

IN THE COURT OF APPEAL OF TANZANIA

AT MTWARA

(CORAM: MKUYE, J.A., MWANDAMBO, J.A. And RUMANYIKA, J.A.)

CRIMINAL APPEAL NO. 300 OF 2021

MOHAMED HAMISI @ BILALI APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Mtwara)

(Dyansobera, J)

dated the 4th day of June, 2021

in

Criminal Appeal No. 26 of 2020

JUDGMENT OF THE COURT

17th March & 24th April, 2023

RUMANYIKA, J.A.:

This is a second appeal by Mohamed Hamisi @ Bilali (the appellant). He is challenging the decision of the High Court of Tanzania at Mtwara which upheld the decision of the District Court of Masasi (the trial court) before which he was charged and convicted of the offence of armed robbery contrary to section 287A of the Penal Code and sentenced to serve a term of thirty years' imprisonment.

It was alleged that, on 23rd April, 2018 at Mkangara Village, Mtwara Rural District in the Region of Mtwara, the appellant and two others who are not parties in this appeal stole a motorcycle with registration No. MC 740 BXH Make TVS STAR, black colourous, valued at TZS. 2,100,000.00/= from Abdulrazaki Yusuph. It was the property of Razaki Hamisi Mmalinda.

Abdulrazack (PW1) a commercial motorcycle rider (commonly called "Bodaboda") testified that he was hired by the appellant and fellows to Makonde beach, the agreed destination. Ahead, at their request, he took them to a witchdoctor at Mkangara Village and arrived there three hours later. But just before he disembarked the motorcycle, they grabbed and attacked him with a machete in the neck and head and robbed him the motorcycle. In the next morning, PW1 was found seriously injured and abandoned in the nearby bushes. He was rescued by Kalambo Selemani (PW5), a passerby. The latter took him to the police station where he reported the incident. Afidhi Salum (PW2) purchased the motorcycle from the appellant for TZS. 1,000,000.00/= but paid TZS. 800,000.00/= only as the balance could be paid upon release of the Registration Card. At the hospital, Dr. Renatus Moris Makarios (PW7) attended PW1. On being arrested and charged, the appellant was interrogated by Assistant Inspector

Tuntufye (PW4). He admitted the offence and that he had sold the motorcycle to PW2 at Tandahimba. The appellant allegedly led the policemen to Tandahimba and the alleged purchaser PW2 admitted the appellant's allegations but he also had sold it to another person.

After a full trial, the appellant was convicted as charged and sentenced to thirty years' imprisonment as above stated. Aggrieved by that decision, he unsuccessfully appealed before the High Court. Further dissatisfied, he has preferred the present appeal with ten grounds. Six grounds in the substantive memorandum of appeal filed on 28th December, 2021 and the other four in the supplementary memorandum filed on 26th August, 2022. Rephrased, the grounds read thus:

- 1. That the first appellate Judge erred in law and fact in upholding the appellant's conviction which was founded on uncorroborated and inconsistent evidence.*
- 2. That the first appellate Judge erred in law and fact in upholding the Appellant's conviction in total disregard of the unexplained delay of PW1 to report the alleged body injuries to hospital.*
- 3. That the first appellate Judge erred in law and fact by upholding the conviction which was grounded on unreliable oral evidence after exhibits P1, P2, P4 were expunged from the record.*

4. *That the first appellate Judge erred in law and fact by upholding the conviction basing on evidence of visual identification which was not watertight.*
5. *That the first appellate judge erred in law and fact in upholding the conviction which was based on the weakness of the appellant's defence instead of strength of the prosecution case.*
6. *That the first appellate Judge erred in law and fact in upholding the conviction without the prosecution proving its case beyond reasonable doubt.*
7. *That the first appellate judge erred in law and fact in upholding the conviction irrespective of the incurably defective charge regarding who owned the allegedly stolen motorcycle.*
8. *That the first appellate Judge erred in law and fact in failing to hold that there was no cogent evidence to show that PW2 purchased the allegedly stolen motorcycle from the appellant.*
9. *That the first appellate Judge erred in law and fact in holding that Razaki Hamisi Mmaiinda owned the allegedly stolen motorcycle without proof.*
10. *That the first appellate Judge erred in law and fact in holding that the prosecution case was proved beyond reasonable doubt.*

At the hearing of appeal on 17th March, 2023, the appellant appeared in person unrepresented whereas the respondent Republic was represented by Mr. Joseph Mauggo, learned Senior State Attorney.

At the outset, the appellant opted to let the learned Senior State Attorney set the ball rolling while reserving his right to rejoin when such need would arise.

Initially, Mr. Mauggo resisted the appeal. However, after a while he changed his course and supported it contending that, there was material variance between the particulars of the offence charged and the testimonies of PW2, PW4 going to the root of the matter. Elaborating his point, he contended that, according to the charge sheet, the particulars of offence showed that, the stolen property was motorcycle with Registration Number MC 740 BXH Make TVS STAR whereas the said witnesses talked about a motorcycle with Registration Number MC. 519 PTY Make TVS Star. It was the learned Senior State Attorney's submission that, those were two different motorcycles. Further, he argued that, the variation rendered the prosecution case not proved beyond reasonable doubt and urged the Court to allow the appeal.

Additionally, Mr. Mauggo argued that, the above material variance apart, the appellant was not properly identified by PW1; the sole eye witness who did not know the appellant before neither did he describe the appellant

at the earliest possible opportunity to remove possibilities of any mistaken identity. He urged us to find the appeal merited and allow it.

The appellant agreed with Mr. Mauggo's submission entirely. He urged us to allow his appeal and restore his liberty, without more.

We have read the record of appeal carefully, considered the appellant's grounds of appeal and the learned senior State Attorney's concessional submission. For our consideration, the issues arising are; **one**, whether PW1 properly identified the appellant at the crime scene and **two**, whether the prosecution case was proved beyond reasonable doubt.

For a start, we have noted that PW1 did not know the appellant before the incident at issue and did not describe him to any person before. He just recognized his face in the dock at the trial which is unreliable and worthless form of evidence. From a long list of the Court's decisions including **Francis Majaliwa Deus and 2 Others v. R.**, Criminal Appeal No. 139 of 2005 and **Fahadi Khalifa v. R.**, Criminal Appeal No. 573 of 2020 both (both unreported). We subscribe to it and reiterate the position.

PW1 may have been invaded and robbed by the passengers whom he identified to be the appellant and fellows with whom had sufficient time bargaining the fare. However, as alluded to before, he did not describe the

appellant's physical features like complexion, color, height, and so on until such time he testified in court. Confronted with a similar situation, in **Waziri Amani v. R.** [1980] TLR. 250, **Omary Iddi Mbezi and 3 Others v. R.**, Criminal Appeal No. 227 of 2009 and **Musa Elias and 2 Others v. R.**, Criminal Appeal No.172 of 1993 (both unreported), to mention but few decisions of the Court, we stressed the need for an identifying witness, in any case always to do what is required of him and the condition required for his evidence to carry weight. If he knew the accused before the incident, to name him at the earliest possible opportunity or describe the stranger person as the case may be, the earliest. Regarding the status and probative value of dock identification, in **Musa Elias and 2 Others** (supra) this Court stated that:

"...dock identification of an accused person by a witness who is a stranger to the accused has value only where there has been an identification parade at which the witness successfully identified the accused before the witness was called to give evidence at the trial."

From the above extract of the Courts' decision therefore, we wish to add that, by analogy, in **Mwita Marwa Wangiti v. R.** [2002] T.L.R 39 the duty imposed on the eyewitness at the earliest to name a person he

recognized at the crime scene assures his reliability, the Court also had in mind that, a witness who, for some reasons could not recognize accused has to describe the latter's physical features similarly, as early as practicable. Those features could be height, color, complexion or attire. However, as hinted earlier, the evidence of PW1 did not meet the threshold. It has to be so because of the unreliability nature of the evidence of visual identification.

Regarding the effects of delayed or, as happened here, by analogy that, a witness's complete failure to name the accused allegedly identified by him, in **Marwa Wangiti Mwita and Another v. R** (supra) which we cited in **The DPP v. Chibago Mazengo and Two Others**, Criminal Appeal No.109 of 2019 and **Swalehe Kalonga @ Swalehe and Another v. R**, Criminal Appeal No. 46 of 2001 (both unreported) the Court stated that:

"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his reliability, in the same way as unexplained delay or complete failure to do so should put a prudent court to inquiry..."

Moreover, we are settled in our minds that, a mistaken identity of an accused apart, at times, there could be fabrication of evidence, loss or diminished memory, illness for the reason of extreme age, color blindness, short or long sightedness, internal prejudice and gambled evidence

occasioning injustice. Further mindful of the dangers of convicting without the court having had critical-eye and further scrutiny of the evidence of visual identification, in **Philimon Jumanne Agala @ J4 v. R.**, Criminal Appeal No. 187 of 2015 (unreported), the Court observed that:-

*"...it has been repeatedly held that eye witness testimony can be devastating **when false witness identification is made due to honest confusion or outright lying...**"* [Emphasis added].

See also, **Mengi Paulo Samwel Lahana and Another v. R.**, Criminal Appeal No. 222 of 2006 and **Nyakango Olala James v. R.**, Criminal Appeal No.32 of 2010 (both unreported).

In the context of this appeal, as above indicated, PW1's failure to name the appellant at the earliest opportunity dented his reliability. Faced with the similar problem in **Omary Iddi Mbezi and 3 Others v. R** (supra), this Court set out the guidelines to be followed by courts to avoid any mistaken identity-based founding conviction. We stated that:-

*"...**The witness should describe the culprit or culprits in terms of body build, complexion, size, attire, or any peculiar body features, to the next person that he comes across and should repeat those***

*descriptions at his first report to the police...**Ideally, upon receiving the description of suspect(s) the police should mount an identification parade to test the witness's memory...***"[Emphasis added].

It is evident that, not only PW1 delayed to describe the appellant whom he did not know before to PW5 who rescued him but also at a later stage to police. We are constrained to hold that, identification of the appellant by PW1 upon which the trial court solely founded conviction left a million questions unanswered for two main reasons. These are: **one**, no identification parade was subsequently mounted to eliminate possibilities of mistaken identity and **two**, absence of arrest warrant for the appellant apart, his arrest did not come out from the descriptions made by the victim. For all intents and purposes, the alleged visual identification was worthless rendering the prosecution case to be shaky and bound to fail. The 4th ground of appeal which challenges visual identification of the appellant by PW1 is merited and allowed.

Last is regarding is with respect to the issue of variance between the particulars of the offence charged and the oral evidence adduced with regard to registration number of the motorcycle alleged stolen by the appellant. It is trite law that, there should always be material consistency between the

charge and the evidence led by the prosecution. Short of it and without the charge being amended to suit the situation the defect is fatal and prejudicial to the appellant rendering the prosecution case to crumble as it will remain unproven. We reiterated that stance in **Noel Gurth a.k.a Bainth and Another v. R.**, Criminal Appeal No. 339 of 2013 and **Issa Mwanjiku @ White v. R.**, Criminal Appeal No. 175 of 2018 (both unreported). In the present case, the said variance between the charge sheet and evidence adduced remained not cleared because the charge was not amended as required and therefore, the prosecution case was not proved.

In the present case, nothing was said in the evidence suggesting that, the motorcycle with Registration Number MC 740 BXH (Exhibit P3) allegedly stolen by the appellant from PW1 and the motorcycle with Registration Number MC 519 BTY referred by PW2 and PW4 in their oral testimonies was one and the same. Nor was the charge amended and filed to put the things right. With respect, the appellant's conviction was unfounded and improper. We therefore find the 4th, 6th, 8th and 10th grounds of appeal to be merited and allow them.

The above said, we are satisfied that it would serve academic purposes only embarking on the remaining grounds of appeal.

In the upshot, we quash the conviction of the appellant, set aside the sentence and allow the appeal entirely. Consequently, we order the appellant's release from the prison immediately unless he is held there for some other lawful cause.

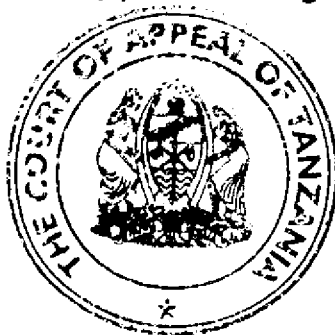
DATED at DAR ES SALAAM this 19th day of April, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 24th day of April, 2023 via video facility connected from Mtwara High Court in the presence of Mr. Melkiory Hurubano, State Attorney for the Respondent and the Appellant in person is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL