IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: MUGASHA, J.A., MWAMBEGELE, J.A. And KEREFU, J.A.)

CRIMINAL APPEAL NO. 92 OF 2019

HASSAN SAID TWALIB ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, at Mtwara)

(Mlacha, J.)

dated the 30th day of July, 2018
in
DC Criminal Appeal No. 29 of 2017

.....

JUDGMENT OF THE COURT

18th & 20th November, 2020.

MWAMBEGELE, J.A.:

Hassan Said Twalib, the appellant herein, was arraigned in the District Court of Masasi at Masasi in Mtwara Region for the offence of theft contrary to sections 258 and 265 of the Penal Code, Cap. 16, the Revised Edition, 2002 (the Penal Code). The particulars of the offence part of the charge had it that on 24.03.2016 at Jida village within Masasi District, Mtwara Region, stole one motorcycle make SANLG, red in colour with Registration No. MC 891 AUH, Engine No. 15922540 valued at Tshs. 1,900,000/=, the property of Fadhili Yusuph. He pleaded not guilty to the charge and after a full trial comprising five witnesses for the prosecution

and one witness for the defence; the appellant himself, he was found guilty as charged, convicted and sentenced to a prison term of seven years. That was on 09.11.2016. The appellant was aggrieved. He thus preferred an appeal to the High Court. The High Court (Mlacha, J.) partly allowed the appeal as the prison term of seven years was reduced to one of five years. Undeterred, the appellant has preferred this appeal on four grounds of grievance; namely;

1. That the trial court and first appellate court erred in law and fact for convicting the appellant herein without proper conviction as required by law;
2. That trial court and first appellate court erred in law and fact by failure to observe the requirement of section 192 (3) of the Criminal Procedure Act, Cap. 20 of the Revised Edition, 2002;
3. That case was not proved beyond reasonable doubts; and
4. That the trial court and first appellate court erred in law and fact by failure to observe the mitigation factors prior to the pronouncement of sentence.

The facts which led to the appellant's arraignment are simple. We glean these facts from the evidence by the prosecution witnesses in the record of appeal. They go thus: the complainant Fadhili Yusuph (PW1) operated a *bodaboda*; a motorcycle for hire. On 24.03.2016, he was hired

by the appellant; a person who was familiar to him, to take him to Masasi. They started the trip to Masasi but stopped at Chikukwe area where the appellant made a stop to greet his in-laws. They thereafter continued with their journey until they reached the area called Jiddah in Masasi where they stopped and parked the motorcycle. The appellant told PW1 to follow him inside a house pretending it to be their home, later lured him to give him the motorcycle so that he could go to a computer repairer to repair his laptop. He left with one Ulende Hamisi (PW4); a schoolboy resident of the house so that he could escort him to the computer technician. The appellant dropped the child on the way telling him that he would be picking him up in a little while on his way back. The appellant made away with the motorcycle and never returned until his arrest. The boy had to walk home.

In his defence, the appellant dissociated with the charges levelled against him. He testified that he was arrested and charged with the offence he did not commit on 21.09.2016. He denied to have known PW1.

When the appeal was placed before us for hearing on 18.11.2020 the appellant appeared in person, unrepresented. The respondent Republic appeared through Mr. Wilbroad Ndunguru, learned Senior State Attorney.

When we gave the appellant the floor to argue his appeal, he simply adopted the memorandum of appeal he lodged in the Court on 28.02.2020 and preferred to hear the learned Senior State Attorney respond after which he would make his rejoinder if need to do so would arise.

Responding, Mr. Ndunguru, initially, expressed his stance that he did not support the appeal and actually argued the first, second and fourth grounds of appeal against it. However, in the course of responding to the third ground of appeal, he shifted the goalposts; he submitted that the appeal was meritorious as there were doubts which needed to be resolved in favour of the appellant. The learned Senior State Attorney thus had no qualms if the appeal is allowed and the appellant is released from prison custody.

Given the response by the learned Senior State Attorney, the appellant had nothing useful to add. He simply prayed to be set free.

We have considered Mr. Ndunguru's concession and are of the considered view that the path taken by the learned Senior State Attorney was but a correct one. The prosecution case was shaky on several aspects. **First**, the appellant was accused of stealing a motorcycle with the descriptions shown in the charge; that is, a motor cycle make SANLG,

red in colour with Registration No. MC 891 AUH, Engine No. 15922540 valued at Tshs. 1,900,000/=. However, in his testimony, PW1 never gave any description of the stolen item. If anything, he was so casual in his testimony that we think the identity of the stolen item left a lot to be desired. In his testimony as appearing at p. 8 of the record of appeal, he is recorded as saying:

> *"He asked me to give him the switch/key of my motorbike and asked me to wait for him at their home. I gave him the said key and asked me to be patient as that place was their home. He left with my motorbike. I waited for almost one hour without the accused returning back."*

The foregoing was the testimony of the star witness for the prosecution with regard to the identity of the stolen motorcycle. The remaining witnesses for the prosecution were as casual as he was. PW4 who allegedly left with the appellant when PW1 was left behind. Not even one witness testified on the colour of the stolen motorcycle, let alone the descriptions shown in the charge. In cases of this nature, sufficient description of the stolen item is of paramount importance. This Court has always been insistent that description of the stolen item should be sufficiently given even in circumstances where the stolen item if found in

possession of the culprit. In **David Chacha and 8 Others v. Republic**, Criminal Appeal No. 12 of 1997 (unreported) for instance, when confronted with an akin situation, we observed:

> *"It is a trite principle of law that properties suspected to have been found in possession of accused persons should be identified by the complainant conclusively. In a criminal charge it is not enough to give generalized description of the property."*
>
> [As cited in **Vumilia Daud Temi v. Republic**, Criminal Appeal No. 246 of 2010 (unreported)].

[See also **Abdul Athuman @ Anthony v. Republic**, Criminal Appeal No. 99 of 2000, **Ally Zuberi Mabukusela v. Republic**, Criminal Appeal No. 242 of 2011 and **Kurubone Bagirigwa & 3 Others v. Republic**, Criminal Appeal No. 132 of 2015; all unreported decisions of the Court.]

Secondly, ownership of the stolen item was not established. PW1 who is stated in the charge to be its owner did not so testify. No document was ever tendered to establish that PW1 was the owner of the allegedly stolen motorcycle. What we have is just a word from PW1 that the appellant stole his motorcycle. No registration card was tendered to

show that he owned it. Neither was any receipt tendered to verify this. This infraction watered down the prosecution case greatly.

Thirdly, the cautioned statement in which the appellant is alleged to have confessed to have committed the offence and was heavily relied upon by the trial court to convict the appellant was expunged on appeal, and to our mind rightly so. The statement was not procedurally adduced in evidence and the High Court meticulously articulated the law on the point. We need not repeat the excellent articulation by the High Court lest we water it down. It should suffice to state that the exhibit was not read out in court after admission which is a fatal irregularity – see: **Robinson Mwanjisi and Others v. Republic** [2003] TLR 218, **Jumanne Mohamed & 2 others v. Republic**, Criminal Appeal No. 534 of 2015 (unreported), **Lack Kilingani v. Republic**, Criminal Appeal No. 402 of 2015 (unreported) and **Magina Kubilu @ John v. Republic**, Criminal Appeal No. 564 of 2016 (unreported), to mention but a few.

In view of the discussion above, we are at one with the learned Senior State Attorney that the case against the appellant was not proved to the hilt. This ground alone disposes of the appeal. We thus see no reason why we should canvass the remaining three grounds of appeal.

In the upshot, we find merit in this appeal and allow it. We order that the appellant Hassan Said Twalib be released from prison custody unless held there for some other offence.

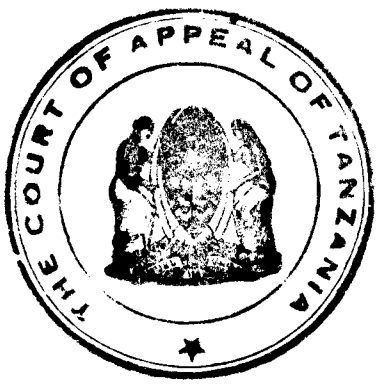
DATED at **MTWARA** this 19th day of November, 2020.

S. E. A. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The Judgment delivered this 20th day of November, 2020 in the presence of the Appellant in person and Mr. Wilbroad Ndunguru, learned Senior State Attorney for the Respondent/Republic, is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL