

**IN THE HIGH COURT OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA
CRIMINAL APPEAL NO.65 OF 2020**

DAVID ISEME.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the decision of the Resident Magistrate Court of Shinyanga)

(U.E. Madeha, SRM)

Dated 20th day of December, 2018

In

Criminal Case No.224 of 2017

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JUDGEMENT

2nd & 12th March 2021

MDEMU, J.:

In this appeal, the Appellant David Iseme was charged of two counts, to wit: stealing contrary to section 265 and 258 of the Penal Code, Cap.16, R.E 2002 and possession of goods suspected to have been stolen contrary to section 312(b) of the Penal Code, Cap.16, R.E 2002 in the first and second counts respectively.

Brief facts of the case are as follows: On 25th day of August, 2017 at about 10:00hrs at Tambukareli area within Shinyanga Municipality in

Shinyanga Region, the Appellant was found possessing a motor cycle with registration No.MC 389 BCR make SANLG which was suspected to be stolen. It was the property of one ERNEST TEMU. Following full trial, the Resident Magistrate's Court of Shinyanga convicted the Appellant on both offences and sentenced him to serve four years imprisonment for the first count and three years imprisonment for the second count. Sentences were ordered to run concurrently. The Appellant was dissatisfied with both conviction and sentence, thus lodged an appeal containing two grounds of appeal as follows:

- 1. That, the trial magistrate erred in law and fact by misconception basing on charge sheet which does not contain full detail of the stolen object as the law require.*
- 2. That, the trial magistrate erred in law and fact by misapprehension disregard the defence adduced by the Appellant rather applying the doctrine of recent possession.*

When the appeal was called for hearing on 2nd day of March,2021, the Appellant appeared in person whereas the Respondent Republic was represented by Ms. Salome Mbuguni, Learned Senior State Attorney.

Regarding grounds of appeal, Ms. Salome Mbuguni, in the first place, supported the appeal. She argued the two grounds of appeal as one and thus submitted that, in general, the prosecution side did not prove the case beyond reasonable doubt. She first observed irregularity in the charge such that, there is duplicity by having the offences of theft and found in possession of properties suspected to be stolen. Nonetheless, the trial court convicted the Appellant on both offences. In her view, according to Section 388 of Criminal Procedure Act, Cap.20, the court may opt to convict the Appellant on any of the two counts but not both as it was.

She further submitted that, the Appellant was not given a fair hearing because tendering of exhibits was unprocedural. She observed that, the said exhibits were not cleared for admission, not read and also the court did not record reasons for disputing or objecting admission of some documents. She referred at page 15 of the proceedings where PW1 stated on the stolen motorcycle by producing insurance policy cover and registration cards(P1). However, the witness did not identify them before being tested in evidence. As to PW4 who testified on certificate of seizure (P4), did not also clear the said exhibit for admission. To her, those irregularities contravened the principles stated in **Robinson Mwanjisi**

and 3 Others v. R (2003) TLR 218 at page 226, and in **Anania Clavery Batela v. The Republic, Criminal Appeal No.355 of 2017**(unreported) at page 13 insisting on the effect of not complying with procedures in tendering of exhibits. She therefore argued that, the remedy is to expunge the said exhibits(P1 and P4).

After expunging exhibits P1 and P4, the concern of the Learned State Attorney was whether there is any other material evidence on record which describes the stolen motorcycle. In her view, relying on the case of **Annania Clavery Batela** (supra), the contents of expunged exhibits may be covered by testimonies of witnesses.

It is on that account the Learned State Attorney commented in the evidence of PW1, PW2 and PW3 regarding description of the stolen motorcycle. She submitted that, PW1 described the motorcycle to be MC.158 ALEX but it was after admission of the document in court stating on the said exhibit. The same description was to PW2 according to Ms. Salome Mbuguni but in the testimony of PW3, the said motorcycle was described as MC 389 BCR as per TRA report which was not tendered. In her considered view, there is contradiction as to what is the real registration number of the said motorcycle. She thought this evidence cannot prove the prosecution case. The Appellant had nothing useful to

add rather than urging this Court to consider his grounds of appeal as filed.

I have duly considered the arguments fronted by the Learned Senior State Attorney on the grounds of appeal she conceded together with the entire evidence on record. According to the available record, I entirely agree with Ms. Salome Mbuguni's view that, the prosecution failed to prove the case beyond reasonable doubt. I shall herein bellow state briefly as to why I think the learned Senior State Attorney is justified to support the appeal.

Regarding to admission of exhibit P1 in evidence, at page 16 of the trial court proceedings, it reads as follows;

Public Prosecutor: I pray my witness to tender the receipt MC 389 BCR make Sunlg red colour, insurance receipt and motorcycle card as exhibit.

Accused: Disputed

Court: a receipt of buying motorcycle, insurance receipt and a motorcycle card admitted and marked as -Exhibit P1 Collectively.

As to the quotation above, it is clear that, PW1 stated on the stolen motorcycle by producing insurance policy cover, receipts on motorcycle purchase and registration cards(P1). The witness did not however identify them and clear them for admission before being tested in evidence. The same was for the tendering of a motorcycle, at page 15 and 16 of the proceedings where the witness did not identify the said motorcycle before tendering it as real evidence. Part of the proceedings regarding this reads as hereunder;

*Public Prosecutor: I pray my witness to
tender a motorcycle made Sunly as exhibit
in court.*

Accused: Disputed

*Court: A motorcycle made Sunlg admitted
and marked as exhibit P2.*

From the quoted part of the proceedings, as one may observe, the Learned trial Magistrate did not record reasons or grounds for objecting tendering of exhibits. The witness also did not describe the said exhibits before the same got tendered in evidence. This, in my view, is the illegality complained of by the Learned Senior State Attorney on want of fair hearing

and want of clearance of exhibits before having their way in evidence. This was also the case in the course of tendering exhibit P4(Certificate of seizure).

On that, as rightly observed by the learned Senior State Attorney, exhibits that is, the motorcycle and the attached documentations were not cleared before their admission. Equally, after being admitted, they were not read in court. That means, in terms of principles stated in the case of **Annania Calvery Batela** (supra), I hereby expunge the said exhibits.

Having expunged the said exhibits, it is trite law that, their contents might be covered by testimonies of witnesses as stated in **Annania Calvery Batela** (supra), at page 13 that;

"However, we wish to interject our agreement with Ms.Mkunde that even without four discounted exhibits, their contents, as we shall demonstrate herein below, were sufficiently covered by the testimonies of PW2,PW3,PW5 and PW6."

That being the legal position, the question is whether, in the instant appeal, there is evidence that may cover what was expunged in the said exhibits. Ms.Salome Mbuguni correctly said there is none, which I entirely agree because,PW1,PW2 and PW3 differs materially in their evidence regarding registration number of the said motorcycle. It is thus, according to

their evidence, not clear if the stolen motorcycle was registered MC 158 ALEX or MC 389 BCR.

It is on that note, I entirely agree with the Learned Senior State Attorney that, in the circumstances of this case, the prosecution case was not proved beyond reasonable doubt.

In the upshot, I find that, the case against the Appellant was not made out. Since the evidence which was relied by the prosecution is not watertight, I proceed to allow the appeal, quash conviction, set aside the sentence and order the Appellant to be released from prison forthwith, unless he is detained for another lawful reason.

Order accordingly.

Gerson J. Mdemu
JUDGE
12/3/2021

DATED at SHINYANGA this 12th day of March, 2021.



Gerson J. Mdemu
JUDGE
12/3/2021