IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTY

MWANZA

HC CRIMINAL APPEAL NO. 28 OF 2021

(Arising from the decision of the Resident Magistrates Court of Mwanza at Mwanza in Criminal Case No. 142 of 2015 delivered on the 23rd day of June, 2016 before Hon. Chitepo, RM)

ANDREA PAUL MSANSHA @ KELVIN ..... 1ST APPELLANT

PETER GRATION @ MSOMI ..... 2ND APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

12/05/2021 & 18/05/2021

W. R. MASHAURI, J;

In the Resident Magistrates' court of Mwanza at Mwanza, the appellants 1. Andrea Paulo Msansha @ Kelvin, 2. Bishory s/o Mabula Ndalahwa 3. Peter Gration Msomi were all jointly arraigned and tried with the offence of armed robbery C/s 287A of the Penal Code Cap. 16 R.E. 2002 as amended by Act No. 4 of 2004. The 2nd accused Bishory Mabula Ndalahwa was found not guilty of the offence of armed robbery. He was acquitted. The 1st appellant Andrea Paulo Mshansha @ Kelvin and Peter Gration were all

together found guilty and convicted for the offence of armed robbery c/s 287A of the Penal Code as amended by Act No. 4 of 2004.

In a nutshell, the particulars of the offence are that, on the 25th day of August, 2015 at Good Prosper Super Sembe Nguzo ya pili at Nyamagana area within Nyamagana District Mwanza City and Region of Mwanza, the accused persons, Andrea Paulo Msansha @ Kelvin, Bishory Mabula Ndalahwa and Peter s/o Gration Msomi did steal one read motor cycle make SANLG with Registration No. MC.868 ACT valued at Shs. 1,800,000/= the property of one Elias Nchakena Mfunya an immediately before and after such stealing they beat John s/o George Makoye @ Choma with an iron bar, club (rungu) sword on his head and hands. So as to obtain the said motor cycle.

Being dissatisfied with the decision of the Resident Magistrates court for Mwanza. The appellants have appealed to this court against both the conviction and sentence. They have fronted 9 grounds of appeal namely: -

1. That, the Hon trial magistrate seriously erred both in fact and law by relying on evidence stemming from an identification parade conducted in violation of law as there was no pior description of the suspects

which was given in the first information report, thus intimately prejudicing rights of the appellants.

2. That, the trial court erred in law and fact when it failed to detect and resolve upon the fact that, the appellants were inordinately delayed, whereby no explanation was put forward by the prosecution to absolve themselves from being doubted for planting and concocting evidence and exhibits against the appellants.
3. That, the Trial Magistrate erroneously admitted into evidence a certificate of seizure (exh. P3) which was objected by the 2nd appellant without conducting a trial within trial to ascertain genuineness (or otherwise) of the said certificate before proceeding to convict the appellants.
4. That, the appellants were unfairly convicted and sentenced upon reliance on prosecution evidence which was recorded in serious contravention of section 210(I) (a) and (b) of the CPA Cap. 20 R.E. 2002.
5. That, the trial court erred in law and fact by basing its conviction of the appellants on uncorroborated on prosecution case which was also

marred by evidence of unfavorable visual identification of the suspects and whose elementary factors were not established.

6. That, the trial court erred, in law and fact by implicating the appellants is reliance of the doctrine of recent possession which was based on contrived evidence for wanting positive identification plus chronological documentation in respect of retrieval, arrest, seizure, analysis, handing and custody of exhibits in question.
7. That, the trial magistrate unfairly disallowed the defence of alibi to 2nd appellant who was already in police custody at the time the alleged offence was committed on 23/08/2015.
8. That, the ambiguity surrounding particulars of the motorcycle alleged to have been stolen by the appellants (MC. 686 AET) and with registration No. MC 868 which was tendered in court as exh. PI was never resolved upon by the trial court before convicting and sentencing the appellants.
9. That, the trial magistrate erroneously ordered for forfeiture of 2nd appellant's mobile phone which was never established to be instrumental or in any way connected to the alleged criminal

transaction which ultimately took the appellants to undeserved penal servitude.

When the matter was called in court for hearing on 19/11/2021, the appellants appeared in person. They did not say much in support of their appeal save that, they prayed the court to decide their appeal of which now is a long time pending case and they have been languishing in prison custody since year 2006.

On her part, Miss Mariasintha learned Senior State Attorney who appeared for the Republic/Respondent submitted that, she was unable to read the proceedings of the trial court which is badly recorded. She therefore prayed this court to order a trial de-novo of the case so that, court proceedings should be dearly recorded.

The issue is whether, the prosecution had proved its case of armed robbery against the appellants.

The prosecution evidence was to the following effect; in his evidence PW1 whose name is not recorded in the courts typed and untyped proceedings told the court that he is owner cum driver of a red motor cycle with

Registration No. MC 868 AET (exh. PI) of which he was using it in carrying passengers commonly known as bodaboda.

That, when this matter was called in court for hearing on 28/10/015. All three accused persons appeared in court and was his (PW1) 1st time to see them.

PW1 further said in his testimony that on 25/08/2015 at 05:00 a.m in the morning being the rider of a motor vehicle with Reg. No. 868 MC AET he was informed by telephone that, his motor cycle with Reg. No. MC AET was being stolen. The matter was reported at police station whereby the victim was provided with PF3 and in the course of investigating the matter, police officers successfully got the said motor cycle and he identified it through its Registration No. MC 868 AET, make SANLG and red in colour. He tendered in court its registration card MC 868 AET and was admitted and marked exh.

PI he did not identify the accused persons who were in a dock as it was his first time to see them.

PW2 whose name is also not recorded said in his testimony that on 25/08/2015, he met with the 1st accused and hired him to ferry him (PW2) he identified the 1st accused using moonlight at the time were bargaining for

fare and along the way the 1st accused was being phoned by other passengers. Later on the 1st accused threatened by his hand then other people assumption 2nd (?) and 3rd accused persons came therein by different people (unknown)(?) later on, the 1st accused threaten him by his hand then other people assumption 2nd and 3rd accused came therein (?) and stated by iron bar, then we p-ray for rescue simply because the area it's along the river, bank, then the motorcycle stolen as well as the fellow motorcycle appeared to rescue him. This is as recorded at page 2 of the judgment by Hon. B. Chitepo – RM.

As correctly alleged by Hon. Mariasintha, Senior State Attorney, the proceedings was badly recorded in an incomprehensible language which is hard to understand what the trial magistrate was meaning. See for example the last paragraph of the typed judgment where it is recorded by the Hon. Trial Magistrate B. Chitepo, RM thus: -

> *"PW2 testimonial that due respect the subject matter reported at the police station and got PF3, ...*
>
> *PW2 testimonial that, on 25/8/2015 he met with the 1st accused and hired the motor cycle (kukodi) and identify him by moonlight and bargain for then the journey started, hence always the 1st accused phoned during all the journey (hired)*

by different people assumption 2nd and 3rd accused came therein and started by iron bar, then we p-ray for rescue simply because the area it's along the river Bank then the said motorcycle stolen as well as a fellow motor cycle appeared to rescue him."

Here, even if an interpreter adopted a very wide method interpretation of the literature involved by the learned trial magistrate cannot secure anything.

Then what is the remedy to take, on her party, Miss Mariasintha, Learned Senior State Attorney, upon failure to understand the language involved by the trial magistrate in recording the proceedings, she prayed the court to order a re trial-de-novo so that the proceedings should be recorded by another magistrate of competent jurisdiction.

The issue is when does the appellate court can order a re-trial of the case.

It is cardinal principle at law that: -

"Where a conviction is vitiated by a gape in the evidence or other defect for which the prosecution is to blame, the court will not order a re-trial. But where a conviction is vitiated by a mistake of the trial court, for which the prosecution is not to blame, it is my view that the re-trial should be ordered."

In this case what vitiates the conviction of the appellants' is the trial court's failure to put the evidence clear in the proceedings. It is therefore the courts to blame.

On that regard, I do hereby order a re-trial of the case before another magistrate of competent jurisdiction and capable of recording evidence precisely.

It is so ordered.

W. R. MASHAURI
JUDGE
18/05/2021

Date: 18/05/2021

Coram: Hon. W. R. Mashauri, J

Appellant: Present

Respondent: Present

B/c: Elizabeth Kayamba

Court: Judgment delivered in court in presence of Hemed, Senior State Attorney for the Republic and in present of the appellant this 18/05/2021. Right of appeal explained.

W. R. MASHAURI
JUDGE
18/05/2021