IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: KWARIKO, J. A., SEHEL, J.A And MAIGE, J.A.)

CRIMINAL APPEAL NO. 56 OF 2022

CHAMUNGO RICHARD @ KIPINGU ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the Court of Resident Magistrate at Tanga at Tanga)

(Kabwe, SRM-Ext. Jur.)

dated the 11th day of March, 2021

in

Extended Jurisdiction Criminal Appeal No. 16 of 2020

.....

JUDGMENT OF THE COURT

29th April, & 9th May, 2022

SEHEL, J.A.:

The appellant, Chamungo Richard @ Kipingu was charged with and convicted of offence of armed robbery contrary to section 278A of the Penal Code by the District Court of Tanga at Tanga (the trial court), and sentenced to 30 years' imprisonment. His appeal to the High Court which was later on, in terms of section 45 of the Magistrates' Courts Act, Cap. 11 R.E 2019, transferred to the Resident Magistrates' Court of Tanga at Tanga to be heard and determined by Kabwe, Senior Resident Magistrate with extended

jurisdiction (the first appellate court) was dismissed for want of merit. Hence, this second appeal.

The facts leading to his conviction and sentence as can be gleaned from the record of appeal are as follows: the prosecution alleged that on 23rd day of December, 2017 at Splended area within the District, City and Region of Tanga, the appellant did steal a motorcycle with registration number MC 280 BLW make Boxer, the property of Samwel s/o Greyson Mzava and immediately before such stealing, he threatened Daniel s/o Joseph @ Mtulwe with a bush knife and an iron bar in order to obtain and retain the said motorcycle. The appellant denied the charge. Thus, a full trial ensued.

The prosecution called a total of four witnesses while the appellant fended for himself and did not call any witness. The prosecution case was also built upon two exhibits, namely: a motorcycle with registration number MC 280 BLW make Boxer (Exh. P1) and a motorcycle registration card number 752317 (Exh. P2).

According to Daniel Joseph (PW1), a motorcycle taxi rider, commonly known as "bodaboda", on 24th December, 2017 at around 19:35 hrs around Chuba Rahaleo he was stopped by a man whom he described to have an average height with white complexion wearing green t-shirt with a grey trouser. As to how he was able to identify that man, he explained that there

was an electricity light in that area. The man wanted to be ferried to Splended area. They used about four minutes to negotiate a fare and ultimately settled for TZS. 2,000.00. While they were on their way and upon reaching at Splended bridge, two people appeared in front of them. As it was an unexpected event, they both fell down from the motorcycle. There and then, one of the two people hit him with a bush knife on his head. As he had his helmet on, he did not sustain much injury. He raised an alarm. Fearing to be arrested, the passenger grabbed the motorcycle and disappeared with it in company with the two men that invaded him. On that same night, PW1 reported the incident to the police who promised him that he will conduct an investigation.

On 1st January, 2018 when Samwel Geryson (PW2), the owner of the motorcycle, was at his hairdressing salon together with Sefu Haruna Bakari (PW3) thereby arrived the appellant who was familiar to PW2 as they reside in the same area with a motorcycle with no registration number. He parked it in front of PW2's salon. PW2 suspected that it was his motorcycle which was stolen from PW1, his bodaboda driver. He started to inspect and asked the appellant as to where he got it. It was the evidence of PW2 that the appellant replied to him that the motorcycle was pledged as a bond. The appellant pretended to make a call but then disappeared in thin air. PW2 started to

inspect the motorcycle and managed to identify some special marks, namely; a bend at its tank and sticker of BMW at the right and left side of its engine. He also identified it by its Chassis and Engine number. Thereafter, he called PW1. Upon arrival, PW1 opened the side of the motorcycle and retrieved an insurance cover. The retrieval of the insurance cover confirmed to PW2 that the motorcycle belonged to him. He took it to Chumbageni Police Station for further investigation of the crime already reported.

PW3 gave similar narration to PW2's story that it was the appellant who came by at the salon riding a motorcycle and parked it outside the salon and that after he was confronted by PW2 and while the appellant was talking over the phone, disappeared and never returned. The last prosecution witness was the arresting police officer, one F. 926 Detective Sergeant Said (PW4) who told the trial court that he arrested the appellant on 5th March, 2018 at Sahare area.

The appellant in his defence admitted to be familiar with both PW2 and PW3 as they were neighbours residing in the same street. He also admitted to have been arrested at his home on 5th March, 2018 at about 10:30 am. Nevertheless, he denied to commit the offence of armed robbery. He claimed that the case was fabricated by PW2 because he accused him to have an affair with his lover.

At the conclusion of the trial, the learned trial magistrate was convinced that PW1 properly identified the appellant as he gave a clear description of the appellant's stature, complexion and attire; the identifying witness had ample time of four minutes to observe the appellant and that, the area was properly lit by the electricity light. He thus found the evidence of the identifying witness was credible and reliable as it was corroborated by PW2 and PW3. At the end, the learned trial magistrate found the appellant guilty, convicted and sentenced him as aforesaid.

Aggrieved, he lodged his appeal to the first appellate court but it was dismissed for want of merit. Still aggrieved, the appellant has filed the present appeal. On 30th August, 2021, he filed a memorandum of appeal comprising of eight grounds and on 14th April, he filed a supplementary memorandum of appeal raising seven grounds. We shall deal with the grounds of appeal as submitted by the learned State Attorney.

At the hearing of the appeal, the appellant appeared in person, unrepresented whereas Mr. Emmanuel Barigila, learned State Attorney appeared for the respondent/ Republic.

When given a chance to amplify his grounds of appeal, the appellant adopted his grounds of appeal and written statement of arguments filed on

14th April, 2022 pursuant to Rule 74 of the Tanzania Court of Appeal Rules, 2009 with no more.

Mr. Barigila began his reply by supporting the appeal. However, before we dwell on the merits of the appeal, we propose first to deal with procedural issues which are two. **First,** Mr. Barigila urged us not to consider the second ground in the supplementary memorandum of appeal which raises issue of facts and not law because it is a new ground. In that ground, the appellant complained that the street leader was not called to support the allegation of PW2. The learned State Attorney argued that the issue was not raised and considered before the first appellate court.

On our part, we have compared the grounds of appeal filed by the appellant in the first appellate court appearing at pages 87 to 89 of the record of appeal with the ones filed to this Court and we entirely agree with the learned State Attorney that, the second ground of appeal raising issues of fact and not law was not raised and considered by the two courts below. As it was held in a plethora of authorities of this Court, save for matters touching on issue of law, the Court will only look into matters which were raised, considered and decided in the subordinate courts (See: - **George Maili Kemboge v. The Republic,** Criminal Appeal No. 327 of 2013; **Galus Kitaya**

v. The Republic, Criminal Appeal No. 196 of 2015; **Hassan Bundala @ Swaga v. The Republic,** Criminal Appeal No. 386 of 2015 and **Godfrey Wilson v. Republic,** Criminal Appeal No. 168 of 2018 (all unreported)). For this reason, we will not consider the second ground of appeal advanced by the appellant in his supplementary memorandum of appeal.

Secondly, the appellant complained in the seventh ground of the memorandum of appeal that the prosecution documentary exhibit P2 was not read out to him after it was admitted in evidence. In his written statement, he submitted that the motorcycle registration card was not read out after being admitted in evidence by PW2 and that such a failure denied him to understand the nature and substance of the facts contained therein for him to make a meaningful defence. He thus prayed for the said exhibit to be expunged from the record of appeal.

Mr. Barigila admitted that according to the record of appeal, indeed exhibit P2 was not read out to the appellant after its admission. He also conceded that the same ought to be expunged from the record. He fortified his submission by referring us to the decision of this Court in the case of **Robinson Mwanjisi & 3 Others v. The Republic** [2003] T.L.R. 218 where it was held that where it is intended to introduce any document in evidence, it

should first be cleared for admission, and be actually admitted, before it can be read out, otherwise it is difficult for the Court to be seen not to have been influenced by the same.

We have duly considered the submissions of the appellant and that of the learned State Attorney and reviewed the record of appeal. We entirely agree that the documentary exhibit was not read over to the appellant after it was cleared and admitted in evidence. It is a settled position of the law that before a document is admitted in evidence it should pass through three stages which have been lucidly stated in the case of **Lack s/o Kilingani v. The Republic**, Criminal Appeal No. 405 of 2015 (unreported) that:

> *"Even after their admission, the contents of cautioned statement and the PF3 were not read out to the appellant as the established practice of the Court demands. Reading out would have gone a long way, to fully appraise the appellant of facts he was being called upon to accept as true or reject as untruthful. The Court in* ***Robinson Mwanjisi and Three Others v. The Republic*** *[2003] T.L.R. 218, at page 226 alluded to the three stages of clearing, admitting and reading out; which evidence contained in documents invariably pass through, before their exhibition as evidence."*

See also **Walii Abdallah Kibuta & 2 Others v. The Republic,** Criminal Appeal No. 181 of 2006, **Kurubone Bagirigwa & 3 Others v. The Republic,** Criminal Appeal No. 132 of 2015, **Issa Hassan Uki v. The Republic,** Criminal Appeal No. 129 of 2017 and **Kassim Salum v. The Republic,** Criminal Appeal No. 186 of 2018 (all unreported).

Yet, in **John Mghandi @ Ndovo v. The Republic,** Criminal Appeal No. 352 of 2018 (unreported), we stated the reason behind the requirement to read over the admitted documentary exhibits to the accused person. In particular we stated as follows:

> *"We think we should use this opportunity to reiterate that whenever a documentary exhibit is introduced and admitted into evidence, it is imperative upon a presiding officer to read and explain its contents so that the accused is kept posted on its details to enable him/her give a focused defence. That was not done in the matter at hand and we agree with Mr. Mbogoro that, on account of the omission, we are left with no other option than to expunge the document from the record of the evidence."*

From the record of appeal and it is not disputed by the learned State Attorney that the motorcycle registration card (exhibit P2) was cleared for admission and admitted in evidence but skipped the third stage. That is,

although it was admitted despite an objection from the appellant, the trial court omitted to read over the contents of the exhibit to enable the appellant to understand and make a meaningful defence. We are therefore satisfied that the omission was fatal as it occasioned a miscarriage of justice to the appellant. Consequently, we expunge exhibit P2 from the record.

We now turn to the grounds raising evidential issues. This being a second appeal to this Court we shall then be mindful of the settled principle of law that, the Court rarely interferes with concurrent findings of fact by the courts below. We can only interfere where there are mis-directions or non-directions on the evidence, a miscarriage of justice or a violation of some principle of law or practice. (See **The Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R. 149 and **Musa Mwaikunda v. The Republic** [2006] T.L.R. 387).

We shall start with the third and fourth grounds of the memorandum of appeal and the fifth and sixth grounds of the supplementary memorandum of appeal touching the complaint on the identification of the appellant, dock identification and identification parade. It was the submission of the appellant that PW1 gave a general description of his assailant which could have fit into anyone and that there was no evidence suggesting that PW1 mentioned or

gave such description at the earliest opportunity to the person he first made a report to.

Mr. Barigila readily conceded that the evidence of the identifying witnesses PW1 and PW2 was so weak and unreliable that no trial court could come to a conclusion that the appellant was positively identified. Relying on the case of **Waziri Amani v. The Republic** [1980] T.L.R. 250, the learned State Attorney submitted that while PW1 claimed that he identified the appellant by the electricity and moon light, the intensity of the light illuminated therefrom was not disclosed to enable the trial court to assess as to whether conditions for identification was favourable. In the same vein, the learned State Attorney argued that PW1 did not describe the features of the assailant to the persons who he claimed to have reported the incident on that very night. He referred us to page 34 of the record of appeal where PW2 said that he saw a message from PW1 informing him about the incident but there was no mention that he was informed about the assailant's description. Furthermore, he submitted that even the police officer to whom PW1 alleged that he reported the incident was not called as a witness to give credence on PW1's evidence as to the description of his assailant.

Besides, he argued, PW1, PW2 and PW3 testified that there was identification parade where they managed to identify the appellant but the parade register was not tendered in evidence. Worst still, he argued, the police officer who prepared and conducted the identification parade and the people who were lined up together with the appellant were not called as witnesses.

It is noteworthy that both the trial court and first appellate court held that the appellant was positively identified. The first appellate court reasoned that the identifying witness had ample to observe the appellant, the distance between the appellant and PW1 was proximate enough as the two were negotiating the fare and that there was enough light illuminating from the moon and electricity bulbs. On this we wish to state that the evidence of identification is of weakest kind and unreliable such that the court should not act upon it unless all the possibilities of a mistaken identity have been eliminated (see: - **Abdallah Bin Wendo & Another v. Rex** [1953] EACA 116 and **Waziri Amani v. The Republic** (supra)).

Having examined the evidence on record, we entirely agree with the learned State Attorney that the visual identification of PW1 and PW2 was not watertight. While, PW1 claimed to have identified the appellant by height,

complexion and the attire with the aid of electricity and moonlight, he failed to describe the intensity of the light. Unlike the two lower courts, we failed to find any evidence suggesting that the identifying witnesses mentioned the intensity of a light or the kind of the bulb. What we gathered from PW1 was the mention of electricity and moon light, with no more.

This Court has now and then stressed the importance of the identifying witnesses to describe the intensity of the light as to whether it was bright enough to allow the correct identification of the appellant or not. We amplified this importance in the case of **Magwisha Mzee & Another v. The Republic**, Criminal Appeals Nos. 465 and 465 of 2007 (unreported) thus:

> *"This Court has consistently held that when it comes to the issue of light, clear evidence must be given by the prosecution to establish beyond reasonable doubt that the light relied on by the witnesses was reasonably bright to enable the identifying witnesses to see and positively identify the accused person. Bare assertions that "there was light would not suffice."*

Further, in **Issa s/o Mgara @ Shuka v. The Republic**, Criminal Appeal No. 37 of 2005 (unreported), we stated as follows:

" It is common knowledge that lamps be they electric bulbs, fluorescent tubes, hurricane lamps, wick lamps, lanterns etc give out light with varying intensities.....hence the overriding need is to give in sufficient details the intensity of the light and size of the area illuminated".

Besides, we gather from the account of PW2 that PW1 did not disclose to him the description of his assailant. We wonder why this is so. If truly, he identified the appellant, he would have disclosed the features of the person who robbed him to the owner of the motorcycle for the owner to make a proper follow up of his motorcycle. Equally, we failed to understand as to why the prosecution did not call the police officer who received a report of the crime from PW1 on that night in order to give credence on the evidence concerning appellant's identification.

Connected to that is the absence of the register book and failure to call a police officer who prepared and lined up the identification parade. If it is true that the identification parade was conducted and it was done at the police station, why was the police officer not paraded as a witness and a register book not tendered in evidence. The evidence of such police officer and the register book were relevant in establishing that PW1 who claimed to have identified his assailant at the time of occurrence of the crime was able to

identify him from the midst of other persons without any aid or any other source. Since there is no any other explanation why the register book was not tendered in evidence and why the police officer was not called as a witness, an adverse inference has to be drawn and should be in the benefit of the appellant- see: **Azizi Abdallah v. The Republic** [1991] T.L.R. 71. In that regard, we are satisfied that both lower courts misapprehended the evidence on identification of the appellant thus we are entitled to interfere. Accordingly, we find merit on the grounds of appeal.

We now turn to the fifth ground of the memorandum of appeal and the fourth ground in the supplementary memorandum of appeal where the appellant complained about chain of custody of the motorcycle. Mr. Barigila admitted that there was no oral account or paper trail to show who was in control of the motorcycle from the moment PW2, the owner of the motorcycle, alleged to have found it up to the time it was tendered and admitted in the trial court by PW1.

It is noteworthy to state here that the first appellate court found that the exhibit involved in the present appeal does not fall into the category of those exhibits that can be easily tempered with and they were properly received by the trial court.

With respect, we differ with the findings of the first appellate court. Our appraisal of the evidence in record reveals that there is lacking an oral account or paper trail on the chronological event showing the seizure, custody, control, transfer and tendering of the alleged motorcycle. At pages 34 – 36 of the record of appeal, PW2 claimed that the appellant arrived at his place of business with the stolen motorcycle. Having confronted the appellant, he run away and left behind the motorcycle. He thus phoned PW1 to come and identify it. PW1 arrived and managed to identify it. Thereafter, PW2 phoned the investigative police officer who told him to send it to the police station on the next day. PW1 further said that he took it to the police station on the next day and it remained at the police station for about a week. After a week, it was handed over to him upon his request. It is not clear as to who kept the motorcycle while it was at the police station, if at all it is true. Further, it is not clear as to how it ended up in the hands of PW1 for him to tender it before the trial court. The whole scenario leaves an unanswered question as to whether the motorcycle was truly stolen.

It is significant also to note that PW1 did not sufficiently identify the motorcycle before tendering it in evidence. In the case of **Peter Marwa Mgore @ Roboti & Another v. The Republic**, Criminal Appeal No. 121 of

2014 (unreported) which was referred to us by the learned State Attorney, the Court emphasized the requirement of the witness to sufficiently identify a common article such as a radio or a motorcycle before it is tendered in evidence. The Court said:

> *"We have carefully gone through the evidence of PW1 and PW2. None of them made attempts to identify those properties which formed exhibits P1A (the allegedly stolen clothes and a radio) as ought to have been. This Court has on several instances stressed that a bare allegation by the complainant claiming ownership of the articles which are subject of theft is not sufficient, particularly so when it involves the identity of common articles."*

Accordingly, we find that the first appellate court misapprehended the facts on the chain of custody hence we find merit on the grounds of appeal.

Another complaint by the appellant concerns variance between the charge and evidence. This is the second ground in his memorandum of appeal. Mr. Barigila conceded that the charge was at variance with the evidence. He pointed out that while the charge alleged that the incident occurred on the 23rd December, 2017 the victim of the crime, PW1 said the

crime occurred on 24th December, 2017 at 19:35 hours. It was therefore the submission of the learned State Attorney that the charge was not proven.

Our scrutiny of the record of appeal revealed that there is such an apparent variance between the evidence of PW1 and the charge that shakes the credibility of PW1. The charge alleges that the incident occurred on 23rd December, 2017 whereas PW1 said the incident occurred on 24th December, 2017. Moreover, the particulars of offence alleged that the appellant used 'a bush knife' and *'an iron bar'* to threaten PW1. However, PW1 only mentioned *'a bush knife'*. He did not mention *'the iron bar'*. This is gathered at page 29 of the record of appeal where PW1 narrated the incident as follows:

> *"While we were approaching the bridge of Splended, abruptly two people appeared in front, they confronted us. It is when we fall down (sic.). Among the two people one was holding a Panga. He did hit me with a Panga at my head as I had covered my head with a helmet or hard hat, I did not sustain any injury."*

In the case of **Abel Masikiti v. The Republic**, Criminal Appeal No. 24 of 2015 (unreported) we emphasized:

"In a number of cases in the past this Court has held that it is incumbent upon the Republic to lead evidence showing that the offence was committed on the date alleged in the charge sheet which the accused was expected and required to answer. If there is any variance or uncertainty in the dates/ then the charge must be amended in terms of section 234 of the CPA. If this is not done the preferred charge will remain unproved, and the accused shall be entitled to an acquittal. Short of that a failure of justice will occur."

Since the prosecution failed to lead evidence to show that the offence of armed robbery was committed on the 23rd December, 2017 and that, both the bush knife and iron bar were used in the commission of the crime as alleged in the charge then the charge remained unproved. We also find merit on this ground of appeal.

Lastly, the first and the eighth grounds of the memorandum of appeal and the third ground of the supplementary memorandum of appeal, the appellant complained that the charge of armed robbery was not proven beyond reasonable doubt. Given as what we have endeavored to show that the evidence of visual identification against the appellant is most unsatisfactory, the identification parade is inconclusive, there is a broken chain of the trail of the motorcycle and there is variance between the charge

and evidence we are satisfied that the offence of armed robbery was not proved by the prosecution against the appellant.

At the end, we find that the appeal has merit. Accordingly, we allow the appeal, quash the conviction, set aside the sentence and order for the immediate release of **Chamungo Richard @ Kipingu,** the appellant from prison custody unless he is lawfully held for other reasons.

DATED at **TANGA** this 9th day of May, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Judgment delivered this 9th day of May, 2022 in the presence of Mr. Chamungo Richard @ Kapingu, the Appellant in person and Ms. Tussa Mwaihesya, State Attorney for the respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL