

**IN THE HIGH COURT OF TANZANIA**

**IN THE DISTRICT REGISTRY**

**AT MWANZA**

**HIGH COURT CRIMINAL APPEAL NO. 287 OF 2018**

(Arising from the decision of the District Court of Bukombe District at Bukombe, in criminal case No. 160 of 2015 dated on 11<sup>th</sup> April, 2016 Before Hon. G.N. Kurwijila-DRM)

**MABULA S/O MANYABILI ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

07 & 20/05/2020

**RUMANYIKA, J.:**

The appeal is against the 11/04/2016 conviction and sentence of thirty (30) years imprisonment for the offence of armed robbery Contrary to Section 287A of the Penal Code Cap 16 R.E. 2002. The particulars of offence read that Mabula Manyabili (the appellant) did on 03/09/2015 at about "08.00 hours" at Nyampangwe village Bukombe district, Geita steal one motorcycle Registration No. MC 111 ANM SANLG valued at shs. 1,800,000/= (the MB) the property of Nzembi Kahigi and immediately before or after he cut him in head using a panga in order to obtain or retain the property.

The 8 grounds of appeal essentially revolve around six (6) main points as follows:-

1. That prosecution case was not proved beyond reasonable doubts.
2. That there was no sufficient proof that the appellant was found in possession of the MB.
3. That the way the MB (Exhibit "P1") was tendered in court it was against the established rules of chain of custody of exhibits.
4. That the complainant proved no ownership of the MB.
5. That the appellant wasn't properly identified.
6. That the accused's cautioned statement (Exhibit "P3") was improperly recorded.

The appellant appeared in person. Ms. Lilian Meli learned state attorney appeared for the Respondent Republic.

Another crucial fact at the very juncture to know is that it took one a considerable long time for the appeal to take off because the trial Bukombe district court's records had not been traced irrespective of several and repeated orders for calling for the records but just before I ordered for reconstruction of the records, it transpired in court that there was, with respect to Criminal Appeal No. 245 of 2018 in the Court of Appeal of Tanzania a copy of records of appeal, it served the purposes much as with respect to the conviction and sentence he preferred to, and he had Criminal Appeal No. 363 of 2016 which one for some reasons this court (De-Mello, J) rejected on 17/08/2017. In other words in the place of the missing original records copies of the said records of appeal were supplied to parties then long at last the appeal took off. Quietly though the appellant would therefore be deemed as having abandoned matter in the Court of Appeal of Tanzania.



When the appeal was called on for hearing on 07/05/2020, but following the global outbreak of the Coronavirus pandemic and pursuant to my order of 06/05/2020 the parties were present online (mobile number 0735-706035 and 0717-418929) respectively, by way of Audio Teleconferencing they were heard:

The appellant submitted that he had nothing to add to his memorandum of appeal. That is it.

Ms. Lilian Meli learned state attorney opposed the appeal and generally she submitted that their case was proved beyond reasonable doubts because; **(a)** Pw1 and Pw2 identified the appellant properly at 19.00 hours and the latter was found in possession of the MB; Pw3 corroborated Pw1's evidence and Pw1 knew the appellant before **(b)** hardly a month later therefore recently, the MB was recovered from the appellant (case of **Magesa Chacha Nyakibari & Another V.R**, Criminal Appeal No. 307 of 2013 (CA), unreported. That is all.

Very briefly the evidence on record reads thus.

Pw1 Nzembi Kahigi stated that as together with one Musa Amori a fellow "bodaboda" they were at their Namonge bodaboda stand on 03/09/2015 at about 19.00 pm and he had the MB, the appellant hired him for Nalusunguti village for fare of shs. 10,000/= but on the way the appellant grabbed and he cut him with a panga in the face and head. That he fell down unconscious and profusely bleeding, the appellant took away the MB with him. That as he was back to his sense on 04/09/2015 at 8.00am in hospital at Runzewe he learnt that the appellant had been

arrested in possession of the MB away at Sengerema and shortly he recognized the appellant and identified the MB (Exhibit "P1").

Pw2 Musa Hamis also a bodaboda rider of Namunge supported the evidence of Pw1 that also around on the material 03/09/2015, but together with Pw1 the appellant hired the former, only at a later stage to learn that his fellow had been attacked and robbed the MB. That is all.

Pw3 Joseph Basime stated that he owned the MB and therefore the Pw1's employer that as usual on the material date Pw1 was busy that through mobile call, but following the incident one Mashaka Juma of Kasamwa informed him in October, 2016 that the appellant had the MB around. That using the trick, a girl one Grace Paulo pretended a lover and through a mobile phone she called the appellant and, without fail the latter was apprehended and readily confessed at 20.00 hours.

Pw4 Grace Paulo a girl and resident of Kasamwa stated that with regard to the trick and trap she supported the Pw3's story and evidence that indeed they used her and having pretended a lover they trapped the appellant. That is it.

Pw5 Emmanuel Kilembeka stated that following the incident, and as he was at work place Uyovu Health Centre on 03/09/2015 at 10.00 hours he received, he gave him First Aid and he transferred the victim Pw1 to Ushirombo.

Pw6 E.5179 D/Cpl. Gozbert stated that following the incident, and as he was at his work place Bukombe on 06/10/2015 at Noon, in ordinary course of business he duly recorded the appellant's cautioned statement (Exhibit "P3"). That the appellant confessed having had pretended to hire



the bodaboda rider (Pw1) to Lwenge area, Sengerema but on the way he robbed him the motor cycle Registration No. MC SU ANM make SUNLG. That is all.

The appellant stated that having travelled and arrived and was at his friend one Lukilonzi of Geita there in October, 2015 at about 11.00 am through a mobile phone Pw3 asked him to secure job in the mines for a brother. That shortly, 4 people of them they arrested and severely beat him but he did not confess until six (6) days later but forcefully at Ushirombo policemen. That is all.

The issue is whether the prosecution case was proved beyond reasonable doubts. The answer is no. Reasons:- **(1)** on the material date/time Pw1 may have been robbed the MB but it cannot be said 100% that either Pw1 or Pw2 or both of them identified him properly because contrary to a long established legal principle, none of them named the appellant to anybody at the earliest possible opportunity if at all Pw1 knew him before. If there was one, such a crucial witness did not appear in court. It is trite law that ability of a witness at the earliest possible opportune to name accused it exhibits that not only the witness saw him but also he identified the culprit properly **(2)** Although the learned trial resident magistrate very much relied on Exhibit "P1", the accused's cautioned wasn't worth the name contrary to the principle of fair hearing it was not led aloud in court to enable the appellant know its nature, contents thereof and, if need be to reject it or further accept the material ingredients of the offence as all being correct Exhibit "P1" therefore is expunged from the record **(3)** Contrary to his findings the learned trial

resident should not have ruled that the appellant's cautioned statement told untruth. Whether or not the appellant repudiated the statement it was immaterial in my view essentially its contents and evidence of Pw4 materially vary, whereas Pw1 alleged that he was hired for Nalusugnuti village for shs. 10,000/= in the cautioned statement (Exhibit "P3") the appellant alleged to have hired Pw1 for Bulega village for shs. 15,000/=.

(4) the appellant if at all he was found in possession of it, contrary to the principles of chain of custody the MB was tendered in court by the stranger Pw1 much as neither too he claimed title nor admitted having been found in possession of the MB (5) the issue of Pw3's failure to identify the MB therefore can't arise.

In the upshot the conviction and sentence are quashed and set aside respectively. Grounds 1, 2, 3, 5 and 6 succeed suffice the points to dispose of the appeal. The appeal is allowed in its entirety. Unless he was held for some other lawful cause, the appellant be released immediately from prison. It is ordered accordingly.




**S.M. RUMANYIKA**

**JUDGE**

**16/05/2020**

It is delivered under my hand and seal of the court in chambers this 20/05/2020 in absence of the parties with notice (copies to be supplied immediately).



  
**S.M. RUMANYIKA**  
**JUDGE**  
**20/05/2020**