IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF ARUSHA
AT ARUSHA
CRIMINAL APPEAL NO. 34 OF 2017

(C/F In the Resident Magistrate Court of Arusha at Arusha Criminal Case No 72/2016)

EMMANUEL MATHAYO..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

2/10/2018 & 16/11/2018

MZUNA, J.:

The appellant was charged in the Resident Magistrate Court of Arusha at Arusha with two counts namely: Burglary Contrary to Section 294 (1) and (2) and Theft Contrary to Section 265 of the Penal Code Cap 16 R.E 2002.The prosecution alleged that, On 07/02/2016 at about 02:30 hrs. at Mbuguni area within Arumeru District and Arusha Region, the appellant did break and enter into the house of Didas Albert with intent to commit an offence and did steal a motorcycle with registration No MC 345 ACQ Make Toyota Power King worth 1,800,000/= the property of Didas Albert. The matter was

reported to the Police which was followed by the arrest and arraignment of the appellant.

After a full trial, the appellant was found guilty as charged and sentenced to five years imprisonment in respect of first count, Two years for the second count. The sentences were ordered to run concurrent. It was further ordered that he should compensate the complainant motorcycle worthy Tshs. 1,800,000/=

Aggrieved, the appellant lodged an appeal before this court. In his petition of appeal the appellant raised 5 grounds of appeal as hereunder reproduced.

1. *That, the trial court erred in law and in fact, when it convicted the appellant in terms of counts number 1st and 2nd while the case was not proved beyond reasonable doubt.*
2. *That, the trial court erred in law and in fact when it convicted and sentenced the appellant to serve 7 years imprisonment without citing an applicable provision of the law.*
3. *That, the case was poorly conducted.*
4. *That, the trial court erred in law and in fact for convicting the appellant for an offence which was not proved by concrete evidence.*

5. That, the trial court erred in law and in fact when it failed to scrutinize the evidence as regards the identification of the appellant.

At the hearing of the appeal, the appellant was unrepresented whereas the respondent Republic was represented by Mr. Diaz Makule learned State Attorney.

The background of this case is as under, PW1 Didas Albert testified that on the material date he was at his home sleeping at around 02:00 AM. He woke up and wanted to get out he found a big stone at his door which obstructed him from opening the door. With the assistance of his wife they opened the door and went to the kitchen where he normally keeps his motorcycle. It was stolen, he awakened his neighbors who started looking for it in vain. They suspected the appellant and he was arrested and taken to police station and later to court to answer the charge against him. In his defence the appellant denied any involvement in the alleged offence.

Arguing the appeal, the appellant told this court that, the charge sheet was not proved beyond reasonable doubt. He said PW1 never said he saw him breaking the kitchen and then took away the motorcycle. He added that, that PW1 tendered a photocopy of the motorcycle, the said motorcycle was not tendered in court so there was no proof that he stole it.

He further told this court that, PW2 and PW3 alleged to have seen him with the motorcycle however they never disclosed the source of light which enabled them to identify him, the identification was not watertight.

On conviction and sentence it was his argument that, the convicting Magistrate sentenced him without showing the position of the law he was convicted for. He prayed for this appeal to be allowed.

Replying to the grounds of appeal jointly, Mr. Makule argued that, on the first ground of appeal on page 11 it shows how the motorcycle was stolen. He followed the tyres marks, and the appellant and his neighbors made a call to him and suspected him, they inquired his whereabouts but he gave contradictory statements as to where he was. They never met him at the two places he mentioned. He was seen at his home later, he was then arrested and did mention to PW1 that he would give him the motorcycle if he was to be released from the police station. He argued that, S. 31 of the Tanzania Evidence Act, Cap 6 allows evidence which leads to discovery. S. 63 and 65 of the Evidence Act allows certified copies or secondary evidence to be admitted in evidence.

On the issue of identification, it was Mr. Makule argument that identification by PW2 and PW3 is clear that the accused ran away after PW3 arrived. It was at the guest house where the accused went to find where to sleep. He said the accused was identified and even the motorcycle was identified and its plate number. She identified him as Ema (short form for Emmanuel).

On the conviction and sentence, he said at page 7 of the judgment the trial Magistrate mentioned that he convicted him as charged. Merely saying under section 235 of the Penal Code was supporting his findings. He said the conviction and sentence cannot be faulted, as for the sentence he said it was proper.

The main issue for determination in this appeal is whether the prosecution evidence was sufficient to convict the appellant on the charged offence? It is incumbent upon it to re-evaluate and re-assess the evidence on record and arrive at its own independent conclusion bearing in mind that this court did not have the opportunity or benefit of hearing and seeing the witnesses when they testified.

The evidence of Didas Albert (PW1) at the trial court was that, he owned a motorcycle, on the eventful night he returned home and store his motorcycle, at around 2:00 AM he woke up and went to the place where he normally keeps his motorcycle. He found it was stolen. He awaken his neighbors who started looking for it in vain. They reported the matter to Police station and the appellant was arrested as among the suspects. PW1 tendered the certified copy of the motorcycle registration card which was admitted in court as Exhb P1.

The evidence of PW2 was that on 07/02/2016 at about 23:00 Hrs she was at Blue rock Bar and Guest house. The appellant went there with a motorcycle black in color after she called her husband, the appellant ran away. He went back without the motorcycle and rented a room at the guest house. He spent the night there and checked out in the morning.

The testimony of PW3 was that, on 07/02/2016 at about 23:00hrs he was at the Blue rock Bar and guest house the appellant went there and called PW2, PW3 went there and the appellant ran away from him. He followed the appellant and he found him seating on the motorcycle black in color with registration No. MC 345 ACQ. He said he identified it because there was light.

The appellant denied to have committed this offence. He admitted to have been asked by the complainant, his neighbor however said asked for some time as he had some excuse.

From the evidence of PW1, PW2 and PW3, it is apparent that none of the witnesses saw the robbers who invaded the complaint's house and stole his motorcycle. The evidence as adduced by the prosecution witnesses was such as to cast suspicion against the appellant. It is trite law that suspicion alone however strong, cannot be the basis for conviction. In the case of **Benedict Ajetu V R** (1983) TLR 190 HC, it was held that:

> *"There is no much room, I think, for debate over the fact there was a fairly strong suspicion against the appellant in this case, but, as the learned authors of "the Law of evidence(10th E. Vol 1) very rightly observed at p. 266." Law reports are full of access based on the wisdom and experience of eminent jurists that suspicion, however strong, cannot take the place of proof"*

Furthermore on the property allegedly stolen, there was no evidence to prove that the said motorcycle was stolen and it was the appellant who stole it, as from the evidence on record there is none which suggests or proved that the motorcycle was found in possession of the appellant. Had it been found it was in possession of the appellant shortly after the alleged

theft, then the doctrine of recent possession could have been invoked but that is not the case here.

The said motorcycle was never tendered as exhibit in Court. The cardinal principle in criminal law is that the charge sheet against the appellant must be proved beyond reasonable doubt. See, **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda vs. Republic** [2006] TLR 385. The Court in emphasizing the burden of proof in criminal cases had the following to say:

> *"As is well known, in a criminal trial the burden of proof always lies on the prosecution. Indeed, the case of* ***Mohamed Said Matula V R*** *[1995] TLR 3 this court reiterated the principle by stating that in a charge of murder the burden of proof is always on the prosecution. And a proof has to be beyond reasonable doubt"*

In the upshot, the appeal by the appellant has succeeded, the appeal is allowed. I quash the conviction and set aside the sentence. Appellant should be set at liberty unless he is lawfully withheld for some other lawful cause. The order for compensation is also set aside.

Order accordingly.

M. G. MZUNA,

JUDGE. 18/12/2018