

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

**DISTRICT REGISTRY OF IRINGA**

**AT IRINGA**

**(PC) CRIMINAL APPEAL NO. 02 OF 2023**

*(Arising from Criminal Appeal No. 06 of 2022 of the Njombe District Court and Original Criminal Case No. 89 of 2022 of the Primary Court for Njombe District at Njombe Urban)*

**DEO MSIGWA----- APPELLANT**

**VERSUS**

**TRESPHORY SAMBALA-----RESPONDENT**

**JUDGMENT**

**Date of last Order: 27.03.2023**

**Date of Judgment: 06.04.2023**

**A.E. Mwipopo, J.**

On 09.08.2022 around 18:00 hours Tresphory Sambala, the respondent herein, went with his motorcycle to the house of Haule at Melinze area. He parked the motorcycle and entered inside the house. When he came out of the house, the motorcycle was not there. The appellant reported the incident to the street leaders who told him to report to the police. He went to report to the police. On 28.02.2022 around 13:00 hours the respondent found the plate number of the motorcycle at Lugenge area in the office of Deo Msigwa,

the appellant herein. Respondent asked where the appellant got the said number and appellant answered that he picked it on the road. Respondent reported to the police and village office. The respondent instituted Criminal Case No. 89 of 2022 at Primary Court for Njombe District at Njombe Urban where the appellant was charged for the offence of Stealing contrary to section 258 (1) and 264 of the Penal Code, Cap. 20 R.E. 2019. After the trial was conducted, the trial Court convicted the appellant for offence of stealing and sentenced him to 3 months community service. The Court also ordered the appellant to compensate the respondent his motorcycle.

The appellant was aggrieved and appealed to Njombe District Court, he filed Criminal Appeal No. 06 of 2022. The District Court heard the appeal and dismissed it for want of merits. The appellant was not satisfied and he filed the present appeal. The appellant preferred four grounds of appeal as follows hereunder;

- 1. That, the District Court erred in law and facts in upholding the decision of the primary court while the offence against the appellant was not established and proved according to the law.*
- 2. That, the appellate District court erred in law and in facts in its failure to re-evaluate the evidence on record and come out with its findings that the trial court erred in law in awarding compensation*

*of TZS 1,800,000/= to the respondent while he completely failed to prove his ownership of the alleged motorcycle.*

*3. That, the appellate District court erred in law and in facts in its failure to find that legally being found with plate no. MC 288 CDL had nothing to do with the theft of a motorcycle.*

*4. That, the appellate District court erred in law and in facts in its failure to find that the offence against the appellant was not proved beyond a reasonable doubt as required by the law.*

The appellant prayed for this Court to quash the decision and orders of trial court forthwith.

The appeal was scheduled for hearing. On the hearing date, the appellant was represented by Mr. Gervas Semgabo, learned Advocate, whereas, the respondent appeared in person.

In his submission, Advocate Semgabo consolidate and submitted jointly on the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal. These grounds are concerned with respondent's failure to prove the offence before Primary Court without a doubt. It was his submission that in criminal cases the complainant has to prove the offence without a doubt. The position was stated in the case of **Shabani Adam Mwajulu and Another vs. Republic**, Criminal Appeal No. 31 of 2019, High Court, Mbeya Registry, (unreported), at page 12. It is

obvious the District Court erred to uphold the decision of the Primary Court by basing its conviction on the weakness of defense case and not on the strength of prosecution's case. The appellant did pick a motorcycle plate number near his office where he has a motorcycle garage. The appellant thought it might be one of his client's plate number and he took it to his office believing that the owner will come and ask about it. The respondent found the plate number in appellant's office.

The trial Primary Court based its decision on the doctrine of recent possession. It misdirected itself in applying the doctrine as it failed to consider important factors for be considered before relying on the doctrine. The said factors were stated by the Court of Appeal in the case of **Seleman Musa and Another vs. Republic**, Criminal Applications No. 7 of 2019, Court pf Appeal of Tanzania at Mbeya, (unreported), at page 10 and 11. The Court of Appeal said that the doctrine is applicable if it proved that; one, the stolen property is found with the accused; two, the recovered property was positively identified to be that of complaint; three, the property was recently stolen from the complainant; and four, the property constituted the subject of the charge. The 1<sup>st</sup> and 2<sup>nd</sup> factors to be considered were not proved. The evidence available does not prove at all that the said plate number was

recovered property was positively identified to be that of complaint; three, the property was recently stolen from the complainant; and four, the property constituted the subject of the charge. The 1<sup>st</sup> and 2<sup>nd</sup> factors to be considered were not proved. The evidence available does not prove at all that the said plate number was tendered as evidence before the primary court. Finding a person with a part of the stolen property is not sufficient to prove that the said stolen property was stolen by the accused.

About the second factor to be considered in the doctrine of recent possession, it was his submission that there is no evidence at all to prove that the plate number belongs to the motorcycle he was owning. The respondent did not tender motorcycle license issued by Tanzania Revenue Authority (T.R.A.). The respondent alleged that he reported to the police about the incident and he was issued with R.B. But, there is no witness from the police who came to testify before the trial court. There is no proof that the appellant was found with stolen property. This issue was raised before District Court in appeal, but the District Court disregarded it on ground that there is no witness who objected that the motorcycle was stolen. The district court based its decision on the weakness of appellant's defense and not the strength of complainant evidence. It was the duty of

the complainant to prove the case without leaving any doubt. The respondent failed to prove the offence without doubt.

With regard to the 2<sup>nd</sup> ground of appeal, it was submitted that the trial Primary Court and appellate District Court erred to order the appellant to pay Tshs. 1,800,000/= to the respondent as compensation for the stolen motorcycle while there is no proof that the said motorcycle was the property of the appellant. As it was submitted earlier herein, there is no evidence to prove that there was a stolen motorcycle which was owned by the respondent. It was wrong for the trial Primary Court and the appellate District court to award the compensation to the respondent. The trial primary court stated in page 13 of the judgment that the respondent evidence is full of doubt. It is unfortunately that the trial court proceeded to convict the appellant for the offence and ordered compensation to the respondent. The counsel prayed for the court to allow the appeal and set aside the decision of the trial primary court accordingly.

In his reply, the respondent submitted that his motorcycle was stolen and after 5 months he found the plate number in appellant's place. He reported to the local leaders who asked the appellant about the plate number and his answer was that he did pick it up from the road. It was

his submission that he tendered the said plate number and the license of the stolen motorcycle to the trial court. The R.B. was not tendered to the trial court as evidence, but there is evidence of the local leader of the area that he went with him to the police to report about the incident. He was of considered opinion that even in absence of the R.B., still there is evidence that he reported the incident to the police.

On the issue that the doctrine of recent possession could not apply in this case since the appellant was found only with a part of the stolen property and not the whole of the stolen property, the respondent submitted that the said plate number was part of motorcycle which was stolen during the incident. When the motorcycle was stolen, it was stolen together with its plate number. It is the plate number which identify the motorcycle. As the appellant was found with the plate number of the stolen motorcycle, he is the one who steal it. The appellant said in his defense that he picked the plate number on the road. But if that is the case, why he decided to keep it inside his shop. If the intention was for the owner of the number to see it, he would have put it outside so that everyone could see it. By keeping the plate number inside the house he was hiding it. Also, he did not inform the local Government leaders of his area that he has

found the plate number of the motorcycle. As the appellant is the mechanic of motorcycle, this prove that he was the one who did steal the said motorcycle.

Respondent further submitted that the appellant evidence was contradictory and it was clear that he was not telling the truth. Thus, his defense did not raise any doubt to the case. The photograph of the plate number taken on 28/02/2020 was tendered as exhibit and the appellant testified that he did pick the plate number on 01/03/2020 which prove that he was not telling the truth. The motorcycle license Card is still in court's file. The stolen motorcycle was bought for Tshs. 1,800,000/= in 2020, this is the reason the appellant was ordered to compensate him with the said amount. The respondent prayed for the court to order the appellant to compensate him with another motorcycle and the appeal be dismissed for want of merits.

In his rejoinder, the counsel for the appellant said that the Plate number is not the proof of ownership, it is license card which prove the ownership. The appellant has testified from the beginning that he picked the plate number close to his area of business. It was wrong to convict the appellant for his good intention to pick the plate number so that possibly



the owner could see it. Appellant did put the plate number in his shop. The respondent did not announce to the public that his motorcycle was stolen. Thus, it was not possible for the appellant to know that the said plate number he picked was of the stolen motorcycle. That is the reason the respondent who went to buy a spare inside the shop/office did see the plate number as it was not hidden. The trial primary court and District Court misdirected themselves based on the weakness of his defense and not on the strength of the complainant case.

Having considered rival submissions from both parties, the main issue for determination in this appeal is whether the case against the appellant was proved without leaving any doubt.

The record of the trial Primary Court shows that the appellant was charged by the respondent for the offence of stealing contrary to section 258 (1) of the Penal Code, Cap. 16 R.E. 2019. The particulars of the offence in the charge sheet reveals that on 09.08.2020 around 08:00 hours at Melinze Street within Mjimwema Ward in the District and Region of Njombe, appellant and another person unlawfully did steal Motorcycle, Kinglion Make with registration number MC. 288 CDL worth 1,800,000/= shillings the property of the respondent, without claim of right.

The evidence available in record reveals the respondent who testified at trial Primary Court as SM1 said that his motorcycle was stolen on 09.08.2020 around 18:00 hours at Merinze Village when he went to pay the debt to Mr. Haule. He reported to Gabriel Frank – SM2 who advised him to report to police. Respondent said he went to report to police. On 28.02.2021 around 13:00 hours he found the plate number of motorcycle in the shop owned by the appellant. He asked him where he got the number and the appellant answered that he did picked up on the road. The respondent reported to Adam Kiswaga – SM1 who is Village Executive Officer. SM1 testified that after receiving the information he went to appellant's shop and found the plate number was in front of the shop. He asked the appellant where he got the number and the answer was that he picked up in the road. SM1 took the appellant and respondent to police station. From this evidence, respondent is of the opinion that as the plate number was found inside the shop and appellant did not inform the street leaders about picking it, it is the appellant who did steal his motorcycle. This was the end of respondent case and he closed his case.

The appellant who testified as SU said in his defense that he is a motorcycle mechanic. On 01/03/2021, he picked the motorcycle plate

number on the road and he decided put it in his shop so the owner could find it. He called in his defense Patrinus Mlowe – SU1 and Paulo Msigwa – SM2 who supported that the appellant picked the plate number on the road on 01.03.2021. The appellant closed his defense case after testimony of SU2. Then, respondent prayed to the trial Court to submit the photograph of the plate number he shot on 28.02.2021. He submitted it. Those photos submitted did shows that it was taken on 28.02.2020. This is the evidence from the complainant and the accused person before the trial Primary Court.

The offence of stealing under section 258 (1) of the Penal Code, Cap. 16 R.E. 2019, is committed when a person who has no claims of right takes a property of another person for his own use or to the use of another person who is not the owner. It simply means the taking of another person's personal property with the intent of depriving that person of the use of their property without that person's consent. The elements of the offence generally include asportation or the taking of another person's property, the absence of consent or claim of right, and the taking was done with intention to deprive the person of that property.

It is obvious that the respondent evidence is circumstantial. The trial Court rightly hold that for the circumstantial evidence needed to be intact to lead to only one irresistible conclusion pointing to the accused's guilt. In **Hamida Mussa vs. Republic [1993] T.L.R. 123**, the Court held, I quote:

*"Circumstantial evidence justifies conviction where inculpatory fact or facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"*

The appellant was convicted for the offence of stealing by the trial Primary Court relying on the evidence that he was found in possession of the allegedly plate number of the stolen motorcycle. This is the doctrine of recent possession. The doctrine applies in the absence of any explanation that might be true when an accused person is found in possession of the complainant's property recently after the property was stolen from the complainant. The appellate District Court was of the same findings as the trial Primary Court that the respondent proved the offence of stealing against the appellant relying on the doctrine of recent possession.

As it was rightly submitted by the counsel for the appellant, there are factors to be considered in invoking before the Court rely on the doctrine as it was held in the case of **Seleman Musa and Another vs. Republic**, (supra), and in **Samwel Marwa @ Ogonga vs. Republic**, Criminal Appeal No. 74 of 2013, Court of Appeal of Tanzania at Mwanza, (Unreported). In the case of **Augustino Mgimba vs. Republic**, Criminal Appeal No.436 of 2019, Court of Appeal of Tanzania at Iringa, (unreported), at page 10 the court referred its previous decision in the case of **John Mkumbwa Samson Mwakagenda Joseph vs. Republic**, Criminal Appeal No.107 of 2009, (unreported), where it was held that:-

*"Where a person is found in possession of a property recently stolen or unlawfully obtained, he is presumed to have committed the offence connected with the person or place wherefrom the property was obtained. For the doctrine to apply as a basis for conviction, it must be proved that, First, that the property was found with the suspect, Second, that the property is positively proved to be the property of the complainant, Third, the property was recently stolen from the complainant, and lastly, that the stolen thing constitutes the subject of the charge against the accused. The fact that the accused does not claim to be the owner of the property does relieve the prosecution of their obligation to prove the above elements"*

In the case of **Mohamed Hassan Said vs. Republic**, Criminal Appeal No. 410 of 2015, Court of Appeal of Tanzania at Dodoma, (unreported), it was held that:

*"The possession by the appellant of the property proved to have been very recently stolen may support the charge. But in order for the principle to apply, the one who claimed ownership of that property, must show through evidence that the property belonged to him"*

Now, the question is does the above stated requirements of the doctrine of recent possession were met in the instant case. It is not disputed that the appellant was found in possession of the motorcycle plate number MC 288 CDL alleged to have been recently stolen from the respondent. The appellant admitted to be in possession of the plate number, but he said that he did pick it from the road and took it to his shop. The said plate number constitutes a subject matter of the charge against the appellant. The only dispute is if the complainant (respondent herein) positively proved the said property to be his property.

It is the contention by the appellant's advocate that the respondent did not tender the plate number or any document to prove that he was owning a motorcycle with the said plate number alleged to be found with

the appellant. The respondent on his side said that, he tendered a stolen motorcycle license and its plate number before the trial Primary Court.

Unfortunately, the proceedings of the trial Court does not show if the respondent tendered the plate number and motorcycle license or registration card to prove that he is the owner of the motorcycle. Moreover, there is no witness who testified to see or to have knowledge that the respondent was owning a motorcycle with number MC 288 CDL. Further, the said complainant's evidence does not prove that the property was recently stolen from complainant.

The respondent testified that the motorcycle was stolen in 09.08.2020, and the plate number of the motorcycle was found in appellant possession on 28.02.2020. It means the plate number of the alleged motorcycle was found in possession of the appellant after 6 months has passed from the date it was alleged the motorcycle was stolen.

The time between the stealing of the property and appellant's possession makes it unlikely for the appellant not to have acquired the stolen property honestly. When the stolen property trade or transfer hands easily, the time interval between finding the accused in possession and the

stealing must be relatively brief. The assumption is that the property has not yet passed out of the hands of the original thief.

In this case the plate number of the alleged motorcycle was found in possession of the appellant after more than 6 months has passed from the date it was alleged the motorcycle was stolen. Normally, the plate number is not something which may change hands fast. But, six months period is a long time to be assumed that the person who is in possession of alleged stolen property is the actual thief of the motorcycle. After all, the appellant has testified in his defense that he did pick the plate number from the road which is probable. I'm aware that there was confusions on the appellant's evidence on the date he claimed to pick up the plate number. But, the same could not be capitalized to be the proof that appellant did not pick the plate number as he claim. It was complainant's duty to prove without a doubt that the appellant was found with plate number of his recently stolen motorcycle. Under such circumstances, it is obvious that the trial Primary Court and appellate District Court wrongly invoked the doctrine of recent possession in this case and found the appellant guilty for the offence.

I'm aware of the settled principle of law that where there are concurrent findings of facts by two Courts below, the appellate court



cannot interfere with such findings, unless, there are sufficient grounds for doing so. The said principle was stated in **Salum Mhando vs. Republic [1993] T.L.R 170**, and in **Director of Public Prosecutions vs. Jaffari Mfaume Kawawa [1981] T.L.R 149**. In the case of **Amratilal D.M t/a Zanzibar Silk Stores vs. A.H. Jariwala t/a Zanzibar Hotel [1980] T.L.R. 31**, it was stated that:

*"Where there are concurrent findings of fact by two courts below, the court should as a wise rule of practice follow the long established rule repeatedly laid down by the court of appeal of east Africa. The rule is that an appellate court in such circumstances should not disturb concurrent findings of facts unless it is clearly shown that there has been a misapprehension of the evidence, miscarriage of justice or violation of some principles of law or practice."*

As I have already deliberated herein above, the case against the appellant was not proved beyond a reasonable doubt. The trial Primary Court wrongly invoked the doctrine of recent possession for failure to prove the ownership of the property alleged to be stolen by the complainant and for failure to prove that the property was recently stolen. Hence, the conviction of the appellant was based on a wrong application of the doctrine. The appellate District Court also wrongly upheld the decision of

the trial Primary Court on the basis of the doctrine of recent possession which was wrongly applied. Under such circumstances, the concurrent decision of the two courts below ought to be disturbed.

Therefore, I find that the appeal has merits and I allow it. The conviction of the appellant by the trial Primary Court is quashed, the sentence of three months community service and order of compensation of the motorcycle imposed by the trial Primary Court is set aside accordingly. Right of appeal explained to both parties. It is so ordered accordingly.



A handwritten signature in blue ink, appearing to be "A.E. Mwipopo", is written over a horizontal line.

**A.E. Mwipopo**

**Judge**

**06/04/2023**