

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

**IN THE SUB-REGISTRY OF MWANZA**

**AT MWANZA**

**CRIMINAL APPEAL NO. 29 OF 2022**

*(Arising from District Court of Magu at Magu in Criminal Case No. 123 of 2021 before  
Hon. Sumaye, DRM)*

**SIMON YOHANA ----- APPELLANT**

**VERSUS**

**THE REPUBLIC----- RESPONDENT**

**JUDGEMENT**

*31<sup>st</sup> October & 29<sup>th</sup> November, 2022*

***Kahyoza, J.:***

The appellant Simon Yohana was charged with the offence of armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E 2019] (the Penal Code). It was alleged that on 23<sup>th</sup> day of August 2021 at 14:00 hrs at Kisesa Village within Magu District in Mwanza Region that **Simon Yohana**, the appellant did steal one motorcycle make SALG with registered No. T 503 CGJ valued at Tsh. 2,400,000/=, one cellular phone make Techno valued at Tsh. 40,000/= and cash money Tsh. 24,000/=, the property of one Yohana s/o Thomas and immediately before or after

stealing, the appellant did use knife to obtain or retain the stolen properties.

The appellant pleaded not guilty. After full trial, the trial court ruled out that, the prosecution failed to prove the offence of armed robbery but proved the offence of theft contrary to section 258(1) and 265 of the Penal Code. It then convicted the appellant and sentenced him to 5 years' imprisonment for offence of theft.

Aggrieved, the appellant appealed to this Court raising 7 grounds of appeal as reproduced hereunder;

1. That, the trial Senior Resident Magistrate glossily erred in law and in fact in not finding that, the offence of stealing was not proved to the required standard as the evidence adduced fell short of proving an essential element of stealing namely fraudulently and without claim of right.
2. That, the trial Senior Resident Magistrate glossily erred in law and in fact when he failed to scrutinize and properly evaluate the evidence on records hence arrived at erroneous decision.
3. That, the trial Senior Resident Magistrate glossily erred in law and in fact when he failed to scrutinize and properly to consider that the charge sheet together with its particulars and contents were defective on the face of the law.
4. That, the trial Senior Resident Magistrate glossily erred in law and in fact when he failed to scrutinize and properly to consider

that there was a variance between the charge sheet and evidence on records.

5. That, the trial Senior Resident Magistrate glossily erred in law and in fact to convict and sentence the appellant without stating the reasons of its decision.
6. That, the trial Senior Resident Magistrate glossily erred in law and in fact to convict and sentence the appellant basing on the poor judgment whereby he failed even to explain clause of appeal being a right to appeal as legal requirement in any judgement of the court.
7. That, the trial Senior Resident Magistrate glossily erred in law and in fact to convict and sentence the appellant basing on the poor procedure which establish the chain of custody of the exhibits submitted to the court as evidence.

The appellant prays for this court to set aside the conviction and sentence.

This being first appeal, I have the privilege to consider the evidence given at the trial, put it into scrutiny or re-evaluate and if desirable to make my own findings. (See the case of **Bonifas Fidelis @ Abel vs Republic**, Criminal Appeal No. 301 of 2014). To discharge my duty, I took trouble to re-visit the evidence before the trial court.

The prosecution side presented a total of 5 witnesses who testified to the effect that; on 23/8/2021 at 12:00 hrs, the appellant hired Yohana Thomas (**Pw1**), a motorcyclist to take him to Kasa from Kisesa. They agreed for a fare of Tsh. 4000/= for go and return trips. On the way, the

appellant asked to go to the shop and came back with a bag. As they reached the agreed destination, the appellant asked to be taken to Kibasa as he wanted to purchase a farm. The appellant offered to add Tsh. 6000/= as the fare price.

As they reached the destination, the appellant went to inspect the farm followed by Yohana Thomas (**Pw1**). They then sat under the tree waiting for another person who promised to be there shortly through an appellant phone call. As they were waiting, the appellant gave jambo juice to Yohana Thomas (**Pw1**), who started to feel unfordable and that was when the appellant took out the knife with blue handle. Yohana Thomas (**Pw1**) was frightened and as he turned back, he fell down unconscious. He woke up at Kisesa Health centre without his belongings which are motorcycle, his mobile phone Techno make, and cash money Tsh. 24,000/=. PW1 tendered motorcycle registration card as Exhibit P1 and the purchase contract as Exhibit P2.

Sosthenes Anthoney (**Pw2**), who is Yohana Thomas (**Pw1**)'s relative, testified to have been informed of Yohana Thomas (**Pw1**) presence at Kisesa Health Centre on 24<sup>th</sup> August 2021. He went to Kisesa Health Centre where he found Yohana Thomas (**Pw1**) with his wife. Yohana Thomas (**Pw1**) was treated at Kisesa Health Centre as testified by Paulo Kisam (**Pw4**), a medical doctor who tendered the PF3 which was

admitted as Exhibit P4. F 7011D/CPL Paulo (**Pw3**), a police officer from Criminal Investigation Department, transferred the appellant from Sengerema where the appellant was arrested, to the office of RCO Mwanza. F 7011D/CPL Paulo (**Pw3**) took the appellant's caution statement, where the appellant admitted to the offence of armed robbery. The appellant's caution statement was admitted as Exhibit P3.

On the part of the defence, Simon Yohana, (**Dw1**), the appellant testified on oath narrating a different story that he was on Safari to Geita for attending a ceremony and he remained there from 21/8/2021 to 28/8/2021 when he decided to return to Buhongwa. He was arrested at Sengerema while on transit. He was beaten and taken to Nyakalilo police station. His statement was taken on next day and the identification parade was conducted and he was not identified. He was beaten and accused of stealing a motorcycle. He was transferred to Mwanza Central police station. He admitted to confess to commit the offence to police due to the beating. He was beaten and interrogated at Nyakato Police station.

On 22/0/2021 he deposed that police took him to Magu Police station and his statement was recorded and he was taken to court. Stephano Yohana (**Dw2**) testified in support of the appellant evidence that he was not at the place of offence. He deposed that he took the appellant to the village office for introduction. Boniphace Jumanne

Ngwesa (**Dw3**) testified that on 21/8/2022 Stephano Yohana (**Dw2**) introduced the appellant as his brother to the family ceremony. That the event was held on 24/8/2021 and the appellant was there and he left on 25/8/2019. And that was all from the evidence given in the trial court.

In arguing this appeal, the appellant was unrepresented while, the respondent enjoyed the services of Ms. Tibilengwa, learned state attorney. The appeal was argued orally in which the appellant had nothing to add apart from his grounds of appeal.

Responding to the grounds of appeal presented before the court, Ms Tibilengwa started submitting on the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal. She stated that, the appellant's complaint that the prosecution did not prove the offence of theft did not tally with the prosecution evidence. She submitted that, the prosecution tendered evidence that the accused used knife to steal from the complainant. That Sosthenes Anthoney (**Pw2**) proved that Yohana Thomas (**Pw1**) was taken to Kisesa Health centre where he was admitted for three days. That PW3 interrogated the accused person whose statement was admitted as exhibit and the accused person admitted to steal the motorcycle. That there was evidence that the accused was properly identified as Yohana Thomas (**Pw1**) spent enough time at day time with the accused and so he properly identified the accused person.

On the 5<sup>th</sup> ground of appeal as for the failure of trial court to give reasons for its decision, Ms. Tibilengwa submitted that, the trial court judgment showed that the evidence proved the offence of theft and not armed robbery in which the appellant was convicted with the offence of theft. She further submitted that, the trial court did not consider the evidence that the appellant used a knife to threaten the victim. Ms. Tibilengwa went further to pray this court to find the appellant guilty of the offence of armed robbery and sentence him accordingly.

On 6<sup>th</sup> ground of appeal, Ms. Tibilengwa submitted that, the trial courts record shows that the trial court explained the right to appeal to the accused person.

On 7<sup>th</sup> ground of appeal that, the chain of custody of exhibit was not observed, Ms. Tibilengwa submitted that, the ground is baseless as given nature of the exhibit tendered there was no exhibit which would be affected by change of hands as the exhibit tendered was motorcycle Registration card and accused caution statement which were received without any objection.

From the parties' submission and the grounds of appeal before this court, the question for determination is whether the appeal is merited.

As submitted by the respondent's counsel, I will determine the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal as to whether the prosecution proved the offence of theft beyond reasonable doubts, then the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> grounds will be determined separately.

The respondents counsel, submitted that, the prosecution proved the offence of theft beyond reasonable doubt but that, the prosecution proved that the appellant committed the offence of armed robbery as he threatened Yohana Thomas (**Pw1**) with a knife and stole his phone and motor bike. She concluded that the offence of armed robbery contrary to section 287A of the Penal Code was proved to the required standard and prayed this court should find the appellant guilty of the offence and sentence him accordingly.

From the evidence gathered in the trial court, Yohana Thomas (**Pw1**) was the key and eye witness as Yohana Thomas (**Pw1**) testified to have been hired by the appellant. The record show that Yohana Thomas (**Pw1**) testified to have identified the accused person since the incident took place at 12:00 hrs. As the key and the only eye witness, PW1 evidence must be subjected to a test as to whether he was able to identify the accused properly. It is trite law that, the evidence of visual identification is of the weakest evidence to rely on as it must be watertight



and free from mistaken identity as it was held in the case of **Waziri Amani vs R.** [1980] TLR 250-

*'The evidence of visual identification is of the weakest and most unreliable. It follows therefore, that no courts should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court is fully satisfied that the evidence before it is water tight'*

It is on record that the offence was committed during the day time and Yohana Thomas (**Pw1**), the victim and the appellant spent long time together to enable the victim to properly identify the appellant. I am of therefore, of the opinion that, the circumstance in our case made it easier to Yohana Thomas (**Pw1**) to identify and his evidence that he identified the appellant was credible and reliable. Reaching to that conclusion, I considered the appellant's defence of *alibi* and found it without merit. The appellant raised the defence of *alibi* while defending himself. The appellant had missed the plane. It is settled that the defence of *alibi* given after closure of the prosecution is considered as an afterthought and it is upon the trial court to decide the weight to attach that defence.

The Court of Appeal held in **Hamisi Barakari Lambani V. R.**, Cr. Appeal No. 108/2012 that-

*The second issue for our consideration is the defence of alibi. The law on this subject is well settled. First, the law requires a person*

*who intends to rely on the defence of **alibi** to give notice of that intention before the hearing of the case (5. 194(4) of the Criminal Procedure Act, Cap 20). If the said notice cannot be given at that early stage, the said person is under obligation, then, to furnish the prosecution with particulars at any time before the prosecution closes its case. Should the accused person raise the alibi much later, later than what is required under subsections (4) and (5) above, as was the case herein, the court may, in its discretion, accord no weight of any kind to the defence (5.194 (6)).*

I wish to conclude that appellant's defence given after the prosecution closed its case had no weight and it was an afterthought. While dismissing the defence of *alibi* as an afterthought, I noted the fact that the appellant and his witness Dw3 gave contradicting evidence as to when the appellant left the village after the ceremony. The appellant deposed that he left the village on 28.8.2021 and his witness deposed that he left the village on 25.8.2021. The defence of *alibi* did not shake the prosecution identification evidence. Thus, the prosecution eliminated all probabilities of mistaken identity.

In addition, the appellant's caution statement, Exhibit P3, which was admitted without any objection corroborated Yohana Thomas (**Pw1**)'s evidence. It is a principle of law that, the best evidence is from the accused who admits his guilty as it was stated in the case of **Jacob Asegelile**

**Kakune vs R.**, Criminal Appeal No. 178 of 2017 (unreported). From the appellant's caution statement, the appellant could narrate the events on how he robbed Yohana Thomas (**Pw1**) and took his motor vehicle, and therefore Yohana Thomas (**Pw1**) evidence was clearly corroborated by the appellant's caution statement that indeed the appellant robbed Yohana Thomas (**Pw1**).

As to the issue whether the offence of armed robbery was proved, I agree with the trial court magistrate that, there was no any evidence that, the appellant used force or threatened Yohana Thomas (**Pw1**) in robbing him. Yohana Thomas (**Pw1**) deposed that, the appellant used a knife to threaten him. I find that the appellant did not threaten a person who was already intoxicated. It is on record that the appellant gave Yohana Thomas (**Pw1**) juice and he took it he started feeling unwell. The prosecution was proved that, the appellant, took the motor vehicle which was the property of Yohana Thomas (**Pw1**) in accordance with Exhibit P2 without any lawful claim right, so it was theft. Thus, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal are baseless and hereby dismiss them.

On 5<sup>th</sup> ground of appeal that, the trial magistrate did not give reasons for his decision, it is a requirement of the law that, any decision must give reasons for it, as it is also provided under section 312(1) of the Criminal Procedure Act, [Cap. 20 R.E 2022] (the **CPA**). (See **Michael Joseph vs**

**R**, Criminal Appeal No. 506 of 2016). Looking at the trial court's judgment the trial magistrate gave reasons for his decision on page 7 as he discussed how the prosecution was not able to prove that the appellant used a knife to threaten Yohana Thomas (**Pw1**) and he went further to establish that the prosecution was able to prove the element of offence of theft contrary to section 258(1) and 265 of the Penal Code [Cap. 16 R.E 2019]. Therefore, this ground of appeal also collapses and it is dismissed.

On the 6<sup>th</sup> ground of appeal, it is true that, the trial magistrate did not inform the appellant his right of appeal. Nonetheless, I believe, the omission did not prejudice the appellant in any way and that why is the appellant was able to appeal on time. I do not vitalize breach of law but I find the omission not fatal as it is curable under section 388 of the **CPA**. Consequently, the sixth ground of appeal also collapses.

On the 7<sup>th</sup> ground of appeal, I agree with the respondent's counsel that, there was no any exhibit which was to be subjected to chain of custody rules. The only exhibit tendered was documentary evidence which whether it changed hands did not affect its quality. Thus, the seventh ground is baseless.

In fine, the appeal has no merit as the trial court was correct to rule that, the prosecution successful proved the offence of theft contrary to section 258(1) and 265 of the Penal Code [Cap. 16 R.E 2019]. Thus, I do

not see the reason to fault the decision of the trial court. Consequently, I proceed to uphold conviction and sentence the trial court imposed.

It is so ordered.

Dated at Mwanza this 29<sup>th</sup> of November, 2022.



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**J.R. Kahyoza**

**JUDGE**

Right of Appeal fully explained to the appellant to the Court of Appeal by lodging a notice of appeal within 30 days from the date this judgment.

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**J.R. Kahyoza**

**JUDGE**

**29/11/2022**

**Court:** Judgment delivered in the parties as they could not connect to the virtual court this 29<sup>th</sup> day of November, 2022.

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**J.R. Kahyoza**

**JUDGE**

**29/11/2022**