

**IN THE HIGH COURT OF TANZANIA  
(DISTRICT REGISTRY OF MTWARA)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 34 OF 2021**

**(Originating from Newala District Court in Criminal Case No. 35 of 2020)**

**FADHILI RASHIDI MALINDI@ TEMBO.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

**20<sup>th</sup> Oct., & 15<sup>th</sup> Dec., 2021**

**DYANSOBERA, J.:**

The appellant herein stood trial before the District Court of Newala charged with armed robbery contrary to section 287A of the Penal Code [Cap. 16 R.E.2002 now R.E 2019] (the Penal Code). The prosecution alleged that the appellant on 9<sup>th</sup> day of March, 2020 at about 1850 hrs at Moneka village within Newala District in Mtwara Region, did steal a motor cycle with registration number MC 792 BVY make SaNLG from Juma s/o Ndalimo and immediately before and after such stealing did cut him on different parts of his body in order to obtain the said property. The appellant denied the charge and the case went to a full trial whereby the prosecution called five witnesses and produced four exhibits. The defence had three witnesses. Two exhibits were also tendered in support of the defence. At the end of the day, the learned Resident Magistrate was satisfied that appellant committed the offence charged. The appellant was found guilty, convicted and sentenced to thirty (30) years gaol term. Believing that justice was not his triumph he has appealed to this court.

The background facts giving rise to this appeal may be stated as follows: Juma Ndelimo Fundi (PW 3) is a motor cycle taxi driver. On 9<sup>th</sup> day of March, 2020 at about 1600 hrs while on duty and at Sabasaba area, one person called Mruzi hired the motor cycle to Newala Kisimani. On the way, the passenger asked PW 3 to stop so that he collected some flour at Mkwaya. On reaching at Newala Kisimani the said passenger invaded PW 3, cut him with knife on various parts of his body. He fell into the ditch and the said passenger went on assaulting him using the same weapon. The said passenger took the motor vehicle and started chasing him with it. PW 3 ran into the bush and the robber made away with the motor cycle. PW 3 made a phone call informing his fellow motor cycle taxi drivers. PW 1 one Dua Said Said responded and found PW 3 lying on the ground, wounded. PW told PW 1 that his assailant was the appellant who after wounding him, made away with the motor cycle. PW 3 was later taken to the Hospital via the Police Station. At the police station, PW 3 identified his culprit who turned to be the appellant. In court he identified and tendered the motor cycle he was using (exhibit P 1) .

Hussein Selemani Atokwete (PW 2) and Zainabu John Mkulia (PW 4) told the trial court that the appellant was apprehended with exhibit P 1 which he had hidden behind the toilet. WP 7536 D/C Pendo (PW 5) and Elisabeth Wilson Mwigune (PW 6) recorded the appellant's cautioned statement (exhibit P 3) and extra judicial statement (exhibit P 4), respectively. PW 7 one Erasto Erasto Mwanganyani, a Medical Officer St. Benedict, Ndanda did, on 10<sup>th</sup> March, 2020 receive PW 3 who was a casualty after he had been referred there from Newala District Government Hospital. According to him, PW 3 had several cut wounds on the face, shoulder, forearms. He cleaned and stitched would. He then filled in the PF 3 (exhibit P 5)

In his defence, the appellant told the trial court that on 9<sup>th</sup> March, 2020 at 1000 hrs he left Mpapa to Mkwaya to sell tomatoes and vegetables. He admitted to have hired bodaboda and to have gone to his girlfriend. They then went to Malenya Street and slept together. On 10<sup>th</sup> March, 2020 at about 0800 hrs he went back home. He was apprehended at Mkwaya and assaulted. He was later taken to the police station and an identification parade was conducted. The appellant called Hamis Ibrahim Hamis (DW 2) to support his defence. However, the said witness told the trial court that he knew nothing.

The learned trial court analysed the evidence and at the end of the day, was satisfied that the case against the appellant was proved beyond reasonable doubt and punished him accordingly.

In his petition of appeal, the appellant has fronted a total of seventeen grounds which as correctly argued by the learned State Attorney boils down to one complaint that the case against him was not proved to the required standard.

On 20<sup>th</sup> day of October, 2021 when this appeal was called on for hearing, the appellant appeared in person while the respondent was represented by Mr. Kauli George Makasi, learned Senior Stat Attorney.

Supporting the appeal, the appellant told this court that he had filed a total of nineteen (19) grounds of appeal. He prayed the learned Senior State Attorney to start responding first.

Responding to the ground of appeal, Mr. Makasi opposed the appeal. He submitted that all the nineteen the grounds lack basis. He observed, I think correctly so, that the first ground of appellant seems to carry all grounds which provides that the prosecution failed to prove the case against the appellant beyond reasonable doubt. Mr. Makasi was of the view that the prosecution managed to prove the case beyond reasonable doubts as per Sections 3(2) (a)

and 110 of the Evidence Act. The version of the learned Senior State Attorney was, briefly as follows: The appellant was charged with armed robbery that on 09/03/2020 he snatched the motor cycle from Juma Ndalimo (PW3) using a knife to injure and the incident happened in the evening. In proof of the allegation there were also exhibits tendered at the trial. PW3 and PW4 have shown clearly the appellant's participation in the commission offence. The exhibits including the motor cycle and the knife used plus the victims PW3 corroborated the prosecution case. Evidence of PW1 and PW7 who is a medical officer there was also extra judicial statement given before the justice of the Peace. The evidence was cogent and the appellant failed to cross – examine such incriminating evidence. Besides, those exhibits were admitted in court without objection. He concluded that the first ground had no basis as the evidence was over whelming and the trial court was right in convicting the appellant.

Mr. Makasi further submitted that there cautioned statement although he argues that he was tortured and the recording of the statement was made out of the prescribed hours. This is afterthought as they did not feature in the trial court's record. The appellant just disown statement. These grounds which are afterthought. That furthermore, the evidence of PW5 was clear that the statement was recorded within the time i.e. the record of the District court.

On the 3<sup>rd</sup> and 11<sup>th</sup> grounds of appeal, the appellant is questioning why the important witnesses were not called in court. It was submitted for the respondent that it was proper for prosecution to call the witnesses, the prosecution deemed proper. He supported his argument by referring to Section 143 of Evidence Act on the authority that that no number of witnesses is required to prove what has already proven by his fellow.

As to the 4<sup>th</sup> and eleventh ground of appeal on identification (appellant) Mr. Makasi pressed that the appellant was well identified by the victim. Accordingly to PW3 who was the victim, the occurrence took place in a day light at 1600 hours where there was sufficient light and had conversation and they were facing each other. Further that they passed on the area to pick a plastic of flour. The same witness named the appellant to PW1 by the name of Fadhilli. There was identification parade conducted twice and in court. He argued that the procedures were not followed the complaint has no basis as the appellant did not object on the admissibility of those exhibits. The complaint is baseless with regard to 5<sup>th</sup> and 15<sup>th</sup> and 12<sup>th</sup> grounds s. 312 of CPA is in respect of writing the judgment as that relates to the writing the judgment which is an art through s. 312 has to be followed. In this appeal the appellant failed to specify what was amiss. The appellant did not explain what procedure was not observed. We believe the trial District court followed all procedures and there was fair hearing. The law was not specified. The appellant did not state which law and how it was not observed the trial court complied with the law and guidelines in the case of **Robnison Mwanjisi and Others V. R** [2003] TLR 218. It is the case which detailed how the exhibits should be tendered in court. The lower court followed all the procedures, Mr. Makasi stressed.

With regard to the 6<sup>th</sup> and 7<sup>th</sup> grounds of appeal on the argument that the blood found on the knife was not taken to the Government Analyst, Mr. Makasi submitted that this was an afterthought a sit was not raised when the knife was being tendered in court. No question on the blood was raised and no cross – examination made when the witness PW3 was testifying. As to the judicial statement, the complaint on it is baseless. An extra judicial statement is recorded

when one volunteers and in this case the appellant volunteered. He cannot now complain. He did not raise it during the trial or object, when it was being tendered by PW6. The appellant did not cross – examine him on that statement.

As to the 9<sup>th</sup>, 10<sup>th</sup>, 13<sup>th</sup> and 16<sup>th</sup> grounds of appeal on the contradiction on the time of incident, Mr. Makasi urged the court to dismiss those allegations. He said that PW3 was clear and the other witnesses stated on the time they got information. PW2 stated on how he was informed. They received information at different intervals. The appellant did not state how PW4 cooked the story. The appellant failed to cross – examine him (p.25 -28 of the typed proceedings). The appellant did not put question when she stated that the appellant took the motorcycle at home with blood. On the corroborative evidence being not concrete. The evidence which implicated the appellant was that of PW3 and PW4 the other witnesses gave corroborative evidence.

There was sufficient evidence to ground conviction. There is an argument on the 16<sup>th</sup> ground that the motorcycle was not found in his possession, PW3 was clear how the appellant took the motorcycle there.

There was evidence of the relationship taking the motorcycle while smeared with blood and then hiding it in the toilet.

Respecting the grounds nos. 14 17 and 19 that is alibi, ignoring defence case and failure to evaluate properly the evidence tendered, the respondent told this court that the trial court was correct as s. 194 (4) and (5) of the CPA requires the accused to notify the court and if there is no compliance the court has discretion under sub section (5) of s. 194 of CPA. The court was justified to use its discretion to accord no weight to the defence of alibi. The court did not ignore completely

the appellant's defence but felt that the defence of alibi went against the law. Besides, the trial court analysed the evidence and that is why the trial court convicted him.

The trial court properly evaluated and analysed the evidence and came to the conclusion that the case against the appellant was proved beyond reasonable doubt. The sentence was proper. The appeal is baseless and should be dismissed, Mr. Makasi rested his submission.

In his rejoinder, the appellant argued that the identification of the culprit was wanting as PW4 could not give sufficient evidence to ground convict in that he said that PW3 had relationship with the accused and they were at logger heads and the relationship was terminated. The appellant told this court that it was a revenge. The appellant maintained that there was inconsistency on the time of incidence. PW2 stated that he went to PW4 and saw the appellant running at 2100 hours. PW4 said that the appellant claimed to go to toilet at 0100 hours, the appellant clarified. He also stated that the witnesses who claimed to have gone where the motorcycle was kept, said that they saw the appellant running and identified him through the lights from their motorcycles and moonlight. Such light is insufficient to enable the identification at night. No explanation where the light was shone on the face or back. The victim told the court that she did not know the culprit beforehand - physical, physiques or even colour. At the identification parade there was failure to follow procedures especially changing clothes, the appellant stressed. He argued that the justice of the peace admitted that when the appellant was recording his statement he was under Ally Mkoto who is a court's security guard, the procedure which is against the law.

I have with deserving concern, considered the trial court's record, the grounds of appeal and the submissions.

It is on record that the incident occurred at 1830 hours. It was during the day time and in a broad day light. PW 3 explained in detail how the appellant hired him to ferry him to Newala Kisimani. He explained how the appellant slapped him, cut him on the throat leading him to fall in the ditch. How he was wounded and how the appellant tried to chase him with the motor cycle and then made away with it. The wounding PW 3 sustained was not only his own version but was also supported by P W 1 who responded PW3's phone call and described where PW 3 was wounded. This evidence was supported by the Medical Officer, PW 7 who medically examined PW 3 and filled the PF 3 (exhibit 5). The appellant confessed to have committed the offence before PW 5 as evidenced by his own cautioned Statement (exhibit P 3). Furthermore, the same appellant confessed before the Justice of the Peace (PW 6) who recorded the extra judicial statement (exhibit P 4).

The fact that the motor cycle in question (exhibit P 1) was retrieved at the appellant was supported by PW 2 and PW 4; the latter being the appellant's girlfriend.

The defence of the appellant did not raise any doubt in the prosecution case.

Section 287A of the Penal Code under which the appellant was charged provides as follows:

"Any person who steals anything and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons, and immediately before or

immediately after the time of the stealing uses or threatens to use violence to any person, commits an offence termed "armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment"

According to the above provisions of the law, the ingredients are, in my opinion, four that is:-

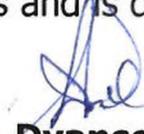
- i. stealing,
- ii. armed with any dangerous or offensive weapon or instrument, or being in company of one or more persons and,
- iii. the use or threats to use violence immediately before or immediately after the time of stealing,
- iv. against the person on whom the robbery was committed.

In the present case, as rightly submitted by the learned Senior State Attorney, all the ingredients were proved in evidence. Indeed, the evidence both testimonial and documentary was cogent and compelling and I find nothing to fault the finding of the trial court.

The conviction was inevitable. The sentence of thirty years term of imprisonment was the punishment which the law prescribes. It needs no interference.

For those reasons, the appeal fails and is dismissed in its entirety.  
Order accordingly.



  
**W. P. Dyansobera**

**Judge**

**15.12.2021**

This judgment is delivered at Mtwara under my hand and the seal of this Court on this 15<sup>th</sup> day of December, 2021 in the presence of the appellant who has

appeared in person and unrepresented and Mr. Lugano Mwasubila, the learned State Attorney for the respondent.



**W.P. Dyansobera**

**Judge**



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