

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

**AT MWANZA**

**CRIMINAL APPEAL No. 42 OF 2022**

*(Originating from Criminal Case No. 71/2021 from Misungwi District Court at Misungwi,  
before Hon. E.R Marley SRM, dated 9<sup>th</sup> November 2021)*

**ABEL S/O YUSUPH SAIDI ..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

*26<sup>th</sup> & 29<sup>th</sup> September, 2022*

**OTARU, J.**

The Appellant herein was charged with the offence of theft contrary to Sections 258(1) and 265 of the Penal Code, Cap 16 of the Laws (R.E. 2019) in the District Court of Misungwi at Misungwi. He was convicted of the offence charged and sentenced to three years and six months imprisonment. Aggrieved, the Appellant has now appealed against both the conviction and the sentence.

The facts of the case are not very clear. The only clear thing is that the Appellant was accused of stealing a motorcycle make KINGLION with Registration Number MC784 BZA. In the Memorandum of Appeal, the Appellant filed six grounds of appeal. At the hearing, he appeared in



person, unrepresented and argued all the grounds, which are mainly carried by the sixth ground that 'the Prosecution failed to prove the offence beyond all reasonable doubt'.

The Appellant cited the case of **Mustapha Darajani v Republic**, Criminal Appeal Case No. 242 of 2008 (CAT) (unreported) on elements of the offence of stealing that should have been proved at the trial but were not. He prayed for the court to consider the appeal, quash the conviction, set aside the sentence and set him free.

The Republic, represented by Ms. Nayla Chamba, the learned State Attorney, supported the Appeal on the ground that the prosecution failed to prove the offence beyond reasonable doubt. Like the Appellant, Ms. Chamba was well prepared. She pointed out the holes in the prosecution's case and faulted the conviction.

Ms. Chamba expounded on the Appellant's submission that the ownership of the allegedly stolen motorcycle was never proved by description nor identification. She cited the case of **Joseph John Makune V Republic** (1988) TLR 44 which discussed the essential elements of the offence of stealing and argued that none of them were proved. Also relying on the case of **Robinson Mwanjisi v Republic** (2006), Ms. Chamba submitted that *Exhibit P-02* was not read out in court, as such it should be

*M. Chamba*

erased from the record as reading out exhibits in court is mandatory. All in all, she challenged the evidence, arguing that it was not sufficient to warrant the conviction of the offence charged. She then prayed for the Appeal to be allowed, conviction quashed, sentence set aside and the Appellant set free.

I have considered the grounds of appeal, the parties' submissions as well as the record of the trial court. The issue for my determination is **whether the Prosecution case was proved beyond reasonable doubt against the Appellant.**

I wish to point out that from the proceedings in the trial court, evidence adduced at the trial did not tally with the facts read to the Appellant at the preliminary hearing (PH). The facts read out to the Appellant indicated that the Appellant stole the motorcycle then run away with it to Simiyu Region where he was found and arrested while trying to sell it. The prosecution called five witnesses to prove their case but none of them went in the direction of the read-out facts. The evidence directed that the motorcycle was found some days after the Appellant was arrested.

On the ownership of the motorcycle, the complainant (PW1) testified that the motorcycle was not registered in his name and no evidence was

*M. Oluoch*

adduced to prove that PW1 was the owner thereof. The case of **Joseph John Makune v Republic** is of relevance here.

Another necessary element in proving the offence of stealing as identified in the case of **Joseph John** (supra), is positive identification of the accused. PW1 stated that he was taken to the guest house because he passed out from drunkenness and he could not tell who took him there. The receptionist of the guest house, one Kayungila Masalu (PW2) claimed that the person who took the Appellant there was the one who left with the motorcycle. This is the only witness who claimed to have identified the Appellant. It is not indicated however, how did he identify the Appellant or the motorcycle for that matter. Was it the only motorcycle in the area? Did it have any special marks? Was the Appellant someone he knew from before or someone he just met? There is no indication that identification parade was conducted as provided for under Section 60 of the **Criminal Procedure Code** (Cap 20 of the Laws) with a view to identifying the Appellant. From the proceedings, PW2's testimony is silent as to how he recognized the Appellant. Surprisingly, the judgment reads that PW2 knew the Appellant well. The prosecution is the one charged with a duty of proving criminal cases. This has been discussed in the case of **Joseph John Makune** (supra).

The allegedly stolen motorcycle is claimed to have been found in the possession of one Sayi Limbu (*PW4*), who alleged to have lent the Appellant T. Shs 120,000/= and bonded the stolen motorcycle. The bond agreement was tendered and admitted as *Exhibit P-01* in court. I have looked at *Exhibit P-01* and the names of the borrower appear as *Abel Kepha Mayolo* while the Appellant herein is *Abel Yusuf Saidi*. The names suggest that the two are different people even if they happen to share the same first name. As such, I fail to see the link between the offence charged and the Appellant.

I am tempted to comment at this juncture that the paragraph cited by the trial magistrate on the doctrine of recent possession from the case of **Mustapha Darajani** (*supra*) is not relevant in this case. The paragraph reads; -

*'It must be established **firstly** that the property was found with the suspect or there should be a nexus between the property stolen and the person found in possession of the property; **secondly**, the property is positively the property of the complainant; **thirdly**, that the property was recently stolen from the complainant; and **lastly**, the stolen property in possession of the accused must have a reference to the charge laid against him'.*

As the Appellant was not found in possession of the allegedly stolen motorcycle neither is it known if the property is that of the complainant, this doctrine was wrongly introduced.

I have also considered the issue of Certificate of Seizure (Exhibit P2) not being read out in court. This exhibit like the rest, does not link the allegedly stolen property to the Appellant. It rather shows that it was not in the possession of the Appellant but *PW4*. Secondly, on admissibility of *Exhibit P2*, in the case of **Robinson Mwanjisi v Republic** (2006) TLR 350 cited by the Republic, it was held that; -

*'Whenever it is intended to introduce any document in evidence, it should first be **cleared for admission**, and be **actually admitted** before it can be **read out**'*

The three stages are mandatory when admitting evidence in court, consequences of failure to comply is removal of the evidence from the record. Applying the above legal position to the instant case (Exhibit P-02) was not read out loud in court, therefore it was improperly admitted. In the circumstances, the same is hereby expunged from the record. The Court of Appeal has done this in a number of similar cases, including the case of **Steven Salvatory v Republic**, Criminal Appeal No. 275 of 2018, **Jumanne Mohamed & 2 Others v Republic**, Criminal Appeal No. 534 of

*M. Qamru*



2015 and **Kurubone Bagirigwa & 3 Others v Republic** Criminal Appeal  
No. 132 of 2015 (all unreported).

Having expunged *Exhibit P-02*, I tried to consider if there was any evidence linking the Appellant to the offence charged and found none whatsoever. Therefore, the issue whether the prosecution case was proved beyond reasonable doubt against the Appellant is answered in the negative.

Subsequently, I find this Appeal to have merits and it is hereby allowed, the conviction is quashed and the sentence set aside. The Appellant is to be released from prison with immediate effect, unless he is otherwise lawfully detained.

**DATED at Mwanza** this 29<sup>th</sup> day of September, 2022.



*M. Otaru*  
**M.P. OTARU**  
**JUDGE**  
**29/09/2022**

Judgement is delivered in Court, in the presence of the Appellant and Deogratias Richard Rumanyika the learned State Attorney.

*M. Otaru*  
**M.P. OTARU**  
**JUDGE**  
**29/09/2022**