IN THE COURT OF APPEAL OF TANZANIA

AT BUKOBA

(CORAM: MWARIJA, J.A., SEHEL, J.A And MAIGE, J.A.:)

CRIMINAL APPEAL NO. 608 OF 2020

MAJALIWA GERVAS ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Judgment of the Court of Resident Magistrate of Bukoba at Bukoba)

(Kiwonde, RM - Ext, Jur.)

dated 8th day of May, 2020

in

Criminal Appeal No. 60 of 2020

.....

JUDGMENT OF THE COURT

15th & 22nd July, 2022

MWARIJA, J.A:

In this appeal, the appellant, Majaliwa Gervas is challenging the decision of the Court of Resident Magistrate, Bukoba (Kiwonde RM-Ext. Jur) handed down in Criminal Appeal No. 60 of 2020. The learned appellate Magistrate upheld the appellant's conviction by the District Court of Bukoba in Criminal Case No. 153 of 2017. In that case, the appellant was charged with two counts. In the 1st count, he was charged with and convicted of the offence of grievous harm contrary to s. 225 of the Penal Code [Cap. 16 R.E. 2002, now R.E. 2022] (the Penal

Code) and in the 2nd count, he was charged with and convicted of the offence of armed robbery contrary to s. 287A of the Penal Code.

The trial court found it proven that on 7/6/2017, at Musira Island within the Municipality of Bukoba, the appellant caused grievous harm to Hamza Emily and on the same date, he stole fish from the same person, Hamza Emily and immediately before such stealing assaulted him with a machete in order to retain the stolen fish. Following his conviction, the appellant was sentenced to seven years and thirty years imprisonment in the 1st and 2nd counts, respectively. In the first appeal, save for reduction of sentence in the 1st count from seven to two years imprisonment, the appellant's conviction was upheld hence this second appeal.

The facts leading to the appellant's arrest, trial and consequently his imprisonment, may be briefly stated as follows: On 7/6/2017 during the night, Hamza Emily (the victim) and his friend, Godfrey Deogratious were in a boat at Musira Island area in Lake Victoria conducting a fishing activity. While carrying out that activity, another boat in which there were three persons approached. Having reached the boat in which were the victim and his friend, one of the persons in the intruding boat demanded money and shortly thereafter, attacked the victim using a

machete, causing injuries on his left hand to the extent of amputating his fifth finger. Having attacked the victim, the culprits stole fish from the victim's boat, destroyed the fishing net and went away.

The victim and his friend raised an alarm and in response, the nearby fishermen went to the scene and assisted the victim who named the appellant as the culprit. The incident was reported to the police station, Bukoba where the appellant was again, named by the victim as the offender. At the police station, the victim was issued with a PF3 and went for treatment at Bukoba Government Hospital. He was attended by Dr. Mboyera (PW3). The appellant was later arrested and after investigation of the case, which was conducted by No. G. 5300 DC Ernest (PW4), the charge against the appellant was preferred as shown above.

In his evidence, the victim who testified as PW1, told the trial court that he identified the appellant who was not only well known to him but was also a friend. He added that, as the appellant's boat approached in a suspicious way and after hearing the appellant demanding money, he increased the light of his pressure lamp and with aid of that light and that of a torch which was in his possession, he properly identified the appellant.

PW1's evidence was supported by that of his friend, Godfrey Deogratious (PW2) who, as said above, was conducting a fishing activity with PW1. It was PW2's evidence that he had also known the appellant for a long time before the date of the incident as his fellow fisherman. He testified further that, on the material date at 20:00 hrs while on PW1's boat carrying out fishing activity, the appellant who was in another boat with two other persons invaded PW1's boat, attacked him with a machete and stole fish from the boat.

On his part, the appellant who testified as DW1 told the trial court that on 14/7/2017, he was arrested by five police officers at Nyamkazi area. He was thereafter taken to police station. At the police station, he was asked whether he knew two persons; Ras and Kato and that, as a condition for his being released, he should assist the police to trace the named persons. He said that, since he did not know those persons and could not thus assist the police to locate them, he was charged as stated above.

He challenged the prosecution evidence contending that the witnesses had contradicted themselves on the date on which the incident occurred. He also disputed the evidence to the effect that he was identified at the scene of crime. He said that on 7/8/2017, he was

at Mwanza having travelled in a bus known as Ncheye Classic. He supported his evidence with a bus ticket and accommodation receipt (exhibit D1 collectively).

After the appellant's defence, the learned appellate Magistrate summoned the agent of Ncheye classic Bus which in his evidence, DW1 said that he used to travel to Mwanza on 7/8/2017. We think, with respect, that the move taken by the appellate Magistrate *suo motu* was improper. However, for reasons which shall be apparent herein, we need not delve in the effect of that impropriety.

In his decision, the learned trial Resident Magistrate found that the appellant was properly identified at the scene of crime by PW1 and PW2. He was of the view that, since the appellant was known to the said witnesses before the date of the incident and because there was sufficient light from PW1's pressure lamp, there was no possibility of a mistaken identity of the appellant. On the appellant's *alibi*, the learned trial Resident Magistrate found that the same could not raise any reasonable doubt on the prosecution's evidence because the offence took place in June 2017 and therefore, the appellant's evidence that he was at Mwanza in August 2017 could not, in any way, add value to his defence.

On appeal, after having re-evaluated the evidence, the learned appellate Magistrate was equally satisfied that the appellant was properly identified by PW1 and PW2. He found however, that the medical report tendered by PW3 (exhibit P1) was improperly acted upon by the trial court because, after its admission in evidence, the same was not read out. He therefore, expunged it from the record. Notwithstanding the expungement of that exhibit, he found that, the oral evidence to the effect that PW1 was injured, remained intact. As stated above, save for reduction of sentence on the 1st count, the appeal was dismissed.

Before this court, the appellant has raised four grounds of appeal which may be paraphrased as follows:

1. That the learned appellate Magistrate erred in upholding the decision of the trial court while the appellant's conviction was based on the charge which is fatally defective for the reasons that:

    (i) The date of commission of the offence was altered in contravention of s. 234 of Criminal Procedure Act.

    (ii) It does not show the quantity and value of the fish which was stolen from the victim.

(iii) The statute under which the charge was preferred is wrongly cited as the Penal Code Cap. 168 R.E. 2002 instead of Cap. 16 R.E 2002.

2. That the learned appellate Magistrate erred in law in upholding the decision of the trial court without considering that, given the circumstances under which the offence was committed, the identification evidence was insufficient to warrant the appellant's conviction.

At the hearing of the appeal, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Nestory Nchiman, learned Senior State Attorney assisted by Mr. Juma Mahona, learned State Attorney.

Submitting in support of the 1st paraphrased ground of appeal, the appellant argued, **first**, that his conviction was based on a fatally defective charge because the same was amended by altering the date of the offence printed thereon and a different date was hand written. Citing the case of **Kamugisha Faustine and Another v. Republic**, Criminal Appeal No. 169 of 2018 (unreported), he submitted that the amendment ought to have been made in accordance with the provisions of s. 234 of the Criminal Procedure Act [Cap. 20 R.E. 2002, now R.E. 2022] (the CPA). **Secondly**, it was his argument that the omission in

the charge to indicate the quantity and value of the stolen fish offended the provisions of s. 135 of the CPA hence rendering the charge defective. **Thirdly**, he contended that he was charged in the second count under a wrong law because the Penal Code is Cap. 16 not Cap. 168 of the revised laws. Relying on the court's decision in the case of **Alex Medard v. Republic**, Criminal Appeal No. 571 of 2017 (unreported), he urged us to find that his conviction was wrongly based on a defective charge.

In response, though the learned Senior State Attorney admitted that the date of commission of the offence was altered, it was his submission that the alteration did not prejudice the appellant because the same was done before the charge was read over to him. He thus argued that, the provisions of s. 234 of the CPA were not contravened. On the omission to state the quantity and value of the stolen fish, he submitted that the omission is also not fatal so long as the ingredients of the offence under s. 287A of the Penal Code were stated. He cited the case of **Mchangwa Marwa Wambura v. Republic**, Criminal Appeal No. 44 of 2017 (unreported) to bolster his argument. With regard to the citation of the Penal Code as Cap. 168 [R.E. 2002], the learned Senior State Attorney contended that such is a minor irregularity which did not

occasion any miscarriage of justice on the part of the appellant because, he understood the offence with which he was charged.

Having considered the submissions made on this ground of appeal, we agree with the learned Senior State Attorney that the irregularities complaint of are minor. The alteration of the date of the offence was made on 5/2/2017. It was on that same date that the charge was read over to the appellant. In their evidence, both PW1 and PW2 stated clearly that the offence was committed on 7/6/2017. PW3 also testified that he attended PW1 on 7/6/2017. Another witness, PW4 testified that the report about the incident was reported to the police on 8/6/2017. The appellant was therefore, aware that he was charged with the offence which was committed in June, 2017 not August, 2017.

With regard to the omission to indicate the quantity and value of the stolen fish, that irregularity is, in our view, also minor. As submitted by Mr. Nchiman, the quantity or value of a property is not one of the ingredients of the offence of armed robbery. Once it is established that a property of whatever quantity or value was stolen and immediately before or after such stealing the offender was armed, he cannot exonerate himself because the quantity or the value of that property was not specified. The value may be relevant only when it comes to

matters of compensation to the victim. For the same reasons that the appellant was aware of the charge which he was facing, we find that the citation of the Penal Code as Cap. 168 R.E. 2002 did not prejudice him. On the basis of the foregoing reasons, the 1st ground of appeal is dismissed.

With regard to the 2nd ground, it was the appellant's submission, **first**, that the trial and appellate Magistrates had failed to consider that, if it is true that the appellant was in another boat, it was not possible for him to access into PW1's boat and attack him as alleged. He argued further that, the evidence of identification tendered by PW1 and PW2 is not valid because the prosecution did not conduct identification parade. In support of his argument, he cited *inter alia,* the case of **Francis Majaliwa Deus v. Republic**, Criminal Appeal No. 139 of 2005 (unreported).

Secondly, it was his argument that, the evidence of the identifying witnesses (PW1 and PW2) is not credible because they did not give the description of the suspect and did not also state the distance from which the identification was made, the intensity of the light and the time spent in observing him at the scene of crime. He cited the cases of **Waziri Amani v. Republic** [1980] T.L.R. 250,

Shabani Hussein Makola @ Makora and Another @ Rutashobya v. Republic, Criminal Appeal No. 287 of 2018, **Machemba Paulo v. Republic**, Criminal Appeal No. 538 of 2015 and **Ahmad Mohamed and Another v. Republic**, Criminal Appeal No. 128 of 2005 (all unreported).

In reply to the appellant's submission on that ground, Mr. Nchiman opposed the contention that the appellant was not properly identified. He argued that the identification evidence was watertight. This, he said, is because PW1 and the appellant had not only known each other before the date of the incident but they were friends. Furthermore, he said, there was light from a pressure lamp which upon suspecting the appellant's intention, PW1 increased it to its full capacity.

He submitted further that, the appellant was immediately named at the scene of crime and at the police station. In the circumstances, he said, the argument that identification parade should have been conducted is misplaced. He relied on the court's decision in the case of **Francis Majaliwa** (supra) cited by the appellant. On how the appellant gained access into PW1's boat and attacked him, Mr. Nchiman submitted that the appellant did not raise that issue in the 1st appeal and he is not therefore, entitled to raise it at this stage of the proceedings. He cited

the case of **Nyerere Nyague v. Republic**, Criminal Appeal No. 67 of 2010 (unreported) to support his argument.

On the contention that the witnesses' identification evidence is not watertight because they did not give the description of the appellant, Mr. Nchiman submitted in reply that, for the same reason that the appellant was known to PW1 and PW2, his description was not necessary. As for the distance between the appellant and the identifying witnesses, he argued that it was so close that the appellant was able to cut PW1 with a machete. With regard to the time spent at the scene, it was the learned Senior State Attorney's submission that the time was sufficient to enable the witnesses identify the appellant because the incident took a considerable period of time.

To start with the complaint that both the trial and appellate Magistrates did not consider the possibility of access by the appellant into PW1's boat, we think, even though in their evidence PW1 and PW2 did not explain the whole scenario on how the appellant got out of his boat and entered into PW1's boat and attacked him, once it was found that he was identified as the offender, such details are not necessary. In any case, as submitted by Mr. Nchiman, that point was not raised in the first appeal and therefore, the appellant is not entitled to raise it in

this appeal. – See for instance, the case of **Nyerere Nyague** (supra) cited by the learned Senior State Attorney. In that case, the Court observed that:

> *"... as a matter of general principle, an appellate court cannot allow matters not taken or pleaded and decided in the court(s) below to be raised on appeal...."*

On the contention that the prosecution should have conducted identification parade and that the description of the appellant should have been given, the position of the law is clear, that when the suspect is known to the identifying witness, the requirement of identification parade or giving of description does not arise. The position has been stated by the Court in a number of its decisions, including the case of **Doriki Kagusa v. Republic**, Criminal Appeal No. 174 of 2004 (unreported). In that case, it was held that:

> *"... where the identifying witness or witnesses knew the suspect or suspects before the incident it is superfluous and a waste of resources to conduct such parade. We have asked ourselves this question: the identification parade is held to achieve what purpose when the suspect is well known to the identifying witness? Our answer has already been indirectly given above. It is unnecessary and a waste of time."*

On the requirement of giving description of the suspect, the Court went on to state as follows:

> *"... it is settled law that a witness on identification need not give any prior detailed description of the suspect who is known prior to the incident. It suffices if he or she mentions the name of the known or familiar suspect: See the decision of this Court in the case of* ***Ezekiel Noel v. R****, Criminal Appeal No. 25 of 2002 (unreported)."*

That said, we now turn to consider whether or not the evidence of identification was sufficient. Both the trial and the appellate Magistrates found the evidence of PW1 and PW2 credible. It is trite principle that this court cannot interfere with concurrent findings of two courts below unless the findings are based on misdirection or misapprehension of evidence. It can only interfere where there is a violation of a principle of law or procedure or when there is miscarriage of justice. – See for instance, the cases of **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R 149, **Omari Lugiko Ndaki v. Republic**, Criminal Appeal No. 544 of 2015, **Jafari Mohamed v. Republic**, Criminal Appeal No. 112 of 2006 (both unreported) and **Salum Mhando v. Republic** [1993] T.L.R 174. In **Jafari Mohamed** case (supra) the Court observed as follows:

"An appellate Court, like this one, will only interfere with such concurrent findings of facts if it is satisfied that they are unreasonable or perverse leading to a miscarriage of justice, or there had been a misapprehension of the evidence or a violation of some principle of law."

In this case, PW1 and PW2 identified the appellant, first, because he was known to them before the date of the incident and secondly, because of light from a pressure lamp which PW1 had increased its intensity to full capacity. It is in record that the appellant was named at the scene of crime to the persons who turned out there after the alarm which was raised by PW1 and PW2 and was also mentioned later at the police station. Actually, when he was being cross-examined by the appellant, PW1 said that, when he identified the appellant at the scene, he asked him: *"Mr. Majaliwa my friend, why [do] you want to kill me ...."*

The principle as stated in the case of **Marwa Wangiti Mwita and Another v. Republic** [2002] T.L.R. 39 is that naming of the suspect at an early opportune time ensures the credibility of a witness. In that case, the court stated as follows:

"The ability of a witness to name a suspect at the earliest opportunity is an all-important assurance of his credibility, in the same way an unexplained delay

or complete failure to do so should put a prudent court to inquiry."

Given the above stated reasons, we do not find any sound reason for interfering with the concurrent findings of the trial and the appellate Magistrates that the appellant was properly identified at the scene of crime. In the event we dismiss the appeal for want of merit.

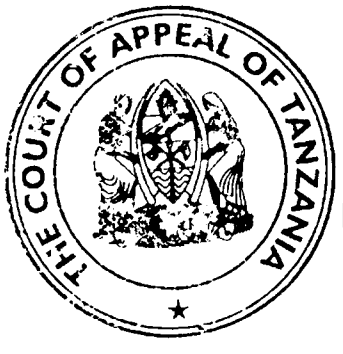
DATED at **BUKOBA** this 22nd day of July, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 22nd day of July, 2022 in the presence of appellant in person and Mr. Amani Kilua, learned State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



G. HERBERT
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