

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(MTWARA DISTRICT REGISTRY)**  
**AT MTWARA**  
**CRIMINAL APPEAL NO. 72 OF 2022**

(Originating from the District Court of Lindi, at Lindi, in Criminal Case No. 20 of 2022)

**THABIT MOHAMEDI KAMBANGA ..... APPELLANT**

**VERSUS**

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

**JUDGMENT**

*Date of last Order: 20.03.2023*

*Date of Judgment: 10.05.2023*

**Ebrahim, J.**

The appellant, Thabiti Mohamedi Kamanga filed the instant appeal challenging the conviction and sentence meted against him at the District Court of Lindi at Lindi in Criminal Case No. 20 of 2022 on 08.09.2022.

The appellant was charged and convicted of the offence of theft contrary to **section 258 (1) and 265 of the Penal Code, Cap. 16 R.E 2019** (Now R.E 2022). He was sentenced to serve a term of five (5) years imprisonment. It was alleged by the prosecution that on 11<sup>st</sup> May, 2022 at

Likotwa area within Municipal and Region of Lindi, the appellant did steal one Motorcycle with registration No. MC. 895 CHV make TVS black in colour worth Tshs. 1,800,000/= (One Million and Eight Hundred Thousand shillings) the property of one WILLIAM S/O JORDAN KAMUNDI.

The appellant pleaded not guilty. After the full trial, the appellant was convicted as charged and sentenced as afore said. Aggrieved, he appealed to this court. When the appeal was called for hearing, the appellant appeared in person, un-represented whereas Ms. Mangu, learned Senior State Attorney appeared for the Respondent/Republic.

In proving their case the prosecution lined up a total of 4 witnesses and 3 exhibits. The prosecution evidence was to the effect that on 12<sup>th</sup> May, 2022 PW1 accompanied by the Appellant and other police officers went to Mpilipili Kusini, Lindi Municipal where the stolen motorcycle was hidden following the information given to them by the Appellant himself. At Mpilipili Kusini they were enjoined by the Chairman of the street (PW4) and the Appellant took them to the house of his sister where the motorcycle was hidden. PW1 and PW4 found the motorcycle with Reg. No. MC 895 CHV black in colour. PW1 seized the motorcycle and the certificate of

seizure was issued (**exhibit P1**) signed by the Appellant and other witnesses present.

At the trial court PW3 testified that on 11<sup>st</sup> May, 2022 at Likotwa, Lindi he was watching football. At around 7:20 p.m. he went out of the ballpark to to pick the phone and saw the Appellant sitting on his (PW3) motorcycle at the foot rest area of passengers. After he had finished talking to the phone he went back to the ballpark and the Appellant moved from where he was seated on his motorcycle and went away. PW3 said managed to identify the Appellant because outside the ballpark there was a solar electric light flashing up to 20 or 30 feet in the area and they were about 2-3 feet away. After the first period of the football match was over, he went out of the ballpark not to find the motorcycle and the Appellant had disappeared. He informed the owner of the motorcycle (PW2).

As evidence on record would reveal, the motorcycle was seized and taken to the police station. The search order and the motorcycle were admitted in evidence as **Exhibits P1 and P2** respectively. After the recovery of the motorcycle, it was given to PW5 for custody as he is the custodian of exhibits at the police station, Lindi District.

In his defence, the Appellant (DW1) told the trial court that, he was arrested and interrogated at the police station by the police named Hezron who told him that the motorcycle was found at Mpilipili and they asked him to go there. On reaching there, the Chairman of the street was called, and one James was there and other people were called. Police officer Hezron searched for the motorcycle and it was James who told them that the motorcycle was inside the house. He said after the recovery of the motorcycle, the police identified it as the one stolen and they went back at the police station where he was interrogated. He denied to have taken the motorcycle to that house because he was not staying there but he was forced to admit and he did. However, he denied the charges.

After hearing the evidence from both sides, the trial Court was satisfied by prosecution evidence. Thus convicted the Appellant as per the charge and sentenced him as afore side. Aggrieved, he appealed to this court. The appellant raised thirteen grounds of appeal which however can be conveniently grouped into six;

1. That, the learned trial Resident Magistrate erred in law and in fact in convicting and sentencing the Appellant with theft while the charge was not proved beyond reasonable doubt.

2. That, the learned trial Resident Magistrate erred in law and in fact in convicting the Appellant without considering that Appellant was not arrested with any exhibit.
3. That, the learned trial Resident Magistrate erred in law and in fact in holding that there was no miscarriage of justice caused to the Appellant and that were not prejudiced by the said deficiency of non-disclosure of sufficient particulars of the offence charged.
4. That, the learned trial Resident Magistrate erred in law and in fact where the Appellant conviction was based on presumption since the prosecution did not tender any caution statement made at the police station.
5. That, the learned trial Resident Magistrate erred in law and in fact in convicting and sentencing the appellant without considering the search conducted at the appellant's sister room was illegal because they executed without any order.
6. That, the learned trial Resident Magistrate erred in law and in fact when erroneously concluded that appellant was properly identified and respectively recognized.

When this case was called for hearing, the appellant appeared in person whereas Ms. Nunu Mangu, learned Senior State Attorney represented the Respondent/Republic. The appeal was argued orally.

Submitting in support of the appeal the Appellant prayed to adopt his grounds of appeal and contended that there was no prosecution witness who said that they found him with motorcycle. That the motorcycle was found in the other house which had tenants and no witness saw him with the said motorcycle. The Appellant submitted also that the lady who was found with the motorcycle is like a sister to him and the case was planted because they had grudges with that person.

In concluding, the Appellant prayed for this court to allow the appeal.

In response to the grounds of appeal, Ms. Mangu challenged the appeal and prayed to submit on the grounds of appeal generally and argued that the prosecution side managed to prove the case beyond reasonable doubt. she referred to the testimony of PW4 who said the appellant confessed to have stolen the motorcycle and he is the one who led the police, PW1 and PW4 to where the motorcycle was. She said, PW4 witnessed the search and he saw the motorcycle in the respective room, and the appellant signed the certificate of seizure (Exhibit P1).

She also referred to the testimony of PW2 and PW3 in identifying the stolen property of PW2 which was under the custody of PW3. She contended that not every search that is conducted under **Section 38 (1), Section 42(1) (b) (i) and (ii) of the Criminal Procedure Act, Cap. 20 R.E 2022** a search warrant must be obtained. In other circumstances, search can be conducted without a search warrant.

As for the chain of custody she submitted that PW1 explained how he seized the motorcycle which was in custody of PW5, the evidence was supported by exhibit P4.

Counsel for the Respondent argued concerning the non-issuance of receipt that the same is not fatal due to the fact that there was a signed certificate of seizure by the Appellant. She referred to the case of **Papa Olesikaladai @Lendemu and another Vs. The Republic, Criminal Appeal No. 47 of 2020, pg 13**, where the appellant was convicted following the strong prosecution case which was proved beyond reasonable doubts. She prayed for this court to dismiss the appeal.

In his rejoinder, the appellant argued that he does not live in the area of PW4 and that it is not true he led police officers to show them where the motorcycle was hidden. He reiterated his prayer.

The issue is whether prosecution managed to prove that the appellant stole the disputed motorcycle of the complainant (PW3).

Starting with ground of appeal no. 1 and 5, PW1 and PW4 said that were led by the appellant to the house where he had hidden the motorcycle at the house of appellant's sister. In his submission, he confirmed that the motorcycle was found in a house. The certificate of seizure (Exhibit P1) was signed after motorcycle has been seized in the appellant's sister house and it was signed by the appellant. Further, the Appellant did not object the admission of the certificate of seizure as an exhibit nor challenged it by way of cross examination.

Again, I have thoroughly gone through the charge sheet and found no defect to prejudice the Appellant as particulars of the offence are clearly stated.

Further, I fully prescribe to the position of the Court of Appeal held in the case of **Skona Loryan Munge and others vs The Republic, Criminal Appeal No. 51 Of 2020, CAT at Arusha (Unreported)** that it not a legal requirement for the prosecution in proving a case to tender the cautioned statement of an accused person. I therefore find this ground of appeal by the Appellant to be irrelevant.



Further, in perusal of the documents, I found that the Appellant during the prosecution case neither raised the issue of being forced to accept that he stole the motor cycle nor the torture. He did not cross examine PW1, PW4 and PW5 of which in the eyes of law it means that he has accepted them. It was observed by this court in the persuasive case of **Yoseph S/O Timotheus Mapunda vs. The Republic, DC. Criminal Appeal Case No. 53 Of 2022, HC-Songea (Unreported)** that;

*"Herein the gist of the testimony of PW2, PW3 and PW4 was hinged on oral confession by the Appellant, but the latter never asked any question. Therefore, to plead torture on defence or at this stage, is obvious an afterthought."*

I associate myself with the observation of this court in so far as the circumstances of this case are concerned.

As to the question whether the Appellant was identified/recognized by PW3, I wish to refer to the testimony of PW3 of the trial court proceedings quoted hereunder: -

*"Niliweza kumtambua Thabiti kwa sababu nje ya banda hilo kulikuwa na taa ya umeme wa sola iliyokuwa inatoa mwanga unaoangaza mpaka mita 20 au 30 katika eneo hilo na nilimuona ana kwa ana wakati wa kupishana naye umbali wa futi 2-3"*

Again, when the Appellant was cross examined by the prosecution he replied that;

*"Ni sawa maelezo ya SM3 kwamba tarehe ya tukio alionona huko Likotwa nikiwa nimekaa kwenye pikipiki yake... Ni kweli ninafahamiana vizuri na SM3".*


Basing on the above piece of evidence, the Appellant admitted to have been seen by PW3 sitting on the respective motorcycle and that the two know each well. Accordingly, I need not be detained on the aspect of identification since in essence the Appellant admitted to have been recognized by PW3.

Owing to the above observations, I find that there is damning evidence tendered by prosecution witnesses which proves the guilty of the Appellant. Therefore, the grounds of appeal are wanting of merit and I accordingly upheld the decision the conviction and sentence of the trial. The appeal hereby dismissed in its entirety.

Ordered accordingly.



**Mtwara**  
**10.05.2023**

  
**R.A Ebrahim**  
**JUDGE**