

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO. 127 OF 2021

***(Original Criminal Case No. 563 of 2019 of the District Court of Tarime
District at Tarime)***

BETWEEN

BABU S/O CHAGUCHE MASAMA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

A.A. MBAGWA, J.

This appeal stems from the judgment of the District Court of Tarime in Criminal Case No.563 of 2019. The appellant, Babu Changuche Masama was arraigned before the trial court on a charge of armed robbery contrary to section 287A of the Penal Code as amended by Act No. 3 of 2011.

It was alleged that the appellant on 21st day of November, 2019 at Bomani street within the township and district of Tarime in Mara region stole one motorcycle with Registration No. MC 574 BNM with chassis No. LBRSPJB52G9041217 make SANLG worth Tshs. 1,500,000/=, the property

of Steven Marwa and immediately before stealing used a club and knife to assault one Maginga Francis in order to take the said motorcycle.

The appellant pleaded not guilty to the charge as such, the matter necessarily proceeded through a full trial.

In a bid to prove the case, the prosecution called four witnesses namely, Maginga Francis (PW1), Steven Mwikwabe Marwa (PW2), F.250 D/CPL Simon (PW3) and Theresia Boah (PW4). In addition, three exhibits were produced by the prosecution to wit, MC Registration Card (P1), Caution Statement (P2) and Extra Judicial Statement (P3) though it was inadvertently marked (P2). In defence, the appellant stood alone witness and did not tender any exhibit.

The prosecution account was that Maginga Francis (PW1) was a bodaboda rider. He was using a motorcycle with MC 574 BNM with chassis No. LBRSPJB52G9041217 make SANLG, the property of Steven Mwikwabe Marwa (PW2). On 21st day of November, 2019 at night, PW1, while riding his motorcycle at Gamasara area met the appellant and his confederate one Juma Kiduku. The duo stopped him and hired him to take them to Bomani area within Tarime township at the fare of Tanzanian shillings three thousand

(3,000/=). On reaching at Bomani, the appellant and his ally turned against him. The said Juma Kiduku hit him on his head with a club while the appellant cut him on his head with a machete. Then they robbed him his motorcycle and disappeared. PW1 knew his assailants very well prior to the incident in that they were bodaboda riders who used to park at Bomani area.

The victim (PW1) was found at the scene of crime by Samaritans who took him to police and thereafter to hospital after obtaining a PF3.

Following the incident report at police, the investigation was mounted. As such, on 25th day of November, 2019, the appellant was arrested by civilians and submitted to police at around 19:00hrs. Hardly had he been surrendered to authority when PW3 F.250 D/CPL Simon recorded his statement (exhibit P2). According to PW3, the appellant freely confessed to have committed the offence. Having admitted the offence, the appellant was taken to justice of peace one Theresia Boah (PW4) who also recorded him an extra judicial statement (exhibit P3). In addition, the prosecution called PW2 Steven Marwa, the owner of the stolen motorcycle. PW2 told the court that he had entrusted PW1 his motorcycle. He tendered a motorcycle registration card (P1).

In defence, the appellant denied the accusations. He stated that on the alleged fateful day i.e., 21/11/2019 he was at Mugumu within Serengeti district as he went there to collect some crops which he had been sent by his mother. He continued that he returned home on 23rd November, 2019 and on 25th November, 2019 he was arrested. The thrust of the appellant's defence was alibi meaning that he was not at the scene of crime when the alleged offence was committed.

In the end, the trial magistrate was satisfied that the prosecution case was proved beyond reasonable doubt. She thus found the appellant guilty and convicted him of armed robbery. Consequently, the appellant was sentenced to thirty (30) year imprisonment.

Aggrieved by both conviction and sentence, the appellant filed the present appeal to assail the trial court decision. His petition of appeal contained numerous complaints which can be reduced into the following grounds;

1. That the trial magistrate erred in law and facts for not accepting his defence of *alibi*
2. That the trial magistrate erred in law and fact to convict the appellant despite weak identification evidence

3. That the trial magistrate erred in law and fact to believe the testimonies of PW1, PW2 and PW3
4. That the trial magistrate erred in law and fact to rely on the caution statement which was not voluntarily obtained.
5. That the trial magistrate erred in law and facts for conducting trial without the appellant having legal representation

When this appeal was called on for hearing, the appellant appeared in person from prison via teleconference whereas the respondent, Republic had representation of Nimrod Byamungu, learned State Attorney.

The appellant, in his brief submission, prayed the court to consider his grounds of appeal and eventually set him free.

Mr. Nimrod Byamungu, on his part, strongly resisted the appeal. He was in full support of conviction and sentence meted out by the trial court.

Submitting on defence of alibi, Byamungu said that the trial magistrate at page 7 and 8 of the judgment considered appellant's defence and finally discounted it. Mr. Byamungu supported the learned magistrate on the ground that the appellant failed to lodge a notice in advance and more so he did not adduce any evidence to support his contention. The learned State

Attorney continued that PW1 testified the way he identified the appellant at the scene. He referred this court to the cases of **Masudi Amlima vs Republic** [1989] T.L.R 25 and **Edgar Kayumba vs DPP**, Criminal Appeal No. 498 of 2017, CAT at Mbeya page 16 and urged the court to dismiss the complaint in light of the above authority.

Regarding identification evidence, Mr. Byamungu argued that PW1 identified him two times, first at Gamasara when the the victim (PW1) carried the appellant on his motorcycle up to Bomani area where there was enough light. Further, PW1 knew the appellant before as appellant was once bodaboda driver, a fact was also established through a caution statement (exhibit PE2).

With respect to the attack against the evidence of PW1, PW2 and PW3, the learned State Attorney submitted that their testimonies had no contradictions nor were they shaken during cross examination. Further, throughout the record, nowhere it was suggested that the witnesses had grudges with the appellant which possibly could make them concoct the case. He concluded that every witness is entitled to credence and his testimony must be believed unless there are good reasons to disbelieve

them. According to Mr. Byamungu, there are no good reasons on record to discredit their evidence.

On complaints against the caution statement (exhibit PE2), Mr. Byamungu replied that PW3 who recorded the caution statement clearly told the court that the appellant freely made it and signed the statement to express his voluntariness. The counsel argued that PW3 explained the circumstances under which he recorded the statement and during its tendering, the appellant did not object it. Mr. Byamungu was opined that the complaint is an afterthought. To bolster his argument, Mr. Byamungu sought reliance on the decision of the Court of Appeal in **Issa James vs the Republic**, Criminal Appeal No. 110 of 2020 CAT at Musoma at page 17 where the Court held that where there was no objection during tendering, it is taken that the statement was given voluntarily.

Concerning appellant's legal representation, Mr. Byamungu submitted that there is nowhere the appellant was denied legal representation. He expounded that by virtue of his offence, the appellant had no statutory right of legal representation. Besides, the learned State Attorney said that the appellant never sought legal assistance and got denied. He cited the case

Makenji Kamula vs the Republic, Criminal Appeal No. 30 of 2018, CAT at Mwanza at page 7 to buttress his position.

I have had an occasion to scan the submissions and ground of appeal. I also thoroughly went through the trial court record. The relevant issue for determination of the appeal is whether the conviction entered and sentence meted out by the trial court were deserving.

There is direct evidence from the victim (PW1) that it is the appellant and one Juma Kiduku who hired him at Gamasara and subsequently robbed him the motorcycle at Bomani Bakery area after they harmed him with club and machete. Further, PW1 said that he knew the appellant well before the incident as he was bodaboda rider and used to park at Bomani area. More so, PW1 said that there was electricity light from Gamasara petrol station which enabled him properly identify his culprits. The appellant did not specifically dispute these facts either during cross examination or in defence. It is a settled position of law that an important fact which is not cross examined is taken to have been admitted and the adverse party is estopped from asking the court to disbelieve what the witness said. See the cases of **Nyerere Nyague vs the Republic**, Criminal Appeal No. 67 of 2010, **Bomu Mohamedi vs Hamisi Amiri**, Civil Appeal No. 99 of 2018, CAT at Tanga

and **Athanas Ngomai vs the Republic**, Criminal Appeal No. 57 of 2018, CAT at Dar es Salaam.

PW1's evidence was corroborated by F.250 D/CPL Simon (PW3) and Theresia Boah (PW4) through caution statement (P2) and extra judicial statement (P3). In these statements, the appellant clearly admitted commission of the offence he was charged and later convicted of.

It is noteworthy that the two statements were admitted in evidence without objection. The appellant came to retract them during defence when the prosecution had no longer opportunity to counter his allegations. His retraction or repudiation cannot be accepted in law. It is trite law that if an accused person intends to object to the admissibility of a statement or confession he must do so before it is admitted and not during cross-examination or during defence. The essence is to enable the trial court to conduct inquiry or trial within trial in order to determine the voluntariness or otherwise. To raise it at a later stage is tantamount to an afterthought and cannot be accepted. See the case of **Emmanuel Lohay and another vs the Republic**, Criminal Appeal No. 278 of 2010, CAT at Arusha and **Shihoze Semi and Another vs Republic** (1992) TLR 330.

In light of the above authorities, the complaints by the appellant regarding caution statement and extra judicial statement are devoid of merits. I therefore proceed to dismiss them.

Further, the appellant lamented for not having legal representation during trial. First of all, armed robbery is not among the offences for which legal representation is statutorily provided. See **Makenji Kamula vs the Republic (supra)**. Moreso, throughout the record, there is nowhere the appellant indicated his need for legal representation. As such this ground is also baseless.

The appellant further faulted the trial magistrate on the ground that she did not consider his defence of alibi. In reply, Mr. Byamungu said that the trial magistrate considered the defence but found it wanting. I have gone through the judgment of the trial court in particular at page 7 and 8. In fact, I agree with the appellant that the trial magistrate did not consider his defence of alibi. The magistrate said at page 7;

'In another way accused person defend himself that he was not around when the offence committed by raising the defence of alibi, but he failed to raise the defence of alibi as the law required. The

defence of alibi has to be raised before the defence opened so that the other part could get informed. If the accused person did not raise this before the defence of alibi cannot stand. The accused person was supposed to explain before where he was at the time of the crime, but he stated after that he was at Mugumu Serengeti District'

It is true that appellant did not lodge a notice of alibi before closure of the prosecution case as required by section 194 of the Criminal Procedure Act. Nonetheless, it is worth noting that the trial court was not exempted from considering it. See the cases of **Charles Samson vs Republic** [1990] TLR 39 and **Siza Patrice vs the Republic**, Criminal Appeal No. 19 of 2010, CAT at Mwanza.

In view of the above cited authorities and considering the fact that this is the first appellate court, I decided to re-evaluate the evidence including the defence of alibi but I did not find merits in appellant's alibi. The appellant did not bother to establish it apart from his mere verbals. The appellant's defence did not raise reasonable doubt in the prosecution case.

Having reassessed the whole evidence and in light of the above deliberations, I am of unfeigned findings that the learned trial magistrate rightly convicted the appellant.

In the event, I find this appeal devoid of merits and consequently, I dismiss it. The conviction and sentence imposed by the trial court are upheld.

It is so ordered

Right of appeal is explained.




A.A. Mbagwa

JUDGE

19/10/2022