

TANZANIA / JUDGMENT

alex mwashilindi another vs republic

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IN THE COURT OF APPEAL OF TANZANIA AT MBEYA (CORAM: MWANDAMBO, J.A.. KITUSI. J.A..
And MGONYA. J.A.^ CRIMINAL APPEAL NO. 626 OF 2020 ALEX

MWASHILINDI..... 1st APPELLANT DANIEL SHO M
BE..... 2nd APPELLANT VERSUS THE

REPUBLIC..... RESPONDENT (Appeal from the decision of
the High Court of Tanzania at Mbeya) (Monqella, J.^ dated the 6th day of October, 2020 in
Criminal Appeal No. 94 of 2020 JUDGMENT OF THE COURT 6th & 15th December, 2023

MWANDAMBO. J.A.: The appellants were convicted with armed robbery by the District Court of Momba and sentenced to 30 years' imprisonment. On appeal, the High Court (Mongella, J), sitting at Mbeya concurred with the trial court sustaining convictions and sentences which resulted in an order dismissing the appeal. Still aggrieved, the appellants are now before the Court on a second and final appeal. Before the trial court, the respondent's case was predicated upon the allegation that, on 27 March 2017, during night hours at a place called Mwaka within Momba District, Songwe Region, the appellants stole a motorcycle from its driver one Lazaro Mwasile through threats of knife and panga in order to obtain and retain the said motorcycle. The appellants denied any connection with the allegations. To prove its case, the prosecution relied on the evidence of the victim; Lazaro Mwasile (PW1) whose evidence was to the effect that, on the material date, the second appellant who was well known to him asked to be taken to a place called Mwaka. Before arriving at the destination, the second appellant is said to have ordered PW1 to stop only to see him holding a knife with which he wanted to stab him in the neck with a view to robbing him of the motorcycle. In the course of the scuffle that ensued, another person emerged from the bushes who happened to be the first appellant; also familiar to PW1 holding a machete. After some struggle in the process of rescuing himself, PW1 dropped from the motorcycle and took to his heels in the nearby bushes raising an alarm while his assailants disappeared with the motorcycle. A little later, PW1 called one Meshack Sikanyika (PW2) who happened 2 to be the Chairman of an association of Bodaboda motorcyclists in that area. Within moments, PW1 stumbled into a bodaboda which led other motorcyclists to the direction where the assailants had fled to. After a short pursuit that followed involving a crowd of people, the appellants are said to have surrendered the motorcycle and fled but a little later, the first appellant could not prevail anymore. He was arrested by the mob before calling the police who

came to his rescue and took him to a police station after receiving some beating from the mob. Upon interrogation, the first appellant is said to have mentioned the second appellant as his co-offender. As to how he managed to identify the appellants, PW1 told the trial court that there was sufficient light illuminated from the motorcycle which enabled him to recognize them considering that they were familiar to him. The trial court also relied on the evidence of PW2 who is one of the persons who responded to PW1's alarm for rescue and participated in the hot pursuit that resulted in the arrest of the first appellant. PW2's testimony was followed by Sunday Mwingira (PW3) also a bodaboda motorcyclist who participated in the hot pursuit like PW2. The other identifying witness was No. G.3508 DC Khalfan (PW4) who not only investigated the case, but also recorded a cautioned statement from the first appellant mentioning the second appellant as a fellow assailant. PW4 tendered the cautioned statement (exhibit PE2) as part of his evidence. The other witness was No. F. 8448 DC Abel (PW5) who was on a police patrol duty on the material night. This witness received a call from his colleagues informing him of a robbery incident and arrest of one of the culprits who was being beaten by the angry mob requiring a police rescue. PW5 and his colleagues managed to rescue the first appellant and thereafter took him to the police station. Finally, No. G. 2620 DC. Yona (PW7) was another police investigator who recorded a cautioned statement from the second appellant confessing to the commission of the offence. The second appellant's cautioned statement was admitted as exhibit PE5. Having been found with a case to answer after the closure of the prosecution case, the appellants entered their defence which was largely a denial of any involvement in the crime at the same time trying to discount prosecution evidence as untruthful and unreliable. At the end of it all, the trial court found the prosecution evidence watertight placing the appellant at the scene of crime on the material date and time. Besides, the trial court relied on the appellants' cautioned statements confessing to the commission of the crime. It thus convicted them followed by the mandatory sentence of 30 years imprisonment as alluded to earlier. Before the High Court at Mbeya, the appellants challenged the trial court's decision on nine grounds. Critical of all were; failure by the trial court to consider defence evidence, reliance upon involuntary cautioned statements; weak evidence of identification and that the case against them was not proved to the required standard. The first appellate court (Mongella,J) dismissed all grounds except the first one on failure to consider defence evidence promising to address it in its judgment. Nonetheless, it dismissed the appellants' appeal, resulting in the instant appeal premised on the same grounds raised before the first appellate court in the same sequence. At the hearing of the appeal, the second appellant appeared in person fending for himself-in the absence of the first appellant who was reported to have escaped from lawful custody at Mollo Prison in Sumbawanga, Rukwa region on 20 April 2023. In the premises, we granted the prayer by the respondent's attorneys to proceed with hearing in the absence of the first appellant who could not be traced to prosecute his appeal. 5 Ms. Revina Prosper Tibilengwa, learned Principal State Attorney appeared, assisted by Ms. Prosista Paul, learned State Attorney who made submissions resisting the appeal. The second appellant argued all grounds of appeal responded to by Ms. Paul. However, our discussion will focus on four of the grounds which we consider to be central to the determination of the appeal. These relate to the complaints on the failure to consider defence evidence; acting on hearsay evidence; grounding conviction on weak evidence of identification and whether the case against

the appellants was proved beyond reasonable doubt. We have taken the approach having been satisfied that the first appellate court correctly directed its mind to the rest of the complaints. In the process we shall also address the appellants' complaints on the validity of the cautioned statements. Needless to say, we shall briefly address on two of the remaining grounds. The first relates to the complaint against the first appellate court for sustaining conviction acting on contradictory evidence in relation to the date of incident, subject of ground four of the appeal; was it on 27 March 2017 as testified by PW1 or 28 March 2017 per PW6's evidence or 27 August 2017 according to PW2? This complaint should not detain us as we agree with Ms. Paul that there was no 6 contradiction in the witnesses' evidence as contended by the appellants. Upon our examination of the handwritten proceedings, PW2 stated that, it was 27 March 2017 consistent with PW1's testimony. The evidence by PW6, the owner of the motorcycle cannot be said to be contradictory to PW1 because, 28 March 2017 is the date on which she was informed of the robbery. This ground is equally dismissed, which takes us to ground five. The appellants' complaint in ground five is that, the first appellate court wrongly relied on the motorcycle (exhibit PE1) which was tendered by PW1 rather than the owner (PW6) and the helmet (exhibit PE4) tendered by PW4. We agree, yet again by the learned State Attorney that, proof of armed robbery is not conditional upon the prosecution tendering evidence of a stolen item. The High Court rightly held as such and we find no reason to differ with it. This is so because, PW1 to whom the motorcycle was entrusted by its owner (PW6) proved that the assailants used a knife and machete to rob it from him. This ground is bereft of merit and we dismiss it. We shall now turn our attention to the main grounds starting with the complaint against failure to consider defence evidence. Apparently, Ms. Paul conceded as such that, despite the first appellate court agreeing that the trial court did not take into account the appellants defence, it did not discuss it at all in its judgment. However, the learned State Attorney urged that, the Court can step into the first appellate court's shoes and evaluate the evidence which will show that such defence did not shake the case for the prosecution. With respect, we accept the invitation alive to our previous decisions in similar circumstances, in particular, *Leonard Manyota v. Republic*, Criminal Appeal No. 485 of 2015 (unreported). We shall do as much in due course as we consider the remaining grounds. Next is on the complaint in ground three that the two courts below acted on hearsay evidence. The appellants' complaint is that, since the prosecution did not tender any exhibits implicating them with the commission of the offence, it was wrong for the two courts below to rely on oral evidence alone in convicting them. We agree with the learned State Attorney that proof of the charge against the appellants did not depend on the prosecution tendering the knife and machete used to threaten the victim (PW1) to obtain and retain the motorcycle. The first appellate court relied on the Court's decision in *Michael Joseph v. Republic* [1995] T.L.R. 278 in dismissing the ground. That decision is relevant for the proposition that, 8 absence of dangerous or offensive weapon does not amount to failure to prove the offence of armed robbery where there is sufficient oral evidence proving, as it were through PW1, that the assailants had a knife and machete they used to threaten the victim and rob his motorcycle. This ground lacks merit and is accordingly dismissed. Next we shall discuss the appellants' complaint that their convictions were grounded upon weak evidence of identification. We shall begin with the first appellant. Both the trial court and first appellate court concurred in their finding that, as PW1

was struggling against the second appellant who ordered him to stop before wielding a knife with which he wanted to stab on his neck and disappear with the motorcycle, the first appellant emerged from the bush holding a machete. The two courts below concurred too that although the incident occurred during night hours, PW1 was able to recognize the first appellant as he was very familiar to him. Besides, the motorcycle illuminated sufficient light to identify the culprits. It is common cause that, after their successful mission, the assailants disappeared with the motorcycle and, upon a hot pursuit in which PW1, PW2 and PW3 participated, the first appellant was arrested by a mob which responded to PW1's alarm for his rescue. Consistent 9 with the Court's decision in *Jibril Kash Mohamed v. Republic*, Criminal Appeal No. 331 of 2017 [2021 TZCA 13 (11 February, 2021) Tanzlii, where an accused person is chased from the scene of crime even in difficult conditions such as night without losing sight of him and is successfully arrested, that constitutes sufficient evidence that he is responsible for the commission of the offence. The evidence accepted by both the trial court and first appellate court shows clearly that, it is PW1 who led the people who responded to his alarm to the direction taken by the assailants which resulted into the arrest of the first appellant after the assailants had abandoned the motorcycle at some distance. Even though the appellants' defence was not considered, we are satisfied that the evidence by the prosecution placed the first appellant at the scene of crime as one of the assailants. He was properly convicted as charged. Regarding the second appellant, we agree with the State counsel that he was positively identified. The two courts below rightly believed PW1's evidence that it is the second appellant who hired PW1 to Mwaka area only to stop him somewhere wielding a knife with which he wanted to stab PW1 in his neck. Besides, the second appellant was familiar to the culprit and PW1 mentioned him to PW2, and the police. The second 10 appellant was mentioned by the first appellant to PW2. To cap it all, the second appellant confessed in his cautioned statement (exhibit PE5) tendered by PW7). It is elementary that, the evidence of an accused confessing to the offence is the best evidence to ground conviction. See: *Mboje Mawe & 3 Others v. Republic*, Criminal Appeal No. 86 of 2010 (unreported). It is significant that, the cautioned statement was tendered after an inquiry to establish its voluntariness. We note the second appellant's complaint in grounds two and seven challenging the validity of exhibit PE5 for being recorded by a police constable and for failure to take him to the justice of the peace. However, as rightly held by the first appellate court, PW7 was a competent person to record the statement in terms of section 4 of the Criminal Procedure Act (the CPA) as amended by Act No. 3 of 2011. On the other hand, we know no law which mandates a police officer to take a suspect to a justice of the peace unless he desires so for the purpose of confession. In the upshot, the appellants' complaint in ground six is, as urged by Ms. Paul, baseless and we dismiss it. In view of the foregoing, the answer to the issue whether the prosecution case was proved beyond reasonable doubt is in the li affirmative. The prosecution sufficiently proved the necessary ingredients constituting the offence of armed robbery contrary to section 287 A of the Penal Code; stealing by the use of dangerous or offensive weapons. We have found no reason to interfere with the concurrent findings of facts by the two courts below on the guilt of the appellants on the charged offence. Consequently, we find no merit in the appeal and we dismiss it. DATED at MBEYA this 14th day of December, 2023. L. J. S. MWANDAMBO JUSTICE OF APPEAL I. P. KITUSI JUSTICE OF APPEAL L. E. MGONYA JUSTICE OF APPEAL The Ruling delivered thi§

15th day of December, 2023 in absence of the 1st appellant, 2nd appellant appeared in person, unrepresented, and Mr. Augustino Magessa, learned State Attorney for the respondent /Republic, is hereby certified as a true copy of the original.

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