

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 108 OF 2018

*(Originating from Kinondoni District Court in Criminal Case
No.477 of 2016)*

EZEKIEL DAVID MKUMBI.....APPELLANT

Versus

THE REPUBLICRESPONDENT

JUDGMENT

20 June & 30 July, 2018

DYANSOBERA, J.:

The above named appellant was charged along with Joshua Elia Adam @ White (2nd accused) in the District Court of Kinondoni with three counts namely, conspiracy to commit an offence, kidnapping a child with intent to steal and armed robbery all offences contrary to the Penal Code, Cap. 16. While both of them were acquitted of the offence of conspiracy to commit an offence, the accused was also acquitted

in the counts of kidnapping a child with intent to steal and armed robbery. The appellant was convicted of kidnapping a child with intent to steal and armed robbery. He was sentenced, respectively, to seven years and thirty years term of imprisonment. The sentences were ordered to run concurrently.

Aggrieved, he has appealed to this court. In his petition of appeal, he has preferred a total of nine grounds of appeal which boil down to one complaint that the case against him was not proved beyond reasonable doubt.

The appellant appeared in person in this appeal, whereas Ms Faraja George learned State Attorney represented the Respondent.

The appellant prayed the court to adopt the said grounds of appeal, allow the appeal and set him free.

Then Ms Faraja George took the turn. She supported the appeal. She submitted that the case against the appellant was not proved beyond reasonable doubt. She argued that the chain of

custody was not established and told the court that the main evidence was recent possession of a stolen property but the person who tendered the property was PW 2 who was the owner of the said motor vehicle. She observed that although the law is not clear as to who is to tender an exhibit, since the exhibit was seized by the police officer, then it's the police who were supposed to tender the motor vehicle , otherwise, PW 2 was duty bound to explain where he got it, the duty he did not discharge. In support of this argument, learned State Attorney relied on the case of **Majid John Vicent Mlindamgabo and another v. R.**, Criminal Appeal No. 24 of 2006 at p. 4 in which the court elaborated on how the exhibit should be tendered as far as the chain of custody is concerned. Besides, the motor vehicle was received without following the required procedure. On the cautioned statements, learned State Attorney stated that its contents were not read after it was admitted after inquiry. She referred this court to the case of

Selemani Abdallah and 2 others v. R, Criminal Appeal No.384 of 2008 where at pp. 15 and 16, Hon.Luanda, JA. explained the procedure in accepting and marking the exhibits and thereafter, the contents should be read over to the accused.

On the aspect of visual identification by PW 3 and PW 4, Ms Faraja was of the view that the same was not watertight explaining that the principles of visual identification were not met and that rendered weightless the exhibits tendered in respect of the parades.

For those reasons, learned State Attorney urged the court to allow the appeal and set the appellant at liberty.

Before I go into the details of this appeal, I think it apposite to give a brief background of the case.

Innocent Philipo Dalu (PW2) owns a motor vehicle Toyota Harrier Reg. No. 400 DEH. On 23rd day of October, 2016 was a Sunday. He with his two children

namely Philipo Innocent Dalu (PW 1) aged 7 years and Lightness Innocent Dalu aged 3 years went to church. When back and while driving the motor vehicle, he at Mbezi Beach parked the motor vehicle, alighted leaving behind the two children in the motor vehicle and went to the butchery. Two people arrived at the motor vehicle, took out PW 1 and drove the motor vehicle away. PW 1 ran and informed his father, PW 2. The latter who took a motor cycle and unsuccessfully ran after them. He then reported to Goba and Kawe Police Stations. Later, PW 2 received a call requiring him to go to Kawe police station. When back he found PW 3 one Halima Kamaru Issa, a bar attendant at Golden Bridge with Lightness. PW 2 took the child to Mwananyamala Hospital for medical examination. At 2400 hrs, PW 2 was called by the police from Bagamoyo and informed that his motor vehicle was at Kuvangwa barrier. PW 2 went there with Abdallah and found the car which he identified to belong to him. At the Police Central Station, PW 2

recorded his statement. Before the trial court, PW 2 tendered a registration card (Exhibit P. 1) and the motor vehicle (Exhibit P. 2).

The evidence of PW 3 established that on 23rd day of October, 2016 she was at work at the said bar. At 1730 hrs a man went there with the child (Lightness) and ordered two sodas. He then asked where he could get Tigo services and PW 3 directed him to the main road. The man asked PW 3 to look after the child. That man did not go back. At 1900 hrs, PW 3 informed her boss and the police were called and collected both PW 3 and the child and took them to the police station at Kawe and had PW 3's statement recorded. On 27th October, 2016 at 1200 hrs, PW 3 was called at Central Police Station where at an identification parade, she was required to identify the person who had deserted the child at the bar. She made the identification but was clear that the person was not in court.

PW 4 Juma Denis recalled that on 23rd day of October, 2016 he was at Mbezi Juu, Kipeng'oro bar taking some soda. A motor vehicle make Harrier arrived there and parked nearby and the driver alighted leaving the motor vehicle at silence. PW 4 then saw tow people opening the car door, showed a bush knife to PW 1 in a threatening manner. Those people then forced the child out of the car and drove it. PW 1 ran to the butchery to inform the driver. PW 4 said that he knows those people who are tall and slender; one is black and the other is white. PW 4 further evidence showed that they tried to run after those thugs with a Land Cruiser motor vehicle but failed to trace them. They then decided to report to the police. On 28th day of October, 2017 PW 4 was called at Central Police Station where an identification parade was conducted. PW 4 managed to identify the two accused persons. When cross-examined by the appellant, PW 4 told the trial court

that the appellant had a panga and his the one who drove the motor vehicle.

F. 3469 testified as PW 5. He said that on 24th October, 2016 at night he was on a duty shift. He was informed that a motor vehicle Reg. No. T.400 DEH had been stolen and that they had to check at the barriers. While at Kiwangwa barrier at 0100 hrs a motor vehicle with the detailed specifications arrived and PW 5 stopped it. The driver was the 2nd accused produced a driving license and was asked to alight. In the car, there were three people, the appellant inclusive. When all were ordered to alight, the 2nd accused and his fellow ran away. When the appellant tried to run, PW 5 managed to hold and handcuffed him. PW 5 inspected the appellant and found him with a wallet with different identity cards. In the car, there was a panga and a hammer and the appellant said that those were his properties which he kept for safety purposes. He filled in the search order and the car was parked at the police

station. PW 5 tendered in court the 2nd accused's driving card, the appellant's NIDA identity card, his Advance Bank Card, Visa Card of Banc ABC, CRDB Visa Tembo Card, a Voting Card and Diazapen tablets (Exhibit P 3 collectively), a wallet (Exhibit P. 4), a panga and hammer (Exhibit P. 5 collectively) and a certificate of seizure Exhibit. P. 6. On cross-examination by the appellant, PW 5 said that he was given an order to arrest him and that he arrested, searched and locked him up. The second accused cross examined PW 5 who replied that the former was a driver of the motor vehicle in question but escaped.

PW 6 E.8391 D/Cpl Abdallah who works in Anti-car crimes department did, on 23rd October, 2016 go to Mbezi Tangi Bovu. He then, on 24.10.2016 recorded the appellant's statement (Exh. P. 7).

Inspector Aden (PW 7) did, on 27th and 28th October, 2016 supervise identification parades where PW 3 and PW 5 identified the culprits. He prepared identification parade registers (Exhibits P 8).

PW 8 (D.8214) D/Sgt Emmanuel went to the crime scene, interviewed the witnesses and collected PW 2's daughter. The last witness for the prosecution was Inspector Abdallah of Kawe Police Station. He, on 26th October, 2016 recorded the statement of the 2nd accused (Exhibit P. 8).

In his defence, the appellant told the trial court that on 25th October, 2016 he was on his way to Wazo Hill riding motor cycle. At Lugalo area there was a traffic jam. The appellant decided to bypass but a traffic officer arrested and found him with neither a driving license nor a helmet. The appellant paid a fine of Tshs. 60,000/= but no receipt was given to him. He then held the traffic by his shirt, the traffic officer slapped him and pushed him. He fell down. Later, the police officers including PW 9 arrived there and took him to Kawe Police Station where he was locked up for two days then shifted to Central Police station. There three identification parades were conducted. The appellant signed some

papers for bail and was taken back to Kawe police station. On 17th November, 2011 he was brought in court. He told the trial court that the story of PW 2 was contradictory in that he gave inconsistent statements at the police and in court. The appellant sought to prove this by producing the Statement (Exhibit D.1). He said that he was arrested at Kawe. He denied to have been arrested at Bagamoyo.

The 2nd appellant also denied to have committed the charged offence. He said that he had quarrels with his uncle but when he reported him to the police he was arrested, handcuffed and then charged in court.

The trial court was satisfied that there was ample evidence proving that the appellant had committed the offences of armed robbery and kidnapping a child with intent to steal.

I have given due consideration to the matter before me. As rightly pointed out by the appellant and the learned State Attorney, there are serious

irregularities and in my opinion, it is doubtful if the ingredients on which the appellant was charged and convicted were proved.

Section 287A of the Penal Code under which the appellant was charged provides as follows:

"Any person who steals anything and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons, and immediately before or immediately after the time of the stealing uses or threatens to use violence to any person, commits an offence termed "armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment"

According to the above provisions of the law, the ingredients are, in my opinion, four that is:-

- i. stealing,

- ii. at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or being in company of one or more persons and,
- iii. the use or threats to use violence immediately before or immediately after the time of the stealing,
- iv. against any person.

In the present it was not established leave alone proved that the appellant employed or was in company of any other person. Indeed, the alleged victim of the threats was clear that he did not identify who took him out of the car. The said PW 1 was silent on any use of bush knives. His evidence was clear that "the thieves took me out of the car. I do not know who took me out of the car."

"Armed robbery" is an aggravated form of theft. Ordinarily, robbery is stealing coupled with the use of actual violence or threats to use actual violence to any person or property in order to obtain or

retain the stolen property. A pre-requisite for the crime of armed robbery, therefore, is that "there should be violence to the person of the claimant": See, **Zubell Opeshutu v.R.**, Criminal Appeal No. 31 of 2003 and **Mohamed Harun @ Mtupeni & Another v.R.** Criminal Appeal No. 259 of 2007 (both unreported). Additionally, the charge must disclose the identity of the victim of the alleged violence, so as to enable the accused person to prepare himself effectively for his defence and rule out surprises.

On the count of kidnapping a child with intent to steal, the law on kidnapping is difficult to define with precision because it varies from jurisdiction to jurisdiction. Most states define kidnapping vaguely, and courts fill in the details. Fortunately, our law is clear as far as this case is concerned. It is provided under section 252 of the Penal Code as follows:

"252.-

A person who kidnaps or abducts any child under the age of fourteen years with the intention of taking dishonestly any movable property from the person of the child is guilty of an offence and is liable to imprisonment for seven years."

According to this section, the offence under section 252 above is established by proving the following elements:

- i. kidnapping or abducting,
- ii. any child under the age of 14 years,
- iii. with the intention of taking dishonestly,
- iv. any movable property,
- v. from the person of the child

In the instant case, it was not established that the culprit, whomsoever, kidnapped either PW 1 or Lightness with the intention of taking dishonestly any movable property from the person of that child or those children. What is clear is that the alleged people drove the motor vehicle away while inside

there was a child called Lightness but who was later abandoned at a bar where PW 3 was working.

Apart from failure of proving the charge beyond reasonable doubt on part of the prosecution, the case was tainted with procedural irregularities which were pointed out by learned State Attorney. These irregularities included failure to establish a chain of custody, weak evidence on visual identification and the failure to read the contents of the appellant's cautioned statement after it was admitted in court.

As rightly pointed out by Ms Faraja George, learned State Attorney, these irregularities vitiated the whole trial which entitled the acquittal of the appellant.

In the end result and for the reasons adumbrated above, I agree with the learned State Attorney and the appellant that the appeal has merit. Consequently, I allow it. I quash the conviction and set aside the sentence. I order that the appellant

be released from custody unless lawfully held for
other lawful causes.


W.P. Dyansobera

JUDGE

30.7.2018

Delivered this 30th day of July, 2018 in the presence
of Mr. Justus Ndibalema, learned State Attorney for
the respondent and in the presence of the appellant
in person.


W.P. Dyansobera

JUDGE