

**IN THE HIGH COURT OF TANZANIA**

**AT DODOMA**

**(APPELLATE JURISDICTION)**

**(DC) CRIMINAL APPEAL NO. 43 OF 2017**

*(Original Criminal Case No. 03 of 2016 of the District Court of  
Kongwa at Kongwa)*

**AMANI YOSAMU KIDAGALA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

**JUDGMENT**

**21/4 & 24/5/2017**

**KWARIKO, J.**

Appellant herein and two others MAJALIWA S/O MAJENDA @ ZAKAYO and JAMES S/O CHIGOSHO @ MAGOTO then second and third accused persons respectively were arraigned before the District Court of Kongwa charged jointly and together with two offences of Burglary contrary to section 294 (1) (a) and (2) and 265 both of the Penal Code [CAP 16 R.E. 2002]. They were accused to have broken and entered the dwelling house of one YOHANA KAKA on 1/1/2016 at about 00.00 hours at Visumi Moreti Village in Kongwa District within Dodoma Region and stole

one Motorcycle Reg. No. T 197 CAR make SUNLG red in colour valued at Tshs. 1,800,000/= property of the said YOHANA KAKA.

Having been denied the charge trial was conducted in respect of the three. The facts of the case from the prosecution reveal that the complainant PW1 woke-up the morning of 01/1/2016 and did not find his Motorcycle with the said description. He informed his brother JACKSON KAKA, PW2 and a friend FRANK YOSIA, PW3 about the incident. He also reported the matter at Kibaigwa Police Station where No. E 9101 D/CPL MOSES PW4 was assigned to investigate the case.

However, on the same day i.e 01/1/2016 one NO. H700 DC NGAKAYO, PW5 of Dumila Police Station while on patrol with his Policemen colleagues at about 4:30 hours spotted a Motorcycle carrying three people. They ordered it to stop but those people threw the Motorcycle away which they took to the Police Station. That, they noted the faces and attire of those people. Later, the Police were informed that the three people were at a canteen eating. They arrested them and upon interrogation they admitted that they stole the Motorcycle from Moreti Village in Kongwa hence information was communicated for them to be sent to the material district.

At Kongwa the three accused persons were inquired by PW4 where they are said to have admitted the allegations and despite of them objecting their cautioned statements the same were admitted as exhibit P2 collectively. I think these statements ought to be exhibit P3 collectively

since the Motorcycle and its registration card were admitted and marked exhibits P1 & P2 respectively.

In his defence the appellant said he was of Majawanga area and had gone to Dumila on 30/12/2015 to look for employment and while celebrating the New Year on 01/01/2016 he was arrested by police and taken to Kongwa where was interrogated by PW4 at Kibaigwa Police Station on 5/1/2016 where his personal particulars were taken and was asked to sign in a piece of paper whose content he did not know. He discredited the prosecution evidence and denied that he was the thief. The appellant also said that had he admitted the allegations the police would have taken him to the justice of the peace.

The second accused also said he was coming from Tanga to Gairo and when the Bus stopped at Dumila for eating he was arrested by police and taken to Kongwa for this incident which he denied. He also said he did not know the cautioned statement. Whereas the third accused said had come from Majawanga area to Dumila and was arrested while eating at a canteen. He also disowned the cautioned statement. The three said did not know each other as they were only united in this incident.

At the end the trial court found that the second count had been proved beyond reasonable doubt and appellant and others were convicted and sentenced to three (3) years imprisonment.

Having been dissatisfied with the trial court's decision the appellant filed this appeal upon ten grounds of appeal which essentially raised the following three complaints;

- 1. That, the trial court ought to inform the appellant of the right to conduct inquiry or trial within a trial once objection to cautioned statement was made.*
- 2. That, PW5 did not sufficiently explain how he identified the appellant and others.*
- 3. That, the complainant did not prove that the motorcycle belonged to him.*

When the appeal was called for hearing the appellant only referred this court to his grounds of appeal having no any further explanation hence left to the State Attorney to respond.

As luck would have to the appellant the learned State Attorney did not oppose this appeal. Hence, Ms. Mwakyusa learned State Attorney's submission will be referred in the course of this judgment. The issue to be decided now is whether this appeal has merit. The grounds of appeal will be decided in seriatim as follows;

As regards to the first ground of appeal this court is in agreement with both parties that since the appellant and others objected to their

cautioned statements being tendered as evidence the trial court ought to stay everything and conduct an inquiry to ascertain their admissibility. I get support in this view from the case of TWAHA ALI & 5 OTHERS V R, Criminal Appeal No. 78 of 2004 Court of Appeal of Tanzania where it was held that;

*".....if that objection is made after the trial court has informed the accused of his right to say something in connection with the alleged confession, the trial court must stop everything and proceed to conduct an inquiry (or trial within a trial) into the voluntariness or not of the alleged confession. Such an inquiry should be conducted before the confession is admitted in evidence...."*

Therefore, if that is the law and since the appellant and others objected to their confession after they were asked to say something, and since the trial court did not make inquiry thereafter, that evidence was illegal and therefore it is hereby expunged from the record. This ground of appeal succeeds.

In the second ground of appeal this court is in further agreement that PW5 did not explain how he identified the appellant and others since the time he said saw three people on a motorcycle was 4:30 am that means it was night time hence in darkness. He did not say what distance the suspects were from them and did not say what kind of light that helped him to identify the suspects. PW5 did not describe the attire of the suspects and did not say how he was able to identify them later when he

found them in the canteen to be the ones who were on the motorcycle earlier. Henceforth, since the foregoing criterion were not proved the conditions for favourable identification were not met. (See also the case of GALOUS FAUSTINE STANSLAUS V R, Criminal Appeal No. 2 of 2009, Court of Appeal of Tanzania at Arusha (unreported). The second ground of appeal has merit.

The appellant's complaint in relation to the third ground of appeal is that the complainant did not sufficiently identify the said motorcycle. This court agrees with the appellant that the complainant did not prove that the motorcycle exhibit P1 is his property. This is so because while the charge and evidence in court by PW1, PW2 & PW3 says that Motorcycle registration No. T 197 CAR is property of PW1 YOHANA KAKA, the motor vehicle registration card exhibit P2 says that the Motorcycle is property of WU ZHOU INVESTMENT COMPANY LIMITED OF DAR ES SALAAM. There is no any evidence to show that ownership of the property shifted from the said company to the complainant.

Therefore, if the complainant did not prove that the property, the subject matter of the trial was his property the offence of stealing cannot stand. Since the offence of stealing can only be proved if a general or special owner of a thing alleged to have been stolen proves that that thing belongs to him (see section 258 of the Penal Code (supra)). Therefore, in this case although the appellant and others did not claim ownership of the alleged stolen property but the complainant did not also prove that the same belongs to him. This ground of appeal succeeds.

For the foregoing this court is settled that there is no cogent evidence by the prosecution upon which the trial court could have grounded conviction against the appellant. This appeal has merit and therefore it is allowed, conviction quashed and sentence set aside.

However, in the course of hearing the appellant's appeal this court has found also that the appellant's co-accused persons were also wrongly convicted as the evidence against them was not sufficient. Now, since the appellant's co-accused did not appeal against the trial court's decision, this court by using its powers envisaged under section 373 (1) (a) of the Criminal Procedure Act [CAP 20 R.E. 2002] revises the proceedings in that respect and quash conviction against them and set aside the sentence.

Finally, the appellant and then second and third accused persons MAJALIWA S/O MAJENDA @ ZAKAYO & JAMES S/O CHIGOSHO @ MAGOTO are ordered to be released from prison unless their continued incarceration is related to other lawful cause.

It is ordered accordingly.



**M.A. KWARIKO**

**JUDGE**

**24/5/2017**

Judgment delivered in court today in the presence of the Appellant and Magoma learned State Attorney. Mr. Nyembe court clerk present.



A handwritten signature in black ink, appearing to be "M.A. Kwariiko", written over a horizontal line.

**M.A. KWARIKO**

**JUDGE**

**24/5/2017**