

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF MWANZA)**

AT MWANZA

CRIMINAL APPEAL NO. 82 OF 2021

(Appeal from the Criminal Case No. 36 of 2020 in the District Court of Bukombe at Bukombe (Moshi, SRM) dated 15th of December, 2020.)

MAKOYE EDWARD APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

19th, & 26th July, 2021

ISMAIL, J.

This appeal arises from the decision of the District Court of Bukombe at Bukombe, in respect of Criminal Case No. 36 of 2020. It involved the appellant and two other accused persons who stood charged with theft, contrary to the provisions of sections 258 (1) (2) and 265 of the Penal Code, Cap. 16 R.E. 2019. The subject matter of the alleged theft was a motor cycle Registration No. MC 534 CJB, make SanLG, whose estimated value is TZS. 2,240,000/-. It was alleged that the incident occurred at 17:45 hours on 12th

February, 2020, at Mabatini Bust Stand, in Lyobahika village within Bukombe District, in Geita Region. The owner of the motor cycle is a Mr. Jonas John.

Brief facts of the case are gathered from the testimony of the parties to the trial proceedings. They are simply that the motor cycle was entrusted to the appellant by the owner, on the condition that he should operate it for hire, for a weekly return of TZS. 40,000/-. On the fateful day, the appellant handed the motorcycle to Marwa Chacha, the 2nd accused in the trial proceedings. As the latter was with the said motor cycle, then came an unknown person riding a tri-cycle (Bajaj). He requested that the 2nd accused lets him use motor cycle, leaving his bajaj behind. After a while, the 1st accused appeared, claiming that an unknown person had stolen his bajaj that was found in the 2nd accused's possession. The person who left with the motor cycle was not located or identified. When news reached PW1, the owner, he reported the matter to the Police who arrested the appellant and the two accused persons, and arraigned them in court. After trial proceedings in which six witnesses testified for the parties, the trial magistrate was convinced that a case had been made out against the appellant and the 2nd accused. She convicted and sentenced them to imprisonment for five years.

The conviction and sentence have aggrieved the appellant, hence his decision. Seven grounds of appeal have been preferred as paraphrased as follows:

- 1. That charge sheet discloses no offence against the appellant.*
- 2. That the trial court' erred in law and in fact for relying on contradictory charge sheet and evidence of the prosecutions side without amending the charge sheet. That is, the charge sheet and evidences are at variance on when the event took place.*
- 3. That, the onus of proving the charge beyond reasonable doubt as required by the law was not met by the respondent at the trial.*
- 4. That, exhibit PEX1 tendered by the prosecution was improperly admitted by the trial court.*
- 5. That, the trial court did not properly consider and weigh the appellant's evidence adduced in support of his defence.*
- 6. The cautioned statement against the appellant was recorded out of the prescribed period.*
- 7. That, the trial court erred in law by sentencing the appellant without first entering a conviction.*

Hearing of the matter was through audio-teleconference, and it saw the appellant appear in person, unrepresented, while the respondent enjoyed the usual service of Ms. Jovina Kinabo, learned State Attorney,

who addressed the Court ahead of the appellant. She chose to confine her submissions to grounds one and three of the appeal, believing that they were able to dispose of the appeal.

In her submission on ground one, Ms. Kinabo conceded that, while the trial magistrate found the appellant guilty, she did not enter a conviction. This is clearly found at page 5 of the judgment. The learned attorney argued that the trial court's failure constituted a violation of section 235 of the Criminal Procedure Act. She quickly argued, however, that such omission did not occasion any miscarriage of justice as this Court can step in and enter a conviction. Ms. Kinabo contended that her view is predicated on the decision of the Court of Appeal in **Mabula Makoye & Another v. Republic**, CAT-Criminal Appeal No. 227 of 2017 (unreported). She concluded that this ground is devoid of any merit.

Moving on to ground three of the appeal, the attorney's contention is that the prosecution did not prove its case. Mr. Kinabo submitted that the charge sheet says that the offence with which the appellant and his other co-accused were charged is theft of a motor cycle. She argued that PW1, the owner, stated that he handed the motor cycle to the 3rd accused, the appellant herein. It was also testified by the prosecution that the 2nd accused person gave it to an unknown person who came with a 'bajaj'

belonging to the 1st accused and left it there as he got away with PW1's motor cycle. It was Ms. Kinabo's assertion that the totality of this testimony does reveal how the accused persons stole the motor cycle. It was her conviction that the prosecution failed to attach any culpability to the appellant. She, in view thereof, supported the appeal.

For his part, the appellant did not have anything to submit. He only prayed that he be set free.

Given its decisive importance, my analysis will narrow down and focus on ground three of the appeal. The concession by the respondent in this ground is that the prosecution's testimony lacked the necessary cogency that would rope the appellant in the charge of theft slapped on him. As I address this issue, I will preface by explaining the duty that the prosecution has in criminal case. This is the duty of proving the case beyond reasonable. In legal parlance, this is called the burden of proof, which was expounded in ***Joseph John Makune v. Republic*** [1986] TLR 44, in which it was held:

"The cardinal principle of our criminal law is that the burden is on the prosecution to prove its case. The duty is not cast on the accused to prove his innocence....."

The prosecution's ominous duty was put in a more succinct perspective in the subsequent decision of the Court of Appeal of Tanzania in ***Samson Matiga v. Republic***, CAT-Criminal Appeal No. 205 of 2007 (unreported), thus:

"What this means, to put it simply, is that the prosecution evidence must be so strong as to leave no doubt to the criminal liability of an accused person. Such evidence must irresistibly point to the accused person, and not any other, as the one who committed the offence".

See also: ***Yusuf Abdallah Ally v. Republic***, CAT-Criminal Appeal No. 300 of 2009; and ***George Mwanyingili v. Republic***, CAT-Criminal Appeal No. 335 of 2016 (both unreported).

As rightly submitted by the respondent's counsel, the testimony that came from three of the prosecution witnesses did not lay any blemishes to the accused persons, meaning that theft of which they were suspected was not proved. What came out from PW1, the main prosecution witness, is that the said motor cycle legitimately changed hands from PW1 to the appellant. The appellant and the 2nd defendant have both admitted that, at some point in time and before the said motor cycle had been stolen, the same was taken by an unknown person and left the 1st accused person's 'bajaj'. What this testimony did was to demonstrate how all of the accused

persons fell prey to the unknown person's sinister motive of defrauding them the motor cycle, the same way he did with the 1st accused person's 'bajaj'. Thus, while PW1 was a victim of the loss of the said motor cycle, it is flawed to contend that such loss was a theft act which was perpetrated by the accused persons, including the appellant. In the absence of any evidence that links them with the person who ran away with the said motor cycle, the talk of the appellant and his two co-accused being the perpetrators of the said theft is, in all fairness, unacceptable and unsupportable. Accordingly, this ground of appeal is meritorious and I allow it.

Consequently, I find the basis for faulting the decision of the trial court. I set aside the conviction and the sentence, and order that the appellant be immediately set free, unless held for some other lawful reasons.

Order accordingly.

DATED at **MWANZA** this 26th day of July, 2021.



M.K. ISMAIL

JUDGE

Date: 26/07/2021

Coram: Hon. M. K. Ismail, J

Appellant: Present

Respondent: Ms. Jovina Kinabo, State Attorney

B/C: P. Alphonse

Court:

Judgment delivered in chamber, in the presence of the appellant and Ms. Jovina Kinabo, learned State Attorney, this 26th July, 2021.



M. K. Ismail

JUDGE

