

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MBEYA)

AT MBEYA

PC. CRIMINAL APPEAL NO. 19 OF 2016

(Appeal from the decision of the District Court of Mbeya at Mbeya in Criminal Appeal No. 10 of 2016. Originating from Criminal Case No. 495 of 2015 in Mbalizi Primary Court)

WIZMAN PATSON NDISA.....APPELLANT

VERSUS

KELVIN TEMBO.....RESPONDENT

JUDGEMENT

Date of Last Order : 03/12/2019

Date of Judgement: 17/02/2020

MONGELLA, J.

The Appellant was charged and convicted by the Primary Court of Mbalizi for motor cycle stealing contrary to section 258 (1) (2) (a) (e) and section 265 of the Penal Code, Cap 16, R. E. 2002. He was sentenced to serve five years in prison and to pay compensation to the Respondent to the tune of T.shs. 2,000,000/-. He unsuccessfully appealed to the District Court of Mbeya, hence this second appeal.



Both parties were unrepresented thus for interest of justice this Court ordered the matter to be disposed by written submissions. The Appellant did not file any written submissions as he prayed for the Court to adopt the grounds in his petition of appeal as his submissions. The Respondent on the other hand was ordered to file his submissions in reply to the grounds of petition of appeal on or before 09/10/2019. However, until 03/12/2019 when this matter came for necessary orders, the Respondent had not filed his written submissions and he did not appear in Court to adduce any reasons for his delay or to apply for extension of time. The disposition of this matter therefore proceeds ex parte against the Respondent.

The Appellant raised seven grounds of appeal and I shall deal with them one by one. On the first ground, the Appellant contends that the Hon. District Magistrate erred in law and fact when he dismissed his appeal by believing the evidence of PW1, PW2 and PW3 that the Appellant hired the said stolen motor vehicle for T.shs. 20,000/- while PW1 did not tender before the Court a register book as an exhibit which he used to write names of customers who hires the motor cycle for the name of the Appellant to be found in the register book.

I have gone through the records of both lower courts. The records reveal that PW1 was not in the business of hiring his motor cycle. He had employed PW2 to drive the said motor cycle on the agreement of remitting to him T.shs. 10,000/- per day as proceeds. It was PW2 who hired the same to the Appellant on the agreement that he pays him T.shs. 20,000/- and would return the motor cycle in the evening at 17 hours. I thus find it incorrect for the Appellant to claim that PW1 was to tender a



register book showing to whom he had hired the motor cycle. The records also reveal that PW2 and the Appellant entered into an oral contract which is recognised under the law. (See: **ENGEN Petroleum (T) Ltd. v. Tanganyika Investment Oil and Transport Limited**, Civil Appeal No. 103 of 2003, (CAT-DSM, unreported). It thus do not find merit in this ground and dismiss it accordingly.

On the second ground, the Appellant argued that the Hon. District Magistrate erred in law and fact in dismissing his appeal by believing the evidence of PW1, PW2 and PW3 that the Appellant hired the said motor cycle while the said motor cycle was not found with the Appellant upon his arrest and was never tendered in court as exhibit. In my considered opinion it is not necessary that the accused be found with the stolen item and or the said item be brought to court as exhibit. This is due to the fact that the same might have passed hands at the time of his arrest as suggested in the records of this case. I find no merit in this ground and dismiss it as well.

On the third ground, the Appellant contends that the Hon. District Magistrate erred in law and fact in dismissing his appeal by believing the evidence of PW4, a police officer, that the Appellant admitted to have taken the motor cycle from PW2 while PW4 knowing all the procedures did not record any caution statement regarding his confession as required under section 10 (3) of the Criminal Procedure Act, Cap 20, R.E. 2002 (CPA). He added that the said caution statement was never presented in court as exhibit to support the testimony of PW4. In my considered view, also taking into account the nature of the matter whereby it was instituted



and prosecuted in Primary Court by the victim of the offence. The caution statement even if taken, could not be presented in the primary court by the police officer. The provisions of the Criminal Procedure Act are not applicable in proceedings in the primary court whereby the matter was held on first instance. It is thus a misconception on the part of the Appellant to rely on section 10 (3) of the CPA as he did. Even if I expunge the evidence of PW4 as I hereby do, I find the evidence of the remaining witnesses overwhelming to hold the Appellant liable of the offence committed.

On the fourth ground, the Appellant stated that the Hon. District Magistrate erred in law and fact in dismissing his appeal by believing the evidence of PW4 that the Appellant sold the said motor cycle to the 2nd accused person while there was no any written handing over agreement between the Appellant and the 2nd accused person produced before the Court by the 2nd accused person as exhibit to prove the claim. On the fifth ground, the Appellant argued that the Hon. District Magistrate erred in law and fact in dismissing his appeal by believing the evidence of the DW2, the 2nd accused person that the Appellant sold to him the said motor cycle contrary to section 33 (2) of the Evidence Act, Cap 6 R.E. 2002 which provides that a conviction cannot be solely based on an accused person or a confession by a co-accused. He argued that by basing on the admission of the 2nd accused person he was convicted illegally. He referred this Court to the case of **Henry Mpungwe and 2 Others v. Republic** (1974) LRT No. 50 in which it was held that "a court cannot convict a person merely on a confession by co-accused."



Section 33 (2) of the Evidence Act as argued by the Appellant prohibits conviction of an accused person by solely relying on the evidence of the co-accused. The provision thus requires corroboration. This was also ruled in the case of **Jasson Rwebangira v. Republic** [1975] LRT 26. However, the records of both lower courts clearly indicate that the 2nd accused was not the only witness and the trial court did not solely rely on his evidence. The records clearly show that the trial court also took into account the evidence of PW1, PW2 and PW3. The Appellant's contention is thus unfounded and is dismissed accordingly.

On the ground of lack of handling documents regarding the motor cycle between the Appellant and the 2nd accused person, I find that the records do not reveal as to what exactly transpired. This issue was not raised by the Appellant during trial and thus since it is a matter of fact, it cannot be raised at this stage. See: **Daniel John @ Mwakipesile v. The Republic**, Criminal Appeal No. 02 of 2019 (HC Mbeya, unreported). The issue therefore remains as to the credibility of the witness. My view regarding this issue is that it is the trial court that is best placed to assess the credibility of the witness. An appellate court cannot interfere with the finding of the trial court on credibility of witnesses unless where there are compelling circumstances, such as contradictions among the witnesses that goes to the root of the matter. The CAT in **Alex Wilfred v. The Republic**, Criminal Appeal No. 44 of 2015 ruled that:

"The trial court's finding as to the credibility of witnesses is usually binding on an appeal court unless there are circumstances on an appeal court on the record which call for a re-assessment of their credibility."



I find no such compelling circumstances in the case at hand. This ground thus lacks merit and is dismissed. See also: **Omari Ahmed v. Republic** (1983) TLR 52

On the sixth ground the Appellant contended that the Hon. District Magistrate erred in law and fact when he disregarded the Appellant's defence and dismissed the appeal. I have gone through the decisions of both lower courts and found that the trial magistrate and the District magistrate considered the evidence of both sides and gave reasons for their findings. This ground lacks merit and is dismissed as well.

On the last ground, the Appellant contended that the charge against him was not proved beyond reasonable doubt by the prosecution side. In the case of **Said Ally Mtinda v. The Republic**, Criminal Appeal No. 55 of 2012 (unreported) the CAT while citing the case of **Samson Matiga v. Republic**, Criminal Appeal No. 205 of 2007 (unreported) explained what is required of the prosecution in proving its case. The Court stated:

"What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence.

Going through the records, I have found that the witnesses brought by the prosecution side without contradiction adduced evidence that pointed directly to the Appellant. I see no reason to fault the findings of the Hon. Magistrates in both lower courts.



For the reasons explained above I uphold the decision of both lower courts with respect to the conviction on the offence charged. I however, find the sentence of 5 years imprisonment to be excessive given the fact that the Appellant was also ordered to compensate the Respondent a sum of T.shs. 2,000,000/-. I therefore find the time the Appellant has already served in prison to be enough punishment and order his immediate release from the prison custody. The Appellant should compensate the Respondent the sum of T.shs. 2,000,000/- as ordered by the trial court and confirmed by the District Court. The decision of the District Court is thus varied to the extent stated herein.

Order accordingly.

Dated at Mbeya this 17th day of February 2020


L. M. MONGELLA
JUDGE
17/02/2020

Court: Judgment delivered at Mbeya in Chambers on this 17th day of February 2020 in the presence of the Appellant appearing in person.


L. M. MONGELLA
JUDGE
17/02/2020

Right of Appeal to the CAT has been duly explained




L. M. MONGELLA
JUDGE
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