

IN THE HIGH COURT OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

CRIMINAL APPEAL NO 148 OF 2020

MWITA MARWA TAROGÉ_____ **APPELLANT**

VERSUS

THE REPUBLIC_____ **RESPONDENT**

(Arising from the decision and orders of the district court of Tarime at Tarime, Hon. Mnzava SRM in criminal case no 87 of 2019 dated 09.07.2020)

JUDGEMENT

19th January & 5th February 2021

GALEBA, J.

In this appeal, the allegations are that **Mr. Mwita Marwa Taroge** on 08.02.2019 around 19.00 hours at Mriba center hired **Mr. Mwera John Biginagwa**, who was a motor bike rider to ferry him to Bungulele village in Tarime district. On the way, while riding his customer, past the bushes he was ordered by the latter to stop and disembark from the motor cycle whereupon the appellant withdrew his pistol, fired two shots in the air and ordered **Mr. Mwera John** to raise his hands up and surrender the motor bike ignition keys to his aggressor. Before he was to flee the scene of crime, **Mr. Mwita Marwa** searched his victim and took from his pocket, Tshs 30,000/= and one telephone make *itel* worth the same amount as the case stolen. Then

Mr. Mwita Marwa, left the scene riding the snatched motor cycle together with other part of the loot.

The appellant was later arrested and charged with armed robbery in the district court at Tarime, and after a full trial, he was convicted and sentenced to 30 years imprisonment in respect of the robbery. He was aggrieved by those orders hence this appeal in which he raised 8 grounds of appeal.

His complaints in this appeal are *firstly* that the trial magistrate erred for convicting him based on the evidence of the prosecution witnesses. *Secondly*, that the trial magistrate erred for convicting the appellant based on the prosecution evidence despite the complexities in the facts of the case. *Thirdly*, that the trial court erred for affording the prosecution more time and opportunity to call their witnesses and present their case, while he was allowed to ask a few questions. *Fourthly*, that **EXHIBITS P1, P2 and P3** were taken to court by **PW1** and **PW2** from their home because he was not apprehended with those **EXHIBITS**. *Fifthly*, that there was no proof that he went to **PW3** and **PW4** to change parts of the stolen motor cycle and *sixthly*, that the evidence of **PW1** contradicts that of **PW2** and also the statement that **PW1** recorded at the at the police is contradictory with the evidence he

adduced in court. ***Seventhly***, that the Covid 19 pandemic the appellant failed to call his witnesses and ***finally*** that the trial court convicted him without the prosecution proving the case beyond reasonable doubt.

When this appeal came up for hearing on 19.01.2021, the appellant prayed to adopt his grounds as his submissions so that the state attorney submits in rely.

In this appeal the issue for determination is whether the appellant's grounds of appeal are meritorious.

As for the 1st, 2nd and 5th grounds of appeal, Mr. Yese Temba the learned state attorney who was appearing for the republic, submitted that the trial court was right to convict the appellant because **PW1, the victim** identified him when they were negotiating fair, **PW3** testified that the appellant went to him to change the plate number of the stolen motor cycle and at page 28 the appellant admitted the guilty by leading **PW7 Inspector Salum** to the location where he had hid the pistol, adding that that was confession leading to discovery. He concluded that there was sufficient evidence to find the appellant guilty.

These grounds do not present a lot of difficulty. According to the evidence of the victim, the appellant hired him for a ride from the point he waits for customers to a distant village and midway the appellant

robbed him a motor bike with registration no MC 945 BKH, some money, a telephone and then disappeared. **PW3 Marwa Nyaisa Chacha** testified that on 09.02.2019 the appellant went to his place and placed an order to make a new plate numbers **MC 572 BJT**, as he had lost his plate numbers. On the same day, according to **PW4 Baraka Ogote Kefa**, the appellant went to his place and placed an order to make a red and black cover for his motor cycle, which he did. The evidence of **PW7 Inspector Salum**, was that the appellant led him and other persons to Nyankuru hamlet where they recovered the pistol make CZ2075 RAM serial number B031618 also marked **EXHIBIT P3**. In all fairness, this evidence establishes fully that indeed, it was the appellant who committed the robbery. In the circumstances, grounds, 1, 2 and 5 of appeal have no merit.

As for ground 3, Mr. Temba submitted that there is no evidence showing that the appellant was denied or prevented to call any witnesses or cross examine any prosecution witness. He moved the court to dismiss that ground of complaint. In the 3rd ground of appeal, the appellant is complaining that trial court permitted the prosecution to ask him a lot of questions while he was allowed to ask just a few questions to the prosecution witnesses. This allegation has no basis.

According to the record, the appellant cross-examined all 7 prosecution witnesses. The issue that he asked a few questions is not supported because each after cross examination he indicated to the court that he had no more question by stating *"that is all"*. In respect of **PW6** and **PW7**, he asked each of them 10 substantive questions. In the circumstances, the 3rd ground of appeal is dismissed.

In respect of the 4th ground Mr. Temba submitted that the evidence on record shows that the **EXHBITS** tendered were found with the appellant. I will examine, whether the appellant is right in complaining that **EXHBITS P1, P2** and **P3** upon which his conviction was based were brought by **PW1** and **PW2** from their respective homes. In this case **EXHIBIT P1** was the victim's mobile phone, **P2** were the shield, the gear lever, a steering wheel cover and a motor cycle pedal and **EXHIBIT P3** was the motor cycle itself. I will trace the source of each of the exhibits starting with the telephone. According to **PW6, Emmanuel Ryoba Mjocho** and **PW7, Assistant Inspector Salum**, the telephone was recovered with the pistol from a location where the appellant led them to recover the pistol. So it is not true that **PW1** came with **EXHIBIT P1** from his home, rather the same was recovered where the appellant had hid the gun. Next is **EXHIBIT P2**,

the shield, the gear lever, a steering wheel cover and a motor cycle pedal. It is not clear who recovered the same **PW2 Johnson John Haruni** says at page 13 of the proceedings that the items were found with a certain mechanic without stating who was that individual. It is, too, not clear how those items were taken from that mechanic and found their way to court. In the circumstances, the collective items marked as **EXHIBIT P2** are hereby expunged as an exhibit.

The last exhibit that the appellant complained that witnesses got them from their homes is **EXHIBIT P3**, the motor cycle. According to the **PW2**, the registered owner of the motor cycle the appellant was arrested with the said motor bike and when it was tendered by **PW1** at page 11 of the typed proceedings attracted no objection from the appellant. Had this motor cycle with no relation with the appellant he would have objected to its admission. In the circumstances, the motor bike was a proper **EXHIBIT** to support the case and it was not taken from the witnesses homes. In the circumstances, the 4th ground of appeal partly fails and mainly succeeds in the above context.

In reply to the complaint of the appellant in the 6th ground of appeal, Mr. Temba submitted that evidence of **PW1** and **PW2** do not contradict rather they complement each other, adding that the

statement of **PW1** made at the police was not part of the record of the trial court. In rejoinder, the appellant submitted that, the victim at the police said that he did not identify who attacked him but in court he testified that he identified the appellant. In this appeal, I am inclined to agree with Mr. Temba, because there is no specific area where the appellant clearly indicated as being contradictory between the two witnesses. I agree also with Mr. Temba that whatever the victim stated at the police did not influence the trial magistrate to decide the way he decided the case. The content of anything that a witness says elsewhere other than in court does not count, an appellate court cannot use such material to set aside any judgment. In the circumstances, the 6th ground of appeal is hereby dismissed.

In response to the 7th ground of appeal Mr. Temba submitted that the appellant did not seek any summons to call his witness or witnesses rather after he had testified he closed his defence. I agree with Mr. Temba on this point. On 09.04.2020, when he was found with a case to answer, in response the court the appellant at page 33 of the typed proceedings stated;

***"I will make defence under oath.
-I will not call witnesses.
-No exhibits."***

On 24.06.2020 the appellant testified in defending the case and at closure of his evidence at page 44 of the typed proceedings he stated;

"Your honour I pray to close my defence case as I have no witness to call. I pray for a date of judgement."

The court marked the case closed and handed down the judgment thereafter. In other words the allegations that the appellant was not availed with sufficient opportunity to call his witnesses are not authentic allegations; they are an afterthought, which means the 7th ground of appeal has no merit.

Based on the above discussed in resolving the above grounds, the 8th ground has no merit because the prosecution proved the case beyond reasonable doubt and finally this court makes the following orders;

1. The findings and the judgment of the district court of Tarime in Criminal Case no 87 of 2019 is hereby confirmed and the sentence of thirty (30) years imprisonment imposed upon **Mr. Mwita Marwa Taroge** shall be served by him as passed by the trial court.
2. This appeal is hereby dismissed although the appellant has a right of appeal to the Court of Appeal of Tanzania according to law.

DATED at MUSOMA this 5th February 2021



Z. N. Galeba
JUDGE
05.02.2021