IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 27 OF 2017

(Original Criminal Case No. 127 of 2012 of the District Court of SINGIDA at SINGIDA)

MBUA RAMADHANI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

01/6 & 13/7/2017

KWARIKO, J.

The appellant herein was arraigned before the District Court of Singida with the offence of Armed Robbery contrary to section 287A of the Penal Code CAP 16 Vol. 1 of the Laws R.E. 2009 (sic) where it was alleged that on the 6th day of April, 2012 at about 15.00 hours at Iyanja village within the District and Region of Singida the appellant stole a bicycle no. K. 5807039 size 29 make sport dark green coloured and stoned one MARIAM YOHANA on her right hand in order to obtain and retain the bicycle. Whereas HAMISI IDDI @ MAGESA who was second accused before that court was charged with the offence of Unlawfully receiving the said stolen

bicycle. Both the appellant and the second accused denied the charge hence their trial.

During the trial it was evidenced by the prosecution that MARIAM YOHANA, PW1 was driving a bicycle in the company of HADIJA SELEMANI, PW2 at about 15.00 hours on the material day when they met the appellant herein whom they knew before. That, the appellant stoned them hence they abandoned the bicycle and went away. Information was sent to police station where PW1 was given PF3 for treatment. On 1/7/2012 PW1 was called at police station to identify the appellant herein upon his arrest.

However, on her way home from the station, PW1 who was in the company of her husband MESHACK ABDRAHMAN, PW3 saw a person with a bicycle they identified as the one robbed from PW1. Report was sent to police station where that person was arrested by No. F 1097 D/CPL EX AVERY, PW4 and No. F4285 DC NOAH, PW5 who happened to be the second accused person who said was given the bicycle by his son where he bought it at Itambuka village. The bicycle was admitted in court as exhibit P1.

Further, No. G 356 DC SIMON, PW6 said he interrogated the appellant who is said to have admitted the allegations and his cautioned statement was admitted without objection and marked exhibit P2.

In his defence the appellant said he had been doing timber business since March, 2012 when he was arrested by police in July and was

identified by PW1 and PW3 whereas was beaten to admit the allegations. Whereas the second accused said he was given the bicycle in April, 2012 by his son ABDALLAH HAMISI, DW3 who in turn said he bought the same on 7/4/2012 from the appellant before the Village Executive Officer (VEO), CHRISANT DISMAS, DW5 and witnessed by CHRISTOMY DUDE, DW4. The sale agreement was admitted as exhibit D1.

At the end of the trial it was found that the second accused had sufficiently accounted that the bicycle was legally obtained through his son hence was acquitted of the offence. Whereas the appellant was found guilty of the offence of Armed Robbery, convicted and sentenced to thirty (30) years imprisonment.

On being aggrieved by the trial court's decision the appellant filed this appeal upon the following six grounds of appeal;

1. *That, the prosecution case was not proved beyond reasonable doubt.*

2. *That, the PF3 was wrongly admitted in evidence without him being given opportunity to comment and without calling its author.*

3. *That, the appellant was not adequately identified at the scene.*

4. *That, the cautioned statement, exhibit P2 was taken contrary to law under sections 50 & 51 of the Criminal Procedure Act [CAP 20 R.E. 2002].*

5. *That, the chain of custody was not proved in respect of exhibit P1.*
6. *That, the appellant's defence evidence was not sufficiently considered.*

This appeal was duly heard where Ms. Luwongo learned State Attorney for the respondent Republic opposed the same. Her submission to that effect will be referred in the course of this decision. Therefore, the grounds of appeal will be decided as hereunder.

For the sake of convenience I will start with the second ground of appeal. As rightly submitted by Ms. Luwongo learned State Attorney no any PF3 was tendered as exhibit during the trial hence the appellant's complaint that the same was admitted in evidence without him being given opportunity to say something and its author not called lacks base to stand. This ground of appeal fails.

In the third ground of appeal though it may seem that the appellant was sufficiently identified at the scene by PW1 & PW2 but upon scrutiny the evidence of these two witnesses did not prove the following: **one**, these witnesses did not explain the direction the attacker came for easy of identification. Did the attacker come from behind, front, left or right? There was no answer on that.

Two, the distance between the attacker and the witnesses was not described. **Three**, the witnesses did not describe their attacker, for instance his attire during the material time was not mentioned.

Therefore, even if the witnesses said they knew the attacker before as the appellant herein but in the absence of proof of evidence of proper identification it cannot be held that there was correct identification. I get support in the case of **MOHAMED s/o SHABANI VR**, Criminal Appeal No. 41 of 2009 Court of Appeal of Tanzania at Tabora (unreported) which approved the decision in the case of **JOHN JACOB VR**, Criminal Appeal No. 92 of 2009 where it was said thus;

> *"... we wish to point out that the question of familiarity will only hold if the conditions prevailing at the scene of crime were conducive for correct identification. If the conditions are not conducive for correct identification, as in this case, then the question of familiarity does not arise at all...."*.

Therefore, it is settled view of this court that the appellant was not sufficiently identified at the scene. Also, if the appellant was identified at the scene the witnesses must have mentioned him at the Police Station and search would have been conducted. Instead, in this case while PW1 & PW2 said they identified the appellant on 6/4/2012 and reported the matter to police but the police witnesses did not say that they had information of the appellant since that date as the arrest was done in July, 2012. The Police did not say PW1 mentioned the appellant to be the assailant at the scene and that they had been looking for him all that while.

Since PW1 & PW2 said they knew the appellant before and if they really mentioned him to police he would have been looked after. There is no such evidence from the prosecution. Hence, the delay in arrest adversely impacted on the prosecution case (see also **JUMA SHABAN VR**, Criminal Appeal No. 168 of 2004, Court of Appeal of Tanzania at Tabora (unreported). The third ground of appeal is therefore answered in the affirmative.

As for the fourth ground of appeal this court is in agreement with both sides that while the appellant was arrested on 01/7/2012 his interrogation was done on 3/7/2012 hence beyond four hours provided under section 50 (1) (a) of the Criminal Procedure Act (supra) and no any extension was given as required under section 51 of the said Act. The cautioned statement (exhibit P2) was thus illegal evidence and it is hereby expunged from the record. The fourth ground of appeal has merit.

As rightly complained by the appellant and submitted by the learned State Attorney in the fifth ground of appeal the chain of custody in respect of the said bicycle (exhibit P1) was not proved. This means that from the time the bicycle was allegedly found in possession of the second accused to the time the same was tendered in court it was not shown how the same was being handled in order to prove that it was the same thing all this while. In the case of **PAULO MADUKA & 4 OTHERS VR**, Criminal Appeal No. 110 of 2007, Court of Appeal of Tanzania at Dodoma it was said thus;

"By "chain of custody" we have in mind the chronological documentation and/or paper trail, showing the seizure, custody, control, transfer, analysis and disposition of evidence, be it physical or electronic".

Therefore, as the chain of custody in this case in respect of the bicycle was not proved this court finds that the said bicycle allegedly found in possession of the second accused is the same as exhibit P1.

Closely related to the foregoing is the identification of exhibit P1. On this PW1 who is said to have been robbed of the bicycle did not explain special marks pertaining to the same to distinguish it from any other bicycle. PW1 ought to explain the marks before the same was presented in court to be admitted as exhibit. I get support in this stance in the case of **HASSAN SAID VR** Criminal Appeal No. 264 of 2015, Court of Appeal of Tanzania at Dodoma (unreported) which restated its position in **MUSTAPHA DARAJANI VR**, Criminal Appeal No. 242 of 2015 (unreported) where it was held that;

"In such cases, description of specific marks to any property alleged stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits".

If that is the position of law it is clear that exhibit P1 was not sufficiently identified to be the property of PW1 allegedly stolen on the

material day. That is why PW1 in her evidence said that she was robbed black coloured bicycle whereas the particulars in support of the charge said the bicycle was sport dark green coloured. Thus, the evidence did not support the charge. After all PW1 did not say that the bicycle belonged to her apart from complaining that it was stolen from her. That means even the owner of the alleged stolen bicycle is not known. This analysis lead this court to hold that exhibit P1 was illegally admitted in evidence and it is hereby expunged from the record.

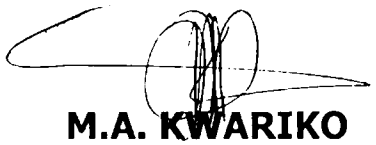
Consequently, if the property allegedly stolen was not properly identified by the complainant the offence of stealing cannot stand. The fifth ground of appeal has merit.

This court finds the sixth ground of appeal baseless because the defence evidence was considered by the trial court.

And lastly, having been decided that the appellant was not properly identified at the scene and exhibit P1 expunged from the record there is no any tangible evidence to connect the appellant with the alleged offence. Therefore, as rightly complained in the first ground of appeal this court agrees that the prosecution case was not proved beyond reasonable doubt against the appellant. This ground of appeal passes.

Finally, this appeal is found to be meritorious and is allowed, conviction quashed and sentence set aside. It is ordered that the appellant be set at liberty unless he is continually held for other lawful cause.

Order accordingly.

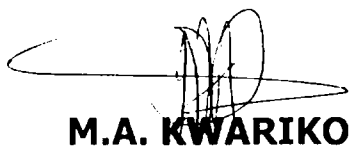


M.A. KWARIKO

JUDGE

13/7/2017

DATED at **DODOMA** this **13th** day of **July, 2017**



M.A. KWARIKO

JUDGE

13/7/2017

Date : 13/07/2017
Coram : Hon. M.A. Kwariko, J.
Appellant : Present
Respondent – Ms. Mgoma State Attorney
C/c : R. Nyembe

Ms. Mgoma State Attorney
The matter is for judgment.

Appellant:
I am ready.

Court: Judgment delivered in court today in the presence of the Appellant and Ms. Mgoma learned State Attorney for the Respondent Republic and Mr. Nyembe Court Clerk.

M.A. KWARIKO

JUDGE

13/7/2017

Court: Right of Appeal Explained.

M.A. KWARIKO

JUDGE

13/7/2017