

TANZANIA / JUDGMENT

CRIMINAL APPEAL NO 37 OF 2022 FADHILI RASHID MALINDI TEMBO VS THE REPUBLIC

COURT
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1 January 2022

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IN THE COURT OF APPEAL OF TANZANIA AT MTWARA (CORAM: KEREFU. J.A., RUMANYIKA. J.A. And MGEYEKWA, J.A.) CRIMINAL APPEAL NO. 37 OF 2022 FADHILI RASHID MALINDI @ TEMBO OAPPELLANT VERSUS THE REPUBLIC..... RESPONDENT ^Appeal from the Judgment of the High Court of Tanzania, at Mtwara) fDvansobera, J.^ dated 15th day of December, 2021 in Criminal Appeal No. 34 of 2021 JUDGMENT OF THE COURT 4th & 28th June, 2024 RUMANYIKA, J.A.: This is a second appeal by Fadhili Rashidi Malindi @ Tembo, the appellant. He is challenging the decision of the High Court of Tanzania, at Mtwara, which upheld the decision of the District Court of Newala at Newala (the trial court) in Criminal Case No. 35 of 2020. In that case, the appellant had been charged and convicted of the offence of armed robbery contrary to section 287A of the Penal Code, Cap. 16 and was sentenced to serve thirty (30) year's imprisonment. It was alleged that, on 9th March, 2020 at about 18:50 hours at Moneka Village within Newala District in the Region of Mtwara, the appellant hired the services of Juma Ndalimo Fundi (PW3), a motorist, commonly known as bodaboda, for Kisimani-Newala trip for a fare of TZ5 3,000.00. However, while on the way, they agreed to pass at Mkwaya Village first, for which PW3 accepted the offer of TZS 1,000.00 being the extra fare. However, while at the destination, but just before PW3 left the place, the appellant attacked him from the back. PW3 struggled vainly, as he surrendered the motorcycle and ran away. However, he fell in a ditch while trying to escape. The appellant stabbed him with a knife on the throat, shoulders, fingers and hands. He pursued the victim vainly, as the latter managed to escape though with difficulties and hide in the bush. Then the appellant disappeared with the victim's motorbike with Registration No. MC 792 BVY Make SANLG. However, while hiding in the bush, the victim called his friends through a cellular phone informing them about the incident. Amongst them, is one Dua Said Said (PW1). Acting on the information given by the victim, PW1 and one Omary rushed to the bush and rescued the victim. They found him lying down screaming for help, due to the multiple deep cut wounds in his body. He narrated to them the ordeal naming the appellant as the assailant and robber of his motorbike. PW1 thus rushed the victim to the police station where he reported the matter. The victim was issued with a PF3 (exhibit P5) and taken to hospital, where he was

attended by one Erasto Erasto Mwangnikani (PW7), a medical doctor. One Hussein Selemani Atokwete (PW2) participated in the exercise of searching for the appellant whom, later, they found at Mnavila village with Zainabu John Mkulia (PW4) who is his girlfriend. The latter stated that the appellant is her boyfriend and had kept the motorbike there. Also, she averred that, as the appellant saw PW2 and the others approaching their residence, he became suspicious and ran away, then they arrested her (PW4). And that they retrieved the stolen motorbike together with a knife and t-shirt from her residence, behind the toilet. The matter was reported to the local chairman and, a moment later, the appellant was produced to the police station together with the said property. Upon the appellant's arrest later, a police identification parade was mounted, where PW3 singled him out. Thereafter, WP 7536 DC Pendo William Susuma (PW5) interrogated the appellant and recorded his cautioned statement (exhibit P3). That, in his statement, the appellant confessed to have committed the offence charged. He maintained it before justice of the peace, one Elizabeth Wilson Mwigune (PW6), as per the extra judicial statement (exhibit P4). The appellant (DW1) and Hamisi Ibrahim Hamisi (DW2) were the only defence witnesses. The appellant denied any involvement in the commission of the offence charged. Nevertheless, he admitted to have hired the victim's service as a bodaboda and that, he had visited his girlfriend (PW4) on the material date. DW2, on his part, he denied having known anything about the case that the appellant is facing. After a full trial, the appellant was convicted as charged and sentenced, as highlighted above. Aggrieved by that decision, he appealed before the High Court of Tanzania at Mtwara, vainly. Still dissatisfied, he has preferred this second appeal, with two memoranda of appeal. The substantive memorandum of appeal contained nine grounds, which was filed on 24/10/2022. It can be paraphrased as follows: One, his cautioned statement was belatedly recorded, contravening section 50(l)(a)(b) of the Criminal Procedure Act Cap. 20 (the CPA), two, the prosecution failed to tender exhibits, including the respective certificate of seizure contrary to section 38(1) of the CPA, three, the prosecution failed to tender a copy of the sketch map of the crime scene, four, the victim failed to prove ownership of the motorbike (exhibit PI), five, the victim failed to tender a driving licence to show that he is a bodaboda rider, six, the prosecution failed to tender, in evidence, the clothes and motorbike that was allegedly found at the residence of PW4, as an exhibit, seven, the prosecution failed to state the exact date of the appellants arrest, eight, the appellant was not found in possession of the alleged motorbike, nine, the prosecution failed, pursuant to section 110 of Tanzania Evidence Act, Cap. 6 (the TEA), to prove that PW4 is the appellant's girlfriend, with whom had been charged together. His supplementary memorandum of appeal contains twelve grounds. Paraphrased, it may read as under: one, the evidence of PW1, PW2, PW3, PW4, PW5 and PW7 contradicted each other, two, PW5 had recorded the appellant's statement without introducing himself, contrary to section 53(a) of the CPA, three, the appellant was arrested without warrant, contrary to section 13(a) of the CPA, four, the procedure for conducting identification parade was flawed contravening the Police General Order (the PGO) rendering the evidence of PW3 liable to be expunged, five, the appellant's defence evidence was not considered, thereby contravening section 235 of the CPA, six, the conviction was based on a defective charge for not giving a full description of the motorbike, contrary to section 135(c) (i) of the CPA, seven, the extra judicial statement was illegally procured for being belatedly recorded and without the appellant's

voluntariness, eight, the purported confession of the appellant was procured under a police torture, contrary to section 27 of the Evidence Act, nine, exhibit P5 had no any evidential value because it was improperly acted upon, ten, the prosecution case was fabricated against the appellant, eleven, the charge was incurably defective for not disclosing the time at which the alleged offence was committed, twelve, the prosecution case was not proved beyond reasonable doubt. At the hearing of this appeal, the appellant appeared in person un- represented. He deferred his explanation to the said twenty-one points of grievance, after the state attorney's submission, if he found reasons to do so. For the respondent Republic, Mr. Wilbroad Ndunguru, learned Principal State Attorney began his submission by opposing the appeal. He pointed out that, the 3rd, 5th 6th and 7th grounds in the substantive together with the 9th and 10th grounds in the supplementary memoranda of appeal respectively are factual and newly raised. For this reason, he beseeched us to disregard them. We agreed with Mr. Ndunguru's proposition. Since, the first appellate Court could not be faulted on matters which had never been fronted before it for determination. As regards the 1st ground in the substantive memorandum, and the 2nd ground of appeal in the supplementary memorandum, on the legality of the appellant's retracted cautioned statement, Mr. Ndunguru urged us to find this complaint merited. Since, the trial court had over ruled the appellant's objection without conducting the mandatory inquiry. He cited our decision in Makumbi Ramadhani Makumbi and 4 Others v. R, Criminal Appeal No. 199 of 2010 (unreported) to reinforce his point. For the 2nd and 4th grounds in the substantive memorandum, which Mr. Ndunguru argued together with the 3rd ground in the supplementary memorandum, on the issues of search and seizure, he contended that, the doctrine of recent possession of the motorbike, in terms of section 38(1) of the CPA, was properly applied against the appellant. He cited our decision in Hashimu Koma v. R, Criminal Appeal No. 452 of 2022 [2023] T2CA 17916 (29 November 2023: TanzLII) inviting us to dismiss the 2nd, 3rd and 4th grounds of appeal. Regarding the 4th ground of appeal in the supplementary memorandum, about visual identification of the appellant by PW3, Mr. Ndunguru asserted that, the appellant was properly identified. Since, the incident took place during the day time between 16:00 - 18:00 hours. They negotiated price and agreed on where they would head to. PW3 mentioned the appellant to PW1 and PW2 at the earliest moment. He cited Raymond Francis v. R [1994] T.L.R. 100. He added that, PW3's evidence was corroborated by the evidence of PW4, the appellant's girlfriend, that he hide the motorbike behind the toilet and upon seeing people he ran away. About the 5th ground in the supplementary memorandum of appeal, Mr. Ndunguru contended that, the first appellate court had evaluated the evidence properly, given the proven ingredients of the offence and the evidence of visual identification. With respect to the 7th and 8th grounds in the supplementary memorandum of appeal, on the propriety or otherwise of the appellant's extra judicial statement, Mr. Ndunguru quickly admitted that, it may have been belatedly recorded, but there is no time limit prescribed by law on that one. He added that, it is upon the confessor to decide, when he feels that he is ready to confess before Justice of the Peace. As regards the 9th and 12th grounds, in the substantive and supplementary memorandum of appeal, respectively, Mr. Ndunguru 8 contended that, the prosecution case was proved beyond reasonable doubt, especially, considering the evidence of PW3. Since, he had such ample time to identify the appellant whom he named immediately. Further, on the appellant's extra judicial statement, Mr.

Ndunguru submitted that, the best witness in any criminal trial is an accused who freely confesses his guilt. And that the statement was corroborated by evidence of PW1 and PW3. He urged us to dismiss the appeal citing Hashimu Koma (Supra) to bolster his point. In his brief rejoinder, the appellant did not have much to say other than associating his confession with the severe torture caused by the policemen and that PW4, who is his ex-lover had fixed him because they had parted the company. Upon hearing the contentions of both sides, and upon further perusal of the record of appeal, we note that, the appellant's twenty-one points of grievance will not detain us. Since, they revolve around one issue greatly. That is; whether the prosecution case was proved beyond reasonable doubt We shall start with the 6th and 11th grounds in the supplementary memorandum of appeal, about the alleged defects in the founding charge, namely; no full description of the motorbike were given 9 distinguishing it from the others' and non-disclosure of the time, in the particulars of the offence, if at all it was committed. This complaint will not detain us. It is so, because, in exhibit P4 the appellant had confessed his guilt and did not claim title over the motorbike warranting the need for further and better description. The two grounds are dismissed. As regards the 1st and 2nd grounds of appeal, in the substantive and supplementary memoranda respectively, about the belatedly recorded appellant's cautioned statement, we agree with the learned counsel's concession that it was wrongly procured. Consequently, and for such reasons, we expunged it from the record. Nevertheless, there is evidence of PW3 which we consider cogent and material, that, the fracas had taken them about two hours in the material day time and that, he remained under the victim's observation for such a reasonable time before and after they had embarked on the motorbike and quite some time bargaining the fare for the said two routes. Secondly, in his testimony, the appellant admitted to have hired the victim's services and that, on the very material date he had visited his girlfriend (PW4). Let alone such an independent corroborating evidence of PW4, that the appellant was her boyfriend who had kept the 10 motorbike at her residence. Thirdly, and of more significance, it is the appellant's extra judicial statement (exhibit P4), where he confessed his guilt much as he did not object its admission in evidence. The relevant part of the statement reads: "...kaka yangu akartiam bia tukio ia w izi atafanya yeye na m im i nim kodi dereva wa pikipiki... NUimtafuta dereva p ik ip ik i nikaenda naye mpaka m aeneo ya kisim ani Newala ambako niiim uacha kaka yangu...aiikuw a am ejificha nyuma ya m korosho...niipofika pale nilim lipa dereva pikipiki...atipotaka kuondoka ndipo kaka yangu akam vam ia na kisu akam jeruhi usoni na shingoni. Yule dereva pikipiki...akaacha pikipiki...M im i nilipatw a woga nikakim bilia porini...niienda Mkwana nikam kuta kaka yangu am baye aiinibeba kwenye He p ikip iki tukaelekea k ijiji cha Mnavia. Tuiipofika paie m im i nilichukua He p ik ip ik i nikaipieka nyum bani kwa mke wangu na m im i n iiii ia huko huko...w aiikuja askari p o iisi m im i niipow aona niiikim bia Ha askari waiim chukua m ke wanguwakaondoka naye kwenda kituoni. Siku ya p iti yake niiikam atw a na raia wema am bao w aiipiga sim u p o iisi ambao w aiikuja kunichukua . "

Meaning that, upon him and his brother conspiring, the appellant hired the victim's service as a bodaboda and that, at the agreed 11 destination, the duo invaded the victim and robbed him the motorbike. And that the appellant kept it at the PW4's residence where he spent the night, and he escaped from being arrested by the policemen until the next day. We note that, the appellant's confession, as observed above, was within the confines of section 3(1) (a) and (d) of the TEA. This

Court has tested the said provisions of the law in a number of its decisions including Paulo Maduka and 4 Others v. R, Criminal Appeal No. 110 of 2007 and Bahati Mateja v. R, Criminal Appeal No. 118 of 2006 (both unreported). In that, the best witness is an accused who confesses his guilt. In this appeal therefore, we are settled in our minds that, the appellant's confession before PW6 was positive and conclusive for the prosecution case. Put in other words, that he and the brother are the perpetrators of the offence charged, and no one else. Therefore, the 1st and 2nd grounds of appeal are dismissed. As for the remaining grounds in both memoranda about the victim's failure to identify the motorbike as his property, and the non-production of the certificate of seizure, we are unable to fault the two courts below, for two main reasons: one, the victim was a special owner, as 12 opposed to the true owner and this evidence was not sufficiently challenged. It would have been a different scenario, which is not the case, if the alleged true owner had appeared but failed to prove the ownership over the motorbike, two, the appellant did not, at any point in time establish title on the motorbike, let alone a claim, three, it was retrieved from the residence of his girlfriend during the search, four, the appellant admitted to have visited the said girlfriend (PW4) on the material date, five, the evidence of PW4 had established that the appellant was constructively found possessing the motorbike, hardly a day after the incident of armed robbery. The evidence of visual identification by PW3 apart, it follows, therefore that, basing on the doctrine of recent possession, as rightly argued by Mr. Ndunguru, the appellant was the responsible arm robber. The cumulative effect of the foregoing therefore is that, the issues of failure to tender copies of the certificate of seizure, the victim's failure to prove ownership of the motorbike, and the PW3's failure to state such extra special marks on the motorbike was afterthoughts, which should have not been raised in the first place. As a result, the 2nd, 4th, 8th and 9th grounds of appeal in the substantive memorandum together with the 13 1st, 3rd, 4th, 5th, 7th, 8th and 12th grounds of appeal in the supplementary memorandum of appeal are without merit and dismissed. As a result, the entire appeal is dismissed for being unmerited. DATED at DAR ES SALAAM this 24th day of June, 2024. R. J. KEREFU JUSTICE OF APPEAL S. M. RUMANYIKA JUSTICE OF APPEAL A. Z. MGEYEKWA JUSTICE OF APPEAL The Judgment delivered this 28th day of June, 2024 in the presence of Appellant in person via video link at Lilungu Prison Mtwara and in the absence for the Respondent; is hereby certified as a true copy of the original.

0. H. KING\ DEPUTY REGISTRAR COURT OF APPEAL 14

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Prepared on 14 October 2026 · Esheria