

IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO 49 OF 2009

(Original Criminal Case No 169 of 2008 of the

District of Mpwapwa District at Mpwapwa)

BEFORE KOBELO, S.ESQ RESIDENT MAGISTRATE

BAKARI SALUM... ..APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

J U D G M E N T

01/03/2010 & 21/04/2010

KWARIKO, J.

The appellant herein and one OMARY JUMA the then 1st accused at the trial were arraigned before the district court of Mpwapwa where they jointly and together faced one count of stealing contrary to section 265 of the Penal Code Cap 16 Vol. 1 of the Laws R.E. 2002. They had denied the charge and at the end of

the trial they were both found guilty and were accordingly convicted and sentenced to five (5) years imprisonment each.

The facts of the case which led to this case can briefly be summarised as follows. At about 08.00 pm on the 23rd day of July 2008 one MOSES FERUZI, PW1 and the complainant in this case had parked his motor cycle with registration number T 226 AKL valued at Tshs 2, 800, 000/= outside his home at TANESCO area in Mpwapwa town. At 08.30 pm while PW1 was inside he was informed by his son that the motor cycle was nowhere to be seen. PW1 reported the matter at the police station and investigation started where on the third day things started to unfold. One ERICK MAJURA, PW2 who was a motor cycle mechanic was approached by the then 1st accused where at first he asked him to find for him a customer to buy some motor cycle spare parts and he (PW2) promised to find one. However, later on, the first accused told PW2 that he actually had a motor cycle which he intended to sell it in dismantled parts. Therefore PW2 was asked to help to disassemble the motor cycle which was in Gulwe area within Mpwapwa district. Since PW2 had information about PW1's motor cycle theft he informed him about what the 1st accused had asked him to do. Therefore when PW2 and the 1st accused drove on another motor cycle to Gulwe PW1 reported the revelations to the police. The first accused took PW2 to the appellant herein where he had earlier kept the motor cycle and

informed him that he had come with a mechanic to repair the same. The appellant was found at his place of work and PW4 SAUL SABINGO the Village Executive Officer in the area was also there. While the appellant looked for SALUM RAMADHANI PW5 who had stored the motor cycle at his home the policemen PW3 NO. F 142 D/SGT EDWIN inclusive also had reached Gulwe and arrested him (the appellant) and then the first accused and ultimately they were led to PW5's house where the motor cycle was found and identified as PW1's stolen property. A certificate of search was signed which was admitted in court as exhibit P2 and the motor cycle was marked exhibit P1.

The motor cycle had been damaged and the appellant said that it was the 1st accused whom he knew before had brought the same to him and asked to keep it for safe custody on 23/7/2008 since the same had been involved in an accident. That since he had no enough space in his home the appellant had asked SALUM to keep the motor cycle. The appellant, the 1st accused and SALUM were sent to police and accordingly charged in court with stealing before SALUM's charge was withdrawn and was made a witness. The appellant's caution statement was admitted in court as exhibit P3 while that of the 1st accused was marked exhibit P4.

In their respective defences the 1st accused and the appellant denied the theft allegations. However, the appellant admitted that the motor cycle was brought to him by the 1st accused and he received it for safe custody only. This explanation was supported by his son OMARY BAKARI DW3 and JUMA ENOCK DW4. For the foregoing evidence the trial court convicted the 1st accused as well as the appellant and sentenced them as indicated earlier.

The appellant was not satisfied with his conviction and sentence hence this appeal. In his petition of appeal the appellant raised six grounds of appeal where he essentially complained that the prosecution case against him was not proved beyond reasonable doubts. During the hearing of this appeal the appellant only asked this court to consider his grounds of appeal and allow the same. On the other hand Mr. Nchimbi learned State Attorney appeared and argued the appeal on behalf of the respondent Republic where he declined to support the conviction and sentence in respect of the appellant. He gave his reasons for the assertion.

This court is in agreement with the parties that the prosecution case at the trial did not prove that the appellant was the thief of the motor cycle. I agree with Mr. Nchimbi that much as the appellant was found in possession of the motor cycle but a doctrine of recent

possession was not proved against him. The appellant had maintained that it was the 1st accused who took a defective motor cycle to him for safe custody and that himself was bleeding from injuries he sustained from the accident with the motor cycle. There was no suggestion put forward to indicate that the appellant ought to have disbelieved the 1st accused whom he knew before very well. The appellant's unsuspecting mind was supported by PW4 a government leader who was there when the 1st accused came to the appellant's place two days later and told him that he had come with a mechanic to repair the motor cycle. For this evidence the prosecution failed to bring evidence to rebut the appellant's assertion that he was an innocent receiver. There was also no evidence to prove that the appellant stole the motor cycle or knew that the same was a stolen property when he received it and failed to report to the law enforcement agencies. Also the doctrine of common intention was not proved in this case between the appellant and the 1st accused.

Lastly I agree with Mr. Nchimbi that the trial court magistrate erred to hold that since the appellant knew the 1st accused before then he must have been his accomplice or knew that the motor cycle was a stolen property. Thus the prosecution case proved that it was the 1st accused and not the appellant who had stolen the motor cycle.

Consequently, the appellant's appeal is allowed, conviction quashed and sentence is set aside. It is thus ordered that the appellant be released from custody unless his continued incarceration is in connection with other lawful causes. It is so held.


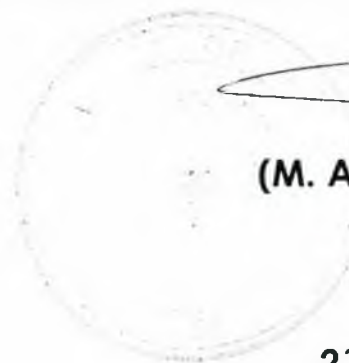


(M.A.KWARIKO)

JUDGE

21/4/2010

Judgment delivered in court today in the presence of the appellant and Mr. Katuli learned State Attorney for the respondent Republic. Ms E. Komba court clerk present.



(M. A. KWARIKO)

JUDGE

21/4/2010