

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SUMBAWANGA

AT SUMBAWANGA

CRIMINAL APPEAL NO. 26 OF 2022

(Original Criminal Case No.87 of 2021 in the District Court of Kalambo at Matai)

JAPHET SIKAWIMBA.....APPELLANT

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

18/5/2023 & 31/5/2023

MWENEMPAZI, J.

The appellant and his colleague one Muhamedi S/O Haden were arraigned in the District Court of Kalambo and charged with the offence of armed robbery contrary to section 287A of the Penal Code, [Cap. 16 R.E. 2019]. Mohamed S/O Haden was the first accused and Japhet s/o Sikawimba was the second accused. It was alleged that the accused persons jointly on the 14th day of July, 2021 at Matai 'A' Village within Kalambo District in Rukwa Region did steal one Motor Cycle make Kinglion Valued at Tshs. 2,450,000/=

and that immediately before and or after such stealing, they used a machete to threaten one Laban S/o Michael in order to obtain and retain the said property of one Bahati s/o Amani@Mwasaka. All of them pleaded not guilty to the charge.

After hearing the case, the 1st accused person one Muhamed s/o Haden was acquitted under section 235 of the Criminal Procedure Act, Cap. 20 R. E 2019 on the reason that there is no evidence linking him to the commission of the offence. The 2nd accused was found guilty and convicted with the offence of Armed Robbery Contrary to section 287A of the Penal Code, Cap. 16 R.E.2019 and sentenced to serve a term of thirty (30) years imprisonment in jail.

The appellant is dissatisfied with the conviction and sentence. He has filed this appeal raising five grounds of appeal. I will not reproduce them here; however, they will be considered in the dealing with the appeal in general.

At the hearing of the appeal the appellant was unrepresented and the respondent was being served by Ms. Marietha Maguta, learned State Attorney. The appellant had a brief submission that he prays this court to

consider the grounds of appeal which are contained in the Petition of Appeal and allow the appeal so that this court sets him free.

In reply to what the appellant had just submitted, Ms. Marietha Maguta, the learned State Attorney representing the respondent submitted that she will submit on the appeal basing on the fifth ground of appeal that the trial court erred in law and fact by convicting the appellant while the case was not proved beyond reasonable doubt as required by law.

The counsel for the responded submitted that in the evidence of PW1 at page 8 of the typed proceedings, PW1 testified that he was invaded when hired by the appellant and another person identified by the name Msomali. He had a motor cycle with registration No. MC 864 CSC. Later, on the 16th July, 2022, they were informed that the Motor Cycle has been found at Chipeta. The motor cycle was identified positively.

That evidence when read together with the testimony of PW3 who testified that the motor cycle was in the house of the person known as Msomali but it is not said whether Msomali was one of the accused persons in court or not. Also, at page 21 of the typed proceedings, the witness testified that the accused were arrested on the road and they had no any exhibit. The

evidence of PW3 raises the question why he arrested the accused person. There is doubt as to how he knew those are the accused who committed the offence at kalambo.

Looking at Exhibit P5, the motor cycle is said to have been taken from possession by the accused persons. It is doubtful at what time the motor cycle was with the accused person while it is said they were not found with the motor cycle. There is doubt to the veracity of the facts adduced. Pw3 testified that the accused said they robbed the motor cycle at Kalambo. The shortfalls of the evidence pointed out shows that the accused was arrested without clearing all the possible doubts. The counsel prayed that the appeal be allowed based on the reasons pointed out. The appellant had nothing to rejoin.

I have read the record of the trial court and also heard the submission by the learned State Attorney in regard to the appeal at hand. The evidence on record as per PW1 one Laban S/o Maiko, he is a resident of Kasesya located in Kalambo District. He works as a Bodaboda driver. The motor cycle he drives belong to one Bahati s/o Amani. On the 14th July, 2021 he was assigned by Bahati s/o Amani (PW2) to take a youngman, possibly his (PW2)

assistant, to Matai. On his way back to Kasesya he met the appellant and one person 'Msomali' who sought his service to be taken by bodaboda to Kazombwe. These persons, believed to be passengers, turned against him (PW1) and robbed him of the motor cycle. According to the witness he was able to identify the two robbers as the appellant and 'Msomali'.

The Motor Cycle was found at Chipeta on the 16th July 2021 in the house of the person again named as 'Msomali'. That is according to the testimony of PW3, Elisha s/o Ernest@Chenge. The accused persons also are said to have been arrested at Chipeta. But they were not arrested with the said motor cycle. They met with the police on the way and they were suspected to be the robbers. According to PW3 he testified that as he was in the office received information from one person that at Msomali residence there is a motorcycle about to be sold by two persons. They left making for the Msomali residence accompanying his fellow police office, on the way they met with two persons. They suspected them and interrogated them and arrested them.

The prosecution also tendered in court exhibits. That is a motor cycle with registration MC 864 CSC, tendered as exhibit P1. Also, a seizure note was

also tendered in court as Exhibit P5. It is however testified by PW3 who tendered the same that the accused persons were not arrested with any exhibits. However, it is in the Exhibit P5 that the accused did sign the exhibit.

It is also in the evidence that the seizure of the motor cycle was taken from the residence of the said 'Msomali' but the owner of the house was not called to testify and also there was no any local leader to witness the exercise. Clearly in the defence evidence by the 1st accused during trial, that was challenged by the accused person.

According to the record, the 1st accused person testified that he was at Chipeta looking for chicken for purchasing and also that his involvement in the present case was due to grudges he had with a Police Officer known as Hussein. The second accused, the present appellant, testified that on the 14th July, 2021 he was at Chipeta and not Matai as testified by PW1. After all he was not arrested with the motor cycle alleged that he had stolen. His argument is that how can he be identified at Matai while he was at Chipeta. He went at Chipeta looking for job.

The evidence as analyzed herein above shows there was deficiency in identification alleged to have been achieved by PW1 of the 2nd accused but

also other evidence adduced does not link the appellant positively with the commission of the offence he is alleged to have committed.

Under the circumstances, I agree with the submission by the learned state Attorney that there was no proof of the offence beyond reasonable doubt as required by law. The doubts pointed out are therefore resolved in favour of the appellant. The appeal is therefore allowed, judgment and conviction by the trial court are quashed and the sentence is set aside. The appellant should be released from prison unless otherwise he is lawfully being held. It is ordered accordingly.

Dated and delivered at Sumbawanga this 31st day of May, 2023



T. M. Mwenempazi

T. M. MWENEMPAZI

JUDGE.