IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
[ARUSHA DISTRICT REGISTRY]
AT ARUSHA.

CRIMINAL APPEAL NO. 106 OF 2019
(Originating from District Court of Monduli, Criminal Case No. 56 of 2017 (Mkama RM)

SALUM ALLY SALUM ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

JUDGMENT

3rd September & 23rd October, 2020

Masara, J.

In the District Court of Monduli (the trial Court), the Appellant stood charged with the offence of Armed Robbery, contrary to Section 287A of the Penal Code, Cap. 16 [R.E 2002] as amended by Section 10A of the Written Laws Miscellaneous Amendment Act No. 3 of 2011. The trial Magistrate was persuaded by the prosecution's evidence and therefore convicted him as charged. The Appellant was sentenced to serve custodial sentence of thirty years jail imprisonment.

The factual background leading to the Appellant's conviction and sentence is as follows: Omari Hamisi (PW5), the victim, testified that he works as a motorcyclist (commonly known as bodaboda) at Makuyuni. That on the evening of 12/11/2017he was hired by the Appellant to drive him to Simago Meshulani. On the way, the Appellant asked him to stop whereby he complied. After stopping he saw two people who emerged from the shrubs. They joined the Appellant and started beating PW5. The Appellant took out

a knife and stabbed him on his forehead. He fell down bleeding. The Appellant and his colleagues stole from PW5's pocket two phones (nokia and tecno) and Tshs. 16,000/=. They then ran away with the motorcycle that PW5 was riding leaving him helpless. The motor cycle was a Toyo Power King with registration Numbers MC 773 BTL. Few minutes later PW6, Kassim Kassim, arrived at the scene while riding his motorcycle to Makuyuni. PW5 narrated to him what had happened. He took him to Makuyuni *Police Station* where they reported the incidence. PW5 was later taken to Makuyuni Health Centre and later to Monduli District Hospital where he was admitted until 17/11/2017. PW6 also testified that he saw the assailants with the stolen motorcycle. He tried to chase them but he could not manage. He did, however, make some calls including to some people at Duka Bovu. He then rode to Duka Bovu. On reaching there, the Appellant was already arrested with the stolen motorcycle.

The testimonies of PW1, PW2 and PW3 is that on 12/11/2017, at 19:45 hrs, they were on duty at Duka Bovu/Meserani Police barrier. They received information from Makuyuni Police Station and a young boy that there was a motorcycle which had been stolen at Makuyuni which was heading to Arusha town. On a move to arrest the bandits, they inspected each Motorcycle that crossed the barrier. After sometime, the said motorcycle which was ridden by the Appellant arrived. They stopped it. The Appellant with his colleagues started running away. PW1, PW2 and PW3 ran after them while firing bullets on air. PW1 managed to arrest the Appellant but the other persons escaped. On searching the Appellant, he was found with a knife and a screw driver.

They took the Appellant and the motorcycle to Monduli Police Station, where a Certificate of seizure (exhibit PE1) was made. PW3 also tendered the motorcycle, knife which had no handle and the screw driver which were admitted as exhibits PE2 collectively.

On 17/11/2017 an identification parade supervised by PW4 was conducted. The Appellant was identified by PW5 twice both from the front and at the back. PW4 filled PF 186, the identification parade form, which was later admitted in Court as exhibit PE3. At Monduli hospital, PW5 was attended by PW7, Dr. Winnie Laizer. According to her testimony, the Appellant was injured by a sharp object on his forehead. She filled in the PF3 which was admitted as exhibit PE4. The Appellant was later interrogated and PW8 took the Appellant's confession statement. The Appellant wrote the statement on his own handwriting. The Appellant objected admission of the statement stating that there was no independent witness and that it was not given voluntarily. He thus denied to have written any statement.

The alleged cautioned statement was taken to the Forensic Bureau Department by PW11. The taking of the handwriting and signature samples were supervised by PW12. It was examined by PW9 who prepared a report accompanied by a covering letter which was collected by PW10. The report was admitted as exhibit PE6. According to the report, it was the Appellant who wrote the confession statement and the signature was verified as his. The confession statement was admitted as exhibit PE7.

In his defence, the Appellant denied to have committed the offence, stating that he was arrested on 11/11/2017 at Kisongo by two police officers where he went to see his friend. He was taken to Duka Bovu, where he was searched and his phone and money seized. He was taken to Monduli Police Station and on 13/11/2017 and was forced to write his statement after severe beatings. He stayed in the police custody until 18/11/2017. He stated that the case against him was fictitious. He faulted PW5's evidence on the grounds that there was no witness who saw the Appellant hiring him. Also, the fact that they were two but he was arrested alone and that he had objected the certificate of seizure. He added that there was no identification parade conducted and that he was never interrogated.

Having heard both sides, the trial Magistrate was convinced that the Prosecution had proved the case against the Appellant to the required standard. As already stated, the trial Magistrate convicted the Appellant as charged and sentenced him to serve 30 years in jail. It is against that decision that the Appellant has appealed in a petition of appeal containing seven grounds of appeal as follows:

a) *That, the learned trial Magistrate erred in law and fact to convict the Appellant basing on defective charge sheet;*
b) *That, the trial Magistrate erred in law and fact to convict the Appellant while the Appellant was not properly identified;*
c) *That, the trial magistrate erred in law and fact to rely on defective police identification parade to sustain the conviction of the Appellant;*
d) *That, the chain of custody of exhibit P2 was broken beyond repair;*
e) *That, the learned magistrate erred in law and fact in admitting the cautioned statement which was taken contrary to the provision of law(sic);*

f) That, the trial magistrate erred in law and fact by failing to notice inconsistencies and contradictions in the testimonies of the Prosecution which should have been resolved in the favour of the Appellant; and

g) That, the trial magistrate erred both in law and fact to enter conviction of the Appellant while the offence was not proved beyond reasonable doubt.

At the hearing of this appeal, the Appellant appeared in person, unrepresented, while the Respondent was represented by Ms. Tusaje Samwel, learned State Attorney.

Submitting on the first ground of appeal, the Appellant stated that the charge against him was defective because according to the evidence of PW5, it is Akoonay who was robbed the motorcycle but the charge shows that the owner of the motorcycle is Omari Hamis (PW5). According to the Appellant the charge ought to have shown that the stolen motorcycle belonged to Prosper Paulo Akoonay but it was stolen in the hands of PW5. That failure leads to a conclusion that he was not fairly tried.

On the second ground of appeal, the Appellant contends that the Prosecution evidence was not watertight as PW5 failed to explain how he identified the robber and that he failed to describe the attire, time and size of the robber. Further, that PW5 failed to explain on how he identified the robber at the identification parade.

Elaborating on the third ground of appeal, the Appellant averred that the trial magistrate based his conviction on the identification parade supervised by PW4 without considering the fact that PW4 failed to describe the

conditions surrounding the parade. That PW4 did not describe how the Appellant was identified, and there was no independent witness. He added that there was no proof whether the Appellant was given a right to give his opinion and whether the Appellant was satisfied by the process. According to the Appellant, the trial magistrate was to conduct an inquiry after the Appellant objected the admission of exhibit PE3.

Regarding the fourth ground of appeal, the Appellant stated that the chain of custody of exhibit PE2 (motorcycle) was not straight. There was no evidence on how the exhibit moved from one officer to another. According to the Appellant, there was no document showing handover which was tendered. He added that the certificate of seizure was prepared contrary to the law as there was no seizure certificate at the time of his arrest and that it was signed at a different place contrary to section 38(3) of the CPA as the law requires presence of an independent witness. According to him, as its admission was objected to, the trial court should not have admitted it without conducting an inquiry.

On the fifth ground of appeal, the Appellant submitted that the trial magistrate relied on the purported cautioned statement without considering that the same was recorded outside the prescribed time (four hours). According to the Appellant, he was arrested on 12/11/2017 and the statement was recorded on 13/11/2017, therefore it should be expunged from the court record. He added that the exhibit was wrongly admitted as PW9 who tendered it was not the author. He faulted the Prosecution

evidence which he said was contradictory on the evidence of PW9, PW10 and PW11.

Expounding on the sixth ground of appeal, the Appellant contended that PW5 failed to prove ownership of the motorcycle as there was no receipt tendered. He added that PW5 was not shown the motorcycle for identification, contrary to law.

Substantiating the last ground, the Appellant stated that the trial court failed to consider irreconcilable contradictions between the evidence of PW5 and PW7. PW5 stated that he went to the hospital on 13/11/2017 and was admitted to 17/11/2017. That evidence according to the Appellant is contrary to the evidence of PW7 who testified that on 12/11/2017 PW5 was sent to her for treatment. The difference in dates makes their evidence unworthy of belief. He therefore prayed that his appeal be allowed considering the grounds explained above.

On her part, Ms Tusaje, while responding to the first ground of appeal, submitted that there are no defects on the charge as alleged, as the robbery was committed on PW5 and not the owner of the motorcycle. In her view, the charge was properly drafted as it meets the conditions set out under section 287A of the Penal Code.

Responding to the second ground of appeal, Ms Tusaje stated that the testimony of PW1, PW2 and PW3 show how the Appellant was arrested after

PW5 reported the incidence. She averred that there was electrical light. Also, that PW6 who assisted PW5 made a follow up and found the Appellant arrested at Duka Bovu. Further, that the testimony of PW4 is clear on how PW5 identified the Appellant.

On the third ground, it was Ms Tusaje's view that PW4's evidence was crystal clear how the identification parade was conducted. That he made sure that the participants in the parade were of the same stature with the Appellant and that PW5 was not able to see the Appellant before the identification and that PW5 confirmed how he identified the Appellant. On the participation of independent witnesses, Ms. Tusaje insisted that exhibit P5 lists the participants in that parade concluding that the parade was proper as per PGO No. 232(2). On failure to conduct an inquiry, her view is that it is not a legal requirement to conduct an inquiry where the identification parade is objected, and that the trial court considered the objection and made a ruling.

Countering the fourth ground of appeal, Ms Tusaje Samwel submitted that it is PW3 who seized the motor cycle and he is the one who tendered it in court. She cited the decision in ***Saganda Kasanzu Vs. Republic***, Criminal Appeal No. 53 of 2019 (unreported) stating that a motor cycle is an item that cannot change hands easily. On the certificate of seizure, exhibit PE1, she was of the view that PW3 stated clearly that during the arrest the arresting officers did not have that document as it was an emergence search as per section 42 of the CPA. In her view, the document was properly admitted. She concluded by stating that an inquiry is not a mandatory requirement in

admission of certificate of seizure. That an inquiry is only necessary in confessional or extra-judicial statements.

Submitting on the fifth ground of appeal, Ms Tusaje contended that PW8 testified to have recorded the Appellant's statement at 20:00hrs, therefore the statement was recorded within the prescribed time. She maintained that during the trial the Appellant did not complain that his statement was recorded outside the prescribed time. That the Appellant's complaint was that he did not record the statement and that he was forced to record but he did not state how. That is why the trial court ordered a handwriting examination by an expert.

On the sixth ground, Ms Tusaje stated that the evidence at the trial was not about the ownership of the motor cycle but armed robbery. She stated that, according to PW6 the motorcycle belonged to someone else and not the Appellant. The evidence of PW3 and PW5 shows the description of the motor cycle and the Appellant was found riding it shortly after it was robbed. Ms Tusaje stated that the alleged contradictions in the testimonies of PW9, PW10, PW11 and PW12 are minor which cannot vitiate the strong evidence by the Prosecution. To support her argument, the learned State Attorney cited the decision in ***Armandi Bueli Vs. Republic***, Criminal Appeal No. 242 of 2010 (unreported).

Her argument in so far as the last ground is concerned is that considering the evidence of PW5 the charge of armed robbery against the Appellant was

proved. That PW1, PW2, PW3, PW4, PW6, PW7 and PW8 testimonies also proved the offence against the Appellant. The evidence of PW5 is that he was taken to the Hospital on 12/11/2017 and on 13/11/2017 he went back to the hospital for further treatment, therefore there was no contradiction on the date PW5 was taken to the hospital as alleged.

Having scrutinised the trial court record and submissions made by the Appellant as well as the learned State Attorney, the following issues crave for determination in response to the seven grounds of appeal. These are: whether the charge against the Appellant was defective, whether the Appellant was properly identified, whether the exhibits tendered were properly admitted and whether the case against the Appellant was proved beyond reasonable doubts.

Starting with the first issue, the Appellant alleged that the charge was defective as it ought to have shown the owner of the motorcycle, Prosper Paulo Akoonay, and not Omari Hamis (PW5). In her response the learned State Attorney stated that since the robbery was committed on PW5 and not the motorcycle owner, the conditions set out under section 287A of the CPA were met. I have carefully gone through the charge sheet, what the Appellant complains is without merits because the charge shows that the offence was committed against PW5 Omary Hamis, who had the motorcycle at the time of robbery. It was PW5 who was threatened and stubbed by using a knife on the forehead. Therefore, the fact that the charge does not mention the owner does not render it defective since the offence was

committed against PW5 who was in possession of the motorcycle, although he was not the owner. What the Prosecution was expected to do was to state all the elements of the offence the Appellant was charged with, so that he could prepare his defence. In ***Mussa Mwaikunda Vs. Republic*** [2006] TLR 387, the Court of Appeal stated the importance of showing all the elements of an offence in the charge to afford the accused a proper defence. The Court observed:

> *"The principle has always been that an accused person must know the nature of the case facing him. This can be achieved if a charge discloses the essential elements of an offence"*

The ingredients of the offence of Armed Robbery were discussed in detail in ***Nchangwa Marwa Wambura Vs. Republic***, Criminal Appeal No. 44 of 2017 (unreported), where it was stated *inter alia*:

> *"To prove Armed Robbery under Section 287A of the Penal Code, the prosecution had to establish that,* ***there was an act of stealing; that at or immediately after the stealing the perpetrator was armed with any dangerous or offensive weapon or instrument and that, he used or threatened to use actual violence to obtain or retain the said stolen property***"(emphasis added)

In the instant case, the charge was specific that the Appellant did steal from PW5 cash Tshs. 16,000/=, two mobile phones and a motor cycle make Toyo with registration Number MC773 BTF. The element of stealing was thus made apparent. The charge further shows that the Appellant threatened PW5 and stubbed him with a knife in order to retain the said property. In the light of the above cited case, all the elements of the offence of armed

robbery were present in the charge. I therefore find the Appellant's claims about the charge untenable. The first issue is answered in the negative.

On the second issue, the Appellant's complaint is that he was not properly identified both at the scene of crime and even at the identification parade. The Respondent on the other hand maintains that the Appellant was properly identified since there was electric light and that the Appellant was arrested at Duka Bovu with the stolen motorcycle. Our Courts in a plethora of decisions have insisted that the evidence of visual identification needs to be taken with caution in order to avoid the possibility of mistaken identity. In ***Waziri Amani Vs. Republic*** [1980] TLR 250, the Court had this to say:

> *"The evidence of visual identification is of the weakest kind and most unreliable. It follows therefore, that no Court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the Court is fully satisfied that the evidence before it is absolutely water tight."*

However, the case at hand is distinguishable from ***Waziri Amani*** (supra) because in this case the facts show that the incidence took place at Makuyuni. Soon after the robbery, the Appellant ran with the motorcycle, and on his way, he was arrested with the stolen motorcycle. Further, PW5 and PW6 stated how they identified the Appellant. PW5 during cross examination by the Appellant insisted that he identified him. PW6 as well stated that he saw the assailants, he chased them but he could not catch up with them, until he found them arrested at Duka Bovu. On the identification parade, PW5 identified the Appellant both from the back and the front. Apart

from that it is the evidence of PW5 which led to the arrest of the Appellant by PW1, PW2 and PW3.

The record is not very clear on whether before the identification parade the identifying witness had stated the description of the suspect. The Court of Appeal in ***Muhidin Mohamed Lila @ Emolo & 3 Others Vs. Republic,*** Criminal Appeal No. 443 of 2015 (unreported) stated that:

> *"But even if the irregularity would have been minor, in our considered view, the procedure which was adopted at the identification parade raises doubt on the identification evidence. From the evidence of PW9, after the identification has been arranged, PW1 and PW3 were in turn, called to identify the suspects. There is nothing in the prosecution evidence showing that these witnesses had, prior to the identification parade, given to the police or any other person, the description of the persons who were identified. The only evidence which is available on record is that of PW7 who stated that, PW1 and PW3 told him that they would be able to identify the bandits if they were to be apprehended."*

As stated earlier, the case at hand is peculiar. There is no evidence whether PW5 gave the description of the Appellant at the police station. However, considering the fact that the Appellant was arrested immediately after the incidence, and since it is PW5 and PW6 who led to his arrest, further, considering the fact that the Appellant was arrested with the stolen motorcycle, then this case does not fall in the purview explained by the Court of Appeal. I have carefully gone through the evidence of PW4, I am satisfied that the parade was conducted in accordance with the law. It is therefore the finding of this Court that the Appellant was properly identified both at

the scene of crime and in the identification parade. The second issue is resolved in the affirmative.

I now turn to the third issue which is on the admission of exhibits. One of the Appellant's complaints is on the admission of exhibit PE3, which is the identification parade form. This issue was well resolved by the trial magistrate in his ruling over the objection. I need not reiterate what was decided, but the procedures highlighted under order 232(2) were properly adhered to by PW4. After the parade, PW4 filled in exhibit PE3 as the law requires. I therefore see no reason to differ with the trial court on the admission of exhibit PE3.

The other complaint is the admission of exhibit PE1, the certificate of seizure. The Appellant contend that it was not signed at Duka Bovu, where the arrest was done. As stated by the learned State Attorney, and as testified by PW3, at the time they arrested the Appellant they did not have the document. It is the reason that they immediately took him to Monduli Police Station where the certificate was filled and signed. This Court is in full agreement with the learned State Attorney that the search was an emergence one, it did not favour the filling of the form at the arresting place. This is also permissible under section 42 of the Criminal Procedure Act, Cap 20 [R.E 2019].

The other complaint is the admission of exhibit PE7 which is the Appellant's confessional statement. His complaint is that it was taken outside the prescribed period. The learned State Attorney in her response stated that

the statement was recorded within time. She also argued that this complaint was not raised in the trial court. I subscribe to this position as reiterated by the Court of Appeal in ***Nyerere Nyague Vs. Republic***, (supra), as cited to me by the learned State Attorney, where it was observed:

> *"Again, as a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided by court(s) below to be raised on appeal."*

As this issue was not raised and considered or ignored by the trial court, I refrain from discussing it.

The Appellant also complained that the confessional statement was tendered by PW9 who was not its author. This complaint is not supported by the facts from the trial court records. The truth is, the statement was tendered by PW8, as reflected at page 46 of the typed proceedings. PW8, being the officer who recorded the statement, was competent to tender it.

The Appellant also challenged the admission of exhibit PE2 in the absence of the chain of exhibit form. It is a well enunciated principle that exhibits must be kept with a document showing their movement and handover from one person to another. However, not every document or object will be disregarded on the ground that it is not accompanied with the chain of custody form. This exception is preferred to those exhibits which do not change hands easily. In ***Issa Hassan Uki Vs. Republic***, Criminal Appeal No. 129 of 2017 (unreported), the Court of Appeal held inter alia;

> *"In the instant case, the items under scrutiny are elephant tusks. We are of the considered view that the elephant tusks cannot change*

hands easily, and therefore not easy to temper with. In cases relating to chain of custody, ***it is important to distinguish items which change hands easily*** *in which the principle in* ***Paulo Maduka*** *and followed in* ***MakoyeSamwel @Kashinje and Kashindye Bundala*** *would apply."*(emphasis added)

In the instant case, the item under consideration is a motorcycle with specific registration number and colour, which cannot, in my view, change hands easily. I therefore agree with the learned State Attorney that the absence of the chain of custody form cannot vitiate the admissibility of the motor cycle, as the exhibit so referred could not exchange hands easily. Having so said, the third issue is resolved against the Appellant.

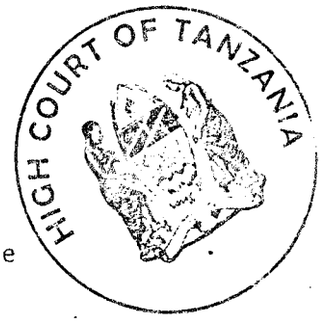
Regarding the last issue, it is my considered view that the same stands or fails on the weight accorded to the evidence at the trial. The Appellant raised contradictions or inconsistencies in the testimonies of PW9, PW10, PW11 and PW12 as well as the date PW5 was taken to the hospital as evidence that the Prosecution case was flawed. As correctly submitted by the learned State Attorney, what the Appellant allege to be contradictions in the evidence of PW9, PW10, PW11 and PW12 is not very apparent. The record is clear that it is PW9 who examined the samples (handwriting of the Appellant vis a vis the disputed cautioned statement). He got the samples from PW11. PW12 supervised the taking of those samples and PW10 is the one who collected the report prepared by PW9.

Regarding the evidence of PW5 and that of PW7, the record is clear that PW5 was taken to the Police Station and hospital at Makuyuni on the same

day. On 13/11/2017, he decided to go to Monduli District Hospital for further treatment where he was admitted until 17/11/2017. I do not consider the two testimonies to be at variance as the Appellant submits. Any inconsistency on what was stated cannot go to the root of the case. The truth is, the robbery incident did take place, and it was the Appellant who was robbed and it is him who was stubbed. Court have on a number of occasions held that contradictions and inconsistencies in testimonies of witnesses are inevitable, the only caution on the Court is to consider whether such contradictions or inconsistencies go to the root of the case. See ***Chrizant John Vs. Republic***, Criminal Appeal No. 313 of 2015 (unreported) and ***Armand Guehi Vs. Republic*** (supra). I agree with the learned State Attorney that the contradictions and inconsistencies highlighted by the Appellant do not go to the root of the matter. I therefore resolve the last issue in the affirmative.

Guided by the authorities and observations above made, it is the finding of this Court that the Prosecution proved the case against the Appellant to the required standard. Consequently, the appeal is dismissed in its entirety. The conviction and sentence met to the Appellant by trial court are hereby upheld.

It is so ordered.



Y. B. Masara
JUDGE
23rd October, 2020.