IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 92 OF 2020

(Originating from Mtwara District Court in Criminal Case No.31 of 2017)

LUKUMANI SAID LAILA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

9th August & 8th October, 2021

DYANSOBERA, J.:

In the District Court of Mtwara, the appellant, Lukumani Said Laila, was charged along with other two persons namely, Mussa Kassim (2nd accused) and Rashid Justine @ Nanjope @Tall (3rd accused) with two counts that is, conspiracy to commit offence contrary to section 384 (1st count) and armed robbery contrary to section 287A (2nd count) under the Penal Code [Cap. 16 R.E.2002 now R.E 2019] (the Penal Code). According to the charge sheet, it was alleged in the first count that on unknown date, place and time within the Municipality and Region of Mtwara, the appellant and his fellows did conspire to commit an offence of armed robbery. The allegations in the second count were that on 7th day of October,2019 at Likonde area within the Municipality and Region of Mtwara, the trio did steal a motor cycle with registration number MC277 CCN make TVS STAR black in colour, valued at Tanzanian Shillings Two Million, Two Hundred and Fifty Thousand (Tshs.2,250,000/=) the property of MOHAMED JAFARI MKWANDA and immediately before such stealing did threaten HAJI MBARAKA who was a rider of the said motorcycle by using a machete in order to obtain and

retain the said motorcycle. The appellant and his fellows denied the charge and the case went to a full trial whereby the prosecution called five witnesses and produced four exhibits. The defence had three witnesses. Two exhibits were also tendered in support of the defence. At the end of the day, the learned Resident Magistrate was satisfied that appellants and his fellows were wrongly charged with conspiracy together with armed robbery and that the offence of conspiracy was not proved. With respect to the 2nd count, the District Court was not satisfifed that the 2nd and 3rd accused persons were implicated. They were, thus, acquitted. The appellant, however, was found guilty, convicted and sentenced to thirty (30) years gaol term. He thought that justice was not his triumph. He has now appealed.

The background facts giving rise to this appeal may be stated as follows: Hamza Hamis Nayapa (PW 2) owns a motor cycle Reg. No. MC 277 CCN make TVS, black coloured which he had bought from Mohamed Jafphar Mkwanda. He had given it to Haji Mbaraka (PW 1) who was using it for business purposes and was parking it at Bima area. On 7.10.2019 at 0100 hours while PW 1 was with the motor cycle at the parking area (at Bima), the appellant approached him pretending to be a motorcycle passenger and hired him to ferry him to Mtuwasa area. PW1 drove the appellant but then the appellant told him to wait for him while he was going to collect a rope. When the appellant was back, PW 1 drove him to Mtuwasa. The appellant entered the office and when he went back to PW 1 he ordered him to take him to Likonde area to the destination known as Mibuyu Mitatu. The appellant ordered PW 1 to stop so he went for a short call. Suddenly, two people PW 1 could not identify appeared while armed with a machete and told PW 1 that they

wanted a motor cycle. PW 1 was reluctant to release it. They threatened him with the machete and he decided to release it to them. The appellant then appeared and joined the two and the three made away with the motor cycle. PW 2 was informed and he with PW 1 reported to the police.

G. 1224 DC Florence (PW 3) on 12. 10.2019 at 0705 hrs went to Magomeni Street and conducted a search in the room of the appellant and retrieved a number plate MC 277 CCN. He prepared seizure documents (exhibits P 3 and P 4, respectively). The search conducted by PW 3 was witnessed by Ivo Wilfred Ng'itu (PW 4).

G. 1559 PC Moshi (PW 5) did, on 12.10.2019 hear the appellant telling his wife who had gone to the police station to take some food to the appellant to go and hide the number plate.

The appellant' s defence was that on 29.9.2019 left Mtwara to Dar es Salaam to follow up his property that had been left behind by his uncle one Abdul Mussa who had passed away and was back on 7.10.2019 and went direct to the house of his grandfather. The appellant sought to impress the trial court that the case against him was a concoction.

In his judgment, the learned Resident Magistrate analysed the evidence and found it falling short of proving the count of conspiracy. He acquitted the appellant and his two fellows but as said before, convicted the appellant and sentenced him accordingly.

In this appeal, a total of eight grounds have been preferred as follows:-

1. That the trial magistrate erred in law and fact in not deciding that the certificate of seizure on plate Number (Exh. P3) was procured contrary to the law.
2. The trial magistrate erred both in law and fact in admitting Exh.P1, P2, P3 and P4 without proof of ownership.
3. The trial court erred in law in relying on Exh. P4 which was not read.
4. That the trial Magistrate erred both in law and fact in convicting the appellant without proof of ownership.
5. Having admitted Exh. D1 and D2, the trial Magistrate erred in law and fact in according no weight in appellant's defence of alibi.
6. The trial Magistrate erred in law and fact in not deciding that the Appellant's identification was not watertight.
7. That the trial Magistrate erred in law and fact in convicting the appellant on contradictory and inconsistent testimony of prosecution's witnesses.
8. That the trial Magistrate erred in law and fact in not deciding that the prosecution case was not proved beyond reasonable doubt.

On 4.8.2021 when this appeal came up for hearing, Mr. Stephen L. Lekey, learned Advocate, appeared for the appellant while the respondent was represented by Mr. Meshack Lyabonga, learned State Attorney.

In arguing the appeal, Mr Lekey dropped the 4th ground of appeal and amended the 3rd ground of appeal by adding "exhibit P 3"

With regard to the 1st ground, Counsel for the appellant submitted that section 38 (1) of the Criminal Procedure Act was contravened in that only a certificate of seizure was tendered without also tendering the receipt. He argued that the procedure in tendering the exhibit was flawed. He supported his argument by citing the case of **Andrea Augustino @ Msigala and anor. v.R**, Criminal Appeal No. 365 of 2018 CAT – Tanga'

On the second ground, Counsel for the appellant contended that the admission of exhibits was objected to by the appellant who had no legal representation but they were admitted without assigning any reasons. Reliance was placed on the case of **Tanzania Air Services Ltd, Minister for Labour, AG and commissioner for Labour**[1996] TLR 217 at P.222.

> "In so for as natural persons are concerned giving reasons for decision constitutes the recognition that the parties the rational beings"

Counsel was of the view that the decision arrived at without assigning reasons was arbitrary. He cited the case of **Tanzania Breweries Ltd. v. Anthony Nyingi** [2016] TLS LR P. 99 at P. 104 to buttress his argument.

Arguing the third ground, he complained that exhibit P 4 was not read out. It was his prayer that exhibits P 3 and P 4 be expunged from the record and relied on the case of **Joseph Maganga and Dotto Butwa v. R.**, Crim. Appeal No. 536 of 2015 (at P. 12).

With regard to the 6th, 7th and 8th grounds of appeal which are on identification, contradictory evidence and failure to prove the case

beyond reasonable doubt, Mr. Lekey argued that the conviction in this case was based on two grounds that is identification and recent possession.

He contended that possession was not proved as the appellant was not found with the motor cycle but only a number plate which was not the subject of the charge. Counsel challenged the identification arguing that it was not watertight and did not meet the criteria set out in the case of **Waziri Amani v.R** (1980) TLR 258. Counsel admitted that the incident happened during the day time but was of the view that the principles in that case apply also during the day time. He referred this court to the case of **Yohana Kulwa @ Mwigulu and 3 0thers v. R.** Cons. Crim. Appeal No. 192 of 2015 and 397 of 2016.

In his elaboration, Mr. Lekey submitted that matters of credibility had to be considered and explained that no explanation was given on how the witness identified the appellant; that he did not mention and describe him. The cases of **Raymond Francis v.R** [1994] TLR P.100 and **Marwa Wangiti Mwita and Anor v. R**, Crim. Appeal No. 6 of 1995 quoted in **Mkondya** at P.14 were cited in support of his argument. According to learned Counsel, PW 1 said that he was confused and this created doubt. It was his further argument that no identification parade was conducted and no identification register was tendered and worse still no witness talked about the identification parade.

A further complaint raised was on the identification by a single witness and Counsel for the appellant argued that the principles were not followed. He made reference to the case of **Yasini Maulid Kipanta and 2 others v. R** [1987] TLR 183 where it was observed that where

there is an identification of a single witness such evidence must be tested with greatest care. What is needed is other evidence direct or circumstantial pointing to the accused.

As far as discrepancies and inconsistencies are concerned, this court was referred to the case of **Mohamed Saidi Matuta v.R** [1995] TLR 3. Mr. Lekey explained that it was not stated how the search was conducted and who was involved and that there was uncertainty on the whole procedure of the search and seizure exercise. On whether or not the offence of armed robbery was proved, Mr. Lekey argued that there was no evidence that force was used as the appellant just appeared and was not charged with aiding and abetting.

On the defence of alibi, Counsel for the appellant argued that the defence was wrongly rejected.

Mr. Lekey was of the view that after discrediting the evidence of PW1 and if the search warrant is expunged there remain no evidence to convict the appellant.

Resisting the appeal, Mr. Lyabonga, admitting that no receipt was issued, he was of the view that the appellant was not adversely affected. He referred this court to the case of **Jumanne Mpini @ Kambilombilo and anor v. R.**, Criminal Appeal No. 195 of 2020 at p. 13 stressing that it the case which should be applicable.

On the second ground of appeal, Mr. Lyabonga was of the view that the argument the learned Magistrate was duty bound to assign reasons when admitting the exhibits was misplaced as Counsel for the appellant conceded that there was no law obliging the court to give reasons when admitting a document. He was of the view also that even

if the exhibits are expunged, the testimonies of the witnesses remain intact.

With respect to the third ground on failure to read exhibits, the learned State Attorney argued that since it was not a documentary evidence, the question of reading the contents of exhibit P 3 did not arise; instead he relied on the case of **ZhengZhi Chao v. DPP**, Crim. Appeal No. 506 of 2019, in which the Court of Appeal at p.20 discussed on the exhibits which were not read in Court and expunged them but held that the oral evidence of the witness who tendered the expunged documents can sufficiently prove facts contained in the said documents. He urged this court that in case those exhibits are expunged, it should find the evidence of PW3 and PW4 to be sufficient proof of what are contained in those exhibits.

With respect to the 5th ground on alibi, S. 194 (4) of CPA which requires a notice to be given is supplemented by sub- section (6) which mandates the Court to record no weight. The learned State Attorney insisted that the trial Magistrate complied with the law and that mere admission did not mean that exhibits D1 and D2 were to be given weight.

Submitting against the 6th ground on identification, Mr. Lyabonga maintained that the identification was proper. He contended that the incident occurred at 1300 hours. The appellant hired that bodaboda and both were together up to Mtuwasa. The appellant alighted and this sufficed to enable the victim to identify the appellant. The victim had a peace of mind. Further that, during cross examination, PW1 was clear in the cloth the appellant was clad – shot black trousers and black T- shirt.

Mr. Lyabonga was of the considered view that this witness sufficiently identified the appellant even up to Mibyu Mitatu place. The learned State Attorney was of the view that the identification was proper and mistaken as the evidence of PW1 was corroborated by PW3 and PW4 who found the number plate in the house of the appellant, a fact which implicated the appellant.

Mr. Lyabonga refuted the argument that PW1 was too confused to make a proper identification. He said that from the beginning PW1 was sober and nothing could cause his mistaking the identity.

On the contradictions and inconsistences pointed out by learned Counsel for the appellant, Mr. Lyabonga submitted that the contradictions are minor which do not go to the root of the case. Referring to the case of **ZhengZhi Chao** (supra), he argued that the contradictions or discrepancies cannot be avoided. He dismissed the seventh ground as having no basis.

On the last ground, it was submitted on part of the respondent that the prosecution managed to prove the case beyond reasonable doubt in that the appellant was identified at the crime scene.

On the argument that it was not proved that the appellant used force, Mr. Lyabonga pointed out that under Section 22 (a), (b) (c) and (d) of the Penal Code, an accused can be charged as a principal offender by counselling or procuring the commission of the offence. The appellant was rightly charged with armed robbery and that the fact that the number plate was found at his home supports his participation, Mr. Meshack Lyabonga emphasised.

On the question of recent possession, this court was told that there is no dispute the appellant was found with the number plate Reg. No. MC 277 CCN, which belonged to the stolen motorcycle. The motorcycle was not found at the appellant but since he was found with exhibit P3 and was identified at the crime scene then the evidence implicated him and the doctrine of recent possession was rightly applied. Mr. Lyabonga urged the court to endorse the judgment of the trial court and dismiss this appeal.

In his brief rejoinder, Mr. Lekey said that the cases cited by the learned State Attorney are distinguishable from the instant case. He reiterated what he had submitted in chief.

I have with deserving concern, considered the trial court's record, the grounds of appeal and the submissions.

There is no dispute that the incident occurred at 1300 hours. It was during the day time and in a broad day light. PW 1 explained in detail how the appellant hired him to ferry him to Mtuwasa up to Likonde and how he feigned that he was going for a short call and how two strangers appeared suddenly and threateningly demanded the motor cycle and although he resisted, he ultimately released it after he was threatened with the machete. The appellant then appeared and joined those other two and they made away with the motor cycle. The evidence of PW 1 was corroborated in material particular by that of PW 3, a police officer, who searched the appellant's house on 12th day of October, 2019 at 0705 hrs and found him with the number Plate with Reg. No. MC 277 which was part of the stolen motor cycle. Although the number plate was not the subject of the charge but it was a part and

parcel of the motor cycle which was the subject of the charge. The appellant offered no any explanation as to how he came by the said exhibit which he, no doubt, had physical control over.

As rightly submitted by Mr. Lyabonga, the failure to tender a receipt of seizure in addition of the certificate of seizure was not fatal nor did it prejudice the appellant as he did not disown the exhibit seized from him and in respect of which a seizure certificate was issued and duly signed.

Likewise, the argument by Mr. Lekey that the exhibits were admitted without assigning reasons has no legal force as no law obliges the magistrate admitting the exhibit to give reasons. This, Mr. Lekey, has admitted.

On the third ground, I agree to the argument of the learned State Attorney that the number plate was not a documentary exhibit to be read but a real. In other words, the number plate was self-proof. It was a physical or real evidence which even the court could see and touch.

With respect to the issue of identification, I have no any scintilla of doubt that the conditions at the time of the commission of the offence were ideal and favourable for correct and unmistaken identity of the appellant. The incident occurred at 1300 hrs, during the day time and in a broad-day light. PW 1 had ample time to observe and identify the culprit who turned out to be the appellant. I have considered the case of **Waziri Amani v. R** (supra) cited to me by learned Counsel for the appellant. That case, read in its totality, did not discredit the conviction on visual identification rather discussed on the objective test.

For instance, apart from a few of the matters to which the trial court should direct its mind before coming to any definite conclusion on the issue of identity and its examination, if the court is satisfied that the quality of identification is good, it can convict. It was observed in that case, *inter alia*, that:-

> "Now, the extent to which the possibility of the danger of an affront to justice occurring in this type of case depends entirely on the manner and care with which the trial Judge approaches his task of analysis and examination of evidence. If the judge does his job properly and before accepting any evidence of identification he goes through a process of examining closely the circumstances in which the identification of each witness came to be made, the dangers of convicting on such evidence are greatly lessened. Although no hard and fast rules can be laid down as to the manner a trial Judge should determine questions of disputed identity, it seems clear to us that he could not be said to have properly resolved the issue unless there is shown on the record a careful and considered analysis of all the surrounding circumstances of the crime being tried.

In the case under consideration, the learned Resident Magistrate made a careful and considered analysis of all the surrounding circumstances of the offence of armed robbery and was satisfied that PW 1 correctly and unmistakably identified the culprit to be the appellant as PW 1's evidence was corroborated by that of PW 3 who found the appellant in possession of number Plate with Reg. No. MC 277 which was part and parcel of the motor cycle the subject of the armed robbery and the appellant offered no any explanation.

It is true, in identification, matters of credibility of a witness has to be looked into. However, the question as to whether a witness is credible or not is in the realm of the trial magistrate who heard and observed the witness and assessed their demeanour. In this case, PW 1 was rightly believed. He had opportunity and ability of observing the appellant. He observed the incident he was describing. The credibility of PW 1, was, in the circumstances, impeccable.

As far as the discrepancies and inconsistencies are concerned, it was not sufficiently stated by learned Counsel for the appellant whether and to what extent they affected the truthfulness and accuracy of the witness' testimony and whether they related to important facts. As rightly submitted by learned State Attorney, the discrepancies and inconsistencies, if any, were minor that one might ignore.

As to how the appellant was implicated in the commission of the charged offence, section 22 of the Penal Code was rightly invoked because the appellant was a principal offender by virtue of section 22 (1) (b) and (d) of the Penal Code [Cap. 16 R.E.2019]. It is provided as hereunder:-

> 22.
>
> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing namely–

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids or abets another person in committing the offence;

(d) any person who counsels or procures any other person to commit the offence, in which case he may be charged either with committing the offence or with counselling or procuring its commission.

(2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.'

In the case on hand, although the appellant was not the person who actually threatened PW 1 with the machete, it was amply proved in evidence that he did an act for the purpose of enabling or aiding those two other fellows (who were not identified by the victim) to commit the offence. He was rightly convicted.

For the stated reasons, I am satisfied and hereby find that the prosecution proved its case against the appellant beyond reasonable doubt. The conviction was deserved.

As the sentence meted out to the appellant was the bare minimum prescribed by law, this court should not interfere.

Accordingly, this appeal is dismissed in its entirety.

It is so ordered.

W.P. Dyansobera

Judge

8.10.2021

This judgment is delivered under my hand and the seal of this Court this 8th day of October, 2021 in the presence of Ms Lightness Kikao, learned counsel for the appellant and the appellant. Also in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the respondent.

Rights of appeal to the Court of Appeal explained.

W.P. Dyansobera

Judge