

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 77 OF 2021

(Originating from Lindi District Court at Lindi in Criminal Case No.34 of 2021 before Hon. M.A. BATULAINE, SRM)

ISMAIL RASHID KILIMBAGO..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

*Date of Last Order: 2/5/2022
Date of Judgment: 13/7/2022*

LALTAIKA, J.:

The appellant, **ISMAIL RASHID KILIMBAGO** appeared before the District Court of Lindi at Lindi where he was prosecuted on allegation of stealing contrary to section 258(1)(2)(a) of the Penal Code, [Cap.16 R.E. 2019]. It was alleged that on 24th day of May, 2021 at Mitwero Area within the Municipality and Region of Lindi the appellant did steal one motorcycle with registration Number MC 479 CUF make SANLG valued at Tanzania shillings two million three hundred thousand only (TZA 2,300,000/=) the property of one Deus Burchard Rwechungura.

According to the records, four prosecution witnesses, namely, G.3183 Kora Thomas (PW1), H 9326 PC Deus Buchard (PW2), Hamisi Bakari (PW3) and G 7805 DC Baraka (PW4) appeared to support the charge. The

prosecution also strengthened its case by tendering four (4) exhibits which were admitted as evidence. These included, certificate of seizure (exhibit P1), motorcycle with Reg. No. MC479 CUF make SANLG red in colour (exhibit P2), motorcycle registration card, invoice and receipt (exhibit P3 collectively) and Police Exhibit Register (exhibit P4).

On the 24/05/2021 at midnight, PW3 a bodaboda rider went to a bar situated at Mitwero bus stand riding the motorcycle with Registration Number MC 479 CUF make SANLG red in colour owned by PW2. He packed his motorcycle, locked it and took out the keys. Thereafter, PW3 got inside the bar in order to pick up a luggage. After five minutes, PW3 came out with the luggage. Surprisingly, his motorcycle was nowhere to be seen. Seeing that, he relayed the information to PW2. Being aware about the loss of his motorcycle PW2 reported the matter to Police Station at Lindi.

By good luck, on 24/05/2020 in the morning PW1 was at Nangurukuru performing his duties as police. He received a phone call from his informer who was suspicious with one motorcycle which was being disassembled. PW1 then went to the scene of crime in plain clothes and with a modestly casual appearance. PW1, allegedly, found the appellant removing the back shock-absorbs and micro of the motorcycle. After some interrogations with the appellant PW1 arrested him and called his fellow police who was at Nangurukuru check point to bring with him a certificate of seizure for purposes of conducting search where appellant was found.

It was testified by PW1 that upon interrogating the appellant, the appellant revealed that he disassembled the motorcycle because it belonged to his brother who lived in Dar es Salaam. PW1 communicated with the person claimed to be the appellant's brother who was in Lindi but

after such communication PW1 realized that it was not his brother rather a friend who was in Dar es Salaam. PW1 went ahead and filed the certificate of seizure of the motorcycle at the scene of crime in the presence of PC Ombeni and the same was signed by himself and the appellant. Thereafter, he took the appellant along with the motorcycle to the Kilwa Masoko Police Station. Upon their arrival at the police station, PW1 interrogated the appellant who in turn disclosed that at Nangurukuru he had no money for fuel that is why he decided to take off some spare parts of the motorcycle, sell them in order to get enough money to enable him travel to Dar es Salaam.

Information on the apprehension of the appellant was relayed to the Lindi Police Station. As a result, PW4 was sent to Kilwa Masoko with an order to bring the appellant to Lindi along with the motorcycle. He took the appellant and brought him at Lindi Police Station with exhibit P2. PW4 stated later as part of his evidence that exhibit P2 was kept at the Lindi police Station from 28/05/2021 to 25/08/2021 when he handled it over to DC Rose who brought it to court. In proving his custodial duty PW4 tendered exhibit P4.

In his defence, the appellant did not call any other witness except himself. He told the trial court that after his arrest by two men at Nangurukuru was brought at Kilwa Masoko police station where he stayed for about five days. On the sixth day he was transferred to Lindi Police Station where he recorded his statement. DW1 testified that there was contradiction on the testimonies of PW1 and PW4. He also told the trial court that the prosecution did not bring in court the instrument which proved that he was opening the spare parts from exhibit P2.

Having being convinced that the prosecution had proved its case at the required standard, the learned trial Magistrate convicted the appellant as charged. Consequently, she sentenced him to serve an imprisonment term of five (5) years. Dissatisfied, the appellant has appealed to this court to contest both the conviction and sentence. To express his dissatisfaction with the trial court's findings and sentence, he lodged a Petition of Appeal comprising of five grounds of appeal which are paraphrased as follows: -

- 1. That, the trial court erred in law and fact in convicting and sentencing the appellant while pleaded not guilty to the offence charged because he did not commit.*
- 2. That the trial court erred in law and fact in convicting and sentencing the appellant basing on the evidence of PW1 who testified that, he saw the appellant removing the back shock up, battery cover and site mirror of Exh.P2 while he failed to tender that property to the court in order to prove his statement.-*
- 3. That the trial court erred in law and fact to convict and sentence the appellant without considering that search warrant was illegal because during search no anyone among the justice of peace participated in conducting search in order to testified the charge.*
- 4. That the trial court erred in law and in fact to convict and sentence the appellant while the prosecution side failed to prove the charge beyond reasonable doubt.*
- 5. That, the trial court erred in law and fact to convict and sentence the appellant based on the weakness of defence.*

During the hearing of this appeal, the appellant appeared in person, unrepresented while the respondent Republic enjoyed the services of Mr.

Wilbroad Ndunguru, learned Senior State Attorney. The appellant suggested that counsel for the respondent submits first and the suggestion accepted by Mr. Ndunguru.

Mr. Ndunguru resisted the appeal. He announced that he supported both conviction and the sentence. He commenced his submission by submitting on the second ground of appeal whereupon the appellant had asserted that exhibit P2 was not tendered in court. In that regard the learned Senior State Attorney argued that the evidence by the prosecution shows that the motorcycle with registration number MC 479 CUF SANLG was tendered as it is reflected at page 12 and 15 of the typed proceedings of the trial court. On the assertion by the appellant that the spare parts were not tendered in court, Mr. Ndunguru stressed that the motorcycle as a whole was tendered. In light of that submission the learned Senior State Attorney opined that the ground had no merit hence should be dismissed.

Submitting on the third ground where the appellant had faulted the search alleging that it was conducted unprocedurally because of none attendance of a justice of peace who could witness the whole process, Mr. Ndunguru submitted that as far as search is concerned, it is not always that there must be a justice of peace. Mr. Ndunguru referred this court the case of **Tongora Wambura vs The Director of Public Prosecutions**, Criminal Appeal No. 212 of 2006 CAT at Arusha (unreported) at page 6 where the Court stated that lack of an independent witness is not enough to shake the case.

On the assertion that exhibit P1 was not read out loud in court soon after its admission the learned Senior State Attorney conceded. He submitted that the remedy was to expunge it from the record of trial court.

However, the learned Senior State Attorney insisted that even if exhibit P1 were to be expunged, the testimony of PW1 remained water tight to warrant conviction of the appellant.

Responding to the complaint that the prosecution side did not prove its case beyond reasonable doubt, Mr. Ndunguru argued that the appellant was found with the stolen property immediately after the same was stolen. Mr. Ndunguru stressed that in criminal law circles, the same is known as the doctrine of recent possession. It is Mr. Ndunguru's submission that in Tanzania, the doctrine of recent possession was well articulated in the case of **Mustapha Maulidi Rashidi vs R**, Criminal Appeal No.241 of 2014 CAT at Mtwara.

He submitted that the Court proffered the following ingredients of the doctrine to include;(i) the property was found with suspect (ii) the property is positively proved to be the property of the complainant (iii) that the property was recently stolen from the complainant and (iv) that the stolen thing constitutes the subject of the charge. To that end, the learned Senior State Attorney argued that all those ingredients were proved in the matter at hand.

In addition, Mr. Ndunguru argued that PW1 had testified [at the trial court] how he met, suspected and arrested the appellant while disassembling exhibit P2. The learned Senior State Attorney stressed that upon inquiry the appellant lied to him that the motorcycle belonged to his brother residing in Lindi as reflected at page 9 of the typed proceeding of the trial court. He went further and argued that the motorcycle was found with the appellant on the same day it was stolen. Mr. Ndunguru insisted

that when PW1 was interrogated, he confessed that he stole the motorcycle at Mitwero.

In rejoinder, the appellant started with the second ground where he argued that PW1 saw him disassembling the motorcycle and mentioned the spare parts which include the shock absorbers (rear shock abs), battery, covers and cite mirror. The appellant argued that it was astonishing that if the respondent did not bring those items and tender them to court in order to prove the allegations against him.

Responding to the third ground on search, the appellant submitted that PW1 had testified that he arrested him in the street. The appellant opined that it was important that an independent witness such as a citizen, local leader or lawyer witnessed his arrest and subsequent search.

On the fourth ground, the appellant argued that the prosecution had failed to prove the case beyond reasonable doubt since the trial court failed to find out whether the motorcycle brought in court was the same which was disassembled. On the fifth ground, the appellant submitted that the trial court convicted and sentenced him basing on the weaknesses of the defence evidence and without making objective analysis on prosecution witnesses. In that regard the appellant argued that PW1 had testified that he arrested him on 24/5/2021 in the morning hours while PW2 received information from PW3 on the same date but at 1:00 in the midnight.

After a careful consideration of the submissions from either side, grounds of appeal and the trial court record before me, basically the determination of this appeal hinges on two issues. One, whether any

arrest of person requires an arrest warrant. Two whether the appellant was convicted on the weaknesses of the defence evidence.

I will begin my deliberation with the first issue as it appears hereinabove. I know that arrest may be conducted by either a police officer, a magistrate or private person(s). In the present case the appellant was arrested by PW1, a police officer at Nangurukuru. I have scanned through the Criminal Procedure Act, [Cap 20 R.E. 2019] and I have found two situations in which a police officer may arrest a person alleged to have committed a crime or breached peace. Those circumstances are, one arrest by police officer using arrest warrant. Two, arrests by the police officer without arrest warrant. The phrase police officer has been defined under section 2 of the CPA to mean: -

"police officer" includes any member of the police force and, any member of the people's militia when exercising police functions in accordance with the law for the time being in force;"

In view of the above and pursuant to the dictates of section 14(1)(c) of the CPA, the arrest of the appellant by PW1 was justifiable. To that end, I dismiss any complains raised by the appellant vide his submission resisting the arrest by PW1.

Coming to the second issue on the complaint that the learned trial Magistrate erred in convicting and sentencing the appellant by relying on the weaknesses of the appellant's evidence, I do not buy that argument. The learned trial Magistrate made an objective evaluation of the defence evidence as it appears from page 12,13,14 and 15 of the typed impugned judgment. On the basis of that finding, I am of the settled view that the

all the grounds of appeal have no merit and the same are hereby dismissed.

In the upshot, this appeal falls short of merits. I hereby dismiss it in its entirety and endorse the conviction and sentence passed by the learned Senior Resident Magistrate.

It so ordered.



E. I. LALTAIKA

E. I. Laltaika
JUDGE

13.7.2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 6th day of June, 2022 in the presence of the Mr. Wilbroad Ndunguru, the learned Senior State Attorney and the appellant who have appeared in person and unrepresented.



E. I. LALTAIKA

E. I. Laltaika
JUDGE

13.7.2022