

IN HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CRIMINAL APPEAL NO. 1 OF 2018

(Originating from Longido District Court at Longido Criminal Case No. 35 of  
2017)

JACKSON SAILEPU ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

4<sup>TH</sup> OCTOBER, 2018

MWENEMPAZI, J.

The appellant is aggrieved with the decision of the District Court of Longido where he was charged and convicted with the offence of Stealing Contrary to section 265 of the Penal Code, Cap. 16 R.E.2002. It is alleged that on the 3<sup>rd</sup> day of July, 2016 at Engikareti area within Longido District in Arusha Region the accused did steal a motorbike with Registration Number MC 179 AZR make Boxer Valued at Tshs. 2,400,000/= the property of JOSEPHAT LEON MORIA. The appellant was sentenced to serve a term of five (5) years imprisonment.

In his appeal the appellant has filed four (4) grounds of appeal as follows: -

1. That, the trial court erred in law and in fact in holding that the doctrine of recent possession was properly established in court as demanded in law.

2. That, the trial Court erred in law and in fact by convicting and sentencing the appellant while the prosecution evidence was insufficient to establish and prove the offence of stealing.
3. That, the trial court erred in law and in fact when it failed to scrutinize the documentary evidence adduced by the prosecution side.
4. That, the trial court erred in law and in fact in that it did not consider the evidence of the defence side.

At the hearing the appellant was unrepresented and the Republic was represented by Elizabeth Swai, the learned Senior State Attorney. The appellant in submitting on an appeal faulted the way an exhibit, a motorcycle, was obtained and handled until being tendered in court. According to the appellant, important rules of procedure were skipped. In that way his rights were prejudiced. For, in his submission he states that PW6 E 2094 CPL SAMWEL testified to the effect that on the date the appellant was arrested, found the appellant with stickers of Insurance and Road licence. He, however, never showed arrest warrant and that independent witnesses were involved. The appellant also submitted that it is a matter of law that anything found following a search, must be accompanied by a certificate of seizure. There must be signatures of the person searching and that of independent witnesses. He submitted that in this case there was no certificate of seizure and also a handover note to prove that the motorcycle which was tendered in court as an exhibit is the one which was in the police station and not another one.

The appellant submitted that the prosecution did not prove an offence and or their case beyond reasonable doubt. There is no witness who has testified as to the arrest and handover of the motorcycle which is said to be the property of PW4, one JOSEPHAT S/O LEON MORIA. Before the motorcycle was admitted it was

identified by PW3:E7167 D/CPL DEOGRATIAS who was the investigator of the case and not PW4.

The appellant submitted that the arresting officer and the police who stored the motorcycle were important witnesses. But they were not called to testify. The appellant is blaming the trial court for failure to see the contradictions in the testimony. The appellant submitted that the complainant in his evidence said that the event took place on the 3/7/2016 (at page 19 of the proceedings). The investigator, PW3 says he was assigned to investigate a case on the 4<sup>th</sup> March, 2016. That means the investigator was assigned to investigate stealing before the offence was committed. It is important to note that checked the original record of the trial court on testimony by PW3:E7167 D/CPL DEOGRATIAS, it is recorded by handwriting of the trial magistrate that PW3 testified that he was assigned to investigate this case on 4/7/2016.

In reply to the submission by the appellant, the respondent attorney, submitted that after she had read the case file and listened to the submission of the appellant she is objecting to the appeal. She submitted that the appellant has submitted and or argued on new grounds of appeal or in his submission. He did not stick to the grounds of appeal filed during institution of an appeal. The learned State Attorney submitted that the appellant has abandoned all grounds of appeal which were filed earlier in court in the petition of appeal.

The learned state attorney submitted that the appellant has complained that the motorcycle was not identified by the complainant. In this case, the complainant was Josephat S/O Leon Moria (PW4) and his testimony is at page 18 of the proceedings. At page 20 of the proceedings the complainant identified a motorcycle which was stolen. He also testified that he identified the a Motorcycle

registration card whose number were erased leaving letters M....AZR. At the last paragraph in the referred page it is clearly recorded that Exh.P2 referred to by the witness is the motorcycle tendered by PW3. Thus, the argument that the complainant has never identified the same has no legs to stand.

In another argument the appellant is complaining that there was no certificate of seizure. At page 24 of the proceedings, PW6:E2094 CPL SAMWEL testified that he is a police officer at the Road Traffic Department. He was involved in arresting the appellant. The respondent finds there is no relevance of stickers of the license and road licence. They were no relevant to the prosecution's case against the appellant.

The respondent submits that the arrest of the appellant and finding of the motor cycle were two different events. PW7: G1823 DC Cosmas is a police officer in the Police Investigation Department at Monduli was the investigator in the cattle theft case under the investigation case file Monduli No. IR 264/2016. He was assigned to investigate that case on the 12/7/2016. PW7's evidence shows that the appellant was arrested for another offence. The motorcycle was stored/handed over to the police at Monduli Police Station and registered as a personal property of the appellant (page 29-31 of the proceedings). There is no handover report but it can be seen in PF 63. He points out at the arrest and handing over of the motorcycle are irrelevant where the Motor cycle was recorded as personal property of the appellant under PF 63 at Monduli police station. This disconnects the arrest and the fact that the appellant was the one was possessing the motor vehicle stolen at Engikareti village.

The learned state attorney submitted further that in another line the appellant has submitted that the prosecution failed to prove the date a motorcycle was stolen.

But from the proceedings PW3 testified that it was on the 3<sup>rd</sup> July, 2016. This testimony was not contradicted by any witness. It however, was linked to the motorcycle found with the appellant in another case at Monduli Police Station. At page 29 of the proceedings PW7: G 1832 DC COSMAS at the second paragraph testified that on the 12<sup>th</sup> July, 2016 he was assigned to investigate a case on stealing cattle whereby the appellant was accused that he stole and carried the same on a motorcycle with registration No. MC 179 AZR make Boxer red in color. The accused had admitted to have stolen that cattle. It was recorded on the report book of Police station Monduli and accused was recorded at entry no. 594 of 12/7/2016. The Complainant was Izack Kazimote and the accused was Jackson Sailepo who is the 1<sup>st</sup> Accused (appellant). It was tendered without objection and admitted as Exhibit P6. The Motorcycle, the 1<sup>st</sup> accused was found with, was registered in a personal property book and the accused was issued a receipt under PF63. He was issued with receipt No. F4040705 of 12/07/2016 with Tshs. 8000 and Motorcycle No. 179 AZR Boxer red in colour. The personal property receipt (PF63) was admitted as exhibit P7.

Then, the respondent, submitted on the grounds of appeal commencing with the 2<sup>nd</sup> ground of appeal that the offence of stealing was not proved beyond reasonable doubt. At page 10 of the proceedings, PW1: Fidelis Mmasy testified that he is a businessman involved in motorcycle selling. He at Jamhuri Street. He has a shop at around Main Market Arusha. Sometime in February, 2017 he was in the office, the appellant went there looking for a motorcycle card which was lost. He said the owner of the motorcycle is his deceased father. Then PW1 asked anything to prove his linkage. He took out from the pocket a road licence and an insurance receipt. He was sort of fearful. PW1 went to check the record after the appellant had left. PW1 discovered that the Motorcycle was sold to Ambrose

Mushumbusi. He called him and inquired. Ambrose Mushumbusi told PW1 that the motorcycle was stolen while in the hands of MORIA. He made communication with Moria and the police. As a team they set a trap. When the appellant went back to collect motorcycle card he was arrested.

Ambrose Mushumbusi testified in court. His testimony is at page 12-13. He testified the dates he bought the motorcycle and how he gave it to Moria. He accounted for how he got information of the attempt by the appellant to collect registration card. In the evidence, PW4 testified also in court how the motor cycle was stolen until how he got information of the fact that the appellant stole it. The registration cards(original) were tendered without objection from the appellant.

At page 25-26 Josephat Moria (PW4) was recalled to testify. He testified and tendered the sale agreement from Ambrose Mushumbusi to PW4. The same was admitted as Exhibit P5. No objection was leveled by the appellant. At page 20 PW4 testified how they came to know where the motorcycle was stored. PW7 confirmed the evidence. The motorcycle was handed over to the police and recorded as a personal property of the accused. Under the circumstances the information on the motorcycle were revealed by the appellant when he went looking for the original records on the registration of the motor cycle. The same was identified by Registration number and physical appearance and chassis.

*"I can identify my motorbike through chasis No. \*MD2A21BZ8FWG54196\* and Engine No. PFZWFG20149 and registration No. MC179AZR Make Boxer Red Colour. I could identify if it will be shown to me now (exhibit P2 shown to PW4 and identified by PW4)*

The appellant has also submitted to fault the Hon. Magistrate for relying on the doctrine of recent possession in convicting him for stealing. The respondent submit that the magistrate was right to rely on it. Time within which the motorcycle was found in his possession allows the court to rely on the doctrine. It was on the 27<sup>th</sup> February, 2017 the appellant went looking for the registration card of the motor cycle. Compared to time the motorcycle was stolen it was recent. In his defence, the appellant gave no reasonable explanation how he came to own the motorcycle. The magistrate was right to convict the appellant relying on the doctrine of recent possession.

I have had time to go through the evidence on record and also, I have considered the submission by the parties herein. However, upon reading the proceedings as a whole, I have discovered that a sticker of the licence and a copy of the motorcycle registration card were factors which helped to discover that the appellant was in possession of the motorcycle in question, which was reported to have been stolen on the 3<sup>rd</sup> July, 2016. One may even speculate that the appellant stole the motorcycle to use as an instrument for stealing cattle. Because, according to evidence tendered in court, Exh. P6, Report Book, the appellant was being held at the police station for allegation of cattle theft (wizi wa mifugo). The appellant is recorded to have had a motorcycle with him when he was arrested. He was charged, convicted and he was sent to jail.

The important question here, in my view, is whether the appellant is the one who stole a motorcycle with registration number MC179AZR Boxer Red in Colour valued at Tshs. 2,400,000/= as per charges leveled against him. The answer is not far to be found. The evidence is so overwhelming. According to Tanzania Police, Prisoner's Property Receipt No. 4040705, which was admitted as Exhibit P7, the appellant recorded Tshs.8000/=, a mobile phone, motorcycle MC 179AZR Boxer

Red in Colour, all were personal properties of the appellant, as per Police case No. MON/RB/594/2016 and MRN/IR/264/2016. In short, this motorcycle is the one which was reported at Longido Police Station by PW4 JOSEPHAT S/O LEON MORIA that it has been stolen on the morning of 3<sup>rd</sup> July, 2016 and this is the same which was the subject of investigation by PW3 E 7167 D/CPL DEOGRATIAS who testified that he was assigned on the 4<sup>th</sup> July, 2016 to investigate the case.

Under the circumstances, this case is a fit case for the application of the doctrine of recent possession. In the case of the **Director of Public Prosecution vs. Joachim Komba**[1984] T.L.R. 213(HC) it was held that:-

*“The doctrine of recent possession provides that if a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief, a breaker or a guilty receiver;”*

In this case, though time had passed since the stealing was committed, the appellant, sometime on February, 2017 in his bid to search for the original documents pertaining to the Motorcycle went to the shop belonging to PW1: FIDELIS MMASY. He even lied that the motorcycle belonged to his father who is dead. Obviously, it is a lie beneficial to the prosecution and owner. It is not a reasonable explanation on how he came into ownership. This was the trigger point which led even PW4 to know who is the thief of his motorcycle.

Another question is whether the court was wrong to invoke the doctrine of recent possession. In my view, the court was right as the appellant, though knowing that his father never owned a motorcycle with registration No. MC179AZR lied to PW1 that the same belonged to his father. Exhibit P6 was

recorded on the 12<sup>th</sup> July, 2016 in the Personal effect Book of the Police at Monduli Police Station. That was recent enough to hold the appellant liable for commission of the offence of stealing. In the referred case above, the court also held that: -

*“there is no general principle for determining the period of time which is recent enough to justify the application of the doctrine of recent possession;”*

In my view, the court was right to convict the appellant with the offence of stealing contrary to section 265 of the Penal code, Cap. 16 R.E 2002. In the record there is no reasonable explanation as to how the appellant came to possess the said motor cycle on the date which was reported 8 days before that it is missing and nobody has been authorized by the owner to take it. Therefore, this appeal has no merit. It is dismissed in its entirety.

It is ordered accordingly.

**T. M. MWENEMPAZI**

**JUDGE**

**4<sup>TH</sup> OCTOBER, 2018**

I hereby certify this to be a true copy of the original



  
**J.F. NKWABI**

**DEPUTY REGISTRAR**

**ARUSHA**

05/11/2018