

**IN THE COURT OF APPEAL OF TANZANIA
AT SHINYANGA**

(CORAM: WAMBALI, J.A., LEVIRA, J.A. And KAIRO, J.A.)

CRIMINAL APPEAL NO. 446 OF 2017

NDIMA KASHINJE @ JOSEPH APPELLANT

VERSUS

THE REPUBLICRESPONDENT

**(Appeal from the decision of the High Court of Tanzania
at Shinyanga)**

(Makani, J.)

dated the 8th day of September, 2017

in

(DC) Criminal Appeal No. 94 of 2016

JUDGMENT OF THE COURT

13th & 24th August, 2021

KAIRO, J.A.:

In the District Court of Kahama at Kahama, Ndima Kashinje @Joseph, the appellant was arraigned and charged with armed robbery contrary to section 287A of the Penal Code, Cap.16 R.E.2002. After a full trial he was convicted and sentenced to a term of thirty years imprisonment. In addition, he was to suffer twelve strokes of the cane; six at the time of entry and six at the time of exit. He was displeased by both the conviction and sentence but he unsuccessfully appealed to the High Court. Still adamant, he decided to lodge this second appeal.

The brief factual background of the case is that, on 9th day of July, 2015 at about 23.40hrs at Kahama Bus Stand, one Jacob Samweli (PW2), a *boda boda* motorcyclist who was employed by Geni Mpondi (PW1) to ride her motorcycle with Registration No. MC 790 ATV make sunlag, was waiting for customers. While there, a young man came and asked PW2 to take him to Nyasubi area around Stallion Lodge and he agreed. When they reached around Stallion Lodge area, the said passenger asked PW2 to stop and suddenly another person emerged from the front, hit PW2 over the head and he lost conscious. Around midnight, he regained his consciousness and raised an alarm for help, but in vain. He decided to go to Rock Point Pub where he found his fellow motorcyclists and narrated his ordeal. They went together to search for the stolen motorcycle in various places but the exercise proved futile. PW2 then informed PW1; his employer and together they reported the incident at Kahama Police Station where she revealed that her motorcycle was fixed with a special GPRS (General Packet Radio Service) tracking device, through which it could be traced and located. The device showed that the motorcycle was kept in one of the rooms found in the house of Maria Nkinga (PW4) situated at Nyihongo area which according to her it was leased to the appellant. A Police Officer,

No.D.9635 D/CPL Ephraim (PW5) and PW1 went to trace it at the indicated house as per GPRS. On reaching there, the said room was locked and the appellant was not in. The police broke in and found the stolen motorcycle which was identified by PW1 who was present in the search process and seized it. A certificate of seizure was filled and admitted as exhibit P2 after being tendered by PW5 who led the search.

The appellant was apprehended by a vigilant Group Commander of Nyihongo Ward who witnessed the search and was later instructed by the police to apprehend the person who would enter that room. In the course, the appellant was arrested and taken to Kahama Police Station where his cautioned statement was recorded by PW6 on the next day and he admitted to have committed the said offence. The cautioned statement was tendered and admitted as exhibit P3 during the trial.

In his defence, the appellant (DW1) denied to commit the charged offence and to be PW4's tenant as there was no lease agreement tendered to that effect. The appellant stated that he was arrested on the 9th of July, 2015 at his work place at CDT area following chaos that ensued whereby one person was injured and refuted the allegation by PW3 that he was arrested while he was about to enter the room where

the stolen motorcycle was retrieved from. He was then taken to Kahama Police Station where he was forced to sign a cautioned statement (exhibit P3). Makoye Masanja (DW2) who was also in the lock up when the appellant (DW1) was sent in confirmed that DW1 was beaten to the extent that he could not walk alone. Elias Fadhili (DW3) on his part testified that DW1 spent a night with him in remand custody on 8th July, 2017. That on the next day, a police officer showed him a motorcycle plate number and told the appellant that it was found in his room. The appellant admitted but stated that the motorcycle was left there by his friend who was in Mwanza.

After hearing the evidence of both sides as earlier stated, the trial court convicted the appellant as charged. In its finding, the trial court relied on the doctrine of recent possession to ground conviction as the motorcycle was found in the room rented by the appellant as evidenced by the certificate of seizure (exhibit P2). Furthermore, it was found that the time lapse between the robbery incident and discovery of the motorcycle in the appellant's premises was sufficient for the invocation of that doctrine.

On appeal, the High Court agreed with the trial court's finding on the reliance to the doctrine of recent possession and dismissed the complaint on the improper search that was allegedly conducted without warrant. The first appellate court resolved that the Police have powers to conduct an emergency search under section 42 of the Criminal Procedure Act, Cap 20 R.E. 2002 (now R.E. 2019), (the CPA). The High Court went further to give credence to the cautioned statement (exhibit P3) wherein the appellant confessed to have stolen the motorcycle. It was also the High Court's finding that DW3's evidence supported the prosecution case and further to that the appellant was properly identified by PW2. Thus, the appeal was dismissed in its entirety, hence this appeal. The appellant's memorandum of appeal to the Court has nine grounds which are based on the following complaints: -

1. The ownership of the motorcycle (exhibit P1) was neither established nor proved.
2. Exhibit P2 was tendered and admitted against the procedure.
3. The appellant was not identified properly.
4. The case was not proved beyond reasonable doubt.

At the hearing of the appeal, the appellant appeared in person without legal representation. The respondent Republic was represented by Ms. Salome Mbughuni, learned Senior State Attorney assisted by Ms. Caroline Mushi, learned State Attorney.

When invited to argue his appeal, the appellant adopted his grounds of appeal and preferred to let the respondent's counsel to respond first but reserved his right to rejoin, if a need to do so would arise.

Upon taking the floor, Ms. Mushi initially informed us that they are opposing the appeal. However, following a brief dialogue with the Court and upon reflection of the grounds of appeal, she changed her mind and supported the appeal. Submitting on the reason of the change of their initial stance, Ms. Mushi stated that, although the searching of the appellant's room resulted to the discovery of the alleged robbed motorcycle, the seizure of the same was done in contravention of Section 38 of the CPA. She pointed out the irregularities to include:- **one**, no search warrant was issued in respect of the conducted search, **two**; the absence of the appellant in the searched premises, **three**; no independent witness was called to witness the conducted search, **four**;

PW2 was recorded in exhibit P2 to be among the persons who were present during the search process while the record of appeal shows that he was left at the Police Station when the police went to conduct the search and **five**; no receipt was issued to the appellant to acknowledge the seizure of the motorcycle. Ms. Mushi argued that the pointed-out flaws raised doubt to the legality of the conducted search and consequently the seizure of the stolen motorcycle. Besides, she contended, the flaws render exhibit P2 to have no evidential value and the remedy is to expunge it. Ms. Mushi also contended that since the conviction of the appellant hinged on the doctrine of recent possession backed up by the certificate of seizure (exhibit P2), if expunged renders the case to have no feet to stand on and consequently the case was not proved beyond reasonable doubt.

The appellant in his rejoinder had nothing much but joined hands with the submission of Ms. Mushi.

Having heard the submissions from the parties, the main issue for our determination is whether the prosecution proved their case beyond reasonable doubt. In dealing with this issue, we shall start with the propriety or otherwise of the search and seizure. To appreciate our

deliberation, we think it is imperative to start with the position of the law. Search and seizure are governed by section 38 of the CPA and for the purpose of this appeal we shall reproduce section 38 (1) and (3) of the CPA hereunder: -

38.-(1) Where a police officer in charge of a police station is satisfied that there is reasonable ground for suspecting that there is in any building, vessel, carriage, box, receptacle or place-

(a) anything with respect to which an offence has been committed;

(b) anything in respect of which there are reasonable grounds to believe that it will afford evidence as to the commission of an offence;

(c) anything in respect of which there are reasonable grounds to believe that it is intended to be used for the purpose of committing an offence, and the officer is satisfied that any delay would result in the removal or destruction of that thing or would endanger life or property, he may search or issue a written authority to any police officer

under him to search the building, vessel, carriage, box, receptacle or place as the case may be.

(2) N/A

(3) Where anything is seized in pursuance of the powers conferred by subsection (1) 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.

Deducing from the quoted provisions of law, no search of a premises shall be affected without **one;** search warrant, **two;** the presence of the owner of the premise, occupier or his near relative at the search premises, **three;** the presence of an independent witness who is required to sign to verify his presence and **four;** issuance of a receipt acknowledging seizure of property.

Our perusal on the record of appeal denotes that PW5 and PW1 were the ones who went to the alleged appellant's premises to track the

motorcycle assisted by the installed GPRS device while PW2 remained at the police station. It is on record that they did not find the appellant and the room was closed and still they decided to break the door for search purpose and seized the motorcycle found into the room, allegedly to be the one stolen. However, PW5 had no search warrant authorizing him to conduct it. This means the search was illegal from the very beginning. We need not emphasize more on the importance of this requirement which is geared to safeguard the constitutional right to dignity and privacy of a person. We understand that, under certain circumstances, an emergency search under Section 42 of the CPA dispenses with search warrant requirement. But we hold the firm view that the circumstances in this case do not fall into that exception. We say so because PW1 and PW2 went to report the incident of theft of the motorcycle to the police and together with PW5, they went to the office which installed GPRS device to her motorcycle and later went to search the premises. Considering that the whole process started at the Police Station, we think PW5 had ample time to prepare a search warrant, and thus the issue of an emergency search does not arise at all.

The record of appeal further reveals that, the motorcycle was seized after PW5 broke the door of the appellant's room. While doing so, there were neighbours, PW1 and PW4. According to the law, the search is to be conducted in the presence of the owner, occupier or a near relative who will be required to sign a certificate to acknowledge the search and seizure, if any. But neither of those prescribed by law was present nor an independent witness. Further to that, PW5 who lead the search did not issue a certificate of seizure on what was seized. The need to issue a certificate of seizure was emphasized in our recent decision in **Shabani Kindamba v. Republic**; Criminal Appeal No. 390 of 2019 in which an excerpt in our earlier decision in **Selemani Abdallah and Others v. Republic**, Criminal Appeal No. 354 of 2008 (both unreported) was referred wherein the Court stated: -

"The whole purpose of issuing receipt to the seized items and obtaining signature of the witnesses is to make sure that the property seized came from no place other than the one shown therein. If the procedure is observed or followed, the complaints normally expressed by suspects that the evidence arising from such search is fabricated will to a great extent be minimized."

As if that was not enough, the certificate of seizure (exhibit P2) was signed by PW1, PW2 and PW4 who are the motorcycle owner, motorcyclist and the land lady of the searched premises respectively, as witnesses to the search. In our view, all these had interest to serve, as such the absence of an independent witness has eroded the credence of the search conducted even if the search warrant would have been available. To crown it all, though PW2 did not witness the search as he was left at the Police Station, yet he was listed among those who witnessed the search as per exhibit P2. The pointed-out flaws create doubts if at all the search was conducted, and as the rule of thumb goes, the doubts are resolved in favor of the accused. The doubts are compounded by the fact that no trial witness or report from the office where the GPRS which indicated that the stolen motor vehicle was at the alleged premises was tendered to confirm the allegation. To say the least, the conducted search was illegal and consequently the seizure, as such it was wrong to ground conviction of the appellant basing on exhibit P2.

In the end, we find the second and fourth grounds to have merit and sufficient to dispose of the appeal. We therefore agree with the

appellant and the learned State Attorney who supported the appeal that the prosecution did not prove the case against the appellant beyond reasonable doubts. In the circumstances, we find no need to address other grounds of appeal. In the foregoing we allow this appeal, quash the conviction and set aside the sentence imposed on the appellant. We order the appellant's immediate release from prison unless he is being held for another lawful cause.

DATED at SHINYANGA this 24th day of August, 2021.


F. L. K. WAMBALI
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Judgment delivered this 24th day of August, 2021 in the presence of appellant in person and Ms. Salome Mbughuni, Senior State Attorney assisted by Mr. Nestory Mwenda and Venance Mkonongo, learned State Attorneys for Respondent/Republic, is hereby certified as true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL