

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(SUMBAWANGA DISTRICT REGISTRY)

AT SUMBAWANGA

DC. CRIMINAL APPEAL NO. 104 OF 2021

MEDIUS S/O DODIUS APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

(Appeal from the decision of the District Court of Mpanda at Mpanda)

(E. L. Ngigwana, RM)

Dated 28th day of August 2019

In

Criminal Case No. 72 of 2019

JUDGMENT

26/07 & 29/08/2022

NKWABI, J.:

With the oral testimony of seven prosecution witnesses and several exhibits, the trial court was satisfied the respondent had proved the case beyond reasonable doubt. It dismissed the defence of the appellant that he did not commit robbery offence. The appellant was convicted as charged and sentenced to serve ten years imprisonment.

The offence was said to have happened at 10:00 hrs on 22nd day of February, 2019. The appellant hired the victim of the offence for motorcycle transport. They agreed the service payment is T.shs 4000/=. On the way, the appellant asked the victim to stop so that the appellant would communicate to the appellant's father. The appellant's attempt to communicate physically failed. He asked to use the phone of the victim as his phone had no credit. He was given the phone. Meanwhile the appellant attacked the victim by strangling him on the neck until he lost consciousness.

After the victim gained consciousness, he reported the matter to the police where he submitted a mobile sim card which was used to arrest the appellant. The robbed motor cycle too was seized in possession of the appellant. The appellant was charged. The trial ensued where he was found guilty, convicted as charged and sentenced as above indicated.

To maintain his innocence, the appellant lodged this appeal having six grounds of appeal which are:

1. That, the trial Court erred in law point and fact by convicting and sentence the appellant for the case which the prosecution failed to prove the charge against the appellant/accused.
2. That, the trial Court erred in law point and fact to convict and sentence the appellant relying on the evidence which adduced by PW1 up to PW7 without taking into account the appellant were not identified at the scene of the crime and later they managed to identify the appellant at the police station after being arrested by the police officer.
3. That, the trial Magistrate misdirected himself by passing the sentence to the appellant without considering the phone line which used to trace the appellant were not tendered before the Court in order to make the Court to certify if the said line was belongs to the appellant as required by law.
4. That, the trial Magistrate Court misdirected himself by convicting and sentence the appellant relying on the caution statement tendered before the Court while there was a contradiction between the one who records the caution statement of the appellant between PW1 and PW7 the something which brings doubt in the eye of law.

5. That, the trial Court erred in both conviction and sentence for the appellant without taking into account that the Hiace driver did not tender the copy of ticket in order to authenticate if the appellant/accused was a passenger in his Hiace and indeed drawn a null conviction for the appellant.
6. That the defence of the appellant before the Court was not considered while I did not commit the serious offence as claimed by crown prosecution side.

Because of the above grounds of appeal, the appellant prayed I allow the appeal, the conviction and sentence imposed on him be quashed and set the appellant free from prison. The respondent resisted this appeal.

Oral submissions were received during the hearing of this appeal. The appellant appeared in person without legal representation while the respondent was fitly represented by Ms. Marietha Maguta, learned State Attorney.

To further justify his appeal the appellant pleaded with this Court to adopt the grounds of appeal as his submissions.

Maintaining the position of the Respondent, Ms. Maguta argued, in respect of the 1st ground of appeal, that the evidence of the victim is very clear that the appellant strangled the victim, a mobile phone line (sim) was recovered from the scene, the sim being of the appellant. She added that PW5 assisted in the arrest of the appellant who was arrested in possession of the motorcycle.

It was also the contention of Ms. Maguta that the appellant confessed the offence. She also pointed out that the arrest of the appellant was witnessed by other persons. She urged me to dismiss the 1st ground of appeal.

In regard to the 2nd ground of appeal, the learned State Attorney asserted that the claim on 2nd ground of appeal that the appellant was not identified is not true since the victim observed the appellant for sufficient time and was found in possession of the motorcycle. Ms. Maguta was of the firm position that the ground of appeal be dismissed.

Elaborating the respondent's stance on the 3rd ground of appeal, Ms. Maguta admitted that the sim card was not tendered but was quick to explain that the sim card is not the only evidence. There is evidence on recent possession and confession statement. The ground of appeal is meritless, Ms. Maguta stressed.

As to the 4th ground of appeal in which the appellant claims that the respondent's witnesses contradicted each other, Ms. Maguta retorted that the same is false and prayed it be dismissed.

Turning to the 5th ground of appeal that the ticket which he got for the Hiace, Ms. Maguta was of the contrary view that there were other pieces of evidence that proved the charge.

Lastly on 6th ground of appeal to the effect that his defence was not considered Ms. Maguta maintained that that is not the case and referred me to page 8 of the judgment of the trial Court. She prayed the ground of appeal be dismissed and ultimately, the entire appeal be dismissed.

When given an opportunity to rejoin his submission in chief, the Appellant insisted on his grounds of appeal. He then prayed that this Court quashes the conviction and sets aside the sentence.

To determine this appeal, I start with the 6th ground of appeal which states, that the defence of the appellant before the trial Court was not considered while the appellant did not commit the serious offence as claimed by crown prosecution side.

In submission in reply, Ms. Maguta rejected this ground of appeal and referred this court to page 8 of the judgment of the trial court urging this Court to decided that the defence of the appellant was duly considered by the trial court.

I agree with MS. Maguta, the learned trial Magistrate was alive with the requirement of considering the evidence of both sides and actually cited the case of **Bahati Kabuje v. Republic**, Criminal Appeal No. 252 of 2014 the decision of the Court of Appeal of Tanzania. Actually, the defence of the appellant was considered at page 8 of the judgment of the trial court and

found to have nothing in substance. Even if it had not been considered, currently failure to consider the defence of an accused person by the trial court is not fatal. See **Jafari Musa v. DPP**, Criminal Appeal No. 234 of 2019, CAT (unreported) where it was stated that:

"We have considered this ground and the arguments thereon. We wish to begin by appreciating that, in the past, failure to consider a defence case used to be fatal irregularity. However, with the wake of progressive jurisprudence brought by case law, the position has changed. The position as it is now, where the defence has not been considered by the courts below, this Court is entitled to step into the shoes of the first appellate court to consider the defence case and come up with its own conclusion."

As such I hold that the 6th ground of appeal is unmerited, I dismiss it.

I now consider the 4th ground of appeal in which the appellant complains that the trial Magistrate Court misdirected himself by convicting and sentence the appellant relying on the caution statement tendered before the

Court while there was a contradiction between the one who records the caution statement of the appellant between PW1 and PW7 the something which brings doubt in the eye of law.

On this ground of appeal, the learned State Attorney rejected the same saying it is false and prayed it be dismissed. I have duly considered this ground of appeal. I think the same does not assist the appellant. This is because, actually, he objected the admission of the same which was overruled by the trial court. The trial court admitted that caution statement. In law, once a caution statement is repudiated or retracted, a court has to warn itself to use it as the basis of conviction. But in this case, there were other pieces of evidence. So, it appears to me that the caution statement acted just as corroboration to evidence that was already sufficient to convict the appellant. Thus, I decide that the 4th ground of appeal is baseless, it fails.

I now revert to consider the 3rd ground of appeal in which the appellant laments that the trial Magistrate misdirected himself by passing the sentence to the appellant without considering the phone line which used to trace the

appellant were not tendered before the Court in order to make the Court to certify if the said line was belongs to the appellant as required by law.

The submission of Ms. Maguta on the 3rd ground of appeal was that indeed the sim card was not tendered but explained that the sim card is not the only evidence. There is evidence on recent possession and confession statement. The ground of appeal is meritless, Ms. Maguta stressed.

I endorse the submission of Ms. Maguta on the 3rd ground of appeal and proceed to dismiss it. The fate of the 3rd ground of appeal befalls the 5th ground of appeal which complains about the failure to tender a hiace ticket. For avoidance of doubt the 5th ground of appeal is also dismissed.

Next, I determine the 2nd justification of appeal which states that, the trial Court erred in law point and fact to convict and sentence the appellant relying on the evidence which adduced by PW1 up to PW7 without taking into account the appellant were not identified at the scene of the crime and later they managed to identify the appellant at the police station after being arrested by the police officer.

On the 2nd ground of appeal, the learned State Attorney contended that the claim on 2nd ground of appeal that he was not identified is not true since the victim observed the appellant for sufficient time and was found in possession of the motorcycle.

On my evaluation of the evidence there was clear evidence of recent possession. The motorcycle was seized on the day when it was robbed. For that reason, the 2nd ground of appeal is unmerited, it crumbles to the ground.

Lastly, I go back to discuss the 1st ground of appeal which appears to be the major one. In the 1st ground of appeal, the appellant complains that, the trial Court erred in law point and fact by convicting and sentence the appellant for the case which the prosecution failed to prove the charge against the appellant/accused.

Submitting in reply to this ground of appeal Ms. Maguta vibrantly contended that the evidence of the victim is very clear that the appellant strangled the victim, a mobile phone line (sim) was recovered from the scene, the sim

being of the appellant. She added that PW5 assisted in the arrest of the appellant who was arrested in possession of the motorcycle.

It was also the contention of Ms. Maguta that the appellant confessed the offence. The arrest of the appellant was witnessed by other persons. She urged me to dismiss the 1st ground of appeal.

I totally agree with Ms. Maguta. The prosecution led clear evidence against the appellant. The doctrine of recent possession applies squarely against the appellant. What was stated by the Court of Appeal of Tanzania in **Shamir John v. Republic**, Criminal Appeal no. 166 of 2004 (CAT) at Mwanza (Unreported) is very relevant against the appellant in this Appeal, the Court said:

"... The appellant never challenged this evidence at all in his defence. Indeed their evidence which was not disputed by the appellant ... The appellant has not attempted to show why these independent witnesses chose to align themselves with PW2 Zacharia to victimize

him. We think the appellant was drawing a red herring in his defence."

It is for those reasons that, I dismiss this appeal for I find that it has no merits. Conviction and sentence by the trial Court are upheld.

It is so ordered.

DATED at **SUMBAWANGA** this 29th day of August 2022.



A handwritten signature in blue ink, appearing to read "J. F. Nkwabi".

J. F. NKWABI
JUDGE