

TANZANIA / JUDGMENT

20191016 TZHC Mwanza2

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-! I t . I I I IN THE HIGH COURT OF TANZANIA I I I (MWANZA DISTRICT REGISTRY) /
ATMWANZA . I I CRIMINAL APPEAL NO. 12 AND . 13 OF 2018 I (Originating from Magu District
Court Crirrinal Case No. 172 1bf 2016) i ST I DANIEL JOSEPH 1 /
APPELLANT i'. 1 CHARLES MAKOYE L 2N~I APPELLANT ,:, I VERSUS;
I I I I I . . REPUBLIC .. ■■ ... ■■■■■ I I I I .. ■ j... ... ■ ■ ... I I ... I ■ ... RES PON
DENT 1111 . I I

JUDGEMENT

I I 14.8 & 16.10.2019 1', ,I. MADEHA, l; / i' I I I I I I I The appellants were charged with and
convicted with the offence . I i I 1 of gang armed robbery contrary to ~ction 287 (A) nd 287 (C) of
the ,/ I, 9 I I Penal Code Act, Cap 16 (R. E. 2002)/as amended by /Act No. 3 of 2011. : I I I ' I They
were sentenced to serve a r11·andatory minim~m sentence of 30 years in prison. Dissatisfied .
with the , ' decision, thJy I lodged this first i' I I, I appeal on grounds of complaints wH.ich can be
consqlidated as follows: - . , · I i I

1. Tha~ the identification of the appJttants, since the{e were unfavourable visual factors. I I I I I
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2. That, the owner of the motorcycle was not properly proved.
3. That, the appellants were wrongly convicted based on uncorroborated retracted/repudiated
confession. I The facts of this case were that, o~ 13 days of august, 2016 about 19:00 hours at
Kisesa within Magu District the pt appellant approached the victim who was motorcycling
operator to ferry with his colleague whom they collected from the bus stage in Matela
village. jrhey agreed a • fare of Tshs 7000/= and upon reaching Matela village the pt accused
I borrowed Tshs 10000/=, from the victim to pay another person and promised to refund
later, the money which the 2nd appellant pretended to have taken to the mentioned person.
The victim asked where else, but i ' later proceeded up to Mwabuye where the 1st accused
stopped him and before paying his fare, the 2nd appellant hit him with a heavy object at the
i head, and ordered the 1st appellant to :stab him with a knife. Before executing the same,
the victim pushed the motorcycle towards him and 2nd appellant hit him for the second
time with stone. The victim fell down ! unconscious when he woke up, he did not find his
motorcycle and the appellants had already disappeared. Oni his way back he met a good ·

Samaritan who took him to the Nyanguge Police Station where he reported the incident. The fellow motorcycle operators came and the 1st appellant unsuccessfully traced the appellants. The 1st appellant was later arrested and when searched was found with the particulars similar to the stolen motorcycle, handing over to another person. When asked, the 1st appellant confirmed to have known the victim and admitted to have robbed him the said motorcycle which was in Guta village within Bunda District. The appellants later led the police officers to Bunda where the said motorcycle was found in the office of VEO as security, of which he had to surrender the motorcycle of one Baraka Maombi, for him to retain it back. Writings were made and each party had the copy, whereas the said copy is the one the 1st appellant was found with immediately after his arrest. The 1st appellant called the 2nd over the phone who claimed to lack fare, which he was sent later, he honoured, and upon reaching Magu stage the 1st appellant who was in the company of the police officers pointed the 2nd appellant hence arrested. The appellants were jointly charged with the offence of gang armed robbery which resulted in their conviction and sentenced to imprisonment. Thus, aggrieved and resulted in this current appeal. At the hearing, the appellants appeared in person while respondent enjoyed the service of learning Senior State Attorney Miss. Rehema Mbuya. The 1st appellant opted for the 1st and 8th grounds of the appeal and abandoned the rest. He argued that the ownership of the said motorcycle did not comply with the law, since PW3 submitted to have, been given by the Tazama group. When submitting for the 8th ground of the appeal, he submitted that the evidence was not corroborated, since PW2 found the victim at the scene on 13/05/2016 while PW3 stated to have seen the appellant on 30/05/2016. The appellant further argued that PW3 was recorded to be 5 years old and he doubts whether a child of that age was able to ride the motorcycle, this false testimony. The 2nd appellant prayed that this court adopt his grounds of the appeal. The learned Senior State Attorney consolidated the grounds of the appeal into six instead of 8 as lodged by the appellants. And argued in general that the appellants were clearly identified since there was enough light to warrant the victim to identify them, and as long as they were known to him, he had no any difficulty in identifying them. She cited the case of Mabara Masasi Monge V. Republic, Criminal Appeal No. 161 of 2010. Where the court held that, where there is retracted and repudiated confession, the corroborated evidence must be there to prove the offence. The learned State Attorney further submitted that it was the 1st appellant's arrest, which led to the discovery of the said robbed motorcycle and this is pure undoubted corroboration. She submitted further that, concerning the age of the 4th victim it was a mere typing error and nothing other than that. The first appellant dropped that argument, however the second appellant prayed for the adoption of the all grounds of appeal he lodged. The learned State Attorney argued that there was no any contention in relation to the identification of the appellants, since there was enough light for the appellants to identify, and having in mind that the appellants were well known to the victim. For the trial Court records either victim nor accused confirmed to have known each other before) the learned State Attorney's submission that they knew each other lacks basis, and I have left this Court in unknown path when trying to find out the truth of the matter from the trial Court records. In the case of Sebastian Muna V.

Republic, Criminal Appeal No.299 of 2016 (unreported) the Court of Appeal held that; "The importation of the extraneous matter into evidence to confirm the decision of the trial Court is an unfortunate occurrence which prejudiced the appellant and offended the ends of justice". However, the fact that they did not know each other before the fateful date cannot deny the victim an opportunity to recognise someone, as he met at about 19:00 hours and carried in his motorcycle for at least 1 happy hour before things turned sour. Thus, I am of the settled mind that the time which both appellants and the victim were negotiating the fare, this afforded the victim ample time to identify the perpetrators even in later days especially in the happening of such atrocious incident such as this. The landmark case of visual identification which has been followed by the Courts in our jurisdiction is the case of Waziri Amani V. Republic (1990) TLR 250, factors to consider includes: "The time the witness had the accused under observation, the distance at which he observed him, the condition in which such observation occurred, for instance, whether it was day or night time, whether there was good or poor lighting at the scene, and further whether the witness knew or had seen the accused before or not. The above reasons stated in my opinion are in relation to the identification of the accused when committing the offence. Unlike the case at hand, which the appellants were in the company of the victim for at least one hour in a friendly face, which was not even covered by masks or that they hide their faces before the commission of the said robbery. I am totally in agreement with the finding of the trial court who also had a different approach as the victim spent longer with the appellants. The second ground, as to whether ownership of the motorcycle alleged to have been robbed, was properly proved; The said motorcycle was admitted and marked as Exhibit P1 is registered as MC592AWN is the property of Africa Logistics Solutions Ltd and not PW3 or nor Tazama group which the former alluded to have obtained the motorcycle from. Now, I am persuaded by the appellants that the prosecution did not prove the ownership of the motorcycle alleged to have been robbed by the appellants. The third ground, was whether the trial court can convict the accused on an uncorroborated retracted/repudiated confession; the learned State Attorney submitted that there was corroboration between the confession statement recorded and tendered by PWS and the evidence that it was DW1 who led the investigation team to whereabouts of the motorcycle, which was finally retrieved from PW4 office in Bunda District. In the case of Twaha Ali and 5 others V Republic, Criminal Appeal No. 78 of 2004 (unreported), the Court of Appeal said that a confession or a statement will be presumed to have been voluntarily made until objection to it is made by the defence on the ground that it was so or it was not made at all. The court went on to hold: "... If that objection is made after the trial court has informed the accused his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct inquiry (or trial within a trial) into voluntariness or not of the alleged confession. In the case at hand, the records show that the accused raised an objection challenging the admission of the confession statement recorded by the PWS on the ground that, it was recorded in the presence of the police officer. But surprisingly the trial magistrate rejected the objection simply because it does not match with the testimony of PW1 and PW4. That, to me, is not the proper way of

conducting the inquiry as laid down in the i i . case cited there above. I The trial court ought to have to look at the correctness of the ; procedures to be followed when recording the statement if were complied I

- I I with or not. Even if he assumed that presence of a police officer I when the confession was being made had no effect, he ought to have inquired I whether the law allows or otherwise. In the case of Paulo Maduka and 4 others V. Republic, criminal appeal No. 110 of 2007 (unreported), the 8 I court stated further that, "such an inquiry should be conducted before the ! i confession is admitted in evidence. " , The trial magistrate did not stop everything and conduct the inquiry I I or trial within a trial to find out the correctness of the confession statement, rather, instead went away to admit Exhibit PE4 as evidence. From the above reasons stated, I am convinced that the procedures were I not complied, with while admitting the confession statement as I evidence. I ! If such anomaly is left unturned it will result in a miscarriage of justice. Back to question my reserved concerning the ownership, there is i no doubt that the motorcycle is registered in different name other than the one purporting to be the rightful owner. From the Exhibit P1 where the ownership of the motorcycle can be obtained from, the owner is Africa i Logistics Solutions Ltd. In the case of Ally Bakari and Pili Bakari V Republic (1992) TLR 10, the Court had this to say: I "The presumption of guilt can only arise where there is cogent proof I i that the stolen thing possessed by the accused is the one that was I i stolen during the commission of the offence charged, and no doubt, it is the prosecution who assumes the burden of proof. " The same position was held in the cases of James I Paulo @ Masibuka and Another V. Republic, criminal Appeal No., 61 of 2004 I 9 and Jumanne Rashid @ Kichochi v. Republic, criminal appeal No. 2006 (both unreported). From the decision, there above, the only thing i to be proved by the prosecution is the property or item possessed by the accused is the one which was stolen during the commission of the offence charged and not the ownership of the property purported to have been stolen. In the case at hand the appellant was found with the motorcycle ' with registration No. MC 592 AWN, which the appellant had been charged to have robbed the victim. Now, whether the said motorcycle was properly proved by the prosecution to belong to the victim or PW3 is, immaterial, I i as long as it did not belong to either of the appellants. As 'that cannot justify the commission of the offence they were charged with. In the upshot and for the above reasons, I hereby quash all the proceedings and the verdict of the subordinate Court, including of the I sentence. I give an order for the release of the appellant from prison unless he is held there for other lawful purposes. Appeal allowed. Order accordingly. ~ Judge 16/10/2019 10 4 • Delivered in Mwanza on the 23rd day of October, 2019 ~--

u. E. Madeha Judge 16/10/2019 11

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