

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 51 OF 2022

*(Originating from the Resident Magistrate Court of Lindi at Lindi in Criminal
Case No 1 of 2021)*

HARID HAMISI MUSSA MTEMA.....1ST APPELLANT

ARABI HASSAN SELEMANI @NAMAONO.....2ND APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGEMENT

5/10/2022 & 16/10/2022

LALTAIKA, J.

The appellants herein **HARID HAMISI MUSSA MTEMA** and **ARABI HASSAN SELEMANI @NAMAONO** (herein after referred to as the first and second appellant respectively and collectively as appellants) were arraigned in the Resident Magistrate's Court of Lindi at Lindi charged with the offence of Armed Robbery contrary to section 287A of the Penal Code Cap 16 R.E 2019. When the charge sheet was read over and explained to the accused persons, they denied wrongdoing. A plea of not guilty was entered as required by law, necessitating conducting of a full trial.

The prosecution, on whose onus it was to prove the allegations levelled against the accused persons beyond reasonable doubt marshalled in a total

of 5 witnesses and tendered three exhibits. Halfway through, the learned trial Magistrate C.P. Singano made a finding that the accused persons had a case to answer and placed them on the dock to defend themselves. The defence case brought together two witnesses the first and second appellants respectively and no exhibit was tendered.

I consider it imperative, at this stage, to provide a brief factual backdrop to the case as can be gleaned from the court records. The victim in this case (PW1) is a bodaboda rider named Karim Ernest Hilahila (24 years old by then). On the evening of 7/9/2021 (around 18:00 hours) he was approached by two individuals at his **kijiwe in Tunduruyaleo** area who needed transport to Ruangwa. PW1 accepted the deal of 15,000/= and took on board two individuals (later, allegedly, identified as the 1st and 2nd appellants) enroute to Ruangwa.

As the trip progressed through the rough road full of sand and pebbles, the appellants allegedly attacked their rider and robbed him of his motorcycle. PW1 had testified in the trial court the chilling experience of being hit by a club and strangled by the neck until he lost consciousness. Upon regaining his consciousness, he reported the matter at Nachingwea Police Station where he was issued with a PF3 with which he proceeded to Nachingwea Police Station. He also informed his fellow bodaboda riders of his predicament.

A rather unusual turn of events occurred on the next day namely 08/09/2022. The appellants allegedly took the motorcycle suspected to have been stolen **to a car wash located in Mnazimmoja**. They were attended by one Mohamed Omary Pakia (PW2) who testified in the trial court that the

appellants were his first clients that fateful day. No sooner had PW2 started washing the motorcycle than he heard a crowd shouting "mkamate mkamate" (arrest him!). He assisted members of the community in apprehending the appellants who were taken to the nearby Mnazimmoja Police Station and later transferred to Lindi Central Police Station. The Officer Commanding Station (OCS) for Mnazimmoja Hadija Mbila testified to have witnessed the appellants **being beaten by angry civilians necessitating her intervention and opening of a police case** file number IR 895/2021 and the decision to transfer the appellants to Lindi Central Police Station where it was safer.

The motorcycle suspected of being stolen was later identified by one Amina Hashim Kalumba (PW5) who had, allegedly, bought it in Dar es Salaam and entrusted it to PW1 who was her relative. PW5 produced the necessary documents including the registration card and receipts.

The defence case as it appears in the trial court records, was rather brief. The first appellant testified that he was from Mtwara but attended a family meeting in Mnazimmoja on the fateful day. He faulted the prosecution for failure to show him the motorcycle he was accused of stealing. He also wondered why PW2 who alleged that he was given the motorcycle for cleaning was not apprehended with the motorcycle.

The second appellant, on the other hand, introduced himself as a 36-year-old resident of Kimara, Mbezi Area in Dar es Salaam. He recalled that on the fateful day he was leaving a Guest House (where he had spent the previous night) to catch up transport to Dar es Salaam when he suddenly heard people shouting "huyo hapo!" (There he is!) and he decided to run to

the nearby police station for his safety losing his shoes (sandals) along the way. The second appellant, as recorded in the trial court's proceedings, complained bitterly that members of the community *the wananchi* left the person who was washing the motorcycle alone only to apprehend him. He also faulted the prosecution case for irregularity in identification whereupon he was identified by the complainant in finger pointing or in his own words "kunadiwa" style.

Having been convinced that the prosecution had left no stone unturned in the proving their case, the Learned Magistrate convicted the appellants as charged and sentenced them to serve a term of 30 years in prison.

Aggrieved by both conviction and sentence, the accused persons have appealed to this court on fourteen (14) grounds, and I choose not to reproduce them here.

When the appeal was called on for **hearing on 5th day of October 2022**, the appellants appeared in person unrepresented. The respondent Republic, on the other hand, appeared through **Ms. Florence Mbamba**, State Attorney.

The appellants prayed the court to adopt their written submissions. Additionally, they requested that the learned State Attorney is allowed to submit first, and they would if the need arose, respond accordingly in rejoinder.

No sooner had Ms. Mbamba taken the floor than she announced that she was objecting the appeal. She emphasized that she fully supported both conviction and sentence meted by the trial court.

The learned State Attorney commenced her submission by sharing her outline that she would group all the ground appeal into 5. Response to the 8th, 1st, and 7th of the additional grounds of appeal which she claimed were centered on identification, Ms. Mbamba strongly disputed the claim that there was no proper identification of the appellants. It is Ms. Mbamba's submission that the appellants were properly identified by PW1 (the victim) who was the rider of the bodaboda they stole. Ms. Mbamba emphasized that PW1 had spent enough time with the appellants as they were riding and that they attacked him on the way at 19:00 when it was not dark yet. Referring this court to the case of **Rasul Amin Karani @Juma and 3 Others v. R.** Crim App. 368 of 2017 the learned state attorney averred that PW1 had explained the manner in which he identified the appellants and that all ingredients of proper identification were met save for prior knowledge as PW1 did not know the appellants before.

Moving on to the second group, the learned state attorney stated that she would address grounds related to defectiveness of the charge namely the 2nd, 4th and 5th. It was Ms. Mbamba's submission that the statement of the offence was well put as per Armed Robbery contrary to section 287A of the Penal Code Cap 16 R.E 2019. The learned State Attorney went on to quote verbatim the Particulars of the offence thus"

"Harid Hamis Musa Mtema and Arabi Hassan Selemani @namaono on the seventh day of September 2021 at Mibule Mpiluka village within Nachingwea District in Lindi Region and did

steal a motor cycle with registration No. MC 232 CVV Makes HA OJUE valid at two million four hundred thousand. The property of one Karim Ernest Hilahila immediately before and after stealing they used club to hit on the hand one in order to obtain the foresaid motorcycle.”

Ms. Mbamba referred this court to **section 132 of the Criminal Procedure Code Cap 33 RE 2022 which provides** for ingredients of a charge sheet arguing that a charge sheet should give particulars as may be necessary to give reasonable information to the nature of the offence. Having gone through the particulars, Ms. Mbamba asserted, they were clear and unambiguous. To support her argument, the learned State Attorney referred this court to the case of **KANUTI s/o KIKOTI v. R.** Criminal Appeal 7 of 2013 the CAT at Iringa particularly on page 12.

Moving on to the third group of grounds of appeal, Ms. Mbamba expounded that the same were on the complaint on contradictory evidence of prosecution witnesses. In the 3rd and 4th additional grounds; Ms. Mbamba argued, the appellants stated that the prosecution failed to prove ownership of the motorcycle thus creating doubt. The learned State Attorney strongly disagrees. She referred this court to PW1’s testimony as recorded on page 7 – 12 and that of PW5 on page 28 to 30, concluding that there was no contradiction whatsoever occasioned.

In short, Ms. Mbamba emphasized, PW1 had explained how he was robbed off the motorcycle and with regards to ownership he stated that he was given by PW5. Likewise, Ms. Mbamba argued further, PW5 in her evidence proved that she was the one who bought the motorcycle and gave it to PW1 for sustenance.

It was Ms. Mbamba's submission that as pointed out by the appellants, indeed on page 10 of the lower court proceedings, PW1 mentioned PW5 by her names Amina Naganjaga but when PW5 was testifying she introduced herself as Amina Hashim and later she added Kalumba. Ms. Mbamba was quick to point out that those were minor errors that did not take away the offence. She prayed that the grounds related to contradiction be dismissed.

Ms. Mbamba moved on to the 4th group of grounds comprising the 5th ground in the additional grounds the 6th ground of the original grounds where the appellants had faulted the court's application of the doctrine of recent possession. That the prosecution did not produce certificate of seizure. That the evidence did not show that the appellants were found with the motorcycle.

On page 18, however, asserted Ms. Mbamba, PW3 (a police officer) had testified that she took cautioned statements of the appellants. On page 19 she prayed that the certificate of Seizure be admitted in court. This was objected by both appellants that they never signed it. The same was overruled, asserted Ms. Mbamba, and the certificate was admitted. The learned State Attorney argued this court to dismiss the grounds for lack of merit.

Moving on to the 5th and last group of grounds of appeal, Ms. Mbamba asserted that the appellants had faulted the prosecution in general terms for inability to prove their case beyond reasonable doubt. Ms. Mbamba disagrees. It is the learned State Attorneys submission that all the ingredients of the offence of Armed Robbery had been proved beyond reasonable doubt. The evidence of PW2 on page 12 to 14, Ms. Mbamba

alleged, shows that the appellants went to PW2 to ask him to wash the said motorcycle. Thereafter, Ms. Mbamba went on, the appellants were apprehended as thieves and that the same as not contradicted by the appellants. The only complaint by the 1st appellant as appeared on page 25, asserted Ms. Mbamba was on ownership. She concluded that the matter has been proved beyond reasonable doubts and prayed that the appeal be dismissed entirely.

It was the appellants' turn. The first appellant argued that he had indicated in the lower court that he would have two witnesses, but the court failed to summon them.

Still on inability of the court to summon a material witness, the first appellant asserted that PW1 the victim had testified that 8/9/2021 he received a phone call while with his friend named Peter from Mnazimmoja that his motorcycle had been found. Although the said Peter was initially listed as the 2nd prosecution witness, the first appellant argued, he was never summoned in court.

The first appellant also faulted the identification process after their arrest. He argued that although the victim had conceded not to have known the appellants before, and that the incident took place at 19:00, the victim identified them in the docket and such identification, the first appellant asserted, is not legally accepted arguing that an identification parade was necessary.

Arguing passionately on the second ground of appeal centered on defectiveness of the charge, the 1st appellant argued that the offence they

allegedly committed was armed robbery and there was no gang armed robbery in the Penal Code.

The 1st appellant submitted equally passionately that none of the 5 Prosecution Witnesses had direct evidence against them. He opined that such evidence was unacceptable. He added that the lower court wrongly convicted them because they were never found with any stolen property.

The second appellant, on his part, faulted the evidence of PW1 saying that if indeed the incident took place at 18hours it was inconceivable that the fare was TZS 15,000/= because in normal hours, the fair of one person is not less than 40,000/=. In that regard, the 2nd appellant asserted, it could be seen that the victim was not saying the truth. Pocking further holes in the evidence of PW1, the second appellant asserted that PW1 had told the trial court that he was hit with a club "gongo" arguing that he was not sure if a club and a gongo were the same.

The second appellant also faulted the aspect of identification but of the exhibit and not accused persons as it was the case with the first appellant. In law, the second appellant asserted, identification of a motorcycle is as per registration card by comparing the Chassis and engine numbers with those appearing in the registration card and, if possible, argued the second appellant, such a card must be endorsed by the Tanzania Revenue Authority (TRA).

In the lower court the lower court accepted but said it was because the witness came from far. The second appellant prayed that this court makes a finding that the prosecution case was not proved beyond reasonable doubt hence set the appellants free.

I have dispassionately considered the rival submissions by both parties. I must admit that this appeal has exercised my mind quiet a bit. My analysis starts with the intriguing **action of the *wananchi* arresting** the appellants and taking them to the nearby police station. There is so much consistence on the evidence adduced related to how the accused persons were apprehended as they allegedly took the stolen motorcycle to the car wash. The appellants spent so much energy arguing that they were not properly identified. I find, like the learned Trial Magistrate, the accused persons were properly identified by the victim (PW1). In the case of **Lusabanya Siyantemi v. Republic** [1980] TLR 275 that: -

It is a rule of practice, not of law, that corroboration is required of the evidence of a single witness of identification of the accused made under unfavorable conditions; but the rule does not preclude a conviction of the evidence of a single witness if the court is fully satisfied that the witness is telling the truth.

My overall assessment of the evidence adduced in support of the allegation levelled against the appellants does not allow any doubt. The appellants have never denied that they were in the scene of crime. The circumstances in which the stolen motorcycle is linked to them is equally watertight. The *wananchi* at Mnazimmoja could not in my opinion, hand pick the appellants beat them up and accuse them of stealing a motorcycle that had been found.

I am alive to the fact that although the prosecution must prove its case beyond reasonable doubt, the court is also duty bound to analyze the evidence to find out whether any doubts raised by the defence are sufficient to water down the prosecution case. As the first appellate court, it is my duty

to reevaluate the lower court evidence and if need be, arrive to my own evidence.

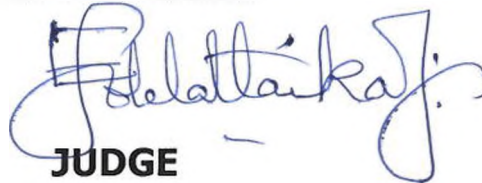
The five Prosecution Witnesses were all consistent. There was no doubt that PW1 had been a bodaboda rider. PW2 had a clear testimony of his job in the car wash. PW3 had explained how the appellants were arrested. PW4 had medically attended the victim and finally PW5 had indicated how she bought the motorcycle and entrusted it to PW1. The appellants indicated that PW1 was not telling the truth with regards to fair. Unfortunately, this is not what the law says. See **Goodluck Kyando v. Republic** [2006] TLR 363 where it was stated that:

"It is trite law that every witness is entitled to credence and must be believed, and his testimony accepted unless there are good and cogent reasons for not believing a witness. The exhibits were also tendered in court as required. With such a watertight prosecution case, my hands are tied."

It may be noted that the appellants have tried their very best to point out weaknesses of the prosecution case. Unfortunately, many if not most of the shortfalls they pointed out are mere technicalities. They do not go to the root of the offence committed. It would be absurd for this court to use technicalities to the detriment of justice.

All that said, and for the above reasons, this appeal has no merit, and it is dismissed in its entirety.

E.I. LALTAIKA



JUDGE

7/12/2022

Court

Judgement delivered under my hand and the seal of this court on this 7th day of December 2022 in the presence of Ms. Florence Mbamba, State Attorney and the appellants.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", written over the printed name.

**JUDGE
7/12/2022**

Court

The right to appeal to the Court of Appeal of Tanzania fully explained.



E.I. LALTAIKA

A handwritten signature in blue ink, appearing to read "E.I. Laltaika", written over the printed name.

**JUDGE
7/12/2022**