

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.26 OF 2020

(Originating from Criminal Case No. 136 of 2018 of the Resident Magistrate Court of

Mtwara at Mtwara. (Hon.E.S. MWAMBAPA, SRM)

MOHAMED HAMISI@ BILALI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

26 March & 4 June, 2021

DYANSOBERA, J.:

Before the Resident Magistrate Court of Mtwara at Mtwara, the appellant, Mohamed Hamisi Bilali@ Mapodo, was arraigned for the offence of Armed Robbery contrary to section 287A of the Penal Code,[Cap 16 R.E. 2002] as amended by Act No.3 of 2011.The prosecution had alleged that on 23rd day of April,2018 at Mkangara village within Mtwara Rural District in Mtwara Region, the appellant did steal a motorcycle with Reg.No.MC 740 BXH make TVS STAR valued at Tanzania shillings two million one hundred thousand (Tshs. 2,100,000/=) only the property of RAZAK S/O HAMISI MMALINDA and immediately before and after such

stealing he used actual violence and threatened one ABDUL RAZAK S/O YUSUPH who was the rider of the said motorcycle by using a bush knife in order to obtain and retain the motorcycle. Despite his denying the charge, he was found guilty, convicted and sentenced to thirty (30) years term of imprisonment. Aggrieved by the decision of the trial court, the appellant has lodged this appeal to this Court.

The facts giving rise to the present appeal can briefly be stated as follows: Ahmad Selemani Ally (PW 3) owns a motor cycle with registration No. MC 740 BXH make TVS Star, black in colour. On 23.4.2018 at or about 1000 hours, PW3 gave it to Abdulrazack Yusuph (PW 1). PW 1 went to his young brother who was residing at Utumishi area within Mtwara Mikindani. On the way, PW 1 met two persons, the appellant inclusive. The appellant and his fellow (Said Mpara) hired PW1 to take them to Makonde beach so as to fetch some sea water as demanded by their witch doctor. From Makonde Beach, PW1 took them to a witch doctor at Mkangara village. However, on the way, PW 1 was ordered to stop the engine. Suddenly, the appellant and his friend started assaulting PW 1 by using a machete and cut him on his head leading PW 1 to fall down and lose consciousness. On 24.4.2018 in the morning hours, while Kalembo Selemani was going to his farm he met PW 1 who was in a devastated situation and was seriously injured on the neck and head. PW 1 told PW

5 that he had been assaulted and robbed of a motor cycle. PW 5 took PW 1 to the police and reported. PW 1 went to Ligula Hospital Referral Hospital and Dr. Renatus Moris Makarios (PW 7), medical officer attended him on 24.5.2018 around 1900 hours. According to PW 7, PW 1 had sustained multiple cut wounds on his body and at his head and was bleeding all over his body. PW 7 admitted PW 1. He stayed at the Hospital for seven days. PW 7 filled the PF 3 ('P3') which I think was wrongly marked since the motorcycle was already marked as exhibit 'P3'.

PW 3 was later informed that PW 1 had been attacked, assaulted and the motor cycle stolen. At the police station, PW 3 did, on 8.6.2018, identify his motorcycle which had a special mark of words "Zaire the Don" though those words were scratched. In addition, PW3 had a reserve key. The chassis and engine numbers tallied. In proving ownership of the said motorcycle PW3, tendered purchase receipt with name of Razack Yusuph Mmalinda (exhibit P1) and a motorcycle registration card bearing the name of Razack Yusuph Mmalinda (exhibit P2) and the motor cycle which was admitted as 'P3'.

The appellant was interrogated and admitted before PW4 (A/Insp. Tuntufye) that he stole exhibit 'P3' and sold it to a person residing at Tandahimba. The appellant led PW4 to the house where he had sold the motorcycle. The owner of the said house admitted to have purchased it

and argued that he had sold it to PW2. In his evidence Afidhi Salum (PW2) agreed to have purchased the motor cycle from the appellant at Tshs. 1,000,000/= but managed to pay Tshs. 8,000,000/= only. The remainder, that is Tshs.200, 000/= was to be paid upon production the registration card. PW8, G.8714 DC Lameck recorded the appellant's police statement but the trial court declined to admit it. PW8, however, testified that when interrogating the appellant, the latter admitted to have committed the offence of armed robbery to PW1 with his colleague and narrated how he was hired by PW 1 who ferried them to Makonde Beach and later to Mkaranga village where they assaulted PW1 with the bush knife and stole the motor cycle.

In his defence, the appellant denied completely to have committed the offence of armed robbery but introduced the issue of being tortured and his mother being forced to sign a document unknown to them. These facts were the same which the appellant rose during trial which resulted into an inquiry. The trial court when ruled out was of the opinion that the appellant failed to call his mother so to prove what he alleged to have existed. Also, he failed to prove torture which he sustained in the torturing room.

The trial court found the case against the appellant proved beyond reasonable doubt.

Before this court, the appellant is challenging this finding on a total of six grounds which may be paraphrased as herein below: -

1. That the learned trial magistrate erred in both in law and facts by convicting the appellant using uncorroborated and inconsistency evidence of the prosecution side.
 - PW1 nor PW5 evidence never testified if he PW1 was admitted at Ligula in order to corroborate with testimony of PW7.
 - PW4 claimed that exhibit P.4 was signed by PW2 never testified if he PW2 signed the alleged exhibit P4.
 - PW7 claimed he (PW7) attended PW1 from 24th March 2018 while the alleged incident occurred on 23/04/2018.
 - PW5 claimed that he met PW1 on 24/04/2018 while the alleged incident occurred on 23/04/2018.
2. That the trial magistrate erred in law by unprocedurally admitting exhibit P.1,P.2 and P.4 as exhibits these exhibits were not read in court before their admission which made the Appellant not to challenge them because the Appellant never knew the contents of the documents.
3. That the learned trial magistrate erred in her judgment by relying on the alleged conviction statement of the Appellant on

exhibit which she had already overruled during the inquiry case (pg 60 of the proceedings).

4. That the learned trial magistrate erred in law and facts by convicting the Appellant while the case was not proved beyond reasonable doubt.

5. That the trial magistrate erred in law and facts by convicting the appellant the appellant was unreliable identified by PW1 (the alleged victim in court) and there was no other evidence to corroborate that of PW1.

-PW1 never mentioned of(sic) how he identified the appellant as to the one who had robbed him his motorcycle in terms of any special mark body height body structure.PW1 identification was too weak to enable conviction.

6. That there was a total misdirection in the judgment as a failure to consider the defence evidence.

At the hearing of this appeal, the appellant appeared in person and fended himself whereas, the Respondent/Republic enjoyed the services of Mr. Paul Kimweri the learned Senior State Attorney. When the appellant was called upon to argue his appeal, he simply submitted that he filed a

total of six grounds of appeal. He opted the respondent to start responding to the grounds of appeal.

Replying on the complaint on the absence of corroboration that PW1 was admitted at Ligula, Mr. Kimweri took a view that this argument does not assist the appellant and maintained that what is at issue is whether robbery was committed. Regarding the appellant's complaint that Exh. P4 was not signed by PW2, the learned Senior State Attorney argued that at p.16 of the proceedings, there is PW4's evidence on Exh. P4 which is a certificate of seizure. He stressed that the witnesses signed that exhibit and PW4 mentioned PW2 to be one of the persons who signed Exh P4. He urged this court to find this ground baseless.

As to the argument that PW7 said he attended PW1 from 24.3.2018 while the incident occurred on 23.4.2018, learned Senior State Attorney argued that the evidence on record is clear that he attended the victim on 24.5. 2018. Regarding the reception/admission of exhibits P1, P2 and P4 Mr. Kimweri conceded that these exhibits were admitted unprocedurally and informed the court that Exh. P1 were receipts but the record does not indicate if the exhibit was read out in court and the same applies to Exh. P2-a registration card and Exh. P4 (a certificate of seizure). In view of this legal flaw, Mr. Kimweri indicated no objection of these exhibits being

expunged from the record but contended that the oral evidence by the respective witness explained well the contents of the documents as seen at pages 13 of the proceedings. To fortify his argument Mr. Kimweri submitted that PW3 explained that the name of persons on the receipt while PW4 Asst. Inspector Tuntufye explained the contents on the certificate of seizure. In view of this evident fact, learned Senior State Attorney was of the view that oral evidence detailed the contents of the exhibits and the appellant was not prejudiced.

Submitting on the third ground of appeal on the appellant's complaint trial court relying on the cautioned statement which was rejected, Mr. Kimweri was of the view that although the statement was rejected, PW8 detailed how the appellant confessed before him as seen at p 61 of the proceedings and that what the appellant made before PW 8 was oral confession which is in law, admissible.

With regard to identification of the appellant, Mr. Kimweri submitted that at p.10 of the proceedings PW1 testified how he amply identified the appellant who hired him on the material day. Besides, the learned senior State Attorney argued that PW2 identified the seller of the motorcycle to be the appellant. More important, Mr. Kimweri submitted that it is the appellant who led the police officers who recovered the stolen items and

that was confession leading to discovery. The learned senior State Attorney maintained that the law is of very clear on this aspect as laid down under section 31 of the Evidence Act. To bolster his argument, Mr. Kimweri cited the case of **Adam Umbe & Another v. Mkurugenzi wa Mashtaka**, Crim Appeal No 45 of 2003(HC-DSM) and stressed that the information given by a culprit to the police leading to discovery is relevant to the fact in issue and the evidence was sufficient to implicate the appellant to the offence charged.

In his rejoinder, the appellant submitted that PW2 claimed that he sold him the motorcycle but failed to prove the assertion as he failed to tender the sale agreement. Furthermore, the appellant argued that at the police station he was denied the right to have identification parade but was taken to the place he did not know.

I have gone through the grounds of appeal filed by the appellant, perused the trial court's record and taken into account the submissions of both parties to this matter.

Starting with the first ground of appeal, I agree to the argument by Mr. Kimweri that the complaints in the first ground of appeal are baseless and are not facts in issue. The appellant was charged and convicted under the offence of armed robbery contrary to section 287A of the Penal Code.

The evidence of PW1, PW5 and PW7 intended to prove the effect of the armed robbery to PW1. The ingredients of the offence of armed robbery are being armed with a dangerous or offensive weapon or instrument, being in a company of another person and immediately before or after the assault uses personal violence. In the present case, PW 1 gave unswerving evidence that the appellant who was in company of his colleague assaulted him before they stole exhibit P3. That piece of evidence is corroborated with the evidence of PW5 who found PW1 in devastated situation of being assaulted on his body and the head. Likewise, the evidence of PW7 corroborate the evidence of PW1 on the presence of cut wounds he sustained from the assault committed by the appellant and his fellow during the armed robbery incident. It is evident that the evidence by PW1 is to the effect that he was assaulted by the appellant and his colleague with a bush knife soon after being ordered to stop the engine. On the basis of the clear evidence, I see basis of the appellant's complaint in the 1st ground of appeal.

As to the complaint that PW4 never testified that PW2 signed Exh. P4 also I take the same view as rightly argued by Mr. Kimweri that PW4 mentioned PW2 to be one of the people who signed Exh P4. To cement

this, I would like to reproduce an excerpt of what PW4 testified at page 16 of the trial court proceedings as follow:

“...resold it to one Afidhi Salum (PW2) and later on he gave us the motorcycle and then prepared certificate of seizure in which the motorcycle with registration No. MC 519 BTY makes TVS star black in color and the material certificate was signed by the said Afidhi Salum, DC Lameck and I”.

This evidence is clear and needs no further elaboration.

The record of the trial court reveals that PW 7 attended PW 1 on 24th May, 2018. This is the exact date when the PF 3, exhibit P 3 was issued by the police authority. The argument that PW 7 said that he attended PW 1 on 24th March, 2018 is not supported by evidence.

Likewise, the appellant’s argument that PW 5 claimed he met PW 1 on 24th April, 2018 while the incident happened on 23rd April, 2018 has no basis because, there nothing disproving the fact that PW 5 met PW 1 after the incident had occurred. The error might have been due to *lapsus linguae* or *lapsus calami* and this did not affect the veracity of the witness in the witness box. In other words, those were minor contradictions which did not go to the root of the substance of the evidence. See the case of

Rajabu Yusuph vs Republic, Criminal Appeal No.457 of 2005(unreported). The 1st ground of appeal is baseless.

As to the second ground of appeal I join hands with the appellant and the learned senior State Attorney that exhibits P1, P2 and P4 were not read out in court soon after its admission. As proposed by Mr. Kimweri following that unprocedural admission of exhibit P1, P2 and P4 I see no reason to retain them but rather to expunge them from the record of the trial court. See the case of **Robinson Mwanjisi & Three Others v. Republic** [2003] T.L.R. 218. The question which remains is whether oral evidence can explain well the contents of the documents expunged and hence give the appellant an ample time to know the contents of the documents so expunged. As the record depicts at page 13 of the proceedings, I agree to the contention by the learned Senior State Attorney that PW3 orally explained the contents of the exhibits. The appellant had opportunity to cross examine the witness and the cross examination did not dent the credibility of the prosecution witness.

Regarding the fourth ground of appeal, it is true that the cautioned statement was rejected by the trial court on the ground that the interrogating officer did not seek additional time from the magistrate so as to record the cautioned statement of the appellant. I must put clear

that the cautioned statement was not retracted on the reason advanced by the appellant but on the reason advanced by the trial court. Thus, in such circumstances I see no reason to depart from what the learned senior State Attorney stated that what PW8 testified amounts to oral confession which in turn led to discovery and recovery of exhibit P3.

This ground fails, too..

With respect to the fourth, fifth and sixth grounds of appeal I think it imperative to tackle the fourth ground which in turn would cover the rest of the grounds. Proving a case beyond a reasonable doubt is the duty vested to the prosecution but what amounts to proof beyond reasonable doubt was succinctly elaborated by the Court of Appeal of Tanzania in the case of **Magendo Paul and Another vs. Republic** [1993] TLR 220 that proof beyond reasonable doubt means: -

“If the evidence is so strong against an accused as to leave only a remote possibility in his favour, which can easily be dismissed, the case is proved beyond reasonable doubt”.

Therefore, in view of the above definition now I am in a settled position so as to see if the prosecution did not prove the case against the appellant on the required standard of proof. The appellant has complained

that was convicted on unreliable evidence of identification by PW1 and there was no other evidence to corroborate that piece of evidence of PW1. In addition, the appellant argued that PW1 never testified on how he identified him as the one who had robbed him and his motorcycle. Furthermore, it was the argument of the appellant that PW1 did not testify on his special mark, body height or body structure. Thus, was of the view that PW1 identification was too weak to enable conviction.

At first, I am aware of the caution in the Court's land mark decision on visual identification in **Waziri Amani v. Republic** [1980] TLR 250, at pages 251 - 252, that:

"... evidence of visual identification, as Courts in East Africa and England have warned in a number of cases, 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 watertight".

It is true that PW1 did not testify on the physical appearance of the appellant and his colleague. PW1, however, testified to know the appellant and his fellow by their faces. For clarity, I reproduce a phrase containing

those words as seen at page 10 of the proceedings of the trial court whereby PW1 testified that: -

"I know the said persons by their faces and that the accused person now in the dock was the one who hired me on the material date and time and a particular person who assaulted me using a machete".

As to the nature and circumstances pertaining to this case it is quite clear that PW1 had ample time to talk with the appellant and his colleague before he took them to Makonde beach to fetch some sea water. Also, he had another time of which he oriented himself with the appellant when he waited them at the beach before he ferried them to Mkangara village at the witchdoctor. That evidence of PW1 is corroborated with evidence of PW3 who testified on time which PW1 hired him a motorcycle that he took it at 1000 hours. The evidence of PW 2 was also corroborative of the evidence of PW 1 that he was robbed of the motor cycle by the appellant and his fellow who went to sell it to other persons, PW 2 inclusive.

In light of those argument, it is clear that when the appellant hired exhibit P3 was at a broad daylight where all elements of possible mistaken identification were eliminated. That is to say that the appellant was

convicted on the proof of the case by prosecution beyond reasonable doubt. I thus find the fourth, fifth and sixth grounds unmerited.

The appeal against conviction fails and is dismissed.

As the sentence meted out to the appellant was the bare minimum prescribed by law. It requires no interference by this court.

Accordingly, this appeal is dismissed in its entirety.

It is so ordered.



A handwritten signature in blue ink, appearing to be "W.P. Dyansobera".

W.P. Dyansobera

Judge

4.6.2021

This judgment is delivered under my hand and the seal of this Court this 4th day of June, 2021 in the presence of the appellant and Mr. Paul Kimweri, learned Senior State Attorney for the respondent.

Rights of appeal to the Court of Appeal explained.



A handwritten signature in blue ink, appearing to be "W.P. Dyansobera".

W.P. Dyansobera

Judge