly identify him. He therefore prayed for the appeal to be allowed.

Having heard the submissions for and against the appeal, we find it appropriate that the first and sixth grounds of appeal which are on legal issues, need to be considered first.

Beginning with the first ground, we note that the appellant had raised seven grounds of appeal before the High Court. Essentially, the grounds raised before the High Court centred on the issue of the identification of the appellant as the one who committed the offences in question. The said complaint on identification was on two limbs; **firstly**, that the appellant was not properly identified before and during when the offences were being committed and **secondly**, that the motorcycle was not found in the appellant's possession.

Having in mind the above two limbs of the appellant's complaint before the High Court, it is our observation from the record that the High Court Judge did not only omit to consider every ground of appeal and in details but he also considered only one limb of appellant's complaint that

he was not identified before and during the incident. At page 79 to 80 of the record, the High Court Judge observed as follows:

> *"As for the identity of PW1's attacker which is crucial question of this appeal I would say that there was ample opportunity for PW1 to see and identify the appellant as the person who hired and finally robbed him on the fateful day. It will be noted that the PW1 knew the appellant as he had been his regular customer before the date of the incident .... It follows therefore, in my judgment that, given the above stated facts and circumstances, I am satisfied beyond reasonable doubt that the appellant was properly and unmistakenly identified on the day in question."*

From the above excerpt it is clear that in his judgment, the High Court Judge completely omitted to consider the appellant's second limb of the complaint as to whether the appellant was found in possession of the motorcycle or not. The immediate question that arises here, is what is the effect of the failure or omission of the appellate court to consider some of the grounds of appeal raised before it. In the case of **Simon Edson @ Makundi v. Republic**, Criminal Appeal No. 05 of 2017 (unreported), the Court, among other things, made the following observation:

> *"The cumulative effect of the law and the cases cited above is that,* ***the appellate court is bound to consider the grounds of appeal presented before it****".*
>
> [Emphasis added]

In the instant case, the High Court Judge omitted to consider only some of the grounds raised. He did not fail to consider all of the grounds. On what should be done, Ms. Mpagama suggested to us two ways. She urged us to either remit the record to the High Court for the grounds to be considered and for composition of a fresh judgment or step into the shoes of the High Court and determine the grounds of appeal left unattended by the High Court. We think that, under the circumstances of this case, where the High Court only omitted to consider some of the grounds and where the grounds of appeal raised before us are essentially the same grounds that were raised before the High Court, the second option is more appropriate.

We have pointed out above that the High Court Judge did not consider the second limb on the appellant's complaint that he was not found in possession of the motorcycle. Stepping into the shoes of the High Court, we will therefore consider whether it was proved that the appellant was found in possession of the motorcycle or not and we will, of course,

also consider whether the High Court findings on the first limb of the complaint that the appellant was properly identified at the scene of crime is supported by cogent evidence or not.

On the sixth ground of appeal, it is complained that the charge and the evidence are at variance regarding the ownership of the motorcycle allegedly stolen in the robbery in question. In determining this ground, we find it appropriate to reproduce the particulars of the charge in respect of the first count as per the charge found at page 1 of the record of appeal, which reads as follows:

PARTICULARS OF OFFENCE

> ***AMBWENE S/O MLIGO @AMBWENE S/O LUOGA*** *on the 31st day of December, 2016 at Mfeleke village within the District and Region of Njombe, stole motor cycle with registration* ***No. MC. 960 BEW MAKE SANLG*** *the property of one* ***MOSES S/O MLOWE,*** *immediately before or after such stealing did use and threaten the said* ***MOSES S/O MLOWE*** *with a wire and four inches nail in order to obtain and retain the said property.*

From the above extracted particulars of the charge, it is clear that the alleged stolen motorcycle belonged to PW1. However, the evidence adduced by the prosecution established that in fact the motorcycle

belonged to one Fadhil Said Nanjonga (PW5). There was therefore a variance between the charge and evidence but, as it was also argued by Ms. Mpagama, under the circumstances of this case, the variance is not only minor but is also of no effect, thus curable. We say so because PW1 from whom the motorcycle was robbed was a special owner while PW5 was an actual owner. Robbery is an aggravated theft whereby during the stealing or after stealing violence is used. Moreover, the definition of theft, which is part and parcel of robbery, under section 258 of the Penal Code, recognises fraudulent taking of anything capable of being stolen from either the general/ actual or special owner. It is immaterial if one steals from either the actual or from the special owner. In the case of **Yunus Habibu v. The Republic**, Criminal Appeal No. 239 of 2017 (unreported) wherein the Court faced a similar scenario, it was observed, among other things, that:

> *"In the present case the motorcycles were stolen from PW1 who had possession of them but they belonged to PW7. PW1 was, then, a special owner or constructive owner. Indication of PW1 as owner in the charge did not therefore affect its validity and the mere fact that the evidence showed PW7 as owner cannot be at variance with the charge."*

For the reasons we have given above and basing on the settled position of the law on special and actual ownership, we therefore find that in the instant case there was no material and effectual variance between the charge and evidence. The sixth ground therefore lacks merit.

Turning to the third ground of appeal, we are, at first, in agreement with Ms. Mpagama that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reason not believing a witness – see **Goodluck Kyando v. Republic** [2006] T.L.R. 363. Ms. Mpagama is also correct in her argument that the fact that PW2 and PW3 were related to PW1 did not make them incompetent to testify in the case at hand. **In Paulo Tarayi v. Republic**, Criminal Appeal No. 216 of 1994 (unreported), this Court stated that:

> *"We wish to say at the outset that it is, of course, not the law that wherever relatives testify to any event they should not be believed unless there is also evidence of non – relative corroborating their story."*

Notwithstanding the above concession with Ms. Mpagama, it is however, trite principle of law that when it comes to the evidence from family members what matters is the credibility and reliability of such evidence. It is further our proposal that considering the circumstances of

this matter, the complaint by the appellant that the evidence from PW2 and PW3 was hearsay evidence or that it could not be used as corroborative evidence on PW1's identification evidence, should be considered in the course of determining the rest of the grounds.

The remaining second, fourth and fifth grounds of appeals are essentially on the appellant's main complaint that he was not identified as the one who committed the offences in question. Here, the appellant's grievance is that the lower courts ought not to have found that he was properly identified by PW1, PW2 and PW3 before the incident and at the scene of crime. It is also his complaint that the lower courts erred in concluding that he was found in possession of the motorcycle because even the witnesses who claimed that they had the appellant's phone number through which they allegedly managed to find his name, did not mention that number.

For the reasons we are going to give, we do not agree with the lower courts findings neither that the appellant was properly identified nor that he was found in possession of the motorcycle in question. We have dispassionately examined the evidence on record particularly from PW1, PW2 and PW3 and observed that there are some shortfalls in their

respective evidence that raise reasonable doubts not only on their credibility and reliability but also on the prosecution case as a whole.

As regards the complaint on identification of the appellant before and during the commission of the alleged offences, there is evidence from PW1, PW2 and PW3. However, the evidence from these three witnesses is not free from doubts. To start with, PW2 did not see the appellant boarding PW1's motorcycle on the material morning as stated by the trial magistrate in his judgment at page 53 of the record of appeal. What was claimed by PW2 is that a day before the material morning he was at Idundilanga with PW1 when the appellant approached them and asked PW1's phone number from him. The disturbing question here is why should the appellant ask for PW1's number from PW2 and not from PW1 who was right there. It should also be borne in mind that in his evidence PW1 claimed that he and the appellant knew each other and that the appellant had hired him on six other occasions. If PW1 and the appellant knew each other, we find no good reason as to why the appellant could not have directly approached PW1. It is therefore doubtful if the appellant did really approach PW1 and PW2 as claimed by PW2. What we observe from the above scenario is that either one of the two or both did

not tell the truth. The credibility and reliability of PW1 and PW2 is therefore questionable.

Further, according to PW1, one Lunogelo Mgimba saw him leaving Chaugingi with the appellant to the appellant's farm at Mfeleke. Very unfortunately Lunogelo Mgimba was not called as a witness. In our considered view Lunogelo Mgimba was, under the circumstances of this case, a very key witness not only because he allegedly saw PW1 leaving with the appellant but also because according to PW1, he is the first person the incident was reported to. According to PW1 after being robbed of the motorcycle and after being abandoned at the scene of crime, he called Lunogelo Mgimba who was a street council member, who with other *bodaboda* drivers rushed at the scene of crime for his rescue. The failure to call this key witness has the effect of adverse inference to the prosecution case.

Again, PW1 claimed to have known the appellant's name by checking it through the M – Pesa system because he had the appellant's phone number. He also claimed that he gave the number to the police at Njombe Police Station. PW1 could, however, not tell what was that number and there is no evidence that he really gave that number to the police. PW1's claims that he very well knew the appellant because he had

taken him to his potato farm at Mfeleke six times is also wanting because there was no evidence proving that the appellant had any farm at Mfeleke. It should be borne in mind that in his defence the appellant denied to be a resident of Mfeleke but of Ludewa. Worst still, there is no evidence on record to the effect that PW1 named or even described the appellant either to those who allegedly rushed to the scene of crime or to the police at the earliest opportunity. It is trite law that failure or delay by a witness to name at the earliest opportunity the person he knows to have committed an offence, casts doubts that the witness had identified the offender – **see Marwa Wangiti Mwita and Another v. Republic** [2002] TLR 39 and **Francis Paul v. Republic,** Criminal Appeal No. 251 of 2017 and **Kirumi v. Republic,** Criminal Appeal No, 25 of 2016 (both unreported).

As on the second limb of the appellant's complaint that he was not found in possession of the motorcycle as there is no good evidence establishing that he was really found in its possession, the way PW2 and PW3 decided to handle the case after allegedly being tipped that the appellant had been spotted at Mavala village in Ludewa, leaves a lot to be desired. If the robbery had been reported at Njombe police station one wonders why and how the information that the appellant had been

spotted at Mavala village was not relayed to the police first. Secondly, while it is claimed by PW2 and PW3 that before getting at Mavala village the two reported at Mlangali Police Station, it is doubtful if they really did so. It is implausible that they did so and still they were not assisted by being given reinforcement of even a single police officer. Again, PW2 and PW3 claimed that in their pursuit of the appellant they engaged Mavala villagers and that the village chairperson was also fully engaged. Surprisingly, neither any villager nor the village chairperson was called as a witness to support the story by PW2 and PW3. The truth of the version by PW2 and PW3 as well as their credibility and reliability, is for those reasons, doubtful.

Further, the evidence from PW2 and PW3 does no establish that the motorcycle in question was really found in the appellant's possession. The evidence from these two witnesses is to the effect that the motorcycle was found in the bush. Their evidence that while fleeing the appellant was heading to where the motorcycle had been hidden, if really that is what happened, cannot be inferred to a conclusion that the appellant was then found in possession of the motorcycle.

In the light of the foregoing, we find that neither was it proved that the appellant was found in possession of the motorcycle in question nor

was he properly identified as the one who committed the offences against PW1. The case against the appellant was not proved to the hilt.

In the result, we allow the appeal, quash the conviction and set aside the sentence with an order that the appellant be released forthwith unless he is held for any other lawful cause.

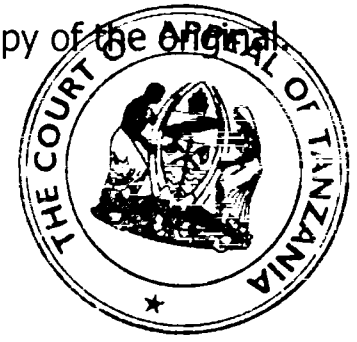
DATED at **IRINGA** this 28th day of September, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 28th day of September, 2021 in the presence of the Appellant in person, and Ms. Rehema Mdagama, learned State Attorneys for the Respondent/Republic, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL