

TANZANIA / JUDGMENT

20160315 TZHC Mbeya

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IN THE HIGH COURT OF TANZANIA I AT MBEYA CRIMINAL APPEAL NO. 104 OF 2014 (From Resident Magistrate's Court at Mbeya, Original Criminal Case No. 14 of 2013) GODLOITE s / o IVIDENDEIII APPELLANT VERSUS THE REPUBLIC

JUDGMENT

Date of last Order: 1410312016 Date of Judgment: 1510312016 A.F. NGWALA, J. The Appellant Godlove Mdendemi was charged with and convicted of the offence of Armed Robbery Contrary to Section 287A of the Penal Code [Cap. 16 R. E. 2002]. He was sentenced to thirty (30) years imprisonment without corporal punishment. The Appellant is challenging both the conviction and sentence. It was alleged that on the 12th of December, 2012 at Mbata area within the City and Region of Mbeya the Appellant stole a motor vehicle make Toyota Carina with Registration No. T442 ATW from one Amasha s/o Lwijajo, and at or immediately before or immediately after such stealing did use a knife to obtain or retain Page 1 01 14 the aforementioned property or prevent or overcome resistance to its being stolen or retained. PW3 Amasha testified that on 12/12/2012 at noon, he was requested by his friend Emmanuel to go to his wife and collect the switch or motor vehicle keys as he was travelling to Dar es Salaam. PW3 did so. He drove the vehicle to the garage for repair of the exhaust. Thereafter he took the said motor vehicle with Registration No. T442 ATW make Toyota Carina and parked it at Mbeya Carnival. Being a taxi driver while at Carnival PW3 was hired by two people to take them to Ghana area in Mbeya. One was dark skinned with afro-hair who was not present in court and another was the Appellant. That person sat at the front with PW3. The appellant sat behind PW3's seat. When they reached at Ghana, Mbata area, PW3 was told to stop and to give them money. The appellant choked him around the neck. A knife was put in front of PW3. The one in the front seat took a sisal rope and tied PW3's hands and legs. Then they took a doll and stuffed it in PW3's mouth. Having tied him with a rope, PW3 was then pulled out to the back seat. The one on the front seat started to drive the said car. They took PW3 to unknown area where they dropped him out of the motor vehicle. PW3 was left in the bush. PW's eyes were closed as they threatened to slaughter him if he opened his eyes. PW3 stayed there at the bush for a long time until when he succeeded to untie the rope in his hands and legs. At that material time it was raining, he ran to wards the road for help. PW3 however Page 2 of 14 S S did not open his mouth. On reaching at the road a "bodaboda" person passed, PW3 waived him. That "bodaboda" driver took PW3 to the Police Station. The said "bodaboda"

driver was asked to go and inform PW3's fellows about the incidence. At the hearing of the appeal the appellant adopted his twelve grounds of appeal which have been paraphrased that: The honourable trial magistrate erred in law and fact when she convicted him relying on the evidence of caution statement (exh.P.A) which was obtained in violation of laws, as it never showed more than three signatures as PW1 alleged. The cautioned statement was admitted as an exhibit without considering that during the enquiry PW I's evidence was not corroborated by any other independent witness such as his relatives, uncle and sister whom he alleged to be present at the recording of the said caution statement. The appellant went on that he was wrongly convicted by the trial magistrate who relied on the evidence of extrajudicial statement (exh. P.B) which was obtained in contravention of the law and its admission was not fair. The appellant stated further that there was improper identification by PW3 because the conditions did not favour PW3 to make correct identification as the event occurred during the night. The appellant further stated in the Petition that the prosecution side did not conduct the identification parade to prove that PW3 had identified him as the appellant was unknown to him. He did not state whether Page 3 of 14 he identified him at the scene of crime. The evidence of PW3 was uncorroborated. The appellant lamented that the trial magistrate erred in law and in fact when she believed the evidence of PW3 that he was tied with a rope. The doll on the mouth and rope were not tendered before the trial court as an exhibit. She wrongly relied on the evidence of PW4 and PW5 who were accomplices without considering that their evidence was to try to escape the charge of theft because they are the ones who were found in possession of the said stolen car. The appellant stated that there was no evidence of the Sale Agreement to prove the evidences of PW4 and PW5 that the appellant was the one who sent the car (exh. P.C.) to them. No blue card was tendered to prove that PW2 owned the car and no licence to prove that PW3 was a driver. The appellant insisted that the defense case of the accused was not considered. The trial magistrate therefore erred in law and in fact when she convicted him relying on the evidence of prosecution side which failed to prove its case beyond reasonable doubt. In response to the said grounds of appeal, the Republic through the learned State Attorney Ms. Juliana submitted in support of the conviction and sentence. She emphasized that the case was proved beyond reasonable doubt. Page 4 of 14 In his rejoinder, the appellant stated that he was neither found at the scene of crime nor in possession of the exhibit. The stolen motor vehicle was found with PW4. The appellant argued that no body proved that he was the one who gave PW4 the said stolen motor vehicle. PW5 clearly stated that the owner of the car was PW4 and not Godlove Mdendemi (the appellant). The appellant further argued that if he was the owner of the said motor vehicle he should have been found with that car. Lastly he prayed the appeal to be allowed, conviction be quashed and the sentence be set aside. Having gone through the arguments for and against the appeal, the point for determination is whether or not the case was proved to the required standard of proof set in criminal cases. In ascertaining this I will discuss each of the ground of appeal raised by the appellant. In the first and second grounds of appeal, the appellant avers that the trial magistrate erred in convicting him relying on the cautioned statement which was obtained in violation of the law without stating the very law which was violated. For the interest of justice, the records of the trial show that PWI recorded the appellants cautioned statement in the presence of the appellant's relatives who included his uncle, brother and sister. The records further show that

there was a trial within a trial that was conducted in order to ascertain the legality of the said cautioned statement. During the inquiry, it was ruled that the accused person was not beaten as he alleged. The inquiry defence witness one Grayson Kabuje testified to the effect that:- Page 5 of 14 "In December, 2012 I was at central police, this person whose name I don't remember was brought. After sometime he was summoned by a police officer. He stayed there and was brought back while beaten. He said that he was beaten by Vicent. He could not get up. We helped him get up and get food." When cross examined by Ms. Juliana the learned State Attorney stated: - "He did not tell us why he was beaten, I did not see injuries. He complained of pain wherever he was touched. When he left the room he was ok. If you tell me that you are sick I believe you." From this piece of evidence, it is clear that the cautioned statement of the Appellant was freely obtained. The witness DW2 said he did not see any mark of beatings, but he told by the Appellant that he was beaten. The evidence of PWI shows that after recording the cautioned statement of the appellant, PWI proceeded to record the statement of the appellant's relatives and that the appellant was giving his statement while eating. The statement was written within two hours, that is from 13.00hrs to 15.00hrs as it is required by the law under Section 57 of the Criminal Procedure Act [CAP. 20 R. E. 2002]. From the above observation, the cautioned statement of the appellant was properly recorded and handled by the trial court. More so the trial court conducted an inquiry to ascertain the Page 6 of 14 allegations by appellant as per the case of Robinson Mwanjisi & 3 others v. Republic, Criminal Appeal No. 154/ 1994, the Court of Appeal of Tanzania at Dar es Salaam at page 7, where the necessity of conducting an inquiry insisted that:- "... if upon doing so he was still intent on admitting the statements, he could do so only after holding a trial within a trial and establishing their admissibility." In this appeal, the same was done by the trial magistrate to ascertain its admissibility. I therefore find that the cautioned statement by the Accused/Appellant was properly received and acted upon in accordance with the law. Henceforth these ground of appeal lack merit. Coming to the third ground of appeal, the appellant complains that the trial court erred in law and fact by convicting him relying on the extra judicial statement which was obtained in the "obligation" of the law and inquiry and its admission was unfair. As I have stated herein; it is in the record that the appellant objected the admission of the extra judicial statements made before a Primary Court Magistrate. The trial court conducted an inquiry to ascertain the legality of the said statement as required by law. The records show that the appellant gave his statement freely without being forced or threatened or promised anything, even his explanations during the inquiry indicate this. Thus the appellant was not forced or threatened to do so. For the purposes of this appeal, part of the Page 7 of 14 evidence of the justice of peace who recorded the extrajudicial statement is reproduced as follows:- "The accused's health was good; I asked him if he was forced to give the statement or promised to be given something in the exchange of the statement and he said no. he said that he is ready to give his statement voluntarily, I also told him that the statements he was about to give will be tendered as evidence against him in case if he is sued. After addressing him of his rights he said that he is ready to give his statement." The appellant narrated the story on how the incident had occurred. During inquiry, the appellant stated that:- "...the statements tendered by justice of peace are the ones I wrote at the Police Station." On perusing further the court's records; it was observed that the appellant did not raise any objection during the inquiry on the legality of the extrajudicial

statement, on how the same was obtained. The law empowers magistrates to record confessions as provided for under Section 28 of the Evidence Act, Cap. 6 [R. E. 2002] which reads:- "A confession which freely and voluntarily made by a person accused of an offence in the immediate presence of a magistrate as defined in the Magistrate's Courts Act, or a justice of peace under the Act may be proved as against that person." Page 8 of 14

- Since the Magistrate informed the appellant on the gist of the above cited provision of the law; and since the trial court conducted an inquiry on the same, it is my considered view that its admission in the trial court was proper. The third ground of appeal therefore has no leg to stand. Consequently it is dismissed. On the evidence of PW4 and PW5 whom he considers that they were accomplices. The record specifically show that they were not all accomplices as alleged by the appellant because it is not known if they knew that it was a stolen property. PW4 was a mechanic found repairing the stolen motor vehicle; PW4 alleged that it was brought to him by the Appellant. PW5 was the prospective buyer of the said stolen motor vehicle. The record reveals that on 30/12/2012 at around 18:00hrs PW5 while at the bar, one young man called Dennis (PW4) went to borrow a jack for the purpose of repairing a vehicle, a white carina. Later on PW4 told PW5 that the said car was sold at the price of Tshs. 2,000,000/=, PW5 then asked PW4 that he wanted to meet with the owners of that car. To this piece of evidence adduced by PW4 and PW5, it follows therefore that PW4 knew that the said car was a stolen property. This is by his conducts of being a middleman in the purported sale of the said motor vehicle. I hold so that PW4 had knowledge of the stolen car from his statements in his testimony in court and at the Police Station were trying to incriminate the appellant while exonerating himself from being charged with criminal offence. This takes me to the conclusion that PW4 ought to have been treated as Page 9 of 14 an accomplice to the appellant. His testimony should have been corroborated with other independent piece of evidence before being acted upon because he was a person who in one way was involved with another in the commission of the crime, whether as a principle in the first or second degree or as an accessory. The appellant avers that the trial court convicted him relying on uncorroborated evidence. On this ground I tend to agree with the argument by the learned State Attorney Ms. Juliana that it is quite clear on the record that the incident occurred during the night and the victim PW3 was thrown at Mbata in the bush. There was no person who witnessed the complainant (PW3) being robbed. However it is a trite principle in evidence that the number of witnesses in proving a case is immaterial, a single witness who is credible suffices to hold a person criminally liable. This principle is provided for under Section 143 of the Law of Evidence Act, Cap. 6 [R. E. 2002] which I find prudent to reproduce. Section 143 reads:- "Subject to the provisions of any other written law, no particular number of witness shall in any case be required for the proof any fact." Therefore the above quoted provision of the law and the circumstance of this case, at the trial court, as the prosecution side found that there was no need of having other witness to corroborate with evidence adduced. This court cannot compel them to do so. Thus this ground of appeal is dismissed. Page 10 of 14 The 6th ground of appeal is discussed together with the 4th ground of appeal, as they all centre on the issue of identification. Though the

learned State Attorney vehemently argued in support of the Judgment by the trial court. However my reflection of proceedings in records especially the evidence of PW3, the key witness who is alleged to have been robbed the car, I found that and I tend to agree with the appellant's ground on identification that the accused person or the appellant was not properly identified on the scene of the crime. One of the conditions set out in Waziri Aman's case of

(1980) T. L. R. 50, on the issue of identification was the intensity of the light to enable the witness to identify the accused. In the extra judicial statement by the appellant before the justice of peace, he alleged that it was one Manywele, while the appellant had sat behind the driver's seat. PW3 did not state that he had identified the appellant at the scene of crime. The victim PW3 testified that on the material date at Mbeya Carnival where he packed his tax there was a plenty of light and electrical bulbs light outwards, but did mention the condition of that day. In the case of Gideon S. Julius & Another v. Republic, Criminal Appeal No. 251 of 2011 the Court of Appeal of Tanzania at Mbeya (unreported) the Court stated inter alia that:- "It is common knowledge that lamps be they electric bulbs fluorescent tubes, hurricane lamps, wick lumps, lanterns etc give out light with varying intensities hence the overriding need to give in sufficient details the intensity of the light and size of the area illuminated." Page 11 of 14 The prosecution seemed to have based its case on the evidence of PW3 (the victim) or the complainant that the appellant was present during the incident and he sat behind the PW3 seat. This fact alone could not settle the question of identification of the appellant on that night. PW3 stated that it was his first time to see the appellant with one Manywele. That fact would have assisted PW3 in identifying the appellant if he had frequently seen them. As it was stated in the case of Kuiwa Makwajape and two others v. Republic, Criminal Appeal No. 35 of 2005, the Court of Appeal of Tanzania (unreported). the fact that the prior knowledge of the suspects is a relevant factor that facilitates the identification of suspects. But this should not be considered in isolation from the pre-requisite requirement that conditions for the proper identification of suspects are favourable." This case insists on the issue that even if the witness had seen the accused person prior to the incident, he is supposed to support the same with other explanations as to the identification of the accused. Besides all these the extra judicial statement tendered by a justice of peace (PW6), which was relied upon in convicting the accused person leaves a lot to be desired. I hold so because PW4 was an accomplice whose evidence ought to have been corroborated by other independent witnesses who are not accomplices. The trial court should have warned itself on the evidence of accomplice. Page 12 of 14 It is my considered opinion that, it would have been proper if a charge of being in possession of stolen property should have been preferred against PW4, in whose possession the motor vehicle was found. It is from the above observations and findings that leads me to the conclusion that the prosecution side did not prove its case beyond reasonable doubt. Accordingly this appeal is allowed. The conviction and sentence imposed upon the accused person is set aside. The Appellant to be released from custody unless lawfully detained. Order Accordingly. 40UP % A.F.

Ngwala Judge 15/03/2016 Page 13 of 14 Date: 15/03/2017 Coram: A. F. Ngwala, J. Appellant: Present For the Republic: Mr. Rogers (State Attorney) B/C: M. Mihayo Mr. Rogers (State Attorney): The case is coming for Judgment. We are ready. Court: Judgment is read in the open court in the presence of the accused person and the State Attorney. Court: Right of Appeal to the Court of Appeal of Tanzania explained. WUY A.F. Ngwala k Judge 15/03/ 2016 Page 14 of 14

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