

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF TABORA**

**AT TABORA**

**DC. CRIMINAL APPEAL NO. 9 OF 2019**

(Originating from Tabora District Court in Criminal

Case No. 45/2018)

**ENOCK S/O PETRO @ SHIJA .....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

*Date of Last Order:15/5/2023*

*Date of Judgment: 15/5/2023*

**MATUMA, J.**

The appellant Enock s/o Petro @ Shija and two others namely Salum s/o Juma @ Dizoo and Saidi Juma Ibrahim stood charged in the Resident Magistrate's Court of Tabora, the appellant was arraigned for armed robbery contrary to Section 287A of the Penal Code, Cap. 16 R.E. 2002 as amended by Written Laws Miscellaneous Amendment Act No. 3 of 2011 while the two others faced jointly a count of being found in possession of properties suspected to have been stolen contrary to Section 312 (1) (b) of the ~~same~~ Code supra.

After a full trial, the appellant was found guilty, convicted and sentenced to serve a custodial term of thirty (30) years. The rest two accused persons were acquitted.

Aggrieved with such conviction and sentence, the appellant lodged the instant appeal with a total number of five grounds.

At first, the appellant's appeal was dismissed by this court (the late Justice S.B. Bongole) as he then was for what was considered that the appeal was filed out of time (time barred).

The appellant successfully appealed to the Court of Appeal vide Criminal Appeal No. 570 of 2019, in which the Court of Appeal held that the appeal was wrongly dismissed because a proper and legally computation of the period of appeal dictated that the appellant had lodged his appeal just within 30 days from the day he received the necessary documents for appeal purposes.

The Court of Appeal thus restored this appeal on 20<sup>th</sup> March, 2023 and ordered its expedited hearing.

Now back to the brief facts leading to this appeal is as follows; On 20<sup>th</sup> February, 2018 during night hours one Hudi s/o Festo @ Lukumwa was riding a motorcycle with registration number MC 479 BQX in his normal business commonly known as bodaboda.

It is alleged that the appellant hired him purporting to be a passenger but on reaching at Nanenane area, Ipuli ward within Tabora Municipality, the appellant prompted the victim to stop. Thereat he took off a bush knife (panga) from his coat and ~~cut~~ the victim on the

head to facilitate the stealing. He managed to steal the said motorcycle and fled away with it.

Just five days later, on 25/02/2018 the said motorcycle was found in possession of Salum s/o Juma @ Dizoo (the then 2<sup>nd</sup> accused) who explained that he had bought it from the appellant after having been connected to him by the then third accused one Saidi s/o Juma @ Ibrahimu.

The said Salum Juma @ Dizoo successfully proved that the appellant sold to him the said motorcycle after tendering in evidence the sale agreement between them (exhibit D1). Having been corroborated by DW4, Kadela Ramadhani who gave him Tshs. 350,000/= as an advance payment for paying the appellant and who had personally given Tshs. 15,000/= to the appellant just as a bus fare when he came to her for follow up of the balance of the sale price but his buyer Salum Juma @ Dizoo was absent.

The trial court also found corroborative evidence to the said Salum Juma @ Dizoo that he had bought the motorcycle from the appellant from the evidence of DW5 Bosco Lubelezi who witnessed the sale agreement as the street chairman.

Salum Juma @ Dizoo was thus acquitted for having been an innocent buyer. The other accused Saidi Juma Ibrahim was as well acquitted for having successfully defended himself as an innocent middle man, who was asked by the appellant to find out the buyer of the motorcycle so that he could sell his motorcycle ~~to attend~~ his sick mother.

The appellant as I have said earlier was found guilty for among other evidence that of his co-accused supra, that he was identified by the victim at the identification parade, he was sufficiently identified at the crime scene by the victim by the aid of tube light, confessed in his cautioned statement which was admitted without objection as exhibit P4.

The appellant to fault such findings raised five grounds challenging the same:

- i) *That the victim PW2 did not describe him to the next person he met on the day of incident.*
- ii) *That there was no link between him and the recovered stolen motorcycle nor the sale agreement had any evidential value.*
- iii) *That the identification parade was not conducted in a fair and just manner.*
- iv) *That the cautioned statement was wrongly relied upon because the same was procured out of the prescribed period under section 50(1) of the Criminal Procedure Act, Cap. 20 R.E. 2002.*
- v) *That the ownership of the alleged stolen motorcycle was not cogently established.*

At the hearing of this appeal, the appellant appeared in person while the respondent was represented by Mr. Robert Kumwembe learned State Attorney.

The appellant opted for the learned State Attorney to start submitting on this appeal and for him to respond later. The learned State

Attorney from the outset informed this court that he was supporting the appeal. He submitted that the identification of the appellant was not proved to the required standard because the victim did not describe him properly. He also argued that the prosecution evidence is silent on the time when the appellant was arrested and therefore the complaint of the appellant that his cautioned statement was recorded out of time stands. He again joined hands with the appellant that the sale agreement allegedly made between the appellant and his co-accused on the stolen motorcycle does not in itself prove the case against the appellant.

Submitting on his grounds of appeal, the appellant joined hands with the learned State Attorney and asked this court to consider his grounds of appeal and the submission made by the learned State Attorney and then allow his appeal.

Before, I proceed, I would like to reconcile the names of the appellants because they appear differently on various documents.

The charge sheet and the trial court proceedings referred the appellant in the names herein above Enock Petro @ Shija, his cautioned statement exhibit P4 and the identification parade register exhibit P7 referred him in two names; Enock Petro but at the time of composing the trial court judgment, the learned trial magistrate cited him as Enock Peter. That prompted the commitment warrant to prison to cite him as Enock Peter so does his notice of appeal to this court as well as his Petition of appeal.

When I asked the parties to address me on the anomaly they both submitted that it was a mere oversight by the trial magistrate and that there is no any prejudice for such error because all the names were addressing the very same person before the court who is the appellant in this appeal.

In the circumstances, I decided that the appellant shall be referred to by his names which appear in the charge sheet and proceedings without affecting anything done in his favour or against his favour in the names of Enock Peter.

Now back to the grounds of appeal, in the first ground, the appellant argued that the victim did not give a detailed description of his appearance, attire, height etc to the next person he met in the aftermath of the robbery. The learned State attorney supported him on that ground.

My thorough scrutiny of the records of the trial court find that the victim PW2 Hudi Festo made the requisite descriptions. At page 19 of the trial court proceedings, the victim stated clearly that the police officers asked him if he could identify his assailant. He replied positively and described him for among others his clothes;

*“I managed to tell the police that I can identify the accused person if I see him. I described to the police the clothes of the accused person.”*

Even during cross examination by the appellant the victim at page 20 of the proceedings stated clearly that he had marked the face and

appearance of the appellant as they took almost ten minutes bargaining for the price;

*“The police recorded my statement. I marked your face as we spent about ten minutes bargaining for the price. I grasped your appearance . . . . you had a black trouser.”*

All those are sufficient descriptions for the purposes of identification. It was open for the appellant to test the credibility of the victim’s testimony by investigating or cross checking his declaration statement if it did not contain such description. It was as well open for the appellant to cross examine PW10 A/Insp. Saya the investigator of this case if really the victim had described him or not.

Failure of the appellant to impeach the victim through his declaration statement and failure to cross examined the police officers more so PW10 on whether the victim described him or not leaves the evidence of the victim to the effect that he described him by face, appearance and clothes unchallenged.

This ground of appeal thus stands as an afterthought complaint and it is hereby dismissed.

The second ground as I have said supra is challenging the link between the appellant and the recovered stolen motorcycle exhibit P1 and the sale agreement exhibit D1 had no evidential value. The learned state attorney although he did not address on the issue of “link” between the appellant and the recovered stolen motorcycle, he

addressed on the sale agreement exhibit D1 arguing that such exhibit in itself could not prove the case against the appellant.

It is my firm finding that the link was sufficiently established. First of all, it was the co - accused Salum s/o Juma @ Dizoo who linked the appellant to the said recovered stolen property. The said Salum Juma @ Dizoo informed the police and the court that he bought the said property from the appellant. His evidence was corroborated by DW4 from whom the appellant obtained Tshs. 15,000/= when he went to her as the mother of the buyer Salum Juma in follow up of the outstanding balance of the sale price. The said witness gave the appellant such amount as a bus fare for his return because at that time he did not find Salum Juma. The same very witness was the one who actually gave the first instalment of the purchase price Tshs. 350,000/= to Salum Juma Dizoo so that he could pay the appellant.

Further corroborative evidence linking the appellant to the recovered stolen motorcycle was the evidence of DW3 Saidi Juma Ibrahim who linked the appellant and the buyer of the said stolen property after having been deceived by the appellant that he was in an agent need of money to attend his sick mother who was in a critical condition.

He honestly linked him to Salum Juma @ Dizoo because he himself had no money to buy it.

Further corroboration was the evidence of DW5 Bosco Lubelezi the street chairman who witnessed the sale agreement and reduced it in writing exhibit D1. The appellant alleges that exhibit D1 has no evidential value. I don't agree with him. The same ~~has~~ has the requisite



evidential value because it was entered between adults of sound mind and with their own free consent. It was further witnessed by two independent witnesses who stood for both the seller and the buyer. One of the witnesses DW5 supra was a person in authority who endorsed the said agreement and stamped the same.

Even if I would have to agree with the appellant that such written sale agreement had no evidential value, yet there is sufficient oral evidence to that effect as repeatedly elaborated above. Oral evidence is as well admissible in establishing sale. See, ***Loitare Medukenya Versus Anna Navaya, Civil Appeal No. 7 of 2018*** (CAT). Not only that but also the victim PW2 gave impeccable evidence linking the appellant to the recovered stolen motorcycle. He was the one robbed and managed to identify the appellant as the one who robbed him the recovered stolen motorcycle despite the fact that it was found in possession of a third party Salum Juma @ Dizoo.

With all these; the appellant's complaint that the evidence linking him to the recovered stolen property was not cogently established is without any merit. It is hereby dismissed.

On the 3<sup>rd</sup> ground, the appellant laments that the identification parade was not conducted in a fair and just manner. The learned State Attorney did not say anything on this ground.

In accordance to the evidence of PW9 Insp. Owiso, the appellant was arraigned in a group of 12 people of his same looking. At first the appellant stood no. 4 in the line and was identified by the victim. He was then required to change the clothes and ~~position~~ in the line. He

did the same and stood no. 8 in the line but he was for the second time identified by the victim. See exhibit P7 the Identification Parade Register. That evidence was corroborated by PW7 Felex Daudi who was among the 12 people on the parade.

The appellant did not dispute to have been identified by the victim at both two times or that the process towards the identification parade was not fair. He only laments that he was left to stand with his dirty clothes.

He did not however state that his fellows on the parade had clean clothes and how the dirty clothes prejudiced him in the parade. He did not state whether in changing the clothes before the second parade he was not free to choose the clothes of his own choice. The appellant did not even object the admissibility of the Identification Parade Register exhibit P7.

The fact that the identification parade was conducted at a different place (Tabora) from where he was arrested (Nzega) does not vitiate the identification parade. There is no law mandating that an accused person should be paraded for identification at the place he was arrested.

In the instant case, the crime was committed at Tabora and the investigation of the matter was as well going on at Tabora. The appellant's arrest at Nzega did not in law prohibit his identification parade to be conducted within the locality where the investigation of the matter was being carried on. At Nzega he was just arrested for transit to Tabora. I therefore dismiss the 3<sup>rd</sup> ground of appeal as well.

On the 4<sup>th</sup> ground of appeal, the appellant is complaining that his cautioned statement was wrongly relied upon because it was made out of the prescribed time under Section 50(1) of the CPA Supra. The learned State Attorney conceded on this ground arguing that the evidence of the prosecution is silent on the time the appellant was arrested.

First and foremost this ground is an afterthought. The statement was tendered in evidence without any objection from the appellant. He was given opportunity to object admissibility of that Cautioned Statement but stated to have no objection. He thus pre-empted the prosecution to justify the legality of such statement before its admission. The issue whether or not the said statement was recorded out of time was not at issue. The appellant himself did not even give evidence which suggested that from the time he was arrested to the time when his statement was recorded, it was out of the prescribed four hours.

PW1 G. 8595 PC Vicent in his evidence stated that on 25/02/2018 while he was in his office got a report of the stealing incident and that the stolen motorcycle was sold at Nzega. He started to look for the person who purchased such motorcycle and managed to get him. They then moved to his home and seized such motorcycle. They then returned to police and started to trap the appellant who was later arrested at Mwashekwa Guest House.

Although this witness did not state the exact time they arrested the appellant as rightly observed by the learned State Attorney, but at

least the process he explained towards the arrest of the appellant on that day suggests that it took some hours from the morning time when he first received the report of the theft incident.

In that respect the recording of the appellant's Cautioned Statement at 13:00 hours cannot be said to be out of the prescribed four hours. Or else the appellant could have cross examined the exact time he was arrested and or give his own evidence to that effect.

Had the appellant raised such concern at the right moment, the requisite evidence on the time he was arrested could have been given, contested and resolved. He did not do so and thus his complaint is an afterthought.

Even though, in the absence of the appellant's Cautioned Statement still there is sufficient evidence to prove that the appellant committed the charged offence. Even on this appeal I have given no weight or consideration to the said cautioned statement.

There is evidence of the victim himself, that of the appellant's co - accused persons, that of the street chairman, that of DW4, that of PW7 among others as scrutinized supra. That having been said, I proceed to dismiss the fourth ground of appeal.

The last ground needs not to detain me much. The appellant argued that the ownership of the stolen motorcycle exhibit P1 was not cogently proved. The learned State Attorney did ~~not~~ address this ground.

I do not know what kind of proof the appellant needed. PW2 the victim stated that the said motorcycle belonged to PW3 Emmanuel Abdiel Shayo. He was his "bodaboda". The said Emmanuel Abdiel Shayo appeared in court and testified about the ownership of such exhibit and tendered the motorcycle registration card exhibit P2 which bears his names and describes exhibit P1. Then ownership was thus sufficiently proved.

Even though in an armed robbery incident which faced the appellant under section 287 A of the Penal Code, there is no need of proof of ownership of the stolen property. It suffices to prove that something was stolen and an offensive weapon was used to threaten or assault the person who by then was in possession of such property in order to steal or to retain the stolen property.

In the instant matter, it was sufficient for the victim to establish that at the time of incident he was in possession of the stolen property and it was stolen from him at an armed robbery incident. That evidence was sufficiently given. Therefore ownership is immaterial.

After all, there was no issue of ownership of the stolen motorcycle.

The appellant did not claim ownership thereof. I dismiss the fifth ground of appeal.

Up to this juncture, the appellant's grounds of appeal have all been dismissed,.

In that respect, this appeal has no further ground to stand on, I accordingly dismiss it.

The appellant's conviction and sentence is hereby upheld. Right of appeal is hereby explained. It is so ordered.



**A. MATUMA**

**JUDGE**

**15/5/2023**

**ORDER**

Judgement delivered in chambers in the presence of Mr. Robert Kumwembe, learned State Attorney for the Republic and the appellant in person. Right of appeal explained.



**A. MATUMA**

**JUDGE**

**15/05/2023**