

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

**AT TABORA**

**CRIMINAL CASE APPEAL NO. 34 OF 2020**

*(Original Criminal Case No. 34 of 2020 Nzega District Court)*

**MASUMBUKO S/O MABULA @MHOZYA .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**JUDGMENT**

*Date: 02/08/2021 & 5/11/2021*

**BAHATI, J.:**

The appellant herein, **MASUMBUKO S/O MABULA @MHOZYA** was charged before the District Court of Nzega with two offences, namely armed robbery and doing grievous harm, contrary to sections 287A and 225, respectively, of the Penal Code, Cap.16 [R. E. 2019] and was sentenced to a term of imprisonment of thirty years for the offence of armed robbery and one year for the offence of doing grievous harm. The sentences were ordered to run concurrently. Aggrieved, the appellant appealed to this court against the conviction and sentence, armed with the following grounds namely:-

1. *That, the trial magistrate erred in law and fact convicting and sentencing the appellant by rejecting the fact that the appellant had never been caught with the property which suspected to have been stolen from the victim;*
2. *That the trial magistrate erred in law and fact convicting and sentencing the appellant by rejecting the fact that the appellant had never been caught with the property which suspected to have been stolen from the victim;*
3. *That the trial magistrate erred in law and fact convicting and sentencing the appellant relying only on identification parade conducted by the police officer without following the rules of conducting proper and fair identification parade;*
4. *That the appellant had neither informed that he may have no afforded with the chance to call either an advocate or his friend to be present when the parade takes place;*
5. *That the appellant was shown to the identifier [prosecution witness] before the exercise was conducted*
6. *That the appellant did not put at the place or lined up with people of similar age, general appearance, and a class of life of himself*

*since there is no list of names of persons lined up in the identification parade;*

- 7. That the identifiers (prosecution witnesses) identified the appellant at the open place where other identifiers observed an exercise and later adduced evidence to corroborate evidence adduced by PW2;*
- 8. That the trial magistrate erred in law and fact in convicting and sentencing the appellant disregarding the fact that identification parade was conducted unfairly as the suspect was a stranger to the identifier since the records prove that PW2 spent only two minutes to negotiate the fare with the person suspected to have involved in the commission of the offence and it was at night;*
- 9. That the officer who conducted the identification parade proves that he had prepared a parade of ten people where the appellant was placed in a different position with different clothes while wearing the same clothes from the beginning to the end of the identification parade;*

The following are the brief facts of this case: on the 10th of March 2019, during the night hours at Nhonge within Nzega District, the appellant stole the motorcycle with registration number MC.301 BKP,

valued at TZS 1,700,000/= and ridden by Ramadhan Juma. On the same day, the accused committed the offence of grievous bodily harm to one Ramadhan Juma by using a bush knife to cut his neck and left hand. The allegation was denied by the accused person on both counts.

In discharging the onus of proof, the prosecution called a total of six witnesses led by Mr. Peter Utafu, State Attorney.

The facts of the case can be deduced from the witnesses who testified before the trial court as hereunder. PW1, Emmanuel Joseph, who was a motorcyclist, stated that he parked near Chacha Pharmacy on 10/3/2019 and received a call informing him that his fellow motorcyclist, Ramadhan, was attacked and his motorcycle had been stolen. He started making follow-ups on the tires but in vain. On 11/3/2019 he was informed that it was Masumbuko who stole the motorcycle and they got his description from their fellow as well as from Ramadhan Juma and they headed to Minze to the house of the suspect's father. They first went to the commander of sungusungu and explained the incident. They left for Tabora, where the suspect lived, and he was arraigned there and sent back to Minze, where he admitted to having stolen the motorcycle.

PW2, Ramadhan Juma told the court that he identified the accused person since they spoke before he rode him off, and at their

parking, there was a source of light from nearby shops. The appellant wanted to pay TZS. 1,000/= which the PW2 agreed. As they reached Nhonge the appellant wanted to be taken further in addition to TZS. 500/=. They proceeded with the journey, but PW2 got worried because he did not see any houses further and decided to stop. As he stopped, the passenger dropped out of the motorcycle with a machete and started to cut PW2 with the machete on his neck and hand, then he rode off. PW2 ran to the gate of Natural Resources and asked for help. He informed them of the ordeal.

PW3, Kashindye Paulo, testified that he was sick and asked PW2, Ramadhan to ride his motorcycle. Later, at 19.10 hrs, he went to the place where he parked. He found a passenger who wanted to be taken to Nhonge so he asked PW2 to take him, because everyone refused to take him, and they rode off to the village. PW3 stated that he was able to identify the man as he stayed there for almost ten minutes, pleading with other riders to take him for the fare of TZS. 1,000/=. PW3 stated that the man was wearing a long sleeve T-shirt with strips, a trouser hat, and a backpack.

After a while, PW2 made a call to Daudi informing him that he was wounded and the motorcycle was stolen. PW3 and his colleague arrived on the scene and discovered PW2 bleeding, and his motorcycle was

taken away. Daudi and Yohana took PW2 for treatment while the rest remained for further search but could not get the motorcycle.

The search for the accused started but in vain. However, they heard rumours that it was the appellant who stole the motorcycle. Some of them stated that they knew him and headed to the house of his father at Minze. They arrived at his father's house on 11/3/2019 and reported to Sungusungu. The father of the appellant told them his son was not there but he made a call and shortly the appellant arrived. On 12/3/2019, the appellant was arrested and sent to Nzega Police Station.

PW4, Inspector Pius George stated that while at Nzega police station, he conducted the Identification Parade in order for PW2 to identify the suspect. PW2 gave a description of his suspect and told him he was a mid-aged young man, dark-coloured with medium height, and he paraded 8 men. PW2 identified the accused person by touching him, then they exchanged their clothes, but still managed to identify him thrice. He then prepared a report and they both signed.

PW5, F 2286D/ Cpl Michael informed the court that he was an investigator in the case. He proceeded to take a caution statement wherein, during the initial part of the interrogation, the appellant stated that the motorcycle was at Tabora with Anthony. They travelled to Tabora but did not find it. He then told them he hid the motorcycle

at Mwanahala after the fuel ran out, but they could not get it. They inquired about his father, but the appellant stated that he had forgotten where he kept the motorcycle. This witness informed the trial court that he went to the hospital and managed to see PW2, the victim who had a big wound.

Another witness, PW6 a clinical officer at Nzega told the court that on 10/3/2019 he attended a young man with wounds on the back of his neck and left hand. He was given the first treatment as he was bleeding severely as he was unconscious at the emergency unit and then filled a PF3.

Then the appellant gave his defence, stating that it was Madeleka who had made the allegation that he stole the motorcycle because he had quarreled with his father. He informed the trial court further that the witness who stated that he saw him as the passenger was telling lies against him. He also said that the police officer who performed the identification parade was the one who called him to introduce him to the civilian.

After the trial, the appellant was found guilty of both offences and was accordingly convicted.

During the hearing of this appeal, the appellant appeared in person, whereas the respondent Republic was represented by Mr. Miraji Kajiru, learned Senior State Attorney.

When asked to argue his appeal, the appellant let Mr. Kajiru, Senior State Attorney, begin the grounds of appeal first. He reserved his right to reply.

When Mr. Kajiru took the stage, he objected to the appeal at the outset and made his stance that the evidence produced had weight that directly touches the appellant. He submitted that, according to the evidence, the event occurred during the night hours, but there was enough light in the parking lots. The motorcyclist (PW2) had more time for the conversation with the appellant, and PW2 described the attire worn by the appellant, which was corroborated by PW3 in his evidence.

He also submitted that in the records the witnesses had seen the appellants sometimes at Kijiweni. To bolster his argument, he referred this court to the cases of **Waziri Amani v. R [1980] TLR. 250** and **Raymond Francis V. Republic [1994] TLR. 100**, where it was stated, among other things, that during identification at night, it was important to describe all the circumstances that led to the said identification, which the criteria for identification was adhered to.



He further submitted that PW2, who was the victim, mentioned the appellant to PW3 at the earliest possible opportunity and hence the evidence was reliable. He referred this court to the case of **Marwa Peter Wangiti and others v Republic [2002] TLR pg 39**. He also submitted that the evidence of PW4 that on the identification parade the victim was identified by the victim as well as identified at the scene of the event. He further submitted that even though the motorcycle was not found, it was he who had hired it. He prayed to this court to dismiss the appeal.

Responding, the appellant submitted that he was not involved in the crime since this is a framed case. A person called Madeleka had a conflict with his father. He further submitted that the identification parade was not conducted properly as PW2 was sent to him for identification before the identification parade was set. The appellant insisted that the motorcycle in question was not found in his possession and that the case against him was not proved to the required standard.

On the issue of caution statement, he submitted that the statement was not tendered in court.

There was no rejoinder.

Having heard the submissions for and against the appeal, the issue for consideration is whether the present appeal has merit.

In this appeal, I find it pertinent to collectively consider first on grounds 3, 4, 5, 6, 7 and 9 as they are centered on the issue of the identification parade.

Section 60 of the Criminal Procedure Act, Cap.20 [R.E 2019] provides for an identification parade. Similarly, section 38 of the Police Force and Auxiliary Services Act, Cap. 322 and the Police General Orders issued by the Inspector General of Police from time to time under PGO 232.

It is the principle that if any rules are not complied with, the identification parade becomes of little value as evidence. In his evidence, the appellant submitted that the police officer did not comply with the identification parade. Having traversed through the court records and the identification parade form, the police officer who conducted the IP the records are silent as to whether he asked the appellant if he had any objections, and again, he did not explain to him that he had a right to call his solicitor, a friend or anybody to attend and witness the said exercise.

Having found the variance in the IP, the exhibit PI is hereby expunged from the record. Therefore, from the raised grounds of appeal numbers 3, 4, 5, 6, 7, and 9, the grounds raised have merit.

The issue is whether the remaining evidence is sufficient to convict the appellant.

On the first and second grounds, as clearly pointed out by the State Attorney, that the appellant was not apprehended at the scene of the crime and he had never been caught with the property.

According to the evidence in the record, PW2, who was the victim, recognized his assailant since he spent a lot of time with him when he was negotiating the fare to Nhonge. He testified in court that they stayed for almost 2 minutes and he added that the light was plenty of electricity that he identified the suspect to have been wearing the long sleeve white with stripes shirt trousers and the backpack. This evidence was also corroborated by PW3, who was the owner of the motorcycle, who stated that there was plenty of light from the electric light, which was about ten paces away, and it was not his first time seeing the accused person, but his third time, and he also explained that he was wearing a long-sleeve T-shirt with stripes, black trousers, a black hat and had a backpack.

This is exemplified by the cardinal principle established in the case of *Abdallah Bin Wendo and Others v Rex* (1953) E.A.C.A 116 and followed by this Court in the celebrated case of **Waziri Amani v Republic [1980]** TLR 250 regarding the evidence of visual identification. The principle laid down in these cases is that in a case involving evidence of visual identification, no court should act on such evidence unless all the possibilities of mistaken identity are eliminated and that the Court is satisfied that the evidence before it is watertight.

However, having traversed through the trial court's records, I noted that PW2, who identified the appellant, was given the stolen motorcycle to ride by PW3, who was the owner of the motorcycle and who was sick at the time. I am aware of the principle laid down in **Goodluck Kyando V Republic [2006] T.L.R 363** that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness.

As previously stated, the law is settled in this jurisdiction that evidence of visual identification is of the weakest kind and most unreliable. As such, this type of evidence should only be relied upon to convict an accused person when all possibilities of mistaken identity are eliminated and when the court is satisfied that the evidence before it is nothing but the truth.

In respect of identification; there is only evidence from PW2 and PW3. Considering the circumstances of this matter, there was no other evidence of identification from the group of motorcyclists to corroborate the evidence of PW2 and PW3, who were there bargaining with the motorcyclists, but only the two identified the appellant, which creates doubt since they are business related. Therefore, in my view, as other motorcyclists were there but no one properly identified him, I would think that the credibility and reliability of the witnesses are therefore questionable.

Also, the appellant complained that he was not apprehended at the first instance and the motorcycle was not found with him. Unfortunately, Madeleka, who identified the appellant, was not called as a witness. In my considered view, he was a very key witness who allegedly to have seen the appellant and he was the one who directed them to his father's house. Thus, failure to call this witness has the effect of an adverse inference against the accused person.

Another issue raised by the appellant is that he was not found in possession of the motorcycle as there was no good evidence establishing that he was really found in possession. The evidence of the prosecution does not establish that the motorcycle in question was found in the appellant's possession. The appellant was neither found in

possession of the motorcycle in question nor was properly identified. I find the case against the appellant was not proved to the hilt.

In the upshot, I allow the appeal, quash the conviction, and set aside the sentence with an order that the appellant be released forthwith unless he is held for any other lawful cause.

Order accordingly.



**A. A. BAHATI**

**JUDGE**

**05/11/2021**



Date: 5/11/2021

Coram: Hon. G. P. Ngaeje Ag, DR

Appellant: Present.

Respondent: Absent.

B/C Grace Mkemwa, RMA

**Court:** The matter comes for Judgement which is ready.

**Court:** Judgement delivered in presence of the appellant only, in absence of the respondent in the open court.



G. P. NGAEJE

Ag. DEPUTY REGISTRAR

5/11/2021

**Court:** Right of appeal fully explained.



G. P. NGAEJE

Ag. DEPUTY REGISTRAR

5/11/2021

