IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO.61 OF 2019

(Arising From Criminal Case No.112 of 2017 in the District Court of Mtwara at Mtwara

before Hon. R.E. Kabate, PRM)

IBRAHIMU ISSA NDIWESSA......................................APPELLANT

VERSUS

THE REPUBLIC..RESPONDENT

JUDGMENT

DYANSOBERA, J:.

Ibrahimu Issa Ndiwesa (the appellant) stood trial along with Selemani Dadi Dihenga (2nd accused) in Criminal Case No.112 of 2017 before the District Court of Mtwara charged with an offence of two counts. In the first count, the appellant and the 2nd accused were charged with stealing contrary to sections 258 and 265 of the Penal Code [Cap. 16 R.E. 2002]. In

the second count, the 2nd accused was charged alone in alternative to the first count with receiving stolen or unlawfully obtained property contrary to section 311 of the Penal Code (supra). The allegations in the first count were that the duo, on 26th day of April, 2017 at Likonde area within the Municipality and Region of Mtwara, did steal a motorcycle with Reg. No. MC.258 BFN make SaNLG red in colour valued at Tanzanian Shillings Two Million Twenty Thousand (Tshs.2, 020,000/=) only, the property of Hamida Abdallah. In the second count, it was alleged that the 2nd accused, on 26th day of April, 2017 at Kilambo village within Mtwara Rural District in Mtwara region, did receive a property to wit: a motorcycle with registration number MC 258 BFN make SaNLG valued Tanzanian Shillings Two Million Twenty Thousand (Tshs.2, 020,000/=) only, the property of Hamida Abdallah while knowing or having reason to believe that the property was stolen or unlawfully obtained. While the 2nd accused was found with no case to

answer and acquitted on both counts, the appellant was convicted and sentenced in *abstentia* to serve four (4) years term of imprisonment.

Aggrieved, the appellant has appealed to this court challenging both conviction and sentence. According to the petition of appeal, the following are grounds of appeal:

1. That the trial Magistrate erred in law and fact by holding the conviction and sentence (sic) appellant without considering that prosecution side did not prove the case beyond reasonable doubt.
2. That the trial Magistrate erred in law and facts by holding the conviction and sentence the appellant without considering that prosecution side failed to call the credible witness who called **"Musa"** *boda boda* driver of PW1 in order to corroborate the testimony of PW1 complainant before the court, if is true that the appellant stole her motorcycle, so that to prove the case beyond reasonable doubt.

3. That the trial Magistrate erred in law and fact by convicting and sentencing the appellant by relying on prosecution witnesses while they failed to tender before court the confession statement of appellant in order to prove beyond reasonable doubt.
4. That the trial Magistrate erred in law and fact in convicting and sentence the appellant basing on the absence of the appellant without looking for reality of the absence of essential exhibit in appellant and also the exhibit (motorcycle was found possession (sic) another person at another country in Mozambique.
5. That the trial Magistrate erred in law and facts in convicting and sentence the appellant basing on the absence of the appellant without looking for reality statement of PW1 who narrate before court that she did not know who stolen her motorcycle.
6. That the trial Magistrate fundamentally erred in law and fact by holding, convicting and sentence the appellant without considering

that the prosecution side failure to call a credible witness Immigration Officer who communicated with relative of 2nd accused and the satisfy to receive a motorcycle from Mozambique in order to corroborate the statement of PW3 if it is true that he received a motorcycle from Mozambique. Therefore Hon. Judge this case show that it has been cooked up for the benefit of prosecution side so as to convict the appellant without proving the case beyond reasonable doubt.

7. That the trial Magistrate erred in law and fact by holding convicting and sentencing the appellant without looking for how the appellant was mentioned by a driver or the owner of the motorcycle but prosecution side failure to call driver "Mussa" who receive a motorcycle from PW1 complainant, her *boda bo*da driver in order to prove the testimonies of PW1.

8. That the trial Magistrate erred in law and fact by holding convicting and sentence the appellant by relying on the prosecution side without considering that the stolen motorcycle was not found with appellant but motorcycle was found in Mozambique with another person who was not arrested.

The evidence that led to the appellant's incarceration is as follows. HAMIDA ABDALLAH SHIRAZ (PW 1), a business lady, owns a motor cycle with Reg. No. MC 258 BFN make SaNLG which she bought at Tshs. 2, 020, 000/=. The ownership and value of the motor cycle was evidenced by the Registration Card (Exhibit P 1). On 26th April, 2017 the motor cycle rider one Mussa Salehe (who did not testify) told her that her motor cycle was stolen. Following this information, the hounds of justice got the wind and on 2nd May, 2017 Assistant Inspector Tuntufye (PW 2) and H. 304 Detective Corporal Phile (PW 3) went to Mingano at the appellant. According to these witnesses, the appellant introduced himself to be

Ibrahim Issa Ndiwesa and admitted to have stolen the motor cycle in question and telling them that the loot was at the 2nd accused. The appellant, then, led the search party to the 2nd accused at Kilambo. The 2nd accused admitted to have received the motor cycle from the appellant and told them that it was transferred at Mozambique. The 2nd accused was searched and found with Tanzanian and Mozambican currencies (Exhibits P 2 and P 3). According to PW 3, the 2nd accused's relative communicated with the Immigration authority at Mozambique and the motor cycle was brought back to Tanzania and handed over to the owner. While PW 2 admitted that the witness who informed them of the theft of the motor vehicle had no idea as to when the motor cycle was stolen, PW 3, in his evidence, admitted before the trial court that the person in Mozambique who was found with the motor cycle in question was the proper person to be charged and not the 2nd accused.

After the closure of the prosecution case, the learned trial Principal Resident Magistrate was satisfied that the 2nd accused had no case to answer and was, accordingly acquitted. With regard to the appellant, the trial court found him with a case to answer and convicted him in absentia and accordingly, sentenced him to four (4) years term of imprisonment. In passing the sentence, the trial court record, according to the proceedings dated 30th November, 2017 shows the following:

SENTENCE:

PREVIOUS CONVICTION RECORD

Mr. Ndunguru:

The 1st accused is an habitual offender, pray for severe punishment.

Mitigation: N/A

Court:

Since the accused (1st) is the habitual offender, he is hereby sentenced to serve a sentence of 4 year imprisonment in jail. The sentence to ran

after the 1st accused one Ibrahim Issa Ndiwesa is apprehended. It is so ordered."

At the hearing of the appeal, the appellant appeared in person, unrepresented. The respondent Republic had the legal services of Ms. Caroline Matemu, learned State Attorney.

Supporting his appeal, the appellant submitted that at the time of imprisonment he was not in court and had been charged as the 1st accused. He implored the court to take into account the 4th ground, in particular.

The respondent, Republic through Ms. Caroline Matemu supported both conviction and sentence. Learned counsel contended that the evidence led by the prosecution left no reasonable doubt against the appellant's guilt. According to her, PW1 clearly proved the ownership of her motorcycle which was stolen and later retrieved. In her view, the evidence implicating the appellant came from PW2 and PW3, the police officers, who

stated how they apprehended the appellant and who admitted on the complicity and then led them to the recovery of the motor cycle. Learned state attorney, admitting that the evidence of these witnesses was oral, she explained that it was admissible in law and cogent. She argued that the appellant directed the search party where they could retrieve the motorcycle; the evidence which was relevant under section 31 of the Evidence Act [Cap 6 R.E.2002].

As to the appellant being convicted in his absence, learned state attorney told this court that the argument was not a good ground. She explained that after the case was already in court, the court seized the matter to the exclusion of the police officers. Besides that, the appellant's argument that the appellant was told by the investigating officer not to go to court lacks basis. On the complaint that the *boda boda* rider was not called, Ms Caroline responded that the failure had no adverse effect to the prosecution case given the fact that the owner of the stolen motor cycle

was called and testified in support of the theft. She relied on the provisions of section 143 of the Evidence Act [Cap.6 R.E. 2002] which states that no number of witnesses shall be required to prove facts.

In his short rejoinder, the appellant submitted that he was the second person to be apprehended in this case and it was the first person one Arafat who directed the police where he was and after they found him they went at Mangoela where another person was apprehended. He asserted that it was the said Arafat who was leading the search party and they arrived at Mtwara Police Station at 0300 hours and all the three were locked up. The appellant further contended that he was interrogated but denied complicity and maintained that it is Arafat Kilambo who mentioned where the motorcycle could be found and led the search party at Selemani to retrieve the motor cycle in question. The appellant also narrated that it was Arafat Kilambo who was leading a search party and arrived at 0445 hours and he led them directly to the second accused who, after being

beaten, disclosed that the motorcycle was in Mozambique. Further that the 2nd accused, when searched, was found with Tanzanian and Mozambican currencies but that the said Arafat was not charged in court despite his being apprehended at Mangoela.

Having considered the grounds of appeal and the submissions in support and in opposition, I am of settled view that the appellant's main complaints are only two. First, that the appellant was convicted on insufficient prosecution evidence. Second, the trial court failed to consider the fact that he had sufficiently accounted for his failure to appear in court during the criminal proceedings which ended in his being convicted and sentenced in absentia.

As far as the first complaint is concerned, the evidence is silent on how the motor cycle went missing. It was not clear how it was stolen, when and by whom. According to the evidence of the complainant (PW 1), it is Mussa Salehe, the motor cycle rider who told her that the motor cycle

was stolen. However, Mussa Salehe did not testify in court and there was no explanation for the failure. The story of PW 1 on the motor cycle being stolen was, therefore, a hearsay and inadmissible in evidence.

The learned Principal Resident Magistrate was alive to this fact in his judgment when, at page 6 of the typed judgment observed:

"From what PW 1 said in court, it is not in dispute that the motor cycle No. 258 BFN make SaNLG red in colour was stolen, however, it not on record that through PW 1 evidence, the said motor cycle was stolen by either of the accused. What PW 1 said was to establish ownership of the said bike through Exhibit "P 1""

It is true PW 2 and PW 3 testified to have arrested the appellant and 2nd accused but there is no dispute that the latter were not found with any incriminating exhibit, particularly the motor cycle in question. Worse still, there was no evidence as to who retrieved the motor cycle and how it was retrieved. PW 3 admitted that the motor cycle was found and retrieved in

Mozambique and that the 2nd accused was wrongly charged. It is surprising that the same motor cycle which formed the subject of the charge against the appellant and the 2nd accused was not tendered in court and there was no any explanation for the failure.

In convicting the appellant, the learned Principal Resident Magistrate had the following to say at p. 9 of the typed judgment:

"Since the 1st accused is at large and has been found with a case to answer, s. 231 will not be invoked but rather to declare the 1st accused IBRAHIM ISSA NDIWESA guilty and convicted in absentia for the offence of stealing."

With great respect, the court fell in gross error which occasioned failure of justice. There was no consideration and analysis of the prosecution evidence which could be said to have led the trial court find the appellant guilty. It was incumbent upon the trial court, before convicting the appellant, to satisfy itself not only on the offence being

committed but also to link the appellant with the offence charged. The argument of the learned state attorney in her submission that the evidence of PW 2 and PW 3 implicated the appellant holds no water.

In short, apart from the fact that there was no evidence proving the theft of the motor cycle in question, the evidence linking the appellant with the theft, leave alone theft of the motor cycle was lacking.

I agree that the appellant was convicted on insufficient or no evidence at all. His incarceration was, therefore, uncalled for and illegal.

The second complaint is, to be exact, the legality or otherwise, of the procedure adopted at the trial resulting in the conviction and subsequent sentence of the appellant in his absence.

It is on record that on 8th November, 2018 when the appellant appeared before the learned Principal Resident Magistrate, Mr. Magessa, learned state attorney, addressed the court as follows:

"*Mr. Magessa, SA:* The accused has to show cause why he should not serve his sentence and instead he should show reasons why he should be allowed to enter his defence.

Court: The accused to show cause as requested

Accused: Ibrahim Issa Ndiwesa: It was not my intention to abscond from the court. I faced the problem, my young brother died in Msumbiji on 24/9/2017, I later informed my aunt to notify the court. My aunt is Suzana Albano. I was in Mozambique. When I was back from Mozambique on 12/10/2017. That is all.

Mr. Magessa, SA: The accused has not shown any justifiable ground to convince this court to the contrary. Let him serve his sentence

Accused: no more reply.

Court: The accused was sentenced on 30th November, 2017 and he (accused) has categorically stated that he came back from the funeral of his beloved brother on 24/9/2017 in which the ruling was

yet to be delivered. Had it been the accused was faithful and honest to the court and to his consciousness, he could have attended the court on the date the ruling was delivered because he was present in the country. Since no justifiable cause shown so far for the accused to be allowed to enter his defence, let him serve his punishment as prescribed under the law. It is so ordered"

Although the trial court was not clear what provisions of the law were invoked in convicting and sentencing the appellant in absentia, the law is settled that the applicable provisions are sections 226, 227 and 231 of the Criminal Procedure Act [Cap. 20 R.E. 2002].

The circumstances of the case and the stage at which the criminal proceedings had reached determine which provision should be invoked in a particular case. In the instant case, according to the proceedings of the trial court, the appellant defaulted appearance between 21.9 and 11.10.2017. By the time, PW 1 and PW 2 had already testified. PW 3 was

yet to give his testimony as he gave his evidence on 28.11.2017 the day the prosecution case was closed.

Section 226 of the Criminal Procedure Act which applies on non-appearance of the parties after the adjournment provides as follows:-

"226-

(1) If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court in which the order of adjournment was made, it shall be lawful for the court to proceed with the hearing or further hearing as if the accused were present; and if the complainant does not appear, the court may dismiss the charge and acquit the accused with or without costs as the court thinks fit.

(2) If the court convicts the accused person in his absence, it may set aside the conviction, upon being satisfied that his

absence was from causes over which he had no control and that he had a probable defence on the merit.

(3) Any sentence passed under subsection (1) shall be deemed to commence from the date of apprehension and the person effecting such apprehension, shall endorse the date thereof on the back of the warrant of commitment.

(4) The court, in its discretion, may refrain from convicting the accused in his absence, and in every such case the court shall issue a warrant for the apprehension of the accused person and cause him to be brought before the court".

Although the law permits a court to proceed with the hearing or further hearing where the accused defaults appearance, the same law is clear that the court, if it convicts the accused in his absence, may set aside the conviction upon being satisfied that his absence was from causes over which he had no control and he had a probable defence on the merit. The

relevant provision is sub-section (2) of section 226 of the CPA. This legal position was emphasized by the Court of Appeal in the case of **Olonyo Lemuna and Lekitonyo Lemuna v.** R [1994] TLR 54 where it held:

> "Section 226 (2) of the Criminal Procedure Act 1985 makes provision for the court to set aside a conviction entered in the absence of the accused if it is satisfied that the absence was due to causes beyond the control of the accused; this accords the accused person an opportunity of being heard"

In the instant case, the appellant accounted for his non-appearance and taking into account the prosecution case as analysed above, it cannot be gainsaid that the appellant had a probable defence on the merit. Throwing to the wind the reason he had advanced for his failure to appear in court and denying him of his right to be heard occasioned a serious miscarriage of justice in that the conviction was unreasonably sustained and the sentence which was illegal was allowed to stand.

For the foregoing reasons, I find merit in the appeal and allow it. In consequence, I quash the conviction and set aside the sentence meted against the appellant. I order the immediate release of the appellant from custody unless his liberty is being lawfully assailed for other causes.

Dated at **MTWARA** this 18th day of March, 2020.

(Sgd)

W.P. Dyansobera

JUDGE

18.3.2020

Court: Judgment to be delivered to the parties by the Deputy Registrar.

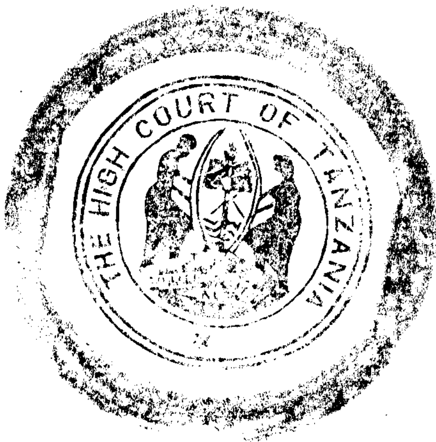
(Sgd)

W.P. Dyansobera

JUDGE

18.3.2020

Court: Judgment delivered today in the presence of all parties. Right of appeal explained.



A. K. Rumisha

DEPUTY REGISTRAR

25.3.2020