IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: LILA, J.A., LEVIRA, J.A. And KITUSI, J.A.)

CRIMINAL APPEAL NO. 118 OF 2020

BADIRU MUSSA HANOGI ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

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

(Ngwembe, J.)

Dated the 30th day of October, 2019
in
Criminal Appeal Case No. 57 of 2019

JUDGMENT OF THE COURT

4th & 9th June, 2021

LILA, J.A.:

The appellant, **BADIRU MUSSA HANOGI**, was initially jointly charged with one Alawi Masoud Ahmad with two counts, namely, conspiracy to commit an offence contrary to section 384 and armed robbery contrary to section 287A, both of the Penal Code, Cap. 16 R. E. 2002 (now R. E. 2019) (the Penal Code), respectively. It was alleged that they conspired and stole a motorcycle using knives to threaten the owner one Ramadhan Juma Lali Kosa at Namgogoli Village near Dangote industry within Mtwara Rural District in Mtwara Region. At the closure of the prosecution case, Mtwara District Court (the trial Court) discharged Alawi Masoud Ahamad for no case to answer. The appellant was convicted of the

offence of armed robbery and was sentenced to serve thirty years imprisonment. He was aggrieved. His appeal to the High Court was somehow successful in that his conviction of the offence of armed robbery was quashed and the sentence thereof set aside. But he was not set free as the High Court found him guilty of the offence of being found in possession of stolen property contrary to section 311 of the Penal Code and was sentenced to serve four (4) years imprisonment. Still aggrieved, he now seeks to challenge that decision before this Court.

The prosecution relied on the testimony of five witnesses to prove the charge. Ramadhani Juma Kosa (PW4) dealt with transport business using a motorcycle famously known as "bodaboda". One Bashiru Nandonde (PW1) bought the motorcycle for him on 6/4/2018 and remained with the receipt thereof which bore the name of PW4. They were not immediately issued with the Registration number plate as they promised to collect it sometimes later. It appears PW4 started to use it even before it was registered. On 11/4/2018 at 18:00hrs he was at Magomeni area where two people, who posed as passengers, approached him so that he could take them to Dangote area. TZS 10,000/= was agreed to be the fare. The journey began and upon arrival at Dangote area, PW4 was directed to turn right. Then one of the passengers claimed to have dropped his shoe. PW4 stopped to allow him collect the shoe. At the same time the one who

remained claimed to have felt the need to attend a call of nature. Soon thereafter getting down, he turned against PW4 and pointed a knife at his neck. The other person also joined pointing a knife to PW4. They demanded PW4 to surrender to them the motorcycle and warned him not to scream for help lest he be killed in five minutes time. Worried, PW4 heeded to the demand and surrendered the motorcycle. PW4's TZS 16000.00 and a mobile phone make TECNO were also taken away. The two left with the motorcycle leaving PW4 helpless near Imekuwa Village. That way, PW4 was dispossessed of the motorcycle.

Sometimes later, PW4 managed to go to the nearby village and reported the matter to the Village Chairman who availed him accommodation for that night. The record is silent whether or not he reported the matter to the police. He identified the appellant in court as being one of the persons who robbed him the motorcycle.

On 11/4/2018, while in Arusha, PW1 was informed of the incident by the Imekuwa Village Chairperson. He returned to Mtwara on 30/5/2018 and while accompanied with PW4, they reported the matter to the police and handed to them a receipt for the motorcycle and a Registration Number Plate.

The story on how the appellant was arrested and the stolen motorcycle was retrieved came from G. 8714 D/C Lameck (PW3) of Mtwara

Police Station. He said while with Inspector Tuntufye, he seized a motorcycle which had fake Registration Number MC 393 BNS at the appellant's home at Mabatini Village at Mpapura. Thereafter a seizure certificate (exhibit P2) was filled and Inspector Tuntufye, himself and the appellant signed on it.

Upon arrival at the police station, one G. 1224 D/C Florence (PW2) interviewed the appellant and recorded his cautioned statement. However, its admission as exhibit was objected to by the appellant on allegation of being beaten and denial to have his father, who was outside the police station, present during the recording of the statement. That notwithstanding, the statement was received by the trial court and admitted as exhibit P1. It is noteworthy that the High Court found it improperly admitted as exhibit due to failure to conduct an inquiry after the appellant had objected its admissibility. There is, however, no indication that he expunged it although it seems clear that he did not act on it.

Nancy Grace Kilimba (PW5), a magistrate stationed at Mtwara Primary Court, recorded the appellant's extra-judicial statement on 16/6/2018. She claimed that the appellant admitted committing the offence of robbery. Its admissibility was objected to but was admitted as exhibit P5. The High Court, yet again, found its admissibility faulty for failure to indicate how it was admitted despite the appellant's resistance and that it

was not read out after being admitted. Despite that finding, no order expunging it was made.

All the allegations brought to the fore by the prosecution were stoutly refuted by the appellant who claimed sometimes in May, 2018 at 15:30hrs he was arrested at his home place by four police officers who were on two motorcycles and taken to the police station without being told the accusations he was facing. In the evening time he was taken to the investigation room where, upon denying knowledge of any crime he committed in April, 2018, he was subjected to beatings. He was later taken to the justice of the Peace twice where his statements were taken and later, following the beatings, he signed the papers taken to him by police.

The trial court, as demonstrated above, found the appellant guilty of armed robbery. The High Court, on first appeal, found various anomalies as demonstrated above but, all the same, apart from finding the trial court's finding of guilty of armed robbery faulty and quashed it, substituted it for the offence of being found in possession of stolen property and sentenced the appellant as shown above.

Initially, the appellant lodged a two point memorandum of appeal but, later on, lodged another one comprising four points of grievances. Lengthy as they are, they substantially fault the courts below for; **one**, improper reliance on seizure certificate (exhibit P2) because it was not

signed by independent witness, search was conducted by a person lacking legal authority and it was not read out in court; **two**, the sentence imposed by the High Court was illegal; **three**, it was not established that the motorcycle belonged to the owner one PW1; and **four**, the charge was not proved beyond reasonable doubt.

Before us for hearing of the appeal, the appellant appeared in person and without legal representation. Ms. Matemu, learned State Attorney, represented the respondent Republic. Ahead of her submission, she intimated to the Court that she was supporting the appeal.

Having heard that the appeal was not being resisted, the appellant adopted the grounds of appeal without more and left it for the learned State Attorney to first respond to his grounds of appeal.

Briefly, but focused, Ms. Matemu argued that the offence of being found in possession of stolen property was not proved to the required standard. Expounding the necessary elements which should be established, she argued that the prosecution was duty bound to prove that the appellant was found in possession of exhibit P3. On the evidence on record, she insisted, PW3 did not sufficiently prove so for two major reasons. **First**, she argued, PW3 did not comply with searching procedures as provided under section 38(1) of the Criminal Procedure Act, Cap. 20 R. E. 2002 (now R. E. 2019) (the CPA). Elaborating, she submitted, it was, in

the first place, not clear as to how it came to PW3's knowledge that exhibit P3 was in possession of the appellant and, secondly, it not being an emergency search, no reason was advanced as to why PW3 did not carry with him a search warrant. Arguing further, she said, in terms of the provisions of section 138(1) of the CPA, an officer incharge of a police station is mandated to conduct search without warrant where he is satisfied that any delay in doing so will affect the outcome or issue a written authority to any police officer to conduct the search. She insisted that, in the present case, Inspector Tuntufye did not conduct the search but it was PW3 who did so and there is no indication whatsoever that he had a written authority from the Police Officer incharge of the police station. The search conducted was therefore illegal, she concluded.

That above aside, **secondly**; Ms Matemu argued that the seizure certificate (exhibit P2) was not read out in court to allow the appellant know its contents so as to enable him to marshal his defence properly. The same is subject to be expunged. Those defects, according to her, caused the prosecution to crumble.

Given the view taken by the learned State Attorney, the appellant urged us to order his release from prison.

Of course, Ms. Matemu's submission begs an answer to this question. Was the procedure for search and admission of seizure certificate (exhibit P2) as exhibit complied with?

We, in the first place, like the learned State Attorney, are of the view that this sole ground touching on the validity of the search and admission of the seizure certificate can dispose of the appeal without delving into considering other grounds of appeal.

Next, before we address the above issues, we appreciate that the law on being found in possession of stolen goods or property is as was elaborated by the learned State Attorney. To ground a conviction under the provisions of section 311 of the Penal Code, one of the crucial elements to be proved by the prosecution is that the appellant was found in possession of the stolen property.

We shall apply the foregoing instruction to the situation at hand. It should be recalled that PW3 claimed that upon a search conducted in the appellant's residence he retrieved a motorcycle stolen from PW4. It was the learned State Attorney's arguments that PW3 was expected to conform to the prescribed procedure for conducting search. His failure rendered the search illegal.

Entry and search of premises by police officers is governed by section 38(1) of the CPA and the Police General Order No. 226 and in particular,

part 1. In terms of section 38 of the CPA, a police officer in charge of a police station may search or issue a written authority to any police officer under him to search any premises. Such a position is complemented by the PGO. Of relevance to us are paragraph 2(a), (c), (d) and (e). To maintain the elaborations inherent in them, we take the liberty to reproduce them in whole as under:-

> *"2. (a) Whenever an O/C.[Officer Incharge) Station, O/C. C.I.D.[Officer In Charge Criminal Investigation of the District], Unit or investigating officer considers it necessary to enter private premises in order to take possession of any article or thing by which, or in respect of which, an offence has been committed, or anything which is necessary to the conduct of an investigation into any offence, he shall make application to a Court for a warrant of search under Section 38 of the Criminal Procedure Act, Cap. 20 R.E. 2002. The person named in the warrant will conduct the search.*
>
> *(c) Where an officer referred to in (a) above receives information or has reasons to believe that a person wanted in connection with the commission of a criminal offence is in any building, he shall apply to the local Magistrate for a Warrant of Arrest.*
>
> *(d) Where anything is seized in pursuance of search the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, bearing the signature of the*

owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any.

(e) Police Officers are reminded that Section 38(4) of the Criminal Procedure Act, Cap. 20 R.E. 2002, states that whoever, being empowered by law to order, authorise or conduct the search or any person, place, building, vessel, carriage or receptacle, vexatiously and without having reasonable grounds for doing, orders, authorises or conducts such search is guilty of an offence and upon conviction is liable to a fine not exceeding three thousand shillings or imprisonment for a term not exceeding one year."

Read closely, these provisions, make it clear that a valid search to any premises is conducted when it is conducted by a police officer who is a police officer in charge of a police station or by any police officer acting under a search warrant authorising him to conduct the search issued by either the police officer in charge of a police station under section 38 of the CPA or a search warrant issued by the court in terms of the PGO No. 226. We think that procedure was purposely set out to avoid abuse of authority on the part of police officers for; it controls unauthorised and arbitrary searches in premises that may be conducted by unscrupulous police

officers and therefore avoid the possibility of fabrication of evidence by planting things subject of a criminal charge.

As readily conceded by the learned State Attorney, in the present case, PW3 introduced himself in court as being a police officer stationed at the CID [Criminal Investigation Department] section in Mtwara police station and, although he was accompanied with Inspector Tuntufye, he was the one who seized the motorcycle. There was no mention that he had a written authority to conduct search issued to him by the officer in charge of a police station or by the court. He was, therefore, neither an officer in charge of a police station nor had a written authority to conduct search. Neither was it an emergency search which is conducted under section 42 of the CPA. For that reason, we agree with the learned State Attorney that the search conducted by PW3 did not accord with the law, hence it was illegal. It should be remembered that, at the time the prosecution sought the motorcycle be admitted as exhibit, the appellant raised objection to its admissibility and denied being arrested and found in possession of it. In the circumstances, had the trial court paid due regard to that objection and minded to admit it, it would have exercised its absolute discretion to admit it or not as exhibit after being satisfied on the balance of probabilities that by so doing it would be in the public interest and the appellant would not thereby be unduly prejudiced. That is in terms of section 169(1) and (2) of

the CPA which vests a trial court with the discretion to admit and act on illegally obtained evidence upon complying with the conditions prescribed therein. That is what we said in **Nyerere Nyague vs Republic**, Criminal Appeal No. 67 of 2010 (unreported). Unfortunately, the trial court did not realise that the motorcycle was illegally seized hence it could have not taken that course. Conversely, it went ahead to receive, admit it as exhibit and acted on it to ground the appellant's conviction. That was irregular and disentitled the trial court the right to act on illegally obtained evidence. Since the appellant has challenged its admissibility again in this appeal and having found that its admissibility was flawed, we have no option but to expunge such evidence from the record as we did in **Mbaruku Hamisi and Four Others vs Republic**, Consolidated Criminal Appeals Nos. 141, 143 and 145 of 2016 and 391 of 2018 (unreported) where the Court found the procedure of obtaining exhibits P1 (a mobile phone make Teckno) and P3 (two blankets) which were seized during a search contravened the provisions of section 38 of the CPA and expunged them from the record.

We now turn to consider the admissibility of the seizure certificate (exhibit P2). The record bears out at pages 110 and 101 that the learned judge relied on it heavily in grounding the appellant's guilt with the offence of being found in possession of stolen property. This is the observation

made by the learned judge about it after referring to its contents and quoting the relevant phrases in it:-

> *"The appellant did not claim ownership of the said motorcycle and did not object when the same was ordered to revert back to the owner. More so, the appellant deny the fact that the motorcycle was found in his house. Exhibit P2 that is the seizure certificate was recorded on 27/5/2018 at 15:30 hrs. The appellant signed it and did put finger print to it. Now the question is to whose possession was that motorcycle during seizure?*

Mindful of the principle that every witness is entitled to credence, the learned judge held PW3 to be a reliable witness and invoked the doctrine of recent possession to hold the appellant liable with the offence of being found in possession of a stolen motorcycle.

With respect, we think the learned judge was not right. It appears that the fact that exhibit P2 was not read out after admission escaped the learned judge's eyes. The proceedings at page 26 of the record of appeal very clearly reveal that anomaly. The appellant's complaint which was readily conceded by the learned State Attorney is therefore valid. In that accord, we take side with the learned State Attorney that the infraction is

fatal and rendered exhibit P2 an invalid evidence deserving no consideration (see **Robinson Mwanjisi and Others vs Republic** [2003] T.L.R. 218). As proposed by Ms. Matemu, we expunge it from the record.

In the event of expunging from the record PW3's evidence including exhibit P3 as well as the expunging of exhibit P2 on which the appellant's conviction was grounded, the remaining evidence falls short of proving the appellant's guilt of being found in possession of stolen property.

In fine, we allow the appeal, quash the appellant's conviction and set aside the sentence. We order his immediate release from prison if not facing any other charge which lawfully holds him behind bars.

DATED at **MTWARA** this 8th day of June, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

The judgment delivered this 9th day of June, 2021 in the presence of the Appellant in person and Mr. Joseph Mauggo, learned Senior State Attorney for the Respondent/Republic is hereby certified as a true copy of the original.

D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL