

**THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY OF BUKOBA)**

**AT BUKOBA**

**CRIMINAL APPEAL NO. 11 OF 2021**

*(Arising from the Resident Magistrate Court of Bukoba at Bukoba in Criminal Case No. 391 of 2016)*

**ERICK MATHIAS -----1<sup>ST</sup> APPELLANT**

**GEOFFREY RICHARD-----2<sup>ND</sup> APPELLANT**

**VERSUS**

**THE REPUBLIC-----RESPONDENT**

**JUDGMENT**

***Date of Judgment: 09.08.2021***

***Mwenda, J.***

In the Resident Magistrate's Court of Bukoba at Bukoba, the appellants, Erick Mathias and Geoffrey Richard hereinafter referred to as the first and the second appellants respectively were jointly charged for armed robbery contrary to ***section 287A of the Penal Code, [Cap 16 R.E. 2002]***. They were convicted and sentenced to serve thirty (30) years in jail. Aggrieved by the trial court's decision they have preferred this appeal in a memorandum containing five grounds.

When this appeal came for hearing, the appellants appeared without legal representation while the respondent (the republic) was represented by Mr. Kahigi, learned State Attorney.

During submissions in support of their appeal, the appellants started by challenging the trial court's findings as against them in that the prosecution's evidence was full of contradictions. Some of the contradiction are firstly, on the testimony of PW.2 (the investigator) and that of PW.3 (the victim) regarding the location where the victim was approached by the first appellant, secondly, that PW.4 stated that the stolen motor cycle was impounded at Nyamkazi area in possession of the 1<sup>st</sup> appellant while PW.7 stated that the said motorcycle was impounded at Kyaka from the 3<sup>rd</sup> accused ; thirdly, while the victim testified that the incident took place on 30/08/2016, PW.6 stated that it was on 30/04/2016 and lastly while PW.2 testified that the stolen property was found on 28/9/2016 the investigator said it was on 20/09/2016.

On the 3<sup>rd</sup> ground of appeal the appellants submitted that the identification parade register (exhibit P.4) was tendered and accepted contrary to PGO 232(2)(C)(O) and (q). In support of their arguments they cited the case of ***Francis Majaliwa Deus & Two others v. Republic, criminal appeal No. 139 of 2005(unreported)***. In addition to that they challenged the legality of a charge sheet in that it was defective for failure to indicate the value of the stolen item

(the motorcycle) contrary to ***Section 135(C), (ii) of the Criminal Procedure Act, [Cap 20 R.E 2019]***.

Lastly the appellants challenged the discrepancy in the stolen Motorcycle's registration number in that while in the charge sheet the motorcycles registration Number is referred to as MC 570 AXT, Bajaj Boxer, in the proceedings reference was made to a motorcycle with Re. No. 928 AVT which are two different things. Also, they further complained that the motorcycle's registration card was tendered as exhibit while it was not read during preliminary hearing stage and during trial there were no prayers to call for additional witnesses so as to tender additional exhibits.

They concluded by praying before this court to allow this appeal, quash conviction entered against them and set aside sentence passed by the trial court.

The learned State Attorney started by informing this Court that the Republic is opposing this appeal. The learned State attorney begun by addressing this court on the alleged discrepancy of the stolen motorcycle's registration numbers. He submitted that the said numbers were referring to the stolen motorcycle as the chassis number appearing in both Motorcycles is the same as the one appearing in the stolen motorcycles original Registration Card. The discrepancy in Registration number was caused by the fact that the original Registration Number was changed from MC 570 AXT to Re. No. 928 AVT.

On the allegations that there are contradictions of the prosecution's witnesses' testimony such as that of PW.1 and PW.2 on the location where the victim and the 1<sup>st</sup> appellant met before an attack occurred, the learned state attorney stated that it was just a minor inconsistency as witnesses cannot be consistent all the time. In support of his argument he cited the case ***of Elia Msambe V. Republic, Cr. Appeal No. 42 of 2007(unreported)***.

On allegations that the Identification parade register was tendered contrary to PGO 232(2), the learned state attorney was of the view that the identification parade was conducted by PW.3 in accordance with PGO 232(2). Also, the learned state attorney was of the view that the circumstances around the scene of crime were favourable for correct identification due to a close vicinity between victim and his assailants, the electricity light from Hallotel communication tower and a considerable time spent with them was sufficient for correct identification. He thus concluded by praying for this appeal to be dismissed.

Having summarized submissions from both parties, the issue for determination is whether the prosecution's side proved its case to the standard required, that is beyond reasonable doubt.

In Convicting the first appellant, the trial court's magistrate was of the view that PW3, (the victim of crime) identified the second accused (the first appellant) when he was approached at machinjoni area seeking bodaboda services.

According to the trial magistrate, the time spent in bargaining fare, the electricity light from the Hallotel communication tower and the description made to him (that he was a short black man in gloves) is sufficient for correct identification. Also, the identification parade conducted at the Central Police Station convinced him that the first appellant was involved in the robbery incident.

This court went through the trial Court's records and upon considering submissions by both parties came to a conclusion that the trial Court's magistrate was justified to convict the first appellant. Although the incident took place at night and the first appellant being not familiar to him to the victim (PW.3). The victim stated that he managed to identify the 1<sup>st</sup> appellant by help of electricity light and that it took them a considerable time together when the first appellant was bargaining for fare and later on ferrying him to machinjioni area. These circumstances were ideal for correct identification and this court is satisfied that the first appellant was correctly identified.

In the case of **Waziri Amani versus Republic [1980] TLR 250**, the Court of Appeal observed thus;

***"Evidence of visual identification is of weakest kind and most unreliable. 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."***

Again, since first appellant was not known to the victim before identification parade was conducted. PW.7 testified on how he organized and conducted identification parade. He then prepared the identification parade Register (exhibit P.4). PW.7 testified that in conducting the identification he prepared participants, asked the first appellant to call his relative/advocate or any other witness and then he told the first appellant that the witness intended to identify him. later on, the witness identified him by touching him. He then filled the identification parade register Exhibit P.4. This court went through identification parade register and noted that it was filled in accordance to PGO. 132.

In the case of ***Donald Joseph Nzweka and 3 others V. Republic, Criminal Appeal No.138 of 2018 (unreported)*** the court held inter alia that:-

***".... PGO 132 is very clear in its wording.  
Identification parade register contains the  
following:***

***a) Name of the suspect***

***b) Name and number of the people participating in  
the parade.***

***c) Name of the witness.***

***d) Name and rank of the conduction officer.***

***e) Force number, rank and name of police officer***

***in charge of the witness before and after the parade.***

***f) Any objection raised by the suspect before, during or after the parade.***

***g) If the suspect was identified or not the position of the suspect during the parade.***

***h) Any other remarks by the officer conducting the parade concerning the parade.***

***i) Signature of conducting officer."***

In their submission the appellants challenged the identification parade register in conducted contrary to PGO 232(2) (C), (O) and (q). This Court considered the contents of the identification parade register (exhibit P.4) and the evidence by PW.7 who organised and conducted identification parade and concluded that he complied to the laid down rules under PGO. Also, the appellants submitted that there were contradictions among the prosecution's witnesses but this court find the said contradictions are just minor which do not go to the root of the case. Again, they challenged the legality of a charge sheet for failure to disclose the value of the stolen motorcycle but this court went through the charge sheet and noted that it used a simple language which indicate with clarity the property it was referring to, this is in alignment to section 135 (c) (i) of the Criminal Procedure Act, [Cap 20 R.E 2019] and the appellants were not prejudiced in any ways.

From the fore going, since the 1<sup>st</sup> appellant was identified at the scene of crime by the victim (PW.3) and later came to be identified at the ID parade, this court is satisfied that the evidence against the first appellant one ERICK MATHIAS is watertight and the trial court was justified to convict him. His appeal therefore lacks merits.

In convicting the second appellant (who stood as the first accused at the trial court), the trial magistrate considered identification by the victim around the Hallotel communication tower where the victim and his assailants faced each other. Also, the Hon. trial magistrate believed in PW4's testimony who testified that they interrogated the second appellant who confessed and agreed to show them where the motorcycle was. According to Trial court's magistrate the 3<sup>rd</sup> accused person agreed to have received the stolen motorcycle from the 2<sup>nd</sup> appellant. This motorcycle was later on came to be identified by PW3 & PW4 as the one which is the subject matter of this appeal. According to honourable magistrate, there is unbroken chain of events as the second appellant was identified at Ihungo near the Hallotel communication tower, arrested by PW4 and later on, led PW4 and his colleagues to 3<sup>rd</sup> accused's Motorcycle's garage.

This court went through the evidence adduced against the second appellant and observed the following. It was the Victim's evidence that when the 1<sup>st</sup> appellant hired to ferry him to Machinjioni area, he (upon their arrival) was told to



stop and wait for first appellant's colleague who appeared shortly afterward. As that area was illuminated by electricity lights from the Hallotel tower the victim managed to identify his assailants including the second appellant. Although his assailants were new to him, identification parade was conducted in respect of the first appellant only. It is not on the record as to why the second appellant was not subjected to an identification parade.

Again, in convicting the 2<sup>nd</sup> appellant, the trial magistrate based on the evidence of PW4 in that he participated in arrest and interrogation of the first accused (2<sup>nd</sup> appellant) who in turn confessed and volunteered to show them where the stolen motorcycle was. It is however important to note that PW4 is a civilian who don't have powers of arrest and interrogation. On top of that PW4 stated that after they have arrested the 2<sup>nd</sup> appellant they took him to the VEO's office where he confessed to commit the crime and PW4 took a letter from VEO and then the second appellant led them to the third accused's garage where the stolen motorbike was. One may ask, if it all the second appellant confessed before the VEO (the justice of peace), why didn't he have his confession recorded. Apart from that the said VEO was never called to testify in court and this create a serious doubt and as a general rule, the accused person must be given the benefit of doubt as underscored by the court in the case of ***Director of Public Prosecutions v Elias Laurent Mkoba and Another [1990] TLR 115(CA)***.

Again PW4's testified that when second appellant led them to the third accused person where the motorcycle was, the third accused tried to offer them some money (bribe) and when they turned down his offer the third accused said the motorcycle in question belonged to the 2<sup>nd</sup> Appellant. One would then ask if the said motorcycle was brought to him by the first accused (2<sup>nd</sup> appellant) why would he attempt to bribe PW4 and his colleagues? On the face of it, the 3<sup>rd</sup> accused was a witness of his own interest to serve his own skin.

In the case of ***Abraham Saigoro V. R (1981) LRT 265*** the court observed *that evidence of a person with an interest of his own to serve must be approached with care and should not be acted upon uncorroborated by some other independent evidence.*

Again the 3<sup>rd</sup> accused being a co-accused to the 2<sup>nd</sup> appellant, his evidence ought to be corroborated by a piece of independent evidence which under the circumstances of this case are lacking. In the case of ***Asia Iddi V. Republic [1989] TZHC 38(02 October 1989)*** the Court held inter alia:

***"that a conviction of an accused person  
shall not be based solely on a confession  
of a co-accused'.***

In the upshot this court find the prosecution's evidence adduced against the first appellant one ERICK MATHIAS sufficient and the trial court was justified to enter conviction against him. His appeal lacks merits and is hereby dismissed.

As for the second Appellant one GEOFFREY RICHARD this court finds his appeal meritorious and his appeal is hereby allowed, conviction quashed and sentence set aside. He should also be released from jail forthwith unless otherwise lawfully held.

It is so ordered.



A. Y. Mwenda

**Judge**

09.08.2021

Judgment delivered in chamber under the seal of this court in the presence of the first appellant Mr. Erick Mathias and second appellant Mr. Geoffrey Richard and in the absence of the respondent the Republic.



A. Y. Mwenda

**Judge**

09.08.2021