IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES-SALAAM DISTRICT REGISTRY

(AT DAR ES SALAAM)

CRIMINAL APPEAL CASE NO 274 OF 2020

(Originating from Criminal Case No. 101 of 2019, District Court of Morogoro before Hon. Kalegeya, RM)

MICHAEL LANDELIN JOHN.....APPELLANT

Versus

THE REPUBLIC..... RESPONDENT

JUDGEMENT

Last Date of Order: *22/06/2021*

Date of Judgement: *29/06/2021*

LALTAIKA, J.

Motorcycles, commonly known as Bodaboda have become an important part of the lives of young people in Tanzania. Many young people dream of owning a Bodaboda. These motorcycles are not only a source of self-employment but also a fairly simple means of mobility among both rural and urban dwellers. One cannot help but admire how quickly this mode of transport has spread in almost all corners of our country. The quicker it

spreads the more it is able to grab the attention and admiration of the youths. Although the discussion on bodaboda among the elderly and the society at large (serve for the young people engaged in the trade) centers mostly on careless use of the motorcycles to endanger the lives of other road users including pedestrians, there are a number of positive attributes including building of social networks and friendship among the youths. In some cities these young people have their own social support groups which cater for, among other things, provision of the much-needed support during bereavement.

The methods through which these motorbikes (I use the term interchangeably with Motorcycle and Bodaboda) come to the possession (or even just temporary assignment) of young people differ. The lucky ones obtain loans from local government authorities and other not-for-profit organizations or individuals, which loans they use to buy and own bodabodas. Another common means through which bodabodas come to the hands of young people is through what I would call personal trust.

In this personal trust arrangement, a more affluent fellow, in most cases a salaried worker, acquires a bodaboda and gets a younger fellow they trust to manage it. The young fellow starts to run after pillion passengers in

a given city and make business out of it, oftentimes without any contractual agreement. The young fellow is required to make regular returns, at a fixed rate, to the owner. The amount is fixed and remains constant whether or not there are customers. This somewhat uncomfortable working condition increases the zeal among young people to finally possess their own motorcycles.

When this desire to own a bodaboda conceives, it gives birth to criminality when criminality is proven it leads to jail terms (inspired by the Book of James 1:15 **"Then, after desire has conceived, it gives birth to sin; and sin, when it is full-grown, gives birth to death.")** Indeed, as the desire intensifies, a much smaller percentage of young people, I should suppose, use illegal, uncouth and outright inhuman methods to achieve their dream of owning a bodaboda. In line with the saying of the wise that **"crime does not pay"** these methods, including armed robbery, bring such young people in conflict with the law. Some of them end up spending a large part of their youthful life in jail.

The quest to own a bodaboda and the financial (and social) benefits that follow the same, was the point of discussion in the trial court leading to conviction, sentence and subsequently this appeal. It goes without saying that the same remains the crux of the matter in this court. A brief historical backdrop to the same is noteworthy.

Michael Lindelin John (herein after the Appellant), was indicted and charged by the District Court of Morogoro for the offence of armed robbery **Contrary to Section 287 A of the Penal Code (Cap 16 RE 2002).** It is alleged that on the 30th day of July 2017 at Nguzo Area in Morogoro the Appellant used a panga to attack one Abdallah Hamis Shomari, a motorcyclist, and robbed him of his motorcycle with **Registration Number MC 869 BFP.**

Having been convinced that the prosecution has proved the case beyond reasonable doubt, the Hon. A.L. Kalegeya, Learned Magistrate, found the accused guilty of Armed Robbery and sentenced him for a jail term of 30 years. Aggrieved with both the conviction and sentence, the appellant approaches this court in its appellate jurisdiction to quash the conviction, set aside the sentence and set him free.

The appellant has lodged ten (10) grounds of appeal through which he seeks to move this court to allow his appeal. For clarity, the grounds are reproduced herein bellow (typos and other omissions in the original are maintained-for originality!):

1. *That the learned trial magistrate grossly erred in law by invoking [the] Doctrine of recent possession while convicting the appellant yet there was no conductive evidence from the prosecution side to show that the appellant was arrested with the alleged motorcycle.*

2. *That without prejudicing the above ground of appeal, the learned trial magistrate wrongly applied the doctrine of recent possession while convicting the appellants in a case where the prosecution failed to show how they were connecting the appellant's injuries with the alleged motorcycle accident as there was no any Traffic case number from Coastal Region D.T.O or medical report from Tumbi General Hospital to prove that his injuries were caused by the said accident where the said motor vehicle was involved and not a hit and run case as it is claimed by the appellant.*

3. *That, the trial magistrate grossly erred in both law and fact by convicting the appellant based on Exh P1 (the alleged motorcycle) despite PW2 having failed to identify it in court if what was tendered in court as Exh P1 is what he alleged to have robbed from him*

4. *That the learned trial magistrate grossly erred in both law and fact by convicting the appellant based on exh P3 (motorcycle's registration card) which does not contain the name of PW3 and Exh P4 (receipt) as a basis of proving the issue of ownership of Exh P1 and worse still none of them was read out loud in court after their admission as exhibits.*

5. *That, the learned trial magistrate wrongly applied the doctrine of recent possession in a case that didn't meet the criteria of applying such a principle, as the evidence adduced was weak, shaky, incredible (sic!) and unreliable to base a conviction.*

6. *That, the learned trial magistrate grossly erred in both law and fact in concluding that PW3 had proved ownership of Exh P1 through Exh P3 and P4 yet there was no evidence on record to show that the engine and chasis number in P1 were either read by PW1, PW2 or PW3 in court in the presence of everybody and then matched the numbers in the said Exh P3 and Exh P4, hence it was wrong for the trial court magistrate to invoke doctrine (sic!) of recent possession while convicting the appellant.*

7. *That, the learned trial magistrate wrongly convicted the appellant based on circumstantial evidence when stated that "it means that the accused had constructive possession over that motorcycle" yet failed to consider that none of the prosecution witnesses testified to have seen him riding on the said motorcycle, or rescued him at the scene where the said motorcycle accident is alleged to have occurred.*

8. *That, the learned trial magistrate erred in both law and fact by convicting the appellant based on incredible (sic!) evidence of the prosecution witnesses and more specific PW1 who claimed that he was entrusted by Chalinze DTO with both the appellant and exh P1 (the alleged stollen motorcycle) yet he failed to tender, any movement/matching order from on (sic!) Region to another and handing or taking over note from the District Traffic Officer who is allege (sic!) to have been the in charge of the alleged traffic case, in order to prove that the appellant was somehow connected with the said motor cycle accident.*

9. *That, the learned trial magistrate grossly erred in law by shifting the burden of proof to the defence side rather than the prosecution side when claimed that he expected the appellant's sisters to have instigated a case against those who had framed a case against their brother, hence this statement rendered him not to apply reasonable weight on the defence case as the appellant sisters (sic!) act of testifying in this case meant the same.*

10. *That, the learned trial magistrate grossly erred in both law and fact in concluding that the prosecution case had been proved to the hilt.*

It is noteworthy on the outset that the main task before this court is to determine whether the above grounds of appeal have merit. The reading of these grounds come down to two main issues for determination, namely:

(i) Whether there was sufficient evidence upon which the trial court based its conviction and

(ii) Whether the prosecution case was proven beyond reasonable doubt.

When this appeal came up for hearing, the appellant opted to adopt the Memorandum of Appeal and its content thereof without any further comments. To this end, the learned State Attorney, Jacqueline Werema took up the floor on behalf of the Respondent. Needless to say that Ms. Werema

appeared confident, brief and straight to the point. She advised the court to allow the appeal.

Before advancing the reasons for her unwavering acceptance of the grounds of appeal, Ms. Werema sought to draw the attention of this court to the case of **Waziri Amani vs R. (1980) TLR 250.** In this case, the learned State Attorney advised, a rule was laid that when it comes to evidence of visual identification, **"...no Court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the evidence before it is absolutely watertight."**

Ms. Werema went on to challenge the evidence adduced by PW 2 who was the victim of the alleged armed robbery. Referring to proceedings of the trial court, the learned State Attorney asserted that during examination in chief, PW2 explained that he never met nor knew the accused person before. This, according to the Learned State Attorney, raises doubts on proper identification of the appellant and consequential connection to the crime committed.

Ms. Werema was not done with PW2 yet. She raised even more doubts on his ability to identify the appellant. According to Ms. Werema, PW2's contention that he saw the accused person while he was seriously injured raises serious doubts. The Learned State Attorney avers further that according to the proceedings of the trial court, PW2 does not mention the time that the accident occurred nor the exact or even approximate time during which he was robbed of the motorbike.

The Learned State Attorney drew the attention of this court to the fact that PW2 was the key witness in this case and that his admission in the trial court that he never knew the accused (now the Appellant) in person nor was he able to describe the type and color of the clothes he was on, by and large, waters down the prosecution case based mainly on lack of proper identification.

With regards to the grounds pointing out as to whether the prosecution case had been proven beyond reasonable doubt, the Learned State Attorney answered this in the negative. She pointed out that another key prosecution

witness, namely the traffic police who witnessed the accident was never summoned to court while in fact, he was the one who could provide the vital information needed to link up the accused person with the crime committed. Summing up, the Learned State Attorney prayed that the court allows the appeal and acquit the accused person.

Having heard the submissions of both the Appellant and Respondent, I have had the opportunity to analyze the evidence relied upon by the trial court to sustain this conviction. I also took the liberty to enlighten myself on the current status of the law and practice on visual identification in Tanzania and beyond.

There is no doubt that, as correctly observed by Ms. Werema, this court must consider the issue of visual identification with uttermost care and that evidence on the same must be watertight. This is the position in many if not most Common Law jurisdictions with which our country shares legal heritage. According to a 1993 United Kingdom Report, the rationale for such high standard of proof needed in visual identification is to ensure that **"the risks of the innocent being convicted and the guilty being acquitted**

are as low as human fallibility allows" (See; ***The Royal Commission on Criminal Justice Report*** ("The Runciman Report") (1993 London: HMSO p. 2.)

The treacherous nature of visual identification evidence was eloquently expounded by Mason J. in ***Alexander v. R (1981) 145 CLR 395 at 426*** thus:

> *"Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognizing on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed."*

In the present case, the danger of "the innocent being convicted and the guilty being acquitted" invites me to consider the evidence adduced as recorded by the trial court with uttermost care. This is because the merits and demerits of this appeal lies almost entirely on visual identification. This position was reiterated by this court in the case of **Raymond Francis v Republic (1994) TLR 100** thus

> *"It is elementary that in a criminal case where determination depends essentially on identification, evidence on conditions favouring a correct identification is of the utmost importance"*

Since a large cloud of doubts surround the entire territory of visual identification of the appellant, I agree with both the Appellant and the learned State Attorney that the prosecution has not met the standard required by criminal law namely to prove the case beyond any reasonable doubt.

To this end, I allow the appeal, quash the conviction and set aside the sentence of 30 years imprisonment. The appellant is to be released forthwith unless otherwise lawfully held.

E. I. LALTAIKA

JUDGE

29/6/2021

Court: Judgement delivered in the Court Chambers in the presence of both the Appellant and Counsel for the Respondent

E.I. Laltaika

JUDGE

29/6/2021