

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**(DC) CRIMINAL APPEAL NO. 27 OF 2022**

*(Arising from Criminal Case No. 2 of 2022 of the District Court of Pangani at  
Pangani)*

**ISSA KITWANA.....APPELLANT**

**-VERSUS-**

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

**JUDGMENT**

*Date of last order:- 28/06/2022*

*Date of judgment:-28/06//2022*

**AGATHO,J.:**

At the District Court of Pangani at Pangani the Appellant faced a charge of Unlawful Possession of Suspected Stolen Property Contrary to Section 312 (1) (a) of the Penal Code [Cap 16 R.E 2019]. Particulars of the offence were that on the 7<sup>th</sup> day of January 2022 at about 09:17 hours at Usalama Street Area within Pangani District in Tanga region the accused person was found unlawfully possessing a motorcycle make Sanya with engine number 157FM\* 410719994\* Chasis Number KCJLG 78138117. When the charge was read, the accused denied to have committed the offence, hence a trial was conducted. The

prosecution procured four witnesses to prove the charge whereas the defence had two witnesses including the accused person.

Having heard both sides, the trial Court found the prosecution proved the case beyond reasonable doubt. The accused was found guilty as charged and was thus convicted and sentenced to serve six (6) months term imprisonment. Dissatisfied, the accused decided to appeal to this Court where he filed a Petition of Appeal based on the following grounds;

- 1. That, the Hon. Resident Magistrate grossly erred in law and in fact in convicting and sentencing the Appellant without ascertaining the owner of the arrowed motor cycle which act swagged off the Respondents herein, evidence and hence failure of proof against the Appellant.*
- 2. That the Hon. Resident Magistrate grossly erred in law and in fact when he/she failed to rely on Exhibit DE1 in line to the evidence of DW2 KITWANA MAKATA, the accused's blood father, whose evidence was unshakable to the effect that the very motor cycle was in his custody in his matrimonial house and also the owner was the one who handled it to him aw well as the motor cycle wasn't stolen.*

3. *That, the Hon. Resident Magistrate grossly erred in law and in fact in not faulting the purported value of the motor cycle to be Tshs 2,200,000/= (price of new motor cycle) as against the evidence of PW2, PW4 and DW1 who testified that the motor cycle was at the time of search, dismantled and not worthy road.*
4. *That, the Hon Resident Magistrate grossly erred in law and in fact when he/she misconstrued as to its ingredients and hence convicted and sentenced the Appellant under Section 312(1) (a) of the Penal Code, [Cap 16 R.E 2019] without proof thereof.*
5. *That, the Hon. Resident Magistrate grossly erred in law and in fact when he/she relied on an informer who wasn't even summoned before the court to testify as against the Appellant herein.*
6. *That, the Hon. Resident Magistrate grossly erred in law and in fact in holding that the Appellant was in control of the motor cycle as against the evidence of DW2 in line to Exhibit DE1.*

From the above raised grounds of appeal, the Appellant pleaded the Court to quash and set aside conviction and sentence imposed by the trial Court.

On the 7<sup>th</sup> day of June, 2022 the Appellant opted that the grounds of appeal be determined as they are without making submissions. In that manner, the court ordered the matter to proceed orally. The Respondent was represented by Mr. Paul Kusekwa, State Attorney.

In his submission, Mr. Kusekwa supported the appeal as follows; Starting with the first and second grounds of appeal, the counsel for the Respondent submitted that as the first ground of appeal, the trial Court failed to consider who was the owner of the motor cycle whereas with respect to the fourth ground of appeal, he submitted that the trial Court misdirected itself in considering the ingredients of the offence that the appellant was charged with and without considering whether the said ingredients were proved beyond reasonable doubt. The counsel further submitted that for the charge of unlawfully possession of suspected stolen property under Section 312 (1) (a) of the Penal Code to be proved so as the Court to convict the accused, the following ingredients must be established;

*(1). The stolen property(item) must be found with the accused.*

*(2). The property must be proved to be belonging (owned) by the complainant.*

*(3). That the property has been stolen recently from the complainant.*

The counsel proceeded submitting that in the case, there were four prosecution witnesses however none of them was a complainant. That entailed that the second ingredient was not proved. Similarly, the third ingredient was not proved indicating that there was a property that was recently stolen. To support his averments, he referred the Court to the case of **Augustino Mgimba v. Republic, Criminal Appeal No. 436 of 2019, Court of Appeal of Tanzania at Iringa (unreported) at page 10 to 11**. On the basis of the decision, the counsel prayed the Court to nullify the proceedings of the trial Court and set aside the conviction and sentence imposed on the appellant and further order release of the accused from prison.

Having heard from both sides, I agree with the learned counsel for the Respondent's submission regarding the first and the fourth grounds of appeal that since the trial Court failed to consider the

issue of ownership of the motorcycle alleged to have been stolen and misdirected itself in considering the ingredients of the offence under which the Appellant was charged as per Section 312 (1) (a) of the Penal Code [Cap 16 R.E 2019] and considering that there were four prosecution witnesses, none of them was a complainant to prove to whom the property belonged and further since there was no proof that the property was recently stolen, this suffices to state that the charge was not proved beyond reasonable doubt.

At that juncture, I now allow the appeal and nullify the proceedings of the trial Court setting aside the conviction and sentence imposed upon the appellant and hereby order immediate release of the Appellant from prison unless otherwise held for other lawful reason.

It is so ordered.

**DATED at TANGA this 28<sup>th</sup> day of June, 2022.**

  
U. J. Agatho

**Judge**

28/06/2022

Date: 28/06/2022

Coram: Hon. Dr. U. J. Agatho, J

For Appellant:

Appellant: Present

For Respondent: Kusekwa (S/A)

C/C: Zayumba

**Court:** Judgment delivered this 28<sup>th</sup> day of June, 2022 in the presence of the Appellant and Mr. Paul Kusekwa, State Attorney for the Respondent.



U. J. Agatho

**Judge**

28/06/2022

**Court:** Right of Appeal fully explained.



U. J. Agatho

**Judge**

28/06/2022