IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: KWARIKO, J.A., SEHEL, J.A. And MAIGE, J.A.)

CRIMINAL APPEAL NO. 54 OF 2022

NGOSHA GAMBA @ DEWITA ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the Court of Resident Magistrate of Tanga at Tanga)

(Mchauru, RM- Ext. Jur.)

dated the 21st day of July, 2020

in

Extended Jurisdiction Criminal Appeal No. 20 of 2020

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JUDGMENT OF THE COURT

27th April & 6th May, 2022

KWARIKO, J.A.:

Formerly, Ngosha Gamba @ Dewita, the appellant was arraigned before the District Court of Handeni with two counts, namely; **one,** armed robbery contrary to section 287A; and **two,** causing grievous harm contrary to section 225 both of the Penal Code [CAP. 16 R.E. 2002, now R.E. 2019]. It was alleged by the prosecution that on 2nd day of February, 2018 at Mbogolwa village within Handeni District in Tanga Region, the appellant stole money and various items including one motorcycle make SANLG with chassis No. LBRSPJB51J9001881,

engine No. 18902380 valued at TZS. 2,100,000.00 the property of Ramadhan s/o Daniel and immediately before such stealing the appellant hit him with a blunt object on the right hand, ribs and mouth and sustained grievous harm and threatened to kill him in order to obtain and retain the said properties.

The appellant denied the charge but at the end of the trial, he was found guilty, convicted and sentenced to thirty years and one year for the first and second counts, respectively, which sentences were ordered to run concurrently.

Aggrieved by that decision, the appellant lodged his appeal at the High Court of Tanzania at Tanga District Registry. However, by an order dated 6th April, 2020, the appeal was transferred to the Court of Resident Magistrate of Tanga at Tanga in terms of section 45 of the Magistrates' Courts Act [CAP 11 R.E. 2019] to be heard by Mchauru, RM – Extended Jurisdiction. The appellant's appeal was not successful. Undaunted, the appellant has approached this Court on appeal.

Before we go any further, we find it appropriate to give brief facts of the case which led to this appeal as follows: Ramadhani Daniel Singano (PW1), was a rider of a motorcycle with registration no. MC

393 BWM (the motorcycle) which was used in the business of carrying passengers ('bodaboda'). In his normal routine on 2nd February, 2018, PW1 was hired by two young men to take them to Mbogolwa area. They agreed on the fare and the journey commenced. When they reached the said destination, the passengers asked to be taken a bit further. However, on the way, they attacked PW1 by beating him with club and stick in his hand, ribs and the back. As a result, they fell down from the motorcycle following which they threatened PW1 with a knife and stole money, mobile phone, motorcycle key, key for his room and ordered him to disappear in the forest. PW1 ran away and on the way, he met people who assisted him to go to the police station and hospital. Whilst at the hospital, PW1 was informed that the motorcycle (exhibit P1) had been found in the possession of the appellant.

Meanwhile, Ramadhan Mgalawe (PW2), a local militiaman, whilst keeping security at the gate of Mkaramo forest reserve, a group of six people came and informed him that a motorcycle had been stolen by people who had a Maasai attire and those people left. Shortly thereafter, two people on a motorcycle appeared wearing Maasai clothes and upon being suspicious, PW2 closed the gate and one of those people ran away and he managed to arrest the other who

happened to be the appellant herein. The motorcycle was new and had no registration number. Thereafter, PW2 informed the police at Kwamsisi Police Station where the Officer Commanding Station (OCS) came and took away the appellant together with the motorcycle.

Further, on 6th February, 2018, at the police station, No. F 6414 DC Hamisi (PW4) was assigned to investigate the case. He took the appellant from the lock-up for interrogation and after compliance with legal formalities, the appellant confessed to the allegations and narrated to him how the robbery took place. Thereafter, PW4 recorded the appellant's cautioned statement which, despite the objection from the appellant, it was admitted in evidence as exhibit P3.

Omary Kassim (PW3) introduced himself as the owner of the motorcycle which he had given PW1 to do the bodaboda business and that it was yet to be registered on the material date as it was new. The motorcycle registration card with names of WU ZHOU Investment Company Limited was admitted in evidence as exhibit P2.

At the hospital, PW1 was attended by a doctor who did not testify but filled the PF3 which was tendered in evidence by Dr. Selemani Mngoya (PW5) as exhibit P3.

The appellant was the sole witness in his defence where in his testimony, he denied the charge. He averred that he was a resident of Masatu area and had travelled to Morogoro on 1st February, 2018 and when he was returning on the next day, he went to buy food at a cafeteria in the Kwamsisi village. Whilst there, he was arrested by the police and sent to Kwamsisi Police Station and the next day, he was transferred to Michungwani Police Station. At the police station, he was beaten when he denied to know a Maasai person and the police took away his mobile phone.

In its judgment, the trial court found that since the appellant was identified at the scene of crime and was found in possession of the stolen motorcycle, the prosecution case was proved beyond reasonable doubt. He was convicted and sentenced as shown earlier.

On dismissing the appellant's appeal, the first appellate court found that the prosecution case was proved as required under the law; not because the appellant was identified at the scene of crime, but for the reason that he was found in possession of the stolen motorcycle. However, the court expunged the appellant's cautioned statement, for it was taken outside four hours as required under section 50 (1) of the Criminal Procedure Act [CAP. 20 R.E. 2019] (the CPA).

Before this Court, the appellant filed a memorandum of appeal containing three grounds which we have paraphrased as follows: **one,** there was no proof of identification of the appellant by PW1; **two,** the prosecution evidence was insufficient for lack of a certificate of seizure as required under section 38 (3) of the CPA; and **three,** the prosecution case was not proved beyond reasonable doubt. In terms of rule 74 of the Tanzania Court of Appeal Rules, 2009, the appellant also had filed a written statement of his arguments in support of the appeal.

On the day the appeal was called on for hearing, the appellant appeared in person, unrepresented, whilst Ms. Elizabeth Muhangwa and Mr. Winlucky Mangowi, learned State Attorneys, represented the respondent Republic.

When we invited the appellant to argue his appeal, he adopted the grounds of appeal and the written statement of his arguments without any further explanation. On her part, Ms. Muhangwa made her stance supporting the appeal for the same grounds raised by the appellant and her submission did not substantially differ from the appellant's written arguments.

As regards the first ground of appeal, the parties argued that PW1 did not prove if the appellant was one of the people who robbed him and PW2 did not give any description of the thieves apart from the information given to him by the alleged group of six people who told him that Maasai men stole the motorcycle from PW1.

In respect of the second ground, both parties argued that the OCS of Kwamsisi Police Station who was alleged to have taken the appellant from PW2 ought to have prepared a certificate of seizure to prove that the appellant was found in possession of the motorcycle as required under section 38 (3) of the CPA. And more so failure by the OCS to testify in court adversely impacted on the prosecution case.

Additionally, Ms. Muhangwa contended that the motorcycle was not sufficiently identified by the owner. She clarified that, while PW1 said he was the rider of motorcycle with registration number MC 393 BWM, PW3 who alleged to be the owner of it said that at the material time, the motorcycle had not been registered since it had just been bought. However, at the time when PW3 testified in court, he said the motorcycle had already been registered and had number MC 393 BWM. The learned State Attorney argued that there is no evidence to prove when the motorcycle was registered, otherwise there was contradiction

regarding the identification of the stolen property. With these submissions, both parties urged us to allow the appeal.

We have considered the grounds of appeal and the submissions by the parties. We find the issue which calls for our determination is whether the prosecution case was proved beyond reasonable doubt against the appellant.

Regarding the identification of the appellant at the scene of crime, PW1 only said during cross-examination that he knew the appellant by face but did not give any further explanation. Even though the trial court convicted the appellant because he was identified by PW1 at the scene of crime and also found in possession of the stolen property; the first appellate court found that the issue of identification of the appellant at the scene of crime could not arise because PW1 did not prove that he identified the thugs at the scene of crime as they were strangers to him and thus identification parade ought to be conducted in that respect. That court dismissed the appellant's appeal for the reason that the appellant was found in possession of stolen motorcycle. The ground is thus misplaced as the crucial issue was whether the appellant was found in possession of the stolen motorcycle.

The complaint in the second ground is about certificate of seizure which is a requirement of law where a suspected article is seized from a suspected offender. The relevant provision of the law is section 38 (3) of the CPA which provides thus:

> *"38.- (3) Where anything is seized in pursuance of the powers conferred by subsection (1) the officer seizing the thing shall issue a receipt acknowledging the seizure of that thing, being the signature of the owner or occupier of the premises or his near relative or other person for the time being in possession or control of the premises, and the signature of witnesses to the search, if any."*

According to this provision of the law, whenever a thing is seized, the officer seizing the thing is supposed to issue a receipt acknowledging the seizure by the signature of the person from which the thing is seized and of the witnesses, if any. In the instant case, because PW2 said he found the appellant in possession of the stolen motorcycle and called the OCS who took him away, the OCS ought to have issued a receipt signed by himself as the executing officer, PW2, the suspect and witnesses, if any, to signify that he had seized the motorcycle from the appellant. This state of affairs is heightened by the fact that PW2 who

allegedly apprehended the appellant with the motorcycle, did not go to the police station along with the appellant and the OCS. In the absence of the certificate of seizure, it could not be said that the appellant was found in possession of the motorcycle and it is the same which was taken to the police station then identified by the alleged owner and tendered as exhibit at the trial.

This issue is not new because it has been discussed by the Court in its previous decisions including the case of **Daniel Matiku v. R,** Criminal Appeal No. 450 of 2016 (unreported). In that case, the seizing officer did not issue receipt after seizure of a television set and a head of sewing machine, the Court observed thus:

> *"If this mandatory requirement had been complied with, of necessity, what was retrieved from the appellant would have been listed and the appellant and independent witnesses would have appended their signatures and each retained a copy of the certificate of seizure so as to put in motion a full proof chain of custody. However, this was not the case and in the absence of the certificate of search and seizure the prosecution fell short of establishing beyond any doubt as to what was actually retrieved and*

seized from the appellant in order to link him with the robbery in question."

See also- **Omary Idd Mbezi and Six Others v. R,** Criminal Appeal No. 214 of 2017 and **Ndima Kashinje @ Joseph v. R,** Criminal Appeal No. 446 of 2017 (both unreported).

Worse still in this case, the said OCS did not testify to explain what he had taken from PW2 that was allegedly found in possession of the appellant. There was no explanation given as to why he did not testify. This omission adversely affected the prosecution case, consistent with the finding of the Court in the case of **Aziz Abdallah v. R** [1991] T.L.R. 71, which it was held *inter alia* that:

"The general and well-known rules is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, are able to testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution."

Further, we are in agreement with Ms. Muhangwa that the stolen motorcycle was not properly identified by the alleged owner, PW3. This

is because while PW1 said he was riding a motorcycle with registration number MC 393 BWM, the alleged owner (PW3), said at the material time the motorcycle had not been registered as it was new but when he testified, it was already registered with number MC 393 BWM. The question which follows is that, when did the motorcycle got registered while it was in the hands of the police waiting to be tendered in evidence. There is no record to show that it was handed over to PW3 following arraignment of the appellant in court.

PW3 also averred that at the time of the incident, the motorcycle was new, not registered and he had not transferred ownership to him from its original owner WU ZHOU Investment Company Limited. Now, if the motorcycle was registered after the incident, why didn't he register it in his own name to authenticate his ownership. Worse still there is no sale agreement between PW3 and the alleged company to prove that the appellant bought the motorcycle from it.

Additionally, closely related to the above issue, we have found that; whereas the charge described the stolen motorcycle as make SANLG with chassis number LBRSPJB51J9001881 and engine number 18902380, no one, among the prosecution witnesses described those marks before the property was tendered in evidence. This means the

stolen property was not properly identified. See **Mustapha Darajani v. R,** Criminal Appeal No. 242 of 2015 (unreported).

For what we have shown above, it is clear that the doctrine of recent possession was not proved in order to find the appellant guilty upon allegations that he was found in possession of the stolen property. In order for this doctrine to properly apply, the following conditions must be satisfied: **one,** the stolen property must be found with the suspect; **two,** the stolen property must be positively identified to be that of the complainant; **three,** the property must be recently stolen; and **four,** the property stolen must constitute the subject of the charge [**Mwita Wambura v. R,** Criminal Appeal No. 56 of 1992 (unreported)].

As we have shown above, the prosecution did not prove that the motorcycle was found in possession of the appellant, it was not positively identified to be the property of the complainant and it was not proved to be the subject matter of the charge.

Finally, for what we have discussed above, it is clear that the prosecution case was not proved beyond reasonable doubt against the appellant in both counts. We thus find the appeal with merit and accordingly allow it, quash the conviction and set aside the sentence

meted out against the appellant. It is therefore ordered that the appellant be released from custody unless he is continually held for other lawful cause.

DATED at **TANGA** this 6th day of May, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

This Ruling delivered this 6th day of May, 2022 in the presence of Mr. Ngosha Gamba @ Dewita, the appellant in person and Ms. Tussa Mwaihesya, State Attorney for the respondent, is hereby certified as a true copy of the original.

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL