

**IN THE HIGH COURT OF TANZANIA  
(MWANZA REGISTRY)**

**AT MWANZA**

**APPELLATE JURISDICTION**

**HIGH COURT CRIMINAL APPEAL NO.260 OF 2016**

*(Original Criminal Case No. 22 of 2015 of the District Court of Nyamagana at Mwanza before Hon. A.L. Kalegeya – (RM) dated 31<sup>st</sup> day of March, 2016.*

**ELIPIDIUS s/o PETERAUS .....APPELLANT**

**VERSUS**

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

*Last Order Date: 26/02/2018*

*Hearing Date: 26/02/2018*

*Judgment Date: 23/04/2018*

**JUDGMENT**

**MAKARAMBA, J.:**

The Appellant, **ELIPIDIUS s/o PETERAUS**, is aggrieved by the decision of the *District Court of Nyamagana at Mwanza* in ***Criminal Case No. 22 of 2015*** dated **31<sup>st</sup> March, 2016** before ***Hon. A.L. Kalegeya – (RM)***. The Appellant has appealed against the said decision on six grounds, which I propose to traverse in the course of this Judgment. I shall not therefore set them out at the outset.

At the hearing of the appeal, the Appellant who appeared unrepresented and fended for himself and prayed that, the grounds of appeal in the Petition for Appeal be entered and recorded as part of his submissions in chief. This Court duly granted the Appellant's prayer and called upon M/s Gisela Alex, learned State Attorney for the Respondent/Republic to reply and hence this Judgment.

Briefly, on the 15<sup>th</sup> day of January, 2015, the Appellant, **ELIPIDIUS s/o PETERAUS**, aged 23 years old then was arraigned before the *District Court of Nyamagana at Mwanza*(the trial Court) on two counts of armed robbery **c/s 287A** of the **Penal Code, Cap.16 R.E. 2002**as amended by Act No.3 of 2011.

In the first count it was alleged that, the Appellant on the **10<sup>th</sup> day of October, 2014** at about **04.00 hrs.** at Mkolani area within Nyamagana District in the City and Regional of Mwanza, stole one Motor Cycle with Registration No. **T 302 CSC** make **SANYA** valued at **Tshs.1,700,000/=** property of one **Gabriel s/o Lufungulo @ Malulu**and immediately before, at and after such stealing he stabbed one **Chiza s/o Bonaventura**with a knife on several parts of his body in order to obtain and retain the said property.

In the second count it was alleged that the Appellant on the **10<sup>th</sup> day of October, 2014** at about **04.00 hrs.** at Mkolani area within Nyamagana District in the City and Regional of Mwanza, stole cash money **Tshs. 25,000/=** the property of one **Chiza s/o Bonaventura** and immediately before, at and after such stealing he stabbed the said **Chiza s/o Bonaventura**with a knife on several parts of his body in order to obtain and retain the said property.

Before the trial Court, the victim of the crime, **Chiza Bonaventura (PW1)**a driver of a passenger motorcycle commonly known as "**bodaboda**", stated that, on **10/10/2014** he was at Villa Park Area where he parked a motorcycle with **Registration No. T.302 CSC, Sanya** make, black in colour,the property of **Mr. Gabriel Michael Lufungulo (PW2)**.The motorcycle had been handed by its owner **Gabriel Michael Lufungulo**to one **Samwel Charles (PW4)**as

its driver, who on the eventful day was sick, and gave it to **Chiza Bonaventura (PW1)** to drive it as a day worker for that day. According to **PW1**, at **04.00 am**, in the morning of **10/10/2014**, a passenger hired the motorcycle at a negotiated fare of **Tshs. 13,000/=** to take him to **Mkolani area**. That upon arriving at the **Gold Crest Hotel** area, opposite where there is a **Petrol Station**, **PW1** stopped to refuel the motorcycle and asked for **Tshs.10,000/=** from the passenger for the refueling, who gave **Tshs. 5,000/=** to **PW1** which the Petrol Station Attendant said that he did not have change. The passenger on hearing the answer from the Petrol Station Attendant started exchanging words with him. **PW1** intervened and they continued with their journey. They managed to refuel at Igogo. When they arrived at Mkolani area near where there were some trees, the passenger ordered **PW1** to stop the motorcycle, to which **PW1** complied and asked for his fare. Instead, the passenger started asking for money from **PW1**. When **PW1** attempted to run away, the passenger grabbed the motorcycle from behind and pushed very hard, making **PW1** fall down on the ground. When **PW1** was struggling to rise up, the passenger started stabbing him with a knife, on his mouth, in the upper lip, on his right ear, on his neck and on his right hand. Thereafter, **PW1** managed to runaway, calling for help. The passenger switched on the motorcycle and run away with it. **PW1** was helped to get home by his fellow motorcyclists who had arrived at the crime scene. When **PW1** reached home he narrated to his mother about the armed robbery incident. Then **PW1** went to report the incident at the **Kirumba Police Station** where he obtained a **PF3** and went to **Sekou Toure** Hospital for treatment, which by then it was already **8.00a.m.** in the morning. The **PF3** of **PW1**

was received in evidence as **Exhibit PE1**. Apparently, despite the trial Magistrate adding the Medical Doctor who had filled the **PF3** on the list of witnesses, and to be summoned for cross-examination by the accused, there is nothing on record to show that the Medical Doctor was ever summoned as a witness before the trial Court and cross-examined by the accused.

When testifying before the trial Court as **PW2**, the owner of the motorcycle, **Gabriel Michael Lufungulo**, stated that he bought the motorcycle, with Registration **No. T 302 SCS**, **Sanya** make, black in colour from a Company called **Kishan Enterprises Ltd**. **PW2** tendered in evidence a receipt and Invoice dated **11/04/2014** for the purchase of the motorcycle, including its Registration Card, which were admitted in evidence as **Exhibit PE2** collectively. **PW2** stated that he had handed the motorcycle to **PW4** on a contract to bring him **Tshs. 7,000/=** daily.

**PW7**, a Police Officer with **No. 3722, Dt. Constable Vedastus** of the **Kirumba Police Station** stated that, on **11/10/2014** he was given a case file to investigate the armed robbery incident which occurred at **Mkolani area** on **10/10/2014**. **PW7** stated further that, on **27/12/2014** he received information that the accused had been arrested and was at the **Kirumba Police Station** in connection with allegations of stealing other motorcycles; which had already been received in the custody of the police. **PW7** stated further that, the owner of the motorcycle, **PW2, Gabriel Michael Lufungulo**, was called to the **Kirumba Police Station** to identify his motorcycle and managed to identify it from among the motorcycles which were in the custody of the police at the **Kirumba Police Station**. **PW7** stated further that, upon

interrogating the accused who was a suspect in connection with stealing motorcycles, the accused told him that he used to convey the motorcycles he was stealing to **Muleba**.

**PW3**, a Police Officer with **No. 5716, Dt. SSgt Salum**, stated that, on **02/01/2015**, at the **Kirumba Police Station** he interrogated the accused who confessed to him to have stolen the motorcycle with **Registration No. T 302 CSC** and that, he had taken it to **Nshambya Muleba** for sale and that, he had sold it to one **Alkardi Nalubert**, who is the uncle of the accused. **PW3** stated further that, he communicated with the Police in **Muleba** who confirmed that there were four motorcycles in their custody, among which was a motorcycle with **Registration No. T 302 CSC**, which is the subject in this case. **PW3** further stated that, the Police and the accused went to **Nshambya Muleba** and in collaboration with the Police in Muleba managed to bring back to Mwanza the four motorcycles, including the one with **Registration No. T 302 CSC**, which is the subject in this case which was admitted in evidence and marked as **Exhibit P3**.

**PW6, Alkardi Nalubert**, who resides in Muleba, stated that on **18/11/2014**, the accused approached him and told him that he had a motorcycle for sale and that he had gotten it from Mwanza and agreed on a purchase price of **Tshs. 1,400,000/=**. **PW6** made a down payment of **Tshs. 1,000,000/=** and the balance was to be settled on **10/02/2015** after the accused had handed him the Registration Card for the motorcycle. **PW6** stated further that, he continued using the motorcycle until he received information that the accused, **Elipidius**, was selling stolen motorcycles. **PW6** took the motorcycle and surrendered it to the **Nshambya Police Station**. **PW6** stated further

that, on the second day of surrendering the motorcycle to the Police, he was informed that the accused **Elipidius** had been arrested in Mwanza. **PW6** was also arrested and taken to the **Muleba Police Station** where **Elipidius** also had already been taken there and that, the accused admitted that he had sold the motorcycle to **PW6**. Both were taken to the **Kirumba Police Station**, where **PW6** gave his statement and went back home.

In her reply submissions, M/s Gisela learned State Attorney for the Republic/Respondent stated that, on the evidence on record, the trial Court was satisfied that the offence of Armed Robbery had been established. The trial Court found the Appellant guilty of the offence as charged in the first count and sentenced him to 30 years in prison. However, the second count was not established. The trial Court ordered the motor cycle with Registration **No. T 302 CSC**, Sanyamake, black in colour (**Exhibit P3**) and also **Exhibit P2** be handed/given back to its owner, **Gabriel Michael Lufungulo (PW2)**.

In the first ground of appeal, the Appellant is challenging the decision of the trial Court on insufficiency of the prosecution evidence particularly **PF3 (Exhibit PE1)** to establish the use of violence or threat, which are the essential ingredients of the offence of Armed Robbery. Submitting in Reply to this ground M/s Gisela stated that, the **PF3** of the victim, **PW1, Chiza Bonaventura**, was received in evidence after the trial Court had granted the Appellant's prayer to have the Medical Doctor who had examined the victim and filed the **PF3** to come and be cross-examined by the accused on it. However, it does not appear in the record of the proceedings of the trial Court if the Medical Doctor was summoned and cross-examined by the accused on the **PF3**.

The trial Magistrate however, although she had admitted the **PF3** in evidence, did not rely on it in finding the Appellant guilty. Instead, the trial Magistrate relied on visual observation in court of the scars on the various parts of the body of the victim and convinced that, the victim (PW1) had been stabbed. It is worth noting here that as I observed in the course of the hearing of this appeal, although the armed robbery incident happened on **10.10.2014**, the **PF3(Exhibit PE1)** was filled in on **27.04.2015**, almost seven (**7**) months after the alleged armed robbery and knife stabbing incident.

Revisiting the evidence on record, M/s Gisela submitted further that, the accused having been involved in an exchange of words with PW1, who was the driver of the motorcycle (*bodaboda*), threw him off the motorcycle and stabbed him with a knife on his mouth area, ears, on his right arm and chest. M/s Gisela surmised that, the trial Court was satisfied that force was used on **PW1** who sustained injury from the knife the accused stabbed him with on the incident day.

In the second ground of appeal, the Appellant state that the doctrine of recent possession was wrongly invoked by the trial Magistrate following a lapse of period of time of **38 days**. On this ground M/s Gisela submitted that, the trial Court was satisfied on the doctrine of recent possession by looking at the following facts:

- i. The property (the motorcycle) was found with the support of **PW6** to whom the stolen motorcycle had been sold at Muleba at a price of **Tshs. 1,400,000/=** with a down payment of **Tshs. 1,000,000/=** and the balance to be settled upon being handed over the Registration Card. Since the Registration Card for the motorcycle was still in the

hands of the accused/appellant, possession was still in his hands; as only part of the purchase price had been paid.

- ii. That the stolen motorcycle was the property of the complainant – much as the victim was only driving it, its owner **PW2, Gabriel Michael Lufungilo** tendered in evidence proof of ownership of the motorcycle vide the Registration Card and the purchase receipts issued by the selling Company. As per **Exh. P2**, the motorcycle was the property of **PW2**, who had hired **PW4** but who was sick on the material day and handed it to **PW1** as a day worker.
- iii. That the property, the motor cycle, was stolen from the complainant, **PW1**, although not its owner, but the fact is that **PW2** had handed it to **PW4** on contract as its driver and in turn **PW4** who was sick on the material day, gave it to **PW1**, the victim/complainant, as its day worker driver.
- iv. That the stolen property, the motorcycle, was recently stolen – it was stolen in the armed robbery incident of **10.10.2014** and was sold by the accused/appellant to **PW6** on **18.11.2014**, which makes **38 days**, a shorter period of time for exchange of such item, from the accused to the purchaser, **PW6**.

In the third ground of appeal, the Appellant stated that the sale of the motorcycle by the accused and its purchase by **PW6, Alkardi Nalubert** was not established, and hence it was wrong for the



trial Court to rely on **Exhibit P3** to convict him. In reply M/s Gisela submitted that **PW2, Gabriel Michael Lufungulo**, who is the owner of stolen motorcycle with **Registration No. T 302CSC, Sanya** make, black in colour, proffered evidence before the trial Court in the nature of a receipt and Invoice dated **11.04.2014 (Exhibit PE2 collectively)** for its purchase from a Company called **KISHAN ENTERPRISES LTD.**

In the fourth ground of appeal, the Appellant stated that the bare assertion by **PW3** that the accused had confessed when interrogating him to have stolen the motorcycle with **Registration No. T 302 CSC** and that he had taken it for sale in **NshambyaMuleba**, and that he had sold it to one **AlkardiNalubert (PW6)**, who claims to be his uncle, and the claim by **PW6** that, he purchased the motorcycle from the accused and had surrendered it to the police in Muleba, lack support from independent witnesses who had not been called to testify on the allegation of the Police receiving the recovered motorcycle and **PW6** surrendering it to the Police, which was admitted in evidence as **Exhibit P3.**

In reply M/s Gisela submitted that, as per the evidence of **PW3**, Police Officer with **No. 5716, Dt. SSgt Salum**, on **02.01.2015** at the **Kirumba Police Station** when interrogating the accused in connection with stolen motorcycles, the accused confessed to him that he had stolen the motorcycles and took them to NshambyaMuleba for sale. **PW3** stated further that, the accused also confessed to him to have stolen the motorcycle with **Registration No. T 302 CSC** and that, he had taken it to Nshambya, Muleba and sold it to **ALKARDI NALUBERT, (PW6)**, who is the uncle of the accused. M/s Gisela submitted further that, **PW3** stated that he communicated with the Police in Muleba who

confirmed that there were four motorcycles in their custody, including the one with **Registration No. T 302 CSC**, the subject of this case. **PW3** stated further that, the Police from the Kirumba Police Station in Mwanza and the accused went to Nshambya Muleba, and in collaboration with the Police in Muleba, they managed to bring back the stolen motorcycles to Mwanza, including the one for which this case was concerned which was tendered and received in evidence as **Exhibit P3**.

M/s Gisela submitted further that **PW6, ALKARDI NALUBERT**, who resides in Muleba confirmed that, the accused/appellant was his uncle. On his part **PW6** stated before the trial Court that, on **18/11/2014**, the accused/appellant approached him (**PW6**) and told him that he had a motorcycle for sale which he had gotten from Mwanza. They agreed on a purchase price of **Tshs.1,400,000/=** and **PW6** made **Tshs. 1,000,000/=** as down payment and the balance of was to be settled on **10/02/2015** after the accused had handed **PW6** the Registration Card for the motorcycle. **PW6** stated further that he continued using the motorcycle until he received information that the accused, **Elipidius**, was selling stolen motorcycles. **PW6** took the motorcycle and surrendered it to the Police Station at Nshambya Muleba. On the second day after surrendering it to the Police he heard that the accused, **Elipidius**, had been arrested in Mwanza. M/s Gisela submitted further that **PW6** was also arrested and taken to the Muleba Police Station where **Elipidius** had also been taken to and that he admitted to have sold it to **PW6**. Both **PW6** and the accused were taken to the Kirumba Police Station and after **PW6** had given his statement, he was allowed to go back home.

In the fifth and six grounds of appeal, the Appellant states that the appellant's evidence was improperly evaluated and/or considered and that the prosecution case/charge was not proved beyond reasonable doubt. M/s Gisela replied that, on the evidence on record, the trial Court was satisfied that the offence of armed robbery had been established. That a motorcycle with **Registration No. T. 302 CSC** was stolen in an armed robbery incident at Mkolani area in which the accused used a knife to injure **PW1** on various parts of his body, that the accused used violence on **PW1**, the victim of the armed robbery incident, who sustained injuries in various parts of his body as evident from the scars as visually observed by the trial Magistrate in Court during the trial. That the owner of the stolen motorcycle, **PW2, Gabriel Michael Lufungulo**, identified the stolen motorcycle with **Registration No. T. 302 CSC** and tendered its Registration Card and the purchase receipt in evidence as **Exhibit PE2** collectively.

M/s Gisela submitted further that, the trial Court was satisfied on the identification evidence as per the elements in the **WAZIRI AMANI case**; that as per the testimony of **PW1**, at the place from which the accused hired the motorcycle for a trip to Mkolani area, Vila Park area where the stolen motorcycle was parked, there was sufficient light to enable **PW1** identify the accused; that at the petrol station during the refueling of the motorcycle opposite **Gold Crest Hotel** area, there was also sufficient light to enable the victim to identify the accused; that the time they spent at the petrol station and during the exchange of words between the accused and the Petrol Station Attendant was also sufficient to enable the victim to properly identify the accused. M/s

Gisela surmised that on these facts there was therefore nothing to prevent **PW1** from properly identifying the accused.

M/s Gisela submitted further that, the accused participated in the discovery of the motorcycle by taking the police to Muleba where the stolen motorcycle was identified. In support of her submissions on this point, M/s Gisela cited to this Court the decision in ***Hadija Salim & Dotto Simba vs Republic, Criminal Appeal No. 11/1996*** (unreported) and the case of ***Deocles Melchard vs Republic, Criminal Appeal No. 180/2007 (CAT) (Bukoba) (Unreported)***, where it was held that, "by showing the way leading to the discovery of the bicycle, it showed that the accused was a participant in the armed robbery leading to the stealing of the bicycle." M/s Gisela reiterated her submissions on the doctrine of recent possession and surmised that the trial Court was satisfied on the elements of the doctrine.

The instant appeal presents for consideration the following main issues as per the grounds of appeal and the submissions thereof; first, ***whether the facts as to use of violence or threat were established***; secondly, ***whether the accused was properly identified at the crime scene***; thirdly, ***whether the invocation by the trial Magistrate of the doctrine of recent possession was proper in the circumstances of this case***; and fourthly, ***whether the transaction i.e. the sale by the accused of the motorcycle to PW6 was established***.

Before I traverse the above issues and the attendant evidence on record, let me albeit very briefly, revisit the main ingredients of the offence of Armed Robbery, specie in a class of robberies, which is a

form of aggravated theft. The establishing section for the offence of Armed Robbery under our law is section **287A** of the **Penal Code, Cap.16 R.E. 2002 as Amended by Act No.3 of 2011**. The offence establishing section provides for the main ingredients of the offence, which the prosecution has to establish, in the following terms:

*"**287A.** Any person who steals anything, and at or immediately after the time of stealing is armed with any dangerous or offensive weapon or instrument, or is in company of one or more persons, and at or immediately before or immediately after the time of the stealing uses or threatens to use violence to any person, commits an offence termed "armed robbery" and on conviction is liable to imprisonment for a minimum term of thirty years with or without corporal punishment."(Emphasis supplied).*

Emanating from the above provision of the law, in the instant case, the prosecution therefore had to establish that, the accused committed **robbery**, that is, the accused "stole anything" capable of being stolen, that is, the accused committed "*theft*" whose ingredients are also stated in the Penal Code. The particulars of the offence of Armed Robbery as per the charge sheet on record are that, a motorcycle with **Registration No. T. 302 CSC**, Sanya make, black colour as per evidence of its owner, **PW2**, allegedly was stolen at the Armed Robbery incident at the Mkolani area in the morning hours of **10/10/2014** at **4.00 hrs**. In that incident, the accused is alleged to have used a knife to injure **PW1** with on various parts of his body before taking the motorcycle by force having used violence on the victim of the armed robbery incident, **PW1**. That, the victim of the armed robbery incident, **PW1**, sustained injuries on various parts of his body as evident from the

scars which the trial Magistrate visually observed in Court during the trial.

As it would appear from the record, aside from the fact of the victim of the armed robbery being stabbed by a knife by the accused being by visual observation of the scars on the victim by the trial Magistrate, in the absence of direct evidence of the accused stealing the motorcycle, the trial Magistrate resorted to the doctrine of recent possession to link the alleged armed robbery incident with the stolen motorcycle which allegedly was sold to **PW6** by the accused at Nshambyain Muleba.

During the hearing of the appeal, the accused submitted that the learned trial Magistrate erred in law in invoking the doctrine of recent possession given the lapse of **38 days**. I am at one with the accused on this score albeit for very different reasons, as I shall shortly explain in the course of this Judgment. In my considered opinion invoking the doctrine of recent possession in the armed robbery incident, which is alleged to have taken place at **Mkolani area** and the motorcycle alleged stolen at the incident being found in Nshambya Muleba and in the hands of another person, this was highly a misnomer. In **Rex v Bakaris/o Abdulla (1949) 16 EACA** it was stated as follows:

*"That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but for murder as well, and if all the circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal."*

The instant case has tasked my mind quite a bit, as to whom between the accused and PW6, could be said to have been found in possession of the recently stolen property, to wit, the motorcycle, allegedly stolen from **PW1** in the armed robbery alleged to have occurred at **Mkolani area**. In her submissions M/s strenuously tried to think in terms of the difference between the concept of "**being in possession**" and "**owning**" property and reasoned that since the accused had yet to surrender the motorcycle's Registration Card to **PW6** then the stolen motorcycle was still in possession of the accused and hence the accused could be said to have been the person who was found in possession of a recently stolen property, and therefore the one who had stolen it at the armed robbery incident at Mkolani area. I should emphasize here on what the Court of Appeal of Tanzania stated in its decision in **Adolf Macrin vs. The Republic Criminal Appeal No. 249 of 2011** (CAT) (Mbeya) (unreported) thus:

*"In order to properly invoke the doctrine of recent possession, the prosecution has to positively prove beyond reasonable doubt, among other things, that the property belongs to the complainant and "the stolen thing in possession of the accused constitutes the subject of the charge against the accused."* See, **Joseph Mkumbwa & Samson Mwakegenda v. R., Criminal Appeal No. 94 of 2007** (unreported) among many others.

In the instant appeal, the complainant, **PW1**, was not the owner of the stolen motorcycle. M/s Gisela submitted that the motorcycle was stolen from the complainant, **PW1**, although not its owner, but the fact is that **PW2** had handed it to **PW4** on contract as its driver and in turn

**PW4** who was sick on the material day, gave it to **PW1**, the victim/complainant, as its day worker driver. These facts were not known to the owner of the motorcycle, **PW2**, since for him he only knew **PW4** to whom he had handed the motorcycle and with whom he entered into a contract to drive it and bring him money on a daily basis.

It is worth noting here that in so far as the first count is concerned, it was alleged that, the Appellant on the **10<sup>th</sup> day of October, 2014** at about **04.00 hrs.** at Mkolani area within Nyamagana District in the City and Regional of Mwanza, stole one Motor Cycle with Registration No.T. **302 CSC** make **Sanya** valued at **Tshs.1,700,000/=** property of one **Gabriel s/o Lufungulo @ Malulu** and immediately before, at and after such stealing he stabbed one **Chiza s/o Bonaventura** with a knife on several parts of his body in order to obtain and retain the said property.

It is not hard to note that although at the time of the alleged armed robbery incident the motorcycle was in the possession of the victim, **PW1, Chiza s/o Bonaventura**, and not **Gabriel Michael Lufungilo**, the charge sheet was drafted in such a way that it appears that the motorcycle was stolen from its owner, **Gabriel Michael Lufungilo** and not **Chiza s/o Bonaventura** who was in its possession at the material time. It is not entirely clear from the charge sheet whether **Chiza s/o Bonaventura** was injured by the accused in the course of the accused taking the motorcycle from its owner **Gabriel Michael Lufungulo** or whether it was **Gabriel Michael Lufungulo** who was in its possession at the time the accused is alleged to have taken it from **Chiza s/o Bonaventura**.



The principles of "*being in possession*" and "*owning*" the stolen property to wit, the motorcycle cannot be invoked in the circumstances of this case, which in my considered view and with due respect, waste the doctrine of recent possession of stolen property to some dangerous limits. In any event this stretching did not absolve the prosecution from proving the nexus between the armed robbery incident at Mkolani area, the stealing of the motorcycle, and its being recovered in the hands of the Police in Muleba. The trial Magistrate having bought the idea that there was a transaction between the accused and **PW6** involving the stolen motorcycle as an item of trade did not bother to interrogate further whether the doctrine of recent possession of property could be a proper candidate to rely on in this case. If anything, I am of the considered opinion that, it was **PW6** who had to do the explaining as how he came to be in possession of a motorcycle believed to have been stolen at an armed robbery incident at the Mkolani area.

The provisions of section **287A** of the **Penal Code Cap.16 R.E. 2002**, which establish the offence of armed robbery, requires a nexus between the *stealing of anything*, the fact of the accused being armed *with any dangerous or offensive weapon or instrument and using or threatening to use violence to any person in the act of stealing*.

In the instant appeal, **PW6**, who apparently had surrendered the stolen motorcycle to the Muleba Police station, came up with the unconfirmed story of a sale transaction between him and the accused, involving the stolen motorcycle, which the trial Magistrate seems to have taken wholesale as an established fact without interrogating further. It is only the word of mouth of **PW6** about the transaction involving the

stolen motorcycle, which had changed hands from the person alleged to have stolen it at the armed robbery incident at Mkolani area, which was believed wholly by the trial Court without interrogating further as to its truth and the veracity of the testimony of **PW6**, which in any case was not recorded by the Police at Mulebato whom he claims to have surrendered the stolen motorcycle.

In my considered view the whole story by **PW6** about the accused selling him the stolen motorcycle at a price of **Tshs. 1,400,000/=**, with a down payment of **Tshs. 1,000,000/=** and the balance to be settled after the accused had handed him the Registration Card for the motorcycle, remains mere allegations without concrete evidential substantiation. Apparently as the record reveals, **PW6** having surrendered the stolen motorcycle to the Police at Muleba, was also taken in by the Police, interrogated and made a statement, but later was let free to go home. In my considered view **PW6** held crucial evidence as to the truth of how he came to be in possession of the stolen motorcycle, which he alleges to have surrendered to the Police at Muleba but without any documentation to prove this fact. In any event, the alleged familial proximity between **PW6** and the accused, seems to have been accepted on its face by the trial Magistrate, and even M/s Gisela in her submissions stated that **PW6** had no reason to lie about the fact of the said relationship and the transaction. And this, is despite the fact that the accused vehemently refuted the existence of any familial relationship with **PW6**.

In my considered view, by the Police arresting, interrogating and letting **PW6**, the person who had surrendered the recently stolen motorcycle to the Police, off the hook, this has highly prejudiced the

prosecution case. And more so given the fact that the alleged transaction between **PW6** and the accused in which the stolen motorcycle is alleged to have changed hands from the accused to **PW6** was only in the knowledge of **PW6**, since the contract was oral whose terms only **PW6** was aware of.

Furthermore, according to **PW6**, he allegedly voluntarily surrendered the stolen motorcycle to the Muleba Police Station. Strangely though there is no evidence on record of the fact of **PW6** **surrendering** the stolen motorcycle to the Police at Muleba. This is so because both the Police at Muleba and Kirumba Police Station failed to comply with the mandatory legal requirement under **section 38 and 39** of the ***Criminal Procedure Act, Cap. 20 R.E. 2002***, concerning Police Officers to itemize in seizure receipt all items seized in the course of investigation. It was therefore expected of the Police at Muleba and Kirumba Police Stations in terms of section 38(3) of the Criminal Procedure Act, Cap. 20 R.E. 2002 to have issued a receipt to acknowledge seizure of the alleged stolen motorcycles including the one which is the subject of this case. The legal consequence of failure by an investigator in a criminal case to issue a **receipt of seizure** of items or things seized during a search was succinctly explained by the Court of Appeal of Tanzania in the case of ***Abdalla Musa and Juma Rashid v. The Republic, Criminal Appeal No. 221 of 2011 (unreported)*** (Mwanza), that "*the evidence of the recovery of the items from the accused becomes suspicious.*" The Court of Appeal of Tanzania in its decision in the case of ***Abuhi Omari Abdallah and 3 Others v. The Republic*** (unreported) has emphasized on the need for police officers arresting suspects and seizing items "*to comply with the mandatory*

*provisions of section 38(3) of the CPA, by which investigators are required to issue a receipt for anything seized as a result of a search."*

In tandem with section 38 of the *Criminal Procedure Act, Cap.20 R.E. 2002*, section 39 of the same Act empowers the police to seize anything in the course of investigation although such items may not necessarily find their way in evidence during trial. This was clearly put by the Court of Appeal of Tanzania in its decision in the case of ***Benard Masumbuko Shio and Charles Widman v. R., Criminal Appeal No. 213 of 2007, the Court of Appeal of Tanzania at Arusha*** (unreported) at page 18 of its Judgment thus;

*"A plain and/or purposive reading of section 39 leaves no doubt that it was meant to aid investigators of criminal cases. **It empowers them to seize anything mentioned in clauses (a), (b) and (c) in the course of their investigations.** It does not compel the prosecution to tender any such thing in evidence in the event a prosecution is instituted. **After all if the prosecution fails to tender material evidence in its possession that will be to its detriment and an advantage to the defence.**"*  
*(Emphasis of this Court)*

The mandatory legal requirement for criminal investigators to document each step involved in a search to the stage of exhibiting items or things seized in that search is a way of completing the "**chain of custody**" as it was succinctly put by the Court of Appeal of Tanzania in ***Makoye Samwel @ Kashinje and 4 Others v. The Republic, Criminal Appeal No. 32 of 2014 (unreported)*** (Tabora) thus;

*"...the "chain of custody" requires that from the moment a piece of evidence is seized or collected, its every handling, custody or transfer must be documented up to the time of its production in Court as an exhibit...Unfortunately, in the situation at hand, this salutary principle pertaining to criminal investigations was not heeded to."*

In the instant appeal clearly the salutary principle pertaining to criminal investigations was not heeded to. The provisions of section 38 and 39 of the *Criminal Procedure Act, Cap.20 R.E. 2002* clearly escaped the minds of the police both at the Muleba and Kirumba Police Stations. In the course of their investigation they handled the seized items, the stolen motorcycles including the one the subject of this case, without maintaining a proper paper trail of chain of custody of the seized items in the nature of a seizure receipt or Certificate of Seizure. This was highly critical given that initially **PW6** had also been taken in by the Police as a potential suspect only to be released later after giving his statement to the Police.

In the absence of any seizure receipt or Certificate of Seizure it is hard for this Court to believe the story by the Police and **PW6** that, **PW6** had surrendered the stolen motorcycle to the Muleba Police Station where also some other four stolen motorcycles had been seized and kept in custody and later transported to Kirumba Police Station in Mwanza. In the absence of evidence on record in the nature of a seizure receipt to establish the truth of the fact of the four motorcycles including the one the subject of this case being seized in Muleba, and finally being handed over to the Kirumba Police Station, the fact of the existence of the four stolen motorcycles has not been established. Curiously, of the

four alleged stolen motorcycles for which the accused had initially been arrested in connection with being involved in stealing them from Mwanza and sending them to NshambyaMuleba for selling, it is only the owner of one motorcycle, **PW2, Gabriel Michael Lufungul** who was called by the Police to the Kirumba Police Station to identify his stolen motorcycle. It was expected that **PW1** was the one who was to have been called by the Police to identify the motorcycle as the one which he alleges that he was driving on the material date of the armed robbery incident in which he claims to have been injured. In any event, the whereabouts of the other four motorcycles for which the accused initially had been arrested by the Police in connection with allegations of having also stolen them is still an unresolved mystery.

In this appeal, in the absence of evidence in the form of seizure receipt or Certificate of Seizure of the stolen motorcycles, including the one the subject of this case being seized in Muleba and being transported to the Kirumba Police Station in Mwanza and finally the stolen motorcycle with **Registration No. T. 302 CSC** being tendered in evidence before the trial Court, the chain of custody has clearly been broken. Without evidence of how the items (motorcycles) were seized in Muleba, stored at the Muleba Police Station, transported to Kirumba Police Station in Mwanza, and finally handed over to the person who tendered in evidence at the trial only the motorcycle alleged stolen at the armed robbery incident at Mkolani area, this has cast serious doubts on the prosecution case. It is hard therefore for this Court to believe the story of the seized motorcycles including the one the subject of this case which are alleged to have been seized in NshambyaMuleba and transported to Mwanza.

The Court of Appeal of Tanzania emphasized in ***Meshaki Abel Ezekiel v. The Republic, Criminal Appeal No. 297 of 2013***(unreported)(Arusha) on the crucial element of chronological documentation and/or paper trail in recording the chain of custody and cited the case of ***Mussa Hassan Barie and Albert Peter @ John v. R., Criminal Appeal No. 292 of 2011*** (unreported) where it was stated as follows:-

*"In Paulo Maduka and Others v. R., Criminal Appeal No. 110 of 2007 (unreported) this Court underscored the importance of proper chain of custody of exhibits and that there should be:-*

*".....chronological documentation and/or paper trail, showing the seizure, custody, control, transfer analysis and disposition of evidence, be it physical or electronic. The idea behind recording the chain of custody, is to establish that the alleged evidence is in fact related to the alleged crime..."*

In the instant appeal there was no chronological documentation and/or paper trail, showing the seizure custody, control, transfer analysis and disposition of evidence, to wit, the stolen motorcycle, so as to establish that the alleged stolen motorcycle with **Registration No. T. 302 CSC** was in fact related to the alleged armed robbery incident at Mkolani area.

As per the evidence of **PW3**, upon interrogating the accused in connection with the stolen motorcycles including the one which is the subject of this case, the accused allegedly "*confessed*" to him to have stolen the motorcycles, including the one with **Registration No. T 302 CSC**, and that he had taken them to **Nshambya Muleba** for sale. Curiously despite **PW3** alleging that the accused had "*confessed*" to him

about committing the crime of stealing motorcycles, and mind you **PW3** did not say that the accused confessed to have been involved in the alleged armed robbery incident at Mkolani, there is no evidence in the form of either Cautioned Statement or otherwise to establish the truth of what **PW3** stated before the trial Court. The testimony of **PW3** about the accused confessing to him about having been involved in the stealing of motorcycles including the one for which this case is concerned, if anything is pure hearsay. The testimony of **PW3** was not worth of any evidential value. The trial Magistrate should not have accorded it any weight as establishing the fact of the accused confessing to him to have committed the crime of stealing motorcycles.

In the instant case, the prosecution also had to establish the second element of the offence of armed robbery, which is that, at the time the accused committed the alleged robbery (stealing of the motorcycle with **Registration No. T 302 CSC**), he was *armed with any dangerous or offensive weapon or instrument* and that, at or immediately before or immediately after the time of the stealing the accused *used or threatened to use violence to any person*. It was alleged by the prosecution that, the accused used a knife to threaten and injure **PW1** with on various parts of his body before taking the motorcycle by violence. I am of the strong view that the fact of **PW1** being injured by a knife by the accused was not established by the prosecution. The record shows that the trial Magistrate having admitted in evidence the **PF3** of the victim (**PW1**) as **Exhibit PE1**, did not however, rely on it in as the basis for establishing the fact of the scars on various parts of the body of **PW1** which were alleged a result of the injuries **PW1** had sustained in the hands of the accused on the day of



the alleged armed robbery incident at Mkolani area. Instead, the trial Magistrate relied on visual observation in court of the scars apparently visible on **PW1** on various parts of his body, as being a result of the injuries inflicted on him by the accused on the fateful day. The trial Magistrate concluded that from the scars which she had visually observed on various parts of the body of **PW1** during the trial, evidently the victim (**PW1**) had suffered those injuries in the hands of the accused on the material day of the alleged armed robbery incident by being stabbed by a knife.

How the learned trial Magistrate came to be seized of expertise to determine that the scars on various parts of the body of **PW1** were as a result of the injuries allegedly **PW1** had sustained in the hands of the accused on the material day of the alleged armed robbery incident is anyone's guess. In the absence of medically proven evidence of cause of injury, clearly the prosecution has failed to establish the fact of the accused being *armed with any dangerous or offensive weapon or instrument* to wit a knife, and that the accused used that knife to threaten the victim with and actually inflicted injuries on various parts of the body of **PW1**. It is highly doubtful, absence of any medical expert evidence, if the alleged scars on the various parts of the body of **PW1**, had resulted from the alleged injuries inflicted on him by the accused using a knife on the eventful night in the course of taking the motorcycle by force from **PW1** or had resulted from other unrelated causes in which **PW1** was involved.

On the issue of identification evidence, M/s Gisela submitted that in this case the elements of *Waziri Amani case(1980) TLR 250* had been established. M/s Gisela further submitted that, there was sufficient

light at the Villa Park area where the accused is alleged to have hired the motorcycle from, for a trip to Mkolani; the exchange of words between the Petrol Station attendant and the accused near Gold Crest Hotel where the victim had to intervene; and the exchange of words between the accused and the motorcycle driver when the accused was demanding to be given money by the victim; the throwing of the victim off the motorcycle by the accused; and the accused stabbing the victim on various parts of his body using a knife.

Perhaps I should pose here a bit to reiterate what the Court of Appeal in Tanzania echoed when commenting on the guidelines for visual identification as stated in ***WaziriAmani case*** (above). In its decision in the case of ***Emmanuel Luka and 2 Others vs The Republic Criminal Appeal No. 325 of 2010*** (CAT)(Unreported)Mwanza) the Court stated at page 5 of the typed Judgment thus:

*"It is important to restate here that these guidelines are not "Mwarobaini" to all cases of this kind. They are not applicable in uniformity in all cases, where visual identification is the issue at hand."*

Essentially in ***Emmanuel Luka case***, the Court of Appeal warned against treating the ***Waziri Amani case*** guidelines for visual identification as a cure for all ills ("***Mwarobaini***") when it comes to issues of visual identification in crimes committed at nighttime. In that case, the Court of Appeal quoted in extensio from ***WaziriAmani case(1980) TLR 250 at page 252*** thus:

*"...the first point we wish to make is an elementary one and this is that the evidence of visual identification... is the weakest and most unreliable. It follows therefore, that no court should act on evidence of visual identification unless all possibilities of mistaken identity are eliminated and the court fully satisfied that the evidence before it is absolutely watertight...**The extent to which the possibility of the danger of an affront to justice... occurring depends entirely on the manner and care to which the trial judge approaches ...although no hard and fast rules can be laid down ....it must be shown on the record a careful and considered analysis of all surrounding circumstances of the crime being tried ...**(emphasis provided)."*

In the instant appeal, it is worth noting that in his testimony **PW1**, the victim of the alleged armed robbery incident, never mentioned the accused as being the "customer" or "passenger" who on **10/10/2014** who had hired him to take him to Mkolani area. Throughout his testimony before the trial Court, PW1 kept on talking about a customer or a passenger who came and negotiated with him for a trip to Mkolani area at a price of **Tshs. 13,000/=**. **PW1** referred only to "a passenger" or "a customer" without specifically mentioning the accused. When cross-examined by the accused, **PW1** stated that he had not seen the accused before and had never seen him anywhere and that although he cannot remember all the people he met on that day and neither all the customers he carried on that day, he remembered him because he had stolen his motorcycle.

In any event be it as it may, curiously **PW1** who claims that after being attacked and injured by the accused was assisted by his fellow **bodaboda** drivers who had arrived at the crime scene, and that he went home and explained to his mother about the whole armed robbery incident, PW1 did not name the accused to either the **bodaboda** drivers or his mother as being the person who had attacked and injured him with a knife and made away with his motorcycle. It is worth noting here that there is now a plethora of case authorities on the settled trite principle of law that:

*"...Delay in naming a suspect without a reasonable explanation by a witness or witnesses has never been taken lightly by the courts. Such witnesses have always had their credibility doubted to the extent of having their evidence discounted."* See the decisions of the Court of Appeal of Tanzania in **MisojiNdebile @ Soji v. R., Criminal Appeal No. 75 of 2013, (CAT)(Mwanza) (unreported); KamuriMashamba v. R., Criminal Appeal No. 325 of 2013, (CAT)(Mwanza) (unreported); and Jackson s/o Thomas v. R., Criminal Appeal No. 229 of 2013, the Court of Appeal of Tanzania at Tabora**, to mention just a few.

The delay and/or failure by **PW1** to *name the suspect* to his fellow **bodaboda** drivers and even to his mother cannot be taken lightly by this Court given the seriousness of the offence the accused was facing thus shaking his *credibility which is doubted to the extent of having his evidence discounted*. If the learned trial Magistrate had properly directed her mind to this fact she would have reached a

different decision. Rather strangely, if indeed as PW1 claim that he had identified the accused at the crime scene, conducting a Police Identification Parade did not add any evidential value to the prosecution case. In any event in the Police Identification Parade it is alleged that the victim, **PW1** managed to identify the accused from among some eleven (11) people who had been assembled and lined up by the Police for that purpose. Curiously enough, apart from absence of explanation from the Police as to how they conducted the purported Police Identification Parade, the prosecution did not produce in evidence during the trial the **Police Identification Parade Register**, thus raising even more doubts if such Police Identification Parade was ever conducted. Lack of explanation how the said Police Identification Parade was conducted and failure by the Prosecution to tender before the trial Court the Police Identification Parade Register renders the testimony of **PW1** about having identified the accused at the Villa Park motorcycle parking area, at the Petrol Station near Gold Crest Hotel area and at Mkolani area near the trees bereft of strong evidential backbone. Additionally the trial Magistrate relied on dock identification of the accused by PW1, which evidence is considered the weakest and most unreliable.

It is for the above reasons that the appeal succeeds. I allow it in its entirety.

The Judgment and order in **Criminal Case No. 22 of 2015** of the District Court of Nyamagana at Mwanza before Hon. A.L. Kalegeya – (RM) dated **31<sup>st</sup> March, 2016** is hereby quashed and set aside.

The sentence of 30 years in prison imposed by the trial Court on the Appellant is hereby set aside.

The Appellant, **ELIPIDIUS s/o PETERAUS**, shall immediately be released from prison where he is being held and set at liberty forthwith unless he is being held there for some other lawful reasons. It is so ordered.

**SGD: R.V. MAKARAMBA  
JUDGE  
23/04/2018**

Date: 23/04/2018

Coram: Hon. Makaramba, J.

Appellant: Present in person

Respondent: Ms. Gisela Alex, State Attorney

B/C: L. Mtaki

**Ms. Gisela Alex, State Attorney:** My Lord, the matter is coming for Judgment and we are ready to receive.

**Appellant:** I am ready to receive the Judgment.

**Court:**

1. Judgment delivered.
2. Right of appeal fully explained.

**R.V. MAKARAMBA  
JUDGE**

**AT MWANZA  
20/04/2018**