

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 58 OF 2021

EMIELY S/O CHOLE @ MMANGA 1st APPELLANT

EVANS S/O CHOLE 2nd APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the Judgment of the District Court of Nkasi at Namanyere)

(N. S. Mwakibibi, RM)

Dated 9th day of February 2021

In

Criminal case No. 136 of 2019

JUDGMENT

20/06 & 09/08/2022

NKWABI, J.:

On 08/09/2019 Christopher Luca had the motorcycle make Kinglion with registration No. MC 179 CGV which was handed over to him by Mr. Nestory (PW2) robbed at a gun point by bandits. It was around 19:00 hrs. when he was from sending a passenger back to his parking place. He met a person who was carrying 1^{1/2} liters of petrol. That person stopped him for transport service to Nkomolo village which he did. In the way they found a parked motorcycle. The 1st accused (who was acquitted by the trial court) alighted

and went to the motorcycle where the 1st appellant was. The 1st appellant, meanwhile produced a bush knife and was about to cut PW1. On resistance from PW1, the 1st appellant produced a pistol, for that reason, PW1 ran away to save his life. He later reported the matter to the police. PW1 identified the 1st accused person through head light while he identified the 1st appellant through sun light.

In evidence, there is confirmation by PW2 to have handed over the motorcycle to PW1 for *bodaboda* business whereas PW1 had to give him T.shs 45,000/= each week for that business. PW2 was called by the police on 25/09/2019 to go to identify his motorcycle. He tendered in court a registration card as exhibit P1. (It ought, however, to be expunged as it was not read over and explained after it was admitted).

It happened that that motorcycle was sold to PW3 Emmanuel by a person who claimed to own it namely Maiko John who would sell it at T.shs 1,650,000/=. The seller told the VEO that he would bring the registration card the next day. PW3 paid T.shs 1,300,000/= as advance payment, he would pay the balance on being supplied with the motorcycle registration card. The sale agreement was stamped by the stamp of the VEO. It was the

1st appellant who introduced himself as Maiko John whose witness introduced himself as Peter Mwanisawa.

PW4 Abiud Joseph Ag. VEO Kasitu village confirm to have attended to PW3 and the 4th accused person who introduced himself as Maiko Simon and Peter Mwanisawa (3rd Accused person). He said the transaction was done during day time before the VEO (PW5). PW5 witnessed the sale agreement (exhibit P.2) in respect of the motorcycle on 23/09/2019. The buyer being Emmanuel Simon while the seller introduced himself as Maiko John while his colleague was Peter Mwanisawa. The seller promised to send the registration card on the next day. It was PW5 who handed over the motorcycle to the police.

The police, led by PW7 A/Inspector Kimbicho, were sent to the home of Alstida Sambili Simeye by PW6 Tedson Chonya the VEO Mintuntumbe village in Kalambo district. The home was searched and four persons were found sleeping in one room. There was also found a locally made pistol which was said to be the property of the 1st appellant who was also found in possession of T.shs 800,000/=. The 2nd appellant was found in possession of T.shs 500,000/=. The 1st appellant told the police where they had sold the motorcycle. The VEO of Kasitu village handed over the motorcycle to the

police. Amiely Chole, Evans Chole, Kelvin John and Adam Kilolo were arrested therefrom.

The defence of the 2nd appellant (DW2) was that he was arrested on 23/09/2019 when he was preparing for farm activities at Kaengesa. On 01/10/2019 he was sent to court. He stated PW3 said the motorcycle was bought from Maiko John and Peter Mwanisawa. He also testified that he was not arrested in possession of the motorcycle. In cross-examination he said witnesses identified him as Peter Mwanisawa which was wrong and he was forced to sign on the seizure certificate. His defence was not accepted by the trial court

In his defence the 1st appellant gave evidence that he was arrested in Sumbawanga when he was going home. He was sent to the court on 01/10/2019. He also testified that the alleged pistol and the bush knife were not tendered in court as exhibits and the identification by PW1 was not reliable. He further said that those who allegedly sold the motor cycle which, however, had no identification marks had different names compared to theirs. He criticized the evidence of all prosecution witnesses and prayed the

court to acquit him. The defence of the 1st appellant was rejected by the trial Court.

At the end of the trial, the District Court was satisfied with the respondent's evidence, convicted the appellants with the offence of armed robbery and sentenced them to serve 30 years imprisonment. Disgruntled with both conviction and sentence, the appellants preferred this appeal to this Court having nine grounds of appeal which are reproduced here below.

1. That, the Trial Magistrate erred in both points of law and fact when he convicted and sentenced the appellants while the case was not proved by the prosecution side, they fail totally to prove the evidence which adduced at the Court.
2. That, the Trial Magistrate erred in law and facts to convict the appellants based on evidence of PW3, PW4, PW5 and exhibit P6 which did not go further to forensically link the appellants to the offence of armed robbery.
3. That, the trial magistrate erred in law and facts for failure to evaluate the evidence of both sides and write the judgment which balance the evidence of both sides instead required the appellants to prove their innocence.

4. That the trial magistrate erred in point of law and fact to convict the appellants based on prosecution evidence while failed to observe that the same was contradictory, problematic, consisted full of ambiguous and unsusceptible of proof.
5. That the trial court had incurably gone astray on point of law and fact to convict appellants based on prosecution side while fail to note out that they failed to testify in details the special marks of the property tendered before the court in order to make the Court to test satisfy in all spheres.
6. That, the learned trial Magistrate erred in law by convicting and sentencing the appellants relying on PW3, PW4, PW5 while misobserved that they failed to testify before the Court on how the appellants managed to rob the said motorcycle even the identification parade were not conducted in order to prove if the appellants are the ones who found with the said motorcycle as alleged by the prosecution.
7. That the trial Court massive and curably gone astray in law and fact to convict and sentence the appellants relying on prosecution evidence without to observe that this case lacked proper investigation as no caution statement tendered before the court even the police officer

who issued the said motorcycle (exhibit P6) and investigate this case was not called at trial court to testify as witness.

8. That the trial magistrate erred in law when he fail totally in this case because even this judgment it has a lot of errors for example this judgment has no magistrate signed, no resident magistrate seal and date which may testify as true copy.
9. That, the trial Magistrate according to the failure to balance this conviction I beg your honourable court to quash all sentence and conviction which imposed to the appellants by the trial District Court Magistrate because there a lot of errors from trial, sentence, conviction and judgment defects which is contrary to section 388(1) of Criminal Procedure Act of R.E. 2002.

The appellants, thus prayed this court to quash the conviction and set aside the sentence while allowing their appeal.

The hearing of this appeal proceeded by way of oral submissions. The 2nd appellant appeared in person, fending for himself while the respondent was aptly represented by Mr. Simon Peres, learned Senior State Attorney.

Advancing his appeal, the 2nd Appellant prayed, in submission in chief, that the grounds of appeal be adopted as his submissions. He then rested his submission in chief by a prayer that this Court to finds him not guilty and releases him from prison.

The respondent's view, however, is different to that of the 2nd appellant in this appeal. Mr. Peres clearly stated that the respondent objects the appeal while supports the conviction and sentence.

He was of the view that thought there are 9 grounds of appeal, the 1st ground of appeal carries the other grounds of appeal which states that the charge was not proved beyond reasonable doubt. The 6th ground of appeal is different, however, Mr. Peres intimated. He stressed they proved the charge beyond reasonable doubt by the evidence of PW1 who was robbed. He had a motorcycle. He identified two persons. It was at 07:00 while it was not yet dark.

Mr. Peres too pointed out that the other evidence which is strong is that of PW3 who said is where the 1st appellant and the 2nd appellant went to Kasitu Village to sell a motorcycle which is the subject matter of this case, that PW1

was robbed. He added in his submissions that PW3 said it was the 2nd appellant who personified himself as Peter Mwanisawa, both the 1st and 2nd appellants were identified. The 1st appellant too personified himself as Michael John.

Mr. Peres also contended that PW3 even stated the purchase price of the motorcycle which is 1,650,000/= but PW3 paid 1,300,000/= the balance being T.shs. 350,000/= which they were told would be paid if they send the card of the motorcycle.

It was also the contention of Mr. Peres in this appeal that PW3 is corroborated by PW4 the acting VEO of Kasitu Village who identified the appellants. He added that PW5 corroborated the evidence and prepared exhibit PE2. He then insisted that all the witnesses, three of them, corroborated the evidence of PW1.

It was a further response of Mr. Peres in respect of this appeal that PW6 is the V.E.O. of Mintutumbe Village who explained in court how he received police officers from Matai Police Station who told him about the persons who were at the home of Alstida. That he sent them to the home of Alstida

Sambili. Mr. Peres further explained that the appellants were there when they were asked about the motorcycle, they told the police that they sold the motorcycle in Kasitu Village. He also told this Court that the 2nd appellant was found in possession of Tshs. 800,000/= on search and the 1st appellant has Tshs. 500,000/= which in total is Tshs. 1,300,000/= which corroborated exhibit PE2. He also identified the culprits to be the persons who sold the motorcycle.

It was a further assertion of Mr. Peres that PW7 is who testified on how he arrested the appellants at Mintuntumbe Village 23/09/2019. Mr. Peres elaborated that he (PW7) got information about the sale of the motorcycle at 02:40 am from an informer. He contended, PW7 went to the VEO and thereafter went to the home of Alstide at 08:00 am. It was where the culprits had been harboured. After arresting them, asserted Mr. Peres, they identified themselves by their real names whereas the 2nd appellant said he is Evans Chole. The 1st appellant identified himself as Emiely Chole. Mr. Peres added that it is the 1st and 2nd appellants who were searched and found in possession of Tshs. 1,300,000/= which were from the sale of the robbed motorcycle.

Mr. Peres also observed that the appellants sent the witness where they had sold the motorcycle which is exhibit P6 exhibit PE4 and PE3. All the exhibits were received in evidence without being objected to, Mr. Peres notified this Court.

Mr. Peres, invoked the doctrine of recent possession to answer the 6th ground of appeal. He explained, it is that the 1st and 2nd appellants were in possession of the robbed property. They did not claim it was their lawful property. He referred me to the case of **Joseph Mkumbwa & another V. Republic**, Criminal Appeal No. 94/2007 Court of Appeal of Tanzania decision of 2011 at page 7 (unreported). Mr. Peres rested his submission by contending that they proved all the ingredients stated by the Court of Appeal. He thus prayed the appeal be dismissed as all the grounds of appeal are unmerited.

Finally, the 2nd Appellant, in his rejoinder submission, claimed that the trial court proved that the PW1 did not identify them. He insisted on the grounds of appeal and implored this Court finds them to have merit and releases him.

Having seen the rival submissions of the parties, albeit in the absence of the 1st appellant, I am of the view that a quick revisit of the law in respect of armed robbery to be clear of what ingredients would constitute armed robbery would be useful in determination of this matter. The Court of Appeal of Tanzania has already spoken itself as to what constitutes the offence of armed robbery. I will let the Court of Appeal speak for itself as stated

Michael Joseph vs. Republic [1995] TLR 278 (CA) the Court held:

- (i) *"Though there is no express and specific definition of what constitutes 'armed robbery' it is clear that if a dangerous or offensive weapon or instrument is used in the course of a robbery such constitutes armed robbery in terms of the law as amended by Act No. 10 of 1989.*
- (ii) *Weapons are not confined to firearms only, other types of weapons such as knives are also included;*
- (iii) *The offence involving the appellant was armed robbery."*

Now, in a very recent decision of the Court of Appeal **Fikiri Joseph Pantaleo @ Ustadhi v Republic**, Criminal Appeal No. 323 of 2015 (unreported) the Court stated as follows:

"... For purpose of instant appeal, the main element constituting offence of armed robbery contrary to section 287A are first, stealing. The second element is using firearm to threaten in order to facilitate the stealing ... third the use of firearm or robbery instrument must be directed against the person."

With that clear position of the law in respect of what constitutes armed robbery, I now undertake to decide the merits or demerits of this appeal. Though Mr. Peres chose to submit collectively on the grounds of appeal save for the 6th ground of appeal, on my side, I will decide in a different sequence.

I will begin with the 8th ground of appeal in which the appellants complain against the judgment of the trial court to the effect that the trial magistrate erred in law when he failed totally in this case because even this judgment has a lot of errors for example this judgment has no magistrate signature, no resident magistrate seal and date which may testify as true copy.

Without much ado, I have anxiously gone through the trial court's record I have been unable to see that the magistrate did not sign the judgment, no resident magistrate seal nor date which may testify as true copy. The judgment of the trial court is in accordance with the prescribed law which governs judgment writing. This ground of appeal is found to have no merits. It fails.

The next grounds of appeal for my consideration and determination are the 2nd and 7th. In these ground of appeal, the appellants lament bitterly that the trial Court massive and curably gone astray in law and fact to convict and sentence the appellants relying on prosecution evidence without observing that this case lacked proper investigation as no caution statement tendered before the court even the police officer who issued the said motorcycle (exhibit P6) and investigate this case was not called at trial court to testify as witness. Further there is no forensic evidence to prove armed robbery.

Mr. Peres for the Respondent was not persuaded with these grounds of appeal. So does this Court. It is trite law that every witness is entitled to credence as decided in the case of **Goodluck Kyando v Republic**, [2006]

TLR 363 CAT. The trial court believed the prosecution witnesses and convicted the appellants with the offence. I see no any fault for the lack of caution statements of the appellants in the evidence of the prosecution. There is also nothing wrong for the investigator to fail to testify in court. In any way the complaints in the 2nd and 7th grounds of appeal are not among the ingredients that are required to be proved as per the above-mentioned decisions of the Court of Appeal. As such the 2nd and 7th grounds of appeal are unmerited. They crumble to the ground.

The next ground of appeal for my consideration and determination is the 5th. In this ground, it was the complaint of the appellants that the trial court had incurably gone astray on point of law and fact to convict appellants based on prosecution side while failed to note out that they failed to testify in details the special marks of the property tendered before the court in order to make the Court to test satisfy in all spheres.

I have duly considered this ground of appeal, I am of a firm view the same is misconceived because the prosecution witnesses testified in respect of its registration number and that it was the very motorcycle that was robbed under a gun point from PW1 by the 1st appellant. The appellants did not

cross-examine anything regarding to any special marks and did not claim that the motorcycle was their property or the property of anyone of them. In the circumstances they are estopped from raising the claim in this Court. I dismiss the 5th ground of appeal for being lacking in merit.

I revert to consider the 6th ground of appeal. It was the complaint of the appellants in this ground that the learned trial Magistrate erred in law by convicting and sentencing the appellants relying on PW3, PW4, PW5 while he failed to observe that they failed to testify before the Court on how the appellants managed to rob the said motorcycle even the identification parade was not conducted in order to prove if the appellants are the ones who found with the said motorcycle as alleged by the prosecution.

On the 6th ground of appeal Mr. Peres, invoked the doctrine of recent possession to answer it. He explained, it is that the 1st and 2nd appellants were in possession of the robbed property. They did not claim it was their lawful property. He referred me to the case of **Joseph Mkumbwa & another V. Republic**, Criminal Appeal No. 94/2007 Court of Appeal of Tanzania decision of 2011 at page 7 (unreported). Mr. Peres rested his submission by contending that they proved all the ingredients stated by the

Court of Appeal. He thus prayed the appeal be dismissed as all the grounds of appeal are unmerited.

I accept the argument advanced by Mr. Peres in respect of the 6th ground of appeal. Indeed, the motorcycle was recently robbed. It is the appellants who were found in possession of the money which in the circumstances are the result of the illegal sale of the motorcycle the subject of this case. The appellants were identified by the witnesses. I dismiss the ground of appeal and state that in the circumstances of this case, there was no need of an identification parade.

Next, I consider and determine the 1st, 3rd and 4th ground of appeal together which can be summarized thus, the respondent's case was not proved beyond reasonable doubt because the respondent's evidence was contradictory and the trial court shifted the burden of proof to the appellants to prove their innocence.

In his submissions, Mr. Peres resisted these grounds of appeal. In my view, properly so, because I have not seen any contradiction on the respondent's evidence worthy the attention of this Court. It is trite law that for

contradictions to crush the respondent's case, the same ought to go to the root of the case. See **Mohamed Said Matula vs. R. [1995] TLR 3 (CA)** where it was held:

"(i) Where the testimonies by witnesses contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and to resolve them where possible; else the court has to decide whether the inconsistencies and contradictions are only minor, or whether they go to the root of the matter."

The appellants did not try to elaborate the contradictions they claim to exist in the prosecution case. They explained neither any ambiguity nor susceptibility of the prosecution case. As rightly submitted by Mr. Peres the appellants were convicted based on identification by witnesses where they sold the motorcycle and a doctrine of recent possession. These grounds of appeal under my consideration here, are unmerited and they are dismissed.

The last ground of appeal for my decision is the 9th ground of appeal in which they complain that the trial magistrate failed to observe section 388(1) of

the Criminal Procedure Act, Cap 20 R.E. 2019 for the trial, conviction, judgment and sentence were full of errors.

Without much ado, I observe that the referred section by the appellant is in favour of the respondent in the sense that if there are minor errors, then conviction and sentence cannot be reversed unless the errors have the effect of occasioning injustice. Finally, I do not see any error in respect of the proceedings and judgment of the trial court which may occasion injustice. For that reason, I dismiss the 9th ground of appeal.

In fine, I dismiss the appeal for being wanting in merit. Conviction and sentence are accordingly upheld.

It is so ordered.

DATED at SUMBAWANGA this 09th day of August 2022.



J. F. NKWABI
JUDGE