IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(TABORA DISTRICT REGISTRY)

AT TABORA

DC. CRIMINAL APPEAL NO. 29 OF 2023

(Originating from the decision of Uyui District Court in Criminal Case No. 01 of 2022)

KAGITO MSAFIRI @ DOTTO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of Last Order: 09/10/2023
Date of Judgment: 27/10/2023

KADILU, J.

In the district court of Uyui, the appellant was charged with the offence of armed robbery contrary to Section 287A of the Penal Code, [Cap. 16, R.E. 2019]. It was alleged by the prosecution that on 22/12/2021 at Makungu - Tura Village within Uyui district in Tabora Region, the appellant stole a motorcycle SANLG making with registration number MC 474 CYT red in colour whereby immediately before stealing he used a knife to threaten and stabbing one Rashid Jumanne @ Rajabu to obtain the said motorcycle the property of Hussein Hamis @ Hussein.

When the charge was read over to him, he pleaded not guilty. The prosecution called six witnesses and tendered seven exhibits to establish that it was the appellant who committed the charged offence. On his part, the appellant was the sole defence witness and he dissociated himself from the alleged offence. After the trial, the appellant was convicted as charged and

sentenced to serve 30 years imprisonment. Aggrieved by the conviction and sentence, he preferred an appeal to this court on the following grounds:

1. *That, the case for the prosecution was not proved against the appellant beyond reasonable doubt as required by the law.*
2. *That, asportation being an important ingredient of the offence of stealing was not cogently established by the prosecution.*
3. *That, the person who arrested the appellant was not summoned in court to testify on whether his arrest had any connection with the commission of the offence charged or whether he was found in possession of the alleged stolen motorcycle.*
4. *That, PW1 did not name the culprit to the next person he met in the aftermath of the robbery.*
5. *In exhibit P6, the seizure certificate was wrongly admitted into evidence.*

The appellant implored this court to allow the appeal, quash the conviction and set aside the sentence imposed on him by the trial court and subsequently, order his immediate release. When the appeal was called for hearing, the appellant was represented by Mr. Denis Othiambo, the learned Advocate whereas the respondent was represented by Ms. Suzan Barnabas and Ms. Joyce Nkwabi, the learned State Attorneys.

On the first and second grounds of appeal, Mr. Denis submitted that the appellant was nowhere identified in connection to the case. He explained that the offence was allegedly committed at 19:00hrs so, proper identification of the appellant was important. He referred to the case of ***Mussa Elias @ 2 Others v R.***, Criminal Appeal No. 172 of 1992, (unreported). Mr. Denis added that the appellant's cautioned statement was

not recorded voluntarily as he was not given a chance to call any of his relatives, a friend, or an Advocate.

Concerning the third ground of appeal, Mr. Denis argued that the appellant was arrested by a person known as Alphan Salum, but he was not summoned to testify during the trial to assist the court in reaching a fair decision. He elaborated that he is aware that the prosecution was not bound to call a particular number of witnesses, but since Alphan Salum was the sole source of information about the alleged crime, it was crucial for him to testify. The learned Advocate relied on the case of ***Aziza Abdallah v R.*** [1991] TLR 71. He submitted that as the prosecution did not offer explanations as to why Alphan Salum was not summoned, the court should draw an adverse inference against its evidence and quash the conviction and sentence against the appellant.

About the fifth ground of appeal, Mr. Denis argued that the seizure certificate (exhibit P6) was admitted improperly by the trial court because the chain of custody was not established. He explained that the exhibits listed therein were neither labelled nor registered in the exhibits' register. Mr. Denis added that the exhibits were not controlled because it was not shown where and how they were kept from the day of the seizure to the date on which they were tendered before the trial court. He cited the case of ***Peter Ngoko v Republic***, Criminal Appeal No. 246 of 2020, High Court of Tanzania at Dar es Salaam in arguing that in the prevailing situation, it is

doubtful whether the seized items were the ones tendered before the trial court.

Submitting on the second ground of appeal, Mr. Denis stated that the alleged motorcycle was not shown as among the stolen items and the knife alleged to be used in the commission of armed robbery was improperly admitted by the trial court. Based on the stated reasons, Mr. Denis concluded that the case against the appellant was not proved beyond reasonable doubt hence, he prayed the appeal to be allowed.

In reply, Ms. Suzan submitted that all the ingredients of armed robbery were proved as indicated on pages 12 to 13 of the trial court's proceedings so, the case was proved to the standard. According to her, PW1 showed clearly how the appellant attacked him and took his motorcycle after having stabbed him with the knife. Regarding the identification of the appellant, Ms. Suzan explained that the PW1 (victim) was familiar with the appellant because it was the second time that he was hired by the appellant. Therefore, PW1 managed to describe the appellant after the incident. Ms. Suzan referred to the case of ***Joseph Mkumbwa & Another v R.***, Criminal Appeal No. 94 of 2007, Court of Appeal of Tanzania at Mbeya in which the court dealt with the doctrine of recent passion. She said on page 36 of the proceedings, it is shown how exhibit P7 was retrieved from the appellant.

Responding to the concern about the admission of the appellant's cautioned statement, the learned State Attorney argued that there is

nowhere that it was shown the cautioned statement was recorded involuntarily. The appellant was informed about his rights and he opted to record his statement in the absence of any relative, friend or Advocate. On the third ground of appeal, the learned Advocate explained that as PW3 was among the persons who participated in arresting the appellant, there was no need to summon all persons who were present as the story would not differ from what was testified by PW3.

Lastly, Ms. Suzan conceded that a certificate of seizure was admitted improperly by the trial court. She elaborated that the admission violated the procedure laid down in the case of ***Robinson Mwanjisi v Republic,*** [2003] TLR 218 on page 225. According to her, the irregularity cannot be cured even by invoking the provisions of Section 388 of the Criminal Procedure Act. She prayed for the court to expunge exhibit P6 from the record. However, she argued that the remaining prosecution evidence was sufficient to justify the conviction and sentence of the appellant.

Concerning asportation, the learned State Attorned replied that it was well established by PW1 who demonstrated how the appellant took the motorcycle and escaped with it up to the next Village from which he was arrested. To support her point, Ms. Suzan cited the case of ***Nyaitore Mbota v R.***, Criminal Appeal No. 326 of 2014, Court of Appeal of Tanzania at Mwanza, in which the Court of Appeal held that always stealing involves asportation. She refuted the allegation that the stolen motorcycle was not produced in evidence. She explained that it was admitted as exhibit P2 as

indicated on page 13 of the proceedings. On the strength of her submissions, Ms. Suzan implored this court to dismiss the appeal.

I have carefully gone through the arguments for and against the appeal. I find the issue for determination is whether the appeal is meritorious or otherwise. In my determination, I will resolve the grounds of appeal in the same order as submitted by the learned Advocates. In the first ground of appeal, the appellant complains that the case for the prosecution was not proved against the appellant beyond reasonable doubt as required by the law. The basis of this contention is that the appellant was not identified in connection with the offence and that, his cautioned statement was recorded in the absence of any of his relatives, a friend or the Advocate.

It is undisputed that under Section 53 of the Criminal Procedure Act, a police officer is obliged to inform a person under restraint about his rights before interviewing him. The rights include communication with a lawyer, relative or friend. In the case at hand, the appellant's cautioned statement was recorded by PW5. PW5 testified that before recording the cautioned statement of the appellant, she informed him that he was free to call any other person to witness him recording his cautioned statement. Then the appellant opted to record his statement without involving any person.

When PW5 prayed to tender the appellant's cautioned statement, the appellant was asked by the court if he had an objection and he replied that he did not have any. He was also allowed to cross-examine PW5, but he did

not question this issue, but he is raising it now as a ground of appeal. In the case of ***George Maili Kamboge v R.***, Criminal Appeal No. 327 of 2013, Court of Appeal of Tanzania at Mwanza, it was held that failure to cross-examine a witness on an important matter implies acceptance of the truth of the witness's evidence.

As for the identification, the appellant claims that he was wrongfully convicted since he was not identified properly. It is alleged that the said robbery took place during the night and the appellant was with PW1 in the same motorcycle. The record shows that the appellant was known well to PW1 before the occurrence of the incident because it was the second time the appellant was boarding PW1's motorcycle. Evidence of PW1 regarding this point was not materially challenged by the appellant. Thus, apart from the identification at the scene of the crime, PW1 was familiar with the appellant before the incident.

PW1 testified more that he called PW2 (owner of the motorcycle) immediately after the theft informing him about the incident and the culprit. It is a settled principle that, the ability of an identifying witness to name a suspect at the earliest opportunity after the incident, is an assurance of the credibility of such a witness. See the case of ***Marwa Wangiti Mwita & Another v. R.,*** [2002] TLR 39. By naming the appellant to the owner of the allegedly stolen motorcycle, it indicates that PW1 had recognized the appellant as being the assailant after having known him before. For these

reasons, I am of the view that there was no possibility of mistaken identity of the appellant as the perpetrator of the charged offence.

Thus, the appellant's conclusion that his conviction was based on weak evidence of the prosecution has no legal base. Passing through the appellant's testimony, not much can be deduced from his defence either. All he said was that on the night of the incident, he was with his girlfriend and they were both drunk. According to him, a person approached them trying to grab his girlfriend and, in an attempt to defend her, he was assaulted and fell unconscious. According to him, he was surprised to find himself at Tura Dispensary while under arrest and he could not remember his attacker. In the circumstances, I find nothing to fault in the prosecution's evidence against the appellant.

The other complaint by the appellant is that asportation as an important ingredient of the offence of stealing was not cogently established by the prosecution. This ground of appeal will not consume much of my time since the law is clear that in proving the offence of armed robbery, theft should be established. The offence of armed robbery is provided under Section 287A of the Penal Code, [Cap. 16 R.E. 2019] which provides:

> *"A person who **steals anything** and, at or immediately before or after stealing is armed with any dangerous or offensive weapon or instrument and at or immediately before or after stealing uses or threatens to use violence to any person to obtain or retain the stolen property, commits an offence of armed robbery and shall, on conviction be liable to imprisonment for a*

term of not less than thirty years with or without corporal punishment."

From the above provision, it is evident that stealing is an important element in proving the offence of armed robbery. In the case of ***Shaaban Said Ally v. R.,*** Criminal Appeal No. 270 of 2018, it was held that:

"The offence of armed robbery is committed where, the accused person, while armed with any dangerous or offensive weapon or instrument, ***steals anything*** *and immediately before or after such stealing, uses or threatens to use violence against the victim. Such violence must be meant for obtaining or retaining the stolen property."*

Under Section 258 (6) of the Penal Code, one is required to establish the asportation of the stolen property if he is to prove the offence of theft. I, therefore, agree with the argument by the Advocate for the appellant that it was vital for the prosecution to establish clearly that there was asportation of the stolen motorcycle. The charge shows that the offence was committed in Makungu Village and that the appellant was arrested with the alleged motorcycle between Kizengi and Mpumbuli Village. Indeed, there was a movement of the motorcycle from Tura to Mpumbuli. The prosecution tendered exhibits P2 (motorcycle) and P3 (registration card) to prove that the alleged motorcycle belongs to PW1.

In ***Mazengo Magale v R.,*** [1969] HCD No. 156, it was held that asportation is always present as long as anything has been moved from its

usual place. Therefore, the appellant's act of transferring the motorcycle from Makungu to Mpumbuli Village is sufficient asportation unless he provides reasonable explanations to negate his intent to deprive the owner permanently of his motorcycle. In the absence of the said explanations, I am left with no other option than to dismiss the second ground of appeal for lack of merit.

In the third ground of appeal, the appellant contends that the person who arrested him was not summoned to court to testify on whether his arrest had any connection with the commission of the offence charged or whether he was found in possession of the alleged stolen motorcycle. Ms. Suzan argued that the appellant was arrested by several persons so, the prosecution was not bound to summon all of them. She challenged the appellant's argument by referring the court to Section 143 of the Evidence Act, [Cap. 6 R.E. 2019], which does not mandate a particular number of witnesses to prove a certain fact. In the matter at hand, the record indicates that PW2 was informed by one Alphan Salum that the appellant was arrested at Tura. Likewise, PW3 testified as follows during the trial:

> *"I was informed by Hussein Hamis Hussein (PW2) that PW1 was robbed and the motorcycle has been stolen. So, we went to the zebra at Kizengi and saw a motorcycle coming while overtaking Abood Bus, then we started to follow him. After some time, I received a phone call which informed me that the accused had been arrested after being knocked and fell ..."*

Therefore, it is apparent that neither PW2 nor PW3 participated in arresting the appellant rather, it was Alphan Salum who arrested him. Nevertheless, the said Alphan Salum was not called to adduce evidence. Much as I agree with Ms. Suzan that under Section 143 of the Evidence Act, no particular number of witnesses is required to prove a fact, I am still of the view that it all depends on the circumstances of each case. This is because the law is also settled to the effect that if in a case a certain witness is considered to be material, it shall then have adverse consequences to the party failing to call such a witness without plausible explanations. See the case of ***Hemed Said v Mohamed Mbilu*** [1983] TLR 113. In my opinion, the said Alphan was an important witness to corroborate the testimony of PW2 and PW3. For failure to summon a material witness, I find the third ground of appeal meritorious so, I allow it.

On whether the appellant was found in possession of the alleged stolen motorcycle, Counsel for both parties have conceded that the seizure certificate (exhibit P6) was improperly admitted in the trial court. More so because in the said certificate, the seized items are the motorcycle, a black bag, a Coca-Cola bottle containing traditional medicine, a silver knife, a black torch, a bunch of keys and a Techno mobile phone, yet, these items were neither labelled to avoid mixing up the exhibits, nor were they registered in the exhibits register to show how they were taken care of. Moreover, some of the seized items such as a bunch of keys and Techno mobile phone were not as produced in evidence.

Generally, there was no description of how the exhibits were seized, kept and transferred from wherever they were to the court. The whole chain of custody was broken making it suspicious whether such exhibits were seized from the appellant. In ***Samwel Marwa @ Ogonga v R.,*** Criminal Appeal No. 74 of 2013, Court of Appeal of Tanzania at Mwanza, it was stated that when an essential feature of the charge is stealing, that the property has, through asportation, moved hands unlawfully from one person to another, the proper recording of the chain of custody of exhibits helps to establish that the alleged evidence (exhibits) is related to the alleged crime.

Without much ado, I subscribe to the learned minds for both parties that exhibit P6 was irregularly admitted by the trial court. In that regard, I allow the sixth ground of appeal and proceed to expunge exhibit P6 together with its contents from the record as prayed by Ms. Suzan, the State Attorney.

The last question to be resolved is whether the case against the appellant was proved beyond reasonable doubt. Ms. Suzan argued that even after expunging exhibit P6 from the record, the remaining direct evidence of PW1, PW2, PW3, PW4, PW5, PW6 and PW7 is sufficient to justify the appellant's conviction and sentence. With due respect, having expunged exhibit P6 and its contents, in my views it becomes difficult to prove the offence of armed robbery against the appellant based on the remaining evidence. The only available tangible evidence for the prosecution is the appellant's cautioned statement, PF3 of the victim and the blood-stained clothes of the victim.

Besides, PW1, PW2, PW3, PW5 and PW6 testified that the victim was attacked and seriously wounded by the appellant. For the stated reasons, I quash the conviction for armed robbery and set aside the thirty years imprisonment sentence imposed on the appellant. Invoking the provisions of Section 300 (2) of the CPA [Cap. 20 R.E. 2022], I convict the appellant of causing grievous bodily harm contrary to Section 225 of the Penal Code. Considering the vulnerability of the injured parts (head, neck and cheek), and given the circumstances under which the attack was carried out, I impose the sentence of seven (7) years imprisonment to the appellant which shall be calculated from the 28th day of November 2022, when he was convicted and sentenced by the trial court.

Consequently, the appeal is allowed to that extent only. The right of appeal is explained for any party aggrieved by this decision.

It is so decided.

KADILU, M.J.
JUDGE
27/10/2023.

Judgment delivered in chamber on the 27th Day of October, 2023 in the presence of the parties.

HIGH COURT OF TANZANIA

KADILU, M.J.,
JUDGE
27/10/2023.