IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 33 OF 2020

(Originating from Criminal case No. 09 of 2017, in the Resident Magistrate Court of Manyara at Babati)

PAPAJA PARISANGA.....APPELLANT

VERSUS

THE D. P. P.....RESPONDENT

JUDGMENT

29/09/2021 & 22/12/2021

GWAE, J

The appellant, Papaja Parisanga is before this court challenging the decision of the Resident Magistrate's Court of Manyara at Babati (trial court) where he was charged with the offence of robbery on two accounts contrary to section 287A of the Penal Code, Chapter 16 Revised Edition 2002 (the Penal Code) and sentenced to thirty (30) years imprisonment for each count, the sentence to run concurrently.

Before the trial, the prosecution alleged that, on the 22nd November 2016 at Olpopong'i village within Kiteto District in Manyara Region, the accused did steal cash money Tshs. 60,000/= the property of one Mussa s/o

Ramadhani and a motor cycle with registration number MC 741 BHP make T-BETTER valued at Tshs. 1,900,000/= the property of one Adam s/o Nyange and immediately before and after such stealing, the appellant did use a double-edged knife or sword ("sime") to cut him on different parts of his body in order to obtain such properties. The appellant patently denied to have committed the said offences.

In its endeavors to prove the charge against the appellant, the prosecution side paraded a number of nine (9) witnesses and tendered a total of three (3) exhibits, to wit; motor vehicle with Registration Number MC. 714 and motor vehicle registration card (PE2) and PF3 (PE3)

It was the prosecution evidence that, on 22/11/2016 at about 19: 00 hrs to 20: 00 hrs, the appellant went to the scene of crime with aim of hiring motor vehicle to take him to Olpopongi area with for the agreed fair of Tshs. 5000/=. At the scene of crime, the appellant initially approached PW6r and then the victim (PW1). He was able to hire the victim. While on the way the appellant stopped PW1 and went for a short call, there after they proceeded to Olpopongi. On reaching, the appellant asked for the phone numbers of PW1 and at the time PW1 was putting his number into the appellant's phone he was suddenly hit by the appellant with a heavy object at the back part of

his head and the appellant continued cutting him by using the so called "sime". The appellant then took from PW1 hard cash, Tshs. 65, 000/= and motorcycle and left the victim became unconscious. Subsequently after the commission of the offence of robbery that is on the 25th November 2016, the appellant was found in possession of motor cycle robbed from PW1. the appellant was then apprehended and the motorcycle found in the appellant's possession was subsequently identified by the victim (PW1) as well as the owner (PW4).

In defence, the appellant denied any involvement in the alleged commission of the offence of robbery in the two counts leveled against him and went on contending that, the institution of the charge against was connected to personal grudges namely; that one of the arresting officers, was his farm lessee who was after purchasing a farm (30 Acres) from him but in vain and that, PW7's father was custodian of the heads of cattle owned by the appellant's father and that, after demise of his late father the said custodian refused to handle them to him.

At the end of the trial, the appellant was found guilty as charged, convicted and sentenced to a term of thirty (30) years imprisonment on each count.

Aggrieved by both sentence and conviction, the appellant has filed this appeal with five (5) grounds of appeal which read as follows: -

1. That, the trial court erred in law and in fact in convicting and sentencing the appellant through the evidence of identification while the said evidence was not watertight to mount a conviction.
2. That, the trial court erred in law and in fact in convicting the appellant while case for the prosecution was not proved beyond reasonable doubt, particularly considering that the doctrine of recent possession was not properly applied.
3. That, the trial court erred in law and in fact in convicting and sentencing the appellant while there was no search warrant or seizure certificate to establish whether the alleged stolen motorcycle itemized in.
4. That, the trial court erred in law and in fact when she failed to subject the evidence to a thorough evaluation and hence reached on an erroneous decision.
5. That, the trial court erred in law and in fact in holding that the case against the appellant had been proved to the hilt. In this

case there is a conspicuous absence of a proper account of the chain of custody of the stolen motorcycle Exh. P1

At the hearing of the appeal, the appellant appeared in person while Ms. Alice Mtenga, the learned State Attorney appeared for the respondent, the Republic.

Supporting his grounds of appeal the appellant challenged the alleged identification taking into account that PW1 stated that, it was his first time to see him. The appellant further stated that at the scene of crime it was so dark and PW1 failed to explain the intensity of the light and the type of the clothes worn by the appellant on the material date. The appellant went on stating that he was not found in possession of the money nor the allegedly stolen motorcycle, and if at all he was found with the stolen properties the prosecution would have tendered a seizure note or the officers who seized the properties would have gone to testify.

The appellant also challenged the chain of custody by stating that it was broken as there was no handing over, he further faulted the evidence of the prosecution witnesses in that, it was so contradictory in respect of the value of the motorcycle and the amount of money allegedly stolen. The

appellant also challenged the charge sheet in that the same was defective as there was no need to have two counts, however this was not raised in the grounds of appeal.

Resisting this appeal, Ms. Mtenga submitted as follows; that, there was proper identification of the appellant on the grounds that, **firstl**y that, the appellant was familiar to PW1 and **secondly,** that, there was light and they both stayed together for a while. More so, PW1 identified the appellant at the dock and even PW6 had conversation with the appellant before hiring the motorcycle of PW1. It was her firm view that the appellant was properly identified.

Furthermore, the counsel submitted that it is undoubtedly that, the appellant was found in possession of the stolen motorcycle that was parked near the homestead of PW7 and when he was asked, he admitted to have parked it.

Ms. Mtenga also argued that, a seizure certificate in this case was not necessary as the stolen motorcycle was properly identified by the owner, PW4 through its registration number and colour. She then urged this court

to make a reference to the case of **Kassim Salum vs. The Republic**, Criminal Appeal No. 186 of 2018 (unreported-CAT).

The learned state attorney likewise submitted that the difference in value of the stolen motorcycle and money in the charge sheet and that adduced through the evidence of PW1 and PW4 does not go to the root of the case.

Lastly, it was the submission by the counsel for the Republic that, the though the charge was defective but such defect did not prejudice the appellant and that, the arresting officers did not give their evidence however the same was replaced by that of the PW7 and PW8 who witnessed the appellant's arrest.

Having summarized the submission by the parties and considering courts' records, this court is now in a position to determine the grounds of appeal as advanced and argued.

Starting with the first ground**, that, the trial court erred in law and in fact in convicting and sentencing the appellant through the evidence of identification while the said evidence was not watertight to mount a conviction.**

The Court of Appeal of Tanzania and this court in a number of decisions tested reliability of evidence of visual identification. In **Director of Public Prosecutions vs Mohamed Said and Another,** Criminal Appeal No. 432 of 2018 (unreported), the Court of Appeal of Tanzania reiterated the observations **in Omari Iddi Mbezi and 3 Others vs Republic,** Criminal Appeal No. 227 of 2009 (unreported-CAT), it was stated that:

> "The witness must make full disclosure of the source of light and its intensity, explanation of the proximity to the culprit and the witness and the time he spent on the encounter, description of the culprits in terms of body build, complexion, size and attire. Additionally, the witness must mention any peculiar features to the next person that person comes across which should be repeated at his first report to the police on the crime who, would in turn testify to that effect to lend credence to such witness's evidence of identification of the suspect at an identification parade and during the trial to test the witnesses' memory."

In the instant case, the question which is to be asked by the court is, whether the above tests were met. PW1's evidence clearly pointed out that the distance between the appellant and PW1 was so close to enable the victim (PW1) to unmistakenly identify his assailant as it is testified by the

prosecution that, initially the appellant and PW1 had a conversation where the appellant asked PW1 for a fare to Olpopongi area and later bordered his motorcycle, later on at a certain time the appellant stopped PW1 and went for a short call and then boarded the motorcycle and proceeded with the journey, and upon reaching Olpopongi the appellant asked for PW1's phone number and when he was writing his phone number, the appellant hit him with a heavy object at the back of his head and then continued beating him and took his mobile phone, money and the motor cycle.

On the test relating to intensity of light at the crime scene, PW1 testified that he managed to identify the appellant from the electricity light coming from the shops around. It is settled that when it comes to the issue of sufficiency of light at a crime scene, clear evidence must be given by witnesses to establish that the light relied upon by the identifying witness was reasonably bright to enable identifying witnesses to see and positively identify a culprit (See the case of **Bernard Thobias Joseph & another vs. The Republic,** Criminal Appeal No. 414 of 2018 (Unreported)

PW1's testimony is such that there was enough electricity light (bulbs of different size) in the compound for him to see clearly the appellant. Certainly, this observation was not a mere claim that there was light but a

description of sufficiency of light at the scene of crime to enable identification of the appellant.

With regard to the duration, it is apparent from the evidence of PW1 that, the appellant and PW1 spent sometimes together taking into account the time they had a conversation on the fare to Olpopongi and the time they were together heading to Olpopongi area and on reaching to Olpopongi the appellant had asked PW1 his phone number before he hit him with a heavy object.

Another evidence from PW1 which is said to have enabled him to identify the appellant is the fact that, the appellant is not new to him as he used to go to where PW1 used to regularly park his motorcycle, "kijiweni", the evidence of the victim was supported by that of PW6, Yunus Shaban who also testified that it was the appellant who went on the material date at Kiteto Kijeweni and hired the victim's motorcycle.

Taking all the above evidence into consideration, this court is of the firm view that, it was probable that, the appellant was identified at the crime scene by PW2 and PW6. Nevertheless, it is not very clear as to whether PW1 and PW6 named the appellant at the earliest moment that is before his

apprehension on 25/11/2016. Description of the suspect now appellant and subsequent mentioning of his name by PW1 & PW6 would have been credible evidence justifying the investigation team to refrain from conducting an identification parade. The requirement of naming a suspect who is alleged familiar to the victim or any person who alleges to have properly identified a suspect was stressed in **Marwa Wangiti Mwita and another vs.Republic** (2002) TLR 39 where it was correctly that:

> "The ability of a witness to name a suspect at the earliest opportunity is an important assurance of his reliability, in the same ways as un-explained delay or complete failure to do so should a prudent court to inquire".

In the absence of clear evidence as to familiarity between a victim or identifying person (PW6) and failure to name the suspect at the earliest opportunity, an identification parade was therefore necessary as correctly held in the case **in Omari Iddi Mbezi and 3 Others vs Republic** (supra). Hence, the evidence adduced by the prosecution witnesses in respect of the alleged identification of the appellant is found to be weak, in my view, requiring other corroborative pieces of evidence to safely secure a conviction against the accused now appellant. This ground is therefore allowed to the said extent.

On the second ground of appeal, That, the trial court erred in law and in fact in convicting the appellant while case for the prosecution was not proved beyond reasonable doubt, particularly considering that the doctrine of recent possession was not properly applied.

It is the assertion of the prosecution side that, on the 25th November 2016, the appellant was found in possession of the motorcycle recently stolen or robbed from the victim (PW1) on the 22nd November 2016, just three days after the incidence. Hence, the doctrine of recent possession might be conveniently invoked. The doctrine of recent possession has been discussed in a chain of courts' decisions. In **Joseph Mkumbwa and Another vs Republic,** Criminal Appeal No. 94 of 2007 (unreported) we stated that:

> "Where a person is found in possession of a property stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place where from the property was obtained. For the doctrine to apply as a basis of conviction, it must be proved, first, that the property was found with the suspect; second, that the property is positively proved to be the property of the complainant; and lastly, that the stolen thing constitutes the subject of the charge against the accused...."

On scrutiny of evidence on the record adduced by PW7 & and PW8 who vividly testified to have seen a motor cycle parked near the house of PW7 and when the appellant showed up, he was asked whether he was the one who parked the motorcycle, he positively replied, stating that he had parked it because it was out of fuel.

Considering the above tests, this court is of the view that three above tests expounded in **Joseph Mkumbwa and Another vs Republic** (supra) seem to have been fulfilled however subject to scrutiny of other pieces of evidence adduced by the prosecution and defence during trial as to be demonstrated herein under.

On the third ground of appeal on the appellant's complaint that, there was no search warrant or seizure certificate.

This court would find as rightly argued by Ms. Mtenga, that so long as the motorcycle was properly identified by PW4, the owner then seizure certificate was not necessary. The learned counsel referred this court to the decision of the Court of Appeal of Tanzania in the case of **Kassim Salum vs. The Republic** (supra). Where the Court stated that;

> "Given the circumstances, even if there was no certificate of seizure, the evidence of PW3, PW4 and PW5 proved that

> the TECNO, M3 black with scratches retrieved from PW5 and produced in court was the very one at issue. Hence, we find this ground to be devoid of merit."

In the matter at hand, the evidence of PW7 and PW8 is weighed as credible but on the other hand it requires corroboration of evidence by one of the arresting officers or tendering of a seizure note by the investigator (PW5) or any other person who had knowledge of the same. In the absence of the testimonies by arresting officer (s) and failure by the prosecution to tender the certificate of seizure which would credibly persuade the trial court to safely convict the appellant, a lot is left to be desired since the arresting officers were vital witnesses.

The last question for my determination is, whether the trial court justly and fairly held that the prosecution evidence was water tight justifying conviction against the appellant. It is trite law that, in a criminal trial, the burden of proof lies on the prosecution shoulders, therefore, it never shifts to the accused. I am guided by the judicial in the case of **Ahmad Omari vs. Republiv,** Criminal Appeal No. 154 of 2005 (unreported), where it was stated thus:

> "In a criminal case the burden of proof is on the prosecution to prove the case against the appellant beyond reasonable

doubt. The burden never shifts. (Section 3 (2) of the Evidence Act)."

From the foregoing analysis of evidence, the noted short falls such as failure to conduct identification parade, failure to tender certificate of seizure, the chain of custody of the exhibit being seriously questionable since the exhibit (PE1) was merely produced by the victim and worse enough nothing was said by the investigator like custody of the said motor vehicle for example; the one who seized it, whether it was kept in the exhibit room or not and who precisely brought it in the trial court and from where. The element of asportation of the allegedly stolen motorcycle is therefore found to be doubtful. I am alive of the principle that some article cannot change hands easily, thus, the strictness of chain of custody may not be mandatorily required (see a judicial decision in **Issa Hassani Uki vs. Republic,** Criminal Appeal No. 129 of 2017 (unreported-CAT) but in our instant case, the victim himself produced PE1, thus no any other person particularly investigation team and arresting officers who appeared and said or mentioned of seizure of the motorcycle and custody of the same.

I have further examined the charge sheet and particulars of the offence, as correctly admitted by the learned state attorney, I am of the firm

opinion that there was not requirement of having two distinct or separate counts as the offences (robbery) in two counts occurred at the same time and to the same victim. it was only one offence of robbery that was committed to the victim where stealing of two valuable items occurred, in that scenario, there was no justification of having two counts for the offence of robbery while the offence of robbery was committed in the same time, same pace and to the same victim. Hence, according to the facts of the case section, 133 (2) of the Criminal Procedure Act, Cap 20 Revised Edition, 2019 was not applicable.

In the event I find this appeal is not without merit, it is allowed and I proceed quashing the trial court's conviction and setting aside the sentence meted against the appellant. The appellant shall be released from the prison forthwith unless held therein for other lawful cause.

It is so ordered.

M. R. GWAE
JUDGE
22/12/2021

Court: Right of Appeal fully explained

M. R. GWAE
JUDGE
22/12/2021