

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CRIMINAL APPEAL NO. 93 OF 2020**

**(CORAM: NDIKA, J.A., KITUSI, J.A. And RUMANYIKA, J.A.)**

**SAID MUSA SOWENI ..... APPELLANT  
VERSUS**

**THE REPUBLIC .....RESPONDENT**

**(Appeal from the decision of the Resident Magistrate's Court of Kibaha  
at Kibaha**

**(Magesa, Ext. Juris.)**

**dated 30<sup>th</sup> day of December, 2019  
in**

**Extended Jurisdiction Criminal Appeal No. 45 of 2019**

.....

**JUDGMENT OF THE COURT**

*15<sup>th</sup> February & 22<sup>nd</sup> day of April, 2022*

**RUMANYIKA, J.A.:**

On 02/07/2018, Said Mussa Soweni, the appellant was tried in the district court of Mkuranga (the trial court) for the offence of Armed Robbery Contrary to s. 287A of the Penal Code Cap. 16 R.E.2002 as amended by s. 10A of the Written Laws (Miscellaneous Amendments) Act No.3 of 2011. However, on 13/08/2019 he was convicted of the offence of gang robbery, which, in the magistrate's opinion, the appellant ought to have been charged with. The appellant was sent to jail for a term of thirty years. Not satisfied, he appealed, but lost the battle on 30/12/2019. Like

the trial court did, Kibaha Resident Magistrate's Court with Ext. Jurisdiction (Magesa, SRM) found the victim, the eye witness (PW1) credible and a witness of the truth. Still unhappy, the appellant is before us with five grounds of appeal. Rephrased, the grounds may boil down to four points as follows; **1.** That the essential ingredient of stealing was not proved **2.** That with regard to the alleged motor bike's ignition switch, the doctrine of recent possession was improperly invoked against the appellant **3.** That appellant was not properly identified by PW1 and **4.** That the prosecution case was not proved beyond reasonable doubt.

Briefly, it was the prosecution's case that Nasibu Musa (PW1), a commercial motor bike rider, commonly known as ("bodaboda") rode a motorcycle with Reg. No. MC 987 BLQ in the material night of 19/06/2018 at about 22:45 hours at Vianzi village in Mkuranga District, Coast Region. It is further stated that in his ordinary course of business he picked three passengers, two of whom, including the appellant he recognized well. After bargaining the fare for five minutes, but just before they arrived at Kiduka Kimoja, their destination, one of the passengers grabbed him and tied his neck with a rope. He lost control, went astray and, as one could have expected they fell down. PW1 rose screaming for help and ran away leaving the motorcycle behind, but he did not get public response

immediately. Nevertheless, he said, with his torch switched on he got courage and went back to the scene. He added that on their arrival, some “angered” people joined him following the alarms raised. It appears due to some mechanical faults the engine having not run, it is said that the culprits just abandoned the motorcycle, they ran away but took with them the ignition switch, a battery and PW1’s jacket until at a later stage where, with exception of the ignition switch, the other two items were recovered from the appellant. Some alleged “angered” people assaulted one of the culprits to death and they burnt him to ashes.

Defending himself, the appellant just denied the charges, involvement and liability completely.

At the hearing of the appeal on 15/02/2021, the appellant appeared in person while Ms. Mkunde Mshanga, learned Principal State Attorney appeared for the Republic.

The appellant adopted his grounds of appeal and just prayed that the appeal be allowed, and that if need be, he would rejoin.

In her submissions, Ms. Mkunde argued the first two grounds jointly and readily supported the appeal. She submitted that there was a serious variance between the charge laid at the appellant’s door and the evidence led by the prosecution. She submitted that whereas in the charge sheet, at

page 1 of the record, the particulars of the offence were that the appellant stole a motorcycle with Registration No. Mc. 987 BLQ make Fekon valued at TZS 1,800,000/=, at page 7 of the record of appeal, PW1 testified that what he was robbed of was a battery and a jacket only.

Ms. Mshanga submitted that for the offence of armed robbery to stand, it was necessary in this case that the element of stealing the motorcycle be established and proved first but it was not. In this regard, she referred us to our decision in the case of **Samwel Marwa Roswe @ Masala v. R**, Criminal Appeal No. 220 of 2014 (unreported). Submitting on grounds 3 and 4 together, Ms. Mshanga argued that the culprits may have been familiar to PW1 but the latter could not have identified them in the material dark night as PW1 did not even describe the appellant's attire. She added that the discrepancies in the evidence so much went to the roots of the prosecution case.

Rejoining, the appellant just asked the court to accept the learned Principal State Attorney's submissions as presented and that his liberty be restored.

Central for our consideration, the issue is whether, as regards the charge of armed robbery, the prosecution case was, against the appellant proved beyond reasonable doubt. We choose to consider grounds 1, 3 and

4 as rephrased before. Having reflected on the charge, we go along with the learned Principal State Attorney's concession to the appeal. Indeed, the particulars of the offence charged and PW1's testimonies are materially at variance and glaringly in conflict. For ease of reference and better appreciation of it, at page 1 of the record, the particulars of the offence read thus:

*"...That Said s/o Mussa Soweni charged on 19<sup>th</sup> day of June, 2018 at about 22.45 Hrs at Vianzi village withi Mkuranda District in Coast Region **being armed with machete, did steai on motorcycle Make: Fekon with registration number MC 987 BLQ valued at TSH 1,800,000/=** the property of one NASSIB s/o MUSSA JOHARI, Immediately before such stealing did threaten Him by using such offensive weapons in order to obtain and retain such properties... [Emphasis added].*

The prosecution mainly relied upon the testimony of the complainant (PW1), the sole eye witness to support the charge. His evidence was to the effect that the appellant and his partners in crime grabbed him, and, at a machete edge attempted to rob him of his motorcycle but failed as they ended up taking away a battery and a jacket as he narrated thus:

*"...Later on other people came at the scene; we found the motorcycle at the same place but the battery was removed and my jacket was stolen...*

It is therefore evident that PW1 was not robbed of his motorcycle, the subject of the charge but such items stranger to the charge namely the battery and jacket. In other words, the charge remained unsupported by evidence just as the essential element of stealing of the motorcycle remained unproven. On that one therefore, the proceedings remain wanting and the appellant should have been acquitted as we held in the case of **Samwel Marwa Roswe @ Masaba** (Supra) (unreported) as quoted bellow:

***"... As for the offence of robbery, stealing is also one of the essential ingredients. As Mr. Alfani has submitted evidence of that element in the present proceedings is wanting as PW1's evidence falls far short of proving theft [Emphasis added]."***

As said earlier, for the reason that the motorcycle (Exhibit P3) was not proven stolen, the prosecution case left such reasonable doubt. It is very unfortunate that not only the appellant was not charged for the alleged missing battery and jacket, but also, as complained by the appellant, the three alleged items were not even tendered in court as exhibits. The point sufficiently disposes of the entire appeal.

The law is settled that, a charge which is in material conflict with the witnesses' testimonies materially shakes credence of the prosecution case

and renders the prosecution case not proved to the required standard. We took this stance in a number of cases including **Issa Mwanjiku @ White v. Republic**, Criminal Appeal No.175 of 2018. See: Also the case of **Mohamed Juma @ Mpakama v. Republic**, Criminal Appeal No. 385 of 2017 (both unreported). Grounds 1, 2, and 3 are allowed. So is ground 4.

As for the issue of visual identification of the appellant, we agree with the learned Principal State Attorney that PW1 may have recognized the appellant at the scene of the crime upfront. However, he did not name or even describe the appellant at the earliest possible opportunity. PW1's failure to mention the appellant immediately questions his reliability, which, the two courts below should have taken into account, but they did not. The PW1's evidence should have been discounted. Possibly his evidence was an afterthought. See: **Marwa Wangiti Mwita and Another v. Republic** [2000] T.L.R 39.

PW1 and the culprits may have spent five minutes or any longer period in the proximity negotiating the fare, but PW1 did not specifically name who, amongst the culprits tied up his neck with the rope. It was not, until at the hearing when he identified the appellant in the dock.

As conceded by Ms Mshanga learned Principal State Attorney, correctly so, in our considered view, a summation of all what we have

herein above endeavored to discuss will show that, indeed the prosecution case was not proved beyond reasonable doubt against Said Mussa Soweni. Consequently, we allow his appeal. We accordingly quash the conviction, set aside the sentence and order the immediate release of the appellant from prison unless he is held there for some other lawful cause. Order accordingly.

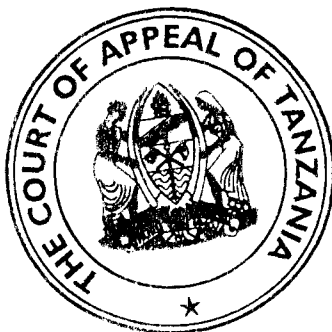
**DATED at DAR ES SALAAM this 21<sup>st</sup> day of April, 2022.**

G. A. M. NDIKA  
**JUSTICE OF APPEAL**

I. P. KITUSI  
**JUSTICE OF APPEAL**

S. M. RUMANYIKA  
**JUSTICE OF APPEAL**

The Judgment delivered this 22<sup>nd</sup> day of April, 2022 in the presence appellant in person, linked Via Video from Ukonga Prison and Ms. Beata Kitale, learned Senior State Attorney for the respondent/Republic is hereby certified as a true copy of the original.



*F. A. MTARANIA*  
F. A. MTARANIA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**