IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

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

CRIMINAL APPEAL NO. 9 OF 2021

SALUM ALLY SALUM.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Masara, J.)

dated the 23rd day of October, 2020

in

DC Criminal Appeal No. 106 of 2019

JUDGMENT OF THE COURT

22nd & 29th September, 2023

KEREFU, J.A.:

SALUM ALLY SALUM, the appellant, is currently serving a term of thirty (30) years' imprisonment following his conviction by the District Court of Monduli with the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 (the Penal Code). It was alleged that, on 12th November, 2017 at Makuyuni area within Monduli District in Arusha Region, the appellant did steal cash TZS. 16,000.00, two mobile phones make Nokia and Techno and motorcycle make Toyo with Registration No. MC 773 BTF the properties of one Omary Hamisi and

immediately before and after such stealing, he threatened and stabbed him with a knife in order to obtain and retain the said properties.

The appellant denied the charge and therefore, the case had to proceed to a full trial. To prove its case, the prosecution called a total of twelve witnesses and tendered seven exhibits. On his part, the appellant depended on his own evidence in defence.

Before embarking on the merits or demerits of the appeal, we find it apposite, albeit briefly, to give sequence of events leading to the arraignment and conviction of the appellant, as obtained from the record of appeal. That, in the evening of 12th November, 2017 around 19:00 hours Omary Hamisi (PW5), the victim who works as a commercial motorcyclist (commonly known as a *bodaboda*) at Makuyuni, was hired by the appellant to ferry him to a place known as Simago Mashuleni for a fee of TZS 3,000.00. On the way, the appellant asked him to stop and PW5 complied to that request. Suddenly, PW5 saw two people who emerged from the nearby shrubs and approached where they had stopped. The said people together with the appellant started beating PW5 and the appellant took out a knife and stabbed him on his forehead and as a result, PW5 fell down bleeding. Thereafter, the appellant and his accomplices stole the motorcycle and took from his pocket, two

mobile phones, cash amounting to TZS 16,000.00 and ran away while leaving him helpless.

A moment later, Kassim Kassim (PW6), who is also a commercial motorcyclist arrived at the scene while riding his motorcycle heading to Makuyuni. PW5 narrated to PW6 what had happened to him. PW6 called Prosper Paul Akonaay, the owner of the stolen motorcycle and assisted to take PW5 to Makuyuni Police Station where they reported the incident. Upon being issued with a PF3, PW5 was taken to Makuyuni Health Centre and later to Monduli District Hospital where he was hospitalized. He was attended by Dr. Winnie Laizer (PW7) who found that he was injured at his forehead by a sharp object. The PF3 to that effect was admitted in evidence as exhibit P4. PW5 described the stolen motorcycle as being Toyo Power King, red in colour. Its seats had white and blue colours and its Registration No. was MC 773 BTL.

In his evidence, PW6 supported the narration by PW5 and added that, he saw the assailants with the stolen motorcycle and tried to chase them but without success. He, however, made some calls to several people at Duka Bovu and upon reaching there, he found the appellant already arrested with the stolen motorcycle.

Edward Sanare (PW1), G. 9515 PC Aden (PW2) and F. 5072 DC Emmanuel (PW3), testified that, on 12th November, 2017 at 19:45 hours, while on duty at Duka Bovu Meserani Police Barrier, they received information from Makuyuni Police Station that there was a motorcycle which had been stolen at Makuyuni heading to Arusha town. On the move to arrest the bandits, they inspected each motorcycle that crossed the barrier. In the process, the said motorcycle rode by the appellant arrived. They stopped it, but the appellant and his colleague ran away. PW1, PW2 and PW3 ran after them while firing bullets in the air. PW1 managed to arrest the appellant but the other suspect escaped. Upon searching the appellant, PW3 found him with a knife and a screwdriver. They took the appellant with the motorcycle to Monduli Police Station where a certificate of seizure was prepared by PW3. The said certificate was admitted in evidence as exhibit P1 and the motorcycle, the knife and the screwdriver were collectively admitted in evidence as exhibit P2.

On 17th November, 2017, Ass. Insp. Israel Mzumya (PW4) conducted identification parade and according to his evidence, the appellant was identified by PW5. The Identification Parade Register was admitted in evidence as exhibit P3. The appellant was later interrogated by F. 2233 DC. Raymond (PW8). It was the testimony of PW8 that the appellant wrote the statement on his own hand writing. However, when

PW8 tendered the said statement, the appellant objected to its admission in evidence alleging that he did not give it voluntarily. On that basis, the said statement was taken to the Forensic Bureau Department by H.908 DC. Haruna (PW11) and examined by Insp. Adam Laurent Ntamuti (PW9). The Forensic Report to that effect was admitted in evidence as exhibit P6 and the appellant's cautioned statement as exhibit P7.

In his defence, the appellant denied to have committed the offence. He testified that, he was arrested on 11th November, 2017 at Kisongo area where he went to see his friend and then taken to Duka Bovu, where upon he was searched and his mobile phones and money were seized. That, on 13th November, 2017 he was taken to Monduli Police Station and forced to write his statement after being tortured. He thus disowned the cautioned statement and challenged the evidence of PW5 that he gave untrue story before the trial court.

Having heard the evidence of both sides, the learned trial Resident Magistrate was convinced that the prosecution had proved the case against the appellant to the required standard. Thus, the appellant was found guilty, convicted and sentenced as indicated above.

Aggrieved, the appellant unsuccessfully appealed to the High Court where the trial court's conviction and sentence were upheld. Undaunted and still protesting his innocence, he has now appealed to this Court. In the memorandum of appeal, he raised nine grounds of appeal which can be conveniently paraphrased as follows; **first**, that, the visual identification adduced by PW5 was weak and unreliable; **second**, the identification parade was unprocedurally conducted; **third**, failure by the trial court to warn itself on the danger of convicting the appellant on a repudiated and or retracted cautioned statement; **fourth**, that, the appellant's cautioned statement was unprocedurally admitted in evidence; **fifth**, the failure by the prosecution to summon material witnesses; **sixth**, that, the charge is defective for being at variance with the evidence adduced at the trial; **seventh**, the evidence adduced by the prosecution witnesses was tainted with contradictions, thus unreliable; **eighth**, failure by the lower courts to address the contradictions between the evidence of PW5 and exhibit P1 on the motorcycle registration number; and **nineth**, that, the prosecution case was not proved to the required standard.

At the hearing of the appeal, the appellant was represented by Mr. Richard Patrice Mosha whereas the respondent Republic was

represented by Ms. Lilian Kowero assisted by Mses. Naomi Mollel and Donata Kazungu, learned State Attorneys.

Upon taking the floor to expound on the grounds of appeal, Mr. Mosha informed the Court that he had abandoned the sixth ground. For the remaining grounds, he intimated that he would argue the first and second grounds conjointly, third and fourth grounds conjointly, the fifth ground separately, seventh and eighth grounds conjointly and the nineth ground separately.

Submitting on the first and second grounds, Mr. Mosha argued that the visual identification of the appellant at the scene of the crime was not watertight, as PW5 did not give proper descriptions of him, such as his attire and or any special marks. He added that, since the appellant was not known to PW5 prior to the incident, PW5 was expected to give further descriptions on how he managed to identify him to avoid mistaken identity. He contended further that the identification parade was unprocedurally conducted as there is nowhere in the record of appeal indicating that, prior to the said parade, PW5 gave to the police or any other person, the proper descriptions of the person he saw at the scene of crime. To support his proposition, he referred us to the case of **Yosiala Nicholaus Marwa & 2 Others v. Republic**, Criminal

Appeal No. 193 of 2016 [2019] TZCA 147: [9 April 2019: TanzLII] and urged us to expunge exhibit P3 from the record.

As for the fourth ground, Mr. Mosha faulted the trial court for failure to conduct trial within a trial to inquire on the voluntariness of the appellant's cautioned statement (exhibit P7) after the appellant had raised an objection to its admissibility on account that it was not voluntarily made. To justify his argument, he referred us to pages 29 to 45 of the record of appeal together with the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 [2012] TZCA 103: [21 May 2012: TanzLII] and urged us to also expunge exhibit P7 from the record.

As for the seventh and eighth grounds, Mr. Mosha contended that the evidence adduced by PW3 and PW5 on the motorcycle's registration number was tainted with contradictions. To amplify his point, he referred us to page 13 of the record of appeal where PW3 mentioned the registration number of the stolen motorcycle as No. MC. 773 BTF while at page 22 of the same record, PW5 mentioned No. MC. 773 BTL and at page 14 where the trial court indicated No MC. 773 BTL. It was his argument that, the pointed-out contradictions raised doubts in the prosecution case which should have been determined in favour of the appellant.

On the nineth ground, Mr. Mosha argued that the prosecution case was not proved to the required standard as there was no scientific examination of the knife to prove that, the knife found with the appellant was the same one used to stab PW5. He further challenged exhibit P1 by arguing that the search was conducted contrary to the requirement of the law as there was no search warrant. According to him, the said search was not supposed to be an emergency measure because the police officers arrested the appellant at the police barrier where they were on duty.

The learned counsel argued also on the fifth ground that, the ownership of the motorcycle was not proved for the failure by the prosecution to call Prosper Paul Akonaay who was alleged to be the owner of the same. He referred us to page 53 of the record of appeal and argued that, although, the said person was listed as one of the prosecution witnesses, he was not summoned to testify before the trial court to shed light on the ownership of the stolen motorcycle as required under the doctrine of recent possession. He equally wondered as to why both lower courts did not draw adverse inference on the prosecution for such failure. To support his proposition, he referred us to the case of **Augustino Mgimba v. Republic**, Criminal Appeal No. 436

of 2019 [2021] TZCA 497: [20 September 2021: TanzLII]. Based on his submission, he urged us to allow the appeal and set the appellant free.

In response, at the outset, Ms. Kazungu, declared the stance of the respondent of opposing the appeal. She then started by arguing that, the third, fourth, fifth, seventh and eighth grounds of appeal raised by the appellant are not worth consideration by the Court because they raise new issues which were neither raised nor determined by the first appellate court. On that basis, she implored us not to entertain them, unless they involve points of law.

As regards the first and second grounds of appeal, although, Ms. Kazungu readily conceded that the visual identification of the appellant by PW5 was not watertight and the identification parade was unprocedurally conducted, she was quick to argue that the appellant's complaint under the said grounds is baseless because he was arrested after being found in possession of a motorcycle which was stolen from PW5. According to her, that was in line with the doctrine of recent possession as discussed in the case of **Justine Hamis Juma Chamashine v. Republic**, Criminal Appeal No. 669 of 2021 [2023] TZCA 214: [2 May 2023: TanzLII]. She argued further that, PW5, the victim who was the custodian of the stolen motorcycle at that particular time, adduced sufficient evidence on how he was hired by the appellant

who later, together with his accomplice, attacked him and stole the motorcycle and his other items. The learned State Attorney cited section 258 (1) and (3) of the Penal Code to support her argument and then, urged us to find the first and second grounds of appeal with no merit.

As for the fourth ground, Ms. Kazungu readily conceded that exhibit P7 was unprocedurally acted upon as after the objection raised by the appellant on its admissibility, trial within a trial was not conducted to determine its voluntariness. She thus also urged us to expunge exhibit P7 from the record.

On the nineth ground, Ms. Kazungu insisted that, the prosecution case was proved beyond reasonable doubt through the evidence of PW5 who narrated on how he was hired by the appellant who later attacked him and stole the motorcycle and his other items. She argued that, the evidence of PW5 was corroborated by PW6 who found PW5 on the road injured and brought him to the police station where they reported the incident. Furthermore, PW1, PW2 and PW3 testified on how they arrested the appellant with the stolen motorcycle at the police barrier.

On the ownership of the motorcycle, although, Ms. Kazungu intimated that there was no dispute on that aspect, she argued that the same was properly established by PW5, the victim who was the

custodian and a special owner of it at that particular time. She therefore insisted that, the prosecution case was proved beyond reasonable doubt through the evidence of PW5 who was at the scene and clearly narrated what transpired. That, the evidence of PW5 was corroborated by PW1, PW2, PW3, PW6 and PW7. It was her argument that, having established its case against the appellant, the prosecution found it unnecessary to summon other witnesses. Based on her submissions, she urged us to find the appellant's appeal unmerited and dismiss it in its entirety.

In a brief rejoinder, Mr. Mosha reiterated his earlier submission and insisted tha the appeal to be allowed.

Having considered the rival arguments advanced by the learned counsel for the parties in the light of the record of appeal, the grounds of appeal as well as the substance of their oral submissions, we should now be in a position to consider the grounds of complaints raised by the appellant.

At first, we are enjoined to determine Ms. Kazungu's submission pertaining to the third, fourth, fifth, seventh and eighth grounds of appeal. Having examined the said grounds, we agree with her that, this Court is precluded from entertaining purely factual matters that were not raised or determined by the High Court sitting on appeal. However,

since the fourth and fifth grounds are on points of law, the Court is not precluded from entertaining them. This is so, because, as a general principle, a point of law can be raised at any stage of proceedings. The said position has been stated in a number of decisions of the Court - see for instance the case of **The Director of Public Prosecutions v. Bernard Mpangala & 2 Others**, Criminal Appeal No. 29 of 2002 (unreported). As such, we will not entertain the third, seventh and eighth grounds of appeal because they raise new issues of facts which were not canvassed and decided upon by the first appellate court.

As for the remaining grounds, we wish to start by stating that, this being a second appeal, the Court will rarely interfere with the concurrent findings of fact made by the courts below. The exception to the rule is when the findings are perverse or demonstrably wrong - see the **Director of Public Prosecutions v. Jaffari Mfaume Kawawa,** [1981] TLR 149 and **Mussa Mwaikunda v. The Republic**, [2006] TLR 387.

With regard to the fourth ground of appeal, we agree with the learned counsel for the parties that exhibit P7 was unprocedurally admitted in evidence as, indeed, the record of appeal bears it out at pages 28 to 45 that, after the objection raised by the appellant on its

admissibility, trial within a trial was not conducted to determine its voluntariness. We thus outrightly expunge it from the record.

On the fifth ground, we find the argument by Mr. Mosha on the aspect that the case was not proved on account of the prosecution's failure to call Prosper Paul Akonaay unfounded as throughout the trial, there was no dispute on the ownership of the stolen motorcycle. As correctly argued by Ms. Kazungu, since the motorcycle was stolen from PW5 who was, at that particular moment, its custodian and special owner, there was no need for the prosecution to summon the owner of the motorcycle. Section 258 (1) of the Penal Code cited to us by Ms. Kazungu provides that:

> *"A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person other than the general or* ***special owner*** *thereof anything capable of being stolen, steals that thing." [Emphasis added].*

The word '*special owner*' is defined under the provision which has been reproduced above to mean, '*any person who has lawful possession or custody of, or any proprietary interest in, the thing in question.*'

Now, since in the instant appeal, PW5 at the time of the robbery incident was the custodian of the stolen motorcycle, and there was no dispute on its ownership, we find, with respect that, Mr. Mosha's argument on that aspect without any justification. On that basis, we dismiss the fifth ground for lack of merit.

As for the arguments made in respect of the first and second grounds, we again, agree with the learned counsel for the parties that the visual identification of the appellant at the scene of crime was weak and unreliable as, in his evidence, PW5 did not explain how he managed to identify the appellant and/or give his proper descriptions. It is also clear that the identification parade was also unprocedurally conducted as there is nowhere in the record of appeal suggesting that, prior to the said parade, PW5 gave to the police or any other person the proper descriptions of the person he saw at the scene of crime. Consequently, we also expunge exhibit P8 from the record.

That apart, we agree with Ms. Kazungu argument that, the appellant's claim on these two grounds is baseless as, it is quite unassailable in the evidence that the appellant was arrested by PW1 at a police pursuit by PW1, PW2 and PW3 after being found at the police barrier in possession of the motorcycle, a little while, after it was robbed from PW5. This piece of evidence renders the appellant's complaint on

his weak visual identification at the scene of crime meaningless on account of his unexplained possession of the recently stolen motorcycle. It is therefore, clear to us that, it was the recovery of that stolen motorcycle in his possession which led to his arrest.

Admittedly, although both courts below found it proven, based on the evidence by PW5, that the appellant was properly identified and found in possession of the stolen motorcycle together with his cautioned statement, his conviction was equally well founded on the doctrine of recent possession. Pursuant to that doctrine, an inference of guilty knowledge may be drawn against the accused in the absence of a reasonable explanation from him on how he came into possession of a stolen item. In **Joseph Mkumbwa & Another v. Republic,** Criminal Appeal No. 94 of 2007 [2011] TZCA 118: [23 June 2011: TanzLII], the Court summarized the position on the application of the said doctrine thus:

> *"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis for conviction, it must be proved,* ***first,*** *that the property was found with the suspect,* ***second,*** *that 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 of their obligation to prove the above elements."*

In addition, in **Omary Said Nambecha v. Republic**, Criminal Appeal No. 109 of 2012, (unreported) the Court emphasized that:

"In order for this doctrine to apply, it must be shown that the found property was subject of the charge against the appellant; that it was found with the appellant; and that it was positively identified by the victim of robbery."

Furthermore, in **The Director of Public Prosecutions v. Joachim Komba** [1984] T.L.R. 213, the Court stated that:

"The doctrine of recent possession provides that if a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or a guilty receiver."

See also **Dickson Kamala v. Republic**, Criminal Appeal No. 422 of 2018 [2023] TZCA 214: [2 May 2023: TanzLII] and **Justine Hamis Juma Chamashine** (supra) cited by the learned State Attorney.

In the instant appeal, PW5 testified in detail on how he was hired by the appellant who later on, ordered him to stop at a certain distance and together with his accomplices attacked him and stole the motorcycle, his mobile phones and cash. PW5 evidence was corroborated by PW6 who found him injured on the road and took him to the police station and then later, to the hospital where he was hospitalized and attended by PW7.

In addition, PW1, PW2 and PW3 testified on how they stopped the appellant at the police barrier with the stolen motorcycle upon receiving the information on the incident from the police station. That, the appellant started running away but after a police pursuit he was arrested and taken to the police station together with the stolen motorcycle. It is also unassailable that the said motorcycle constituted the subject matter of the charge. It is significant that the appellant offered no explanation on how he came into the possession of the motorcycle as he simply denied having been found with it.

It is our considered view that, the appellant's bare denial against the evidence of PW1, PW2, PW3, PW5, PW6 and PW7 does not deflect the prosecution case. We are increasingly of the view that, the above facts together with the appellant's conduct of running away after being stopped at the police barrier with the stolen motorcycle proved beyond reasonable doubt that he had guilt mind. In the case of **Rashid Mtanga Ahamadi v. Republic**, Criminal Appeal No. 249 of 2008 [2011] TZCA 139: [29 September 2011: TanzLII], upon being faced with an akin situation on the conduct of a running away person who had been suspected to have committed an offence, the Court stated that:

> *"In the instant case, we are satisfied that the appellant's conduct of running away just after he saw PW1 and PW3, is related to his guilty conscience to the act he committed to PW1. Such conduct is inconsistent with innocence."*

Likewise in the current appeal, the conduct by the appellant after being stopped by PW1, PW2 and PW3 at the police barrier for inspection, signified his guilty conscience on the unlawful acts he committed towards PW5. That said, and being guided by the above authorities, we go along with Ms. Kazungu's submission and also find the first and second grounds of appeal devoid of merit.

In the circumstances, and having revisited the entire evidence on record, we are satisfied that the first appellate court adequately re-evaluated the evidence on record and arrived at a concurrent finding with the trial court that the prosecution had managed to prove the case against the appellant beyond reasonable doubts. We thus equally find the nineth ground of appeal with no merit.

For the foregoing reasons, we find the appeal devoid of merit and hereby dismiss it in its entirety.

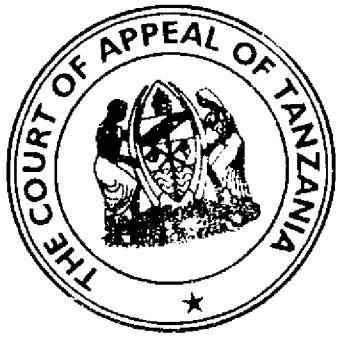
DATED at **ARUSHA** this 27th day of September, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 29th day of September, 2023 in the presence of the appellant in person and Ms. Adelaide Kassala, learned Principal State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL