

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

CRIMINAL APPEAL NO. 125 OF 2023

**(Originating from the District Court of Rungwe at Tukuyu, Criminal Case
No. 22 of 2018)**

ASHERI AYUBU MWAKYUSA APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

JUDGMENT

Date of last order: 16th October 2023
Date of judgment: 12th December 2023

NGUNYALE, J.

The appellant Ashery Ayubu Mwakyusa and another person who is not subject to this appeal were charged and tried for the offence of Stealing contrary to Section 258 (1) and 265 of the Penal Code Cap 16 R. E 2022. It was alleged that the accused persons were jointly and together charged that on 11th day of February 2022 at around 20: 35 hours at Ilenge Village Kyimo Ward Ukukwe Division within the District of Rungwe in Mbeya Region unlawful and without claim of right did steal a green coloured motorcycle with registration number MC. 536 CDT make SKYMARK worth



Tshs 2,010,000/= the property of Daudi s/o Emanuel the act which is contrary to law.

The prosecution paraded five witnesses namely PW1 Daud s/o Emmanuel Bula (41), PW2 H8720 PC Harold (29), PW3 Shukuru s/o Ramson Sambilimwaya (40), PW4 Ambrose s/o Wilbert Chembele (33) and PW5 H 368 DC Mshiku (32) and the defence paraded two witnesses namely DW1 Ashery Ayubu Mwakyusa and DW2 Baraka Award Kilale (19). In order to appreciate what transpired before the trial court I wish to refer to the prosecution and the defence case as presented in court; -

The testimony of PW1 was to the effect that, on 11th day of February 2022 at around 20:35 hours he was at a grocery. At that time he moved outside the grocery where he witnessed his motorcycle missing. It was a motorcycle with registration No. MC536 CDT red in colour. The blue card of the motorcycle was admitted as exhibit No. P1 and the motorcycle was admitted as exhibit No. P2. PW2 testified that while at the police station they received a call from a security guard on 23rd day of February 2022 that the people who abandoned a motorcycle were there. The witness assisted to arrest those people who parked the motorcycle. They realized that there was a case at Tukuyu police station concerning loss of motorcycle.



It was a further prosecution case through PW3 that the 1st accused person parked a motorcycle at Kazibule Guest House early February 2022. PW3 as a security guard received it and kept it safely after they promised to pay parking fee. The appellant never returned back to pick the said motorcycle. They reported the incidence to the street chairman after three days from the date when the motorcycle was parked. The chairman advised them to keep it for other three days to wait the owner and if the owner will not respond the same should be taken to police station. The motorcycle was then taken to the police station. After two weeks, the appellant came back asking for his motorcycle. He told them that it is still safe at their hands. The appellant was accompanied by three people saying he was the owner of the said motorcycle. The witness asked him if he had switch and blue card of the motorcycle. He said no. The police were informed and they came to arrest the appellant and his fellows. The appellant was the one who had earlier brought the motorcycle at Kazibula Guest House. PW4 the manager of Kazibula Guest House testified that he knows the appellant as the person who had earlier parked the motorcycle at the Guest House but they never collected it. The appellant was arrested on the date when he came to collect it.



The other witness PW5 H368 DC Mashiku (32) identified the 1st appellant and the other person who is not the subject of this appeal. On the 4th day of March 2023 he was directed to go to Mbalizi police station with the complainant who his motorcycle was stolen at Tukuyu. They went to Mbalizi because they had information that suspects of stealing motorcycles has been arrested there. The complainant PW1 presented blue card of a motorcycle No. MC 536 CDT make SKY. The complainant managed to identify his motorcycle which was earlier stolen. The witness arrested the accused persons and he took them to Tukuyu for further legal actions.

At the close of evidence in support of the charge, the accused person was found having a case to answer. He was called for defence as DW1. In his defence testimony he said that on 23rd day of February 2022 he went to Kazibule area for taking lunch. He surprised to be arrested by the police officers on allegations of taking alcohol. He completely denied to have committed the offence of stealing a motorcycle. He said that he did not steal the same thus no exhibit was presented before the court to prove the alleged allegations. He faulted the testimony of PW3 who said that he handled the motorcycle to him as false because he said that the



motorcycle was presented to him on 9th February 2022 while the same was stolen on 11th February 2022. He prayed the court to set him at liberty.

At the conclusion of the trial, the court weighed out the evidence on record and it was satisfied that the offence was proved to the tilt. The appellant was convicted on 22nd December 2022 as charged and sentenced to serve 18 months imprisonment. He was seriously aggrieved with the verdict thus he preferred the present appeal premising four grounds of appeal paraphrased as follows in order to make sense; **one**, the trial court erred to enter conviction in the circumstance where the prosecution side failed to prove the offence beyond reasonable doubt **two**; that the evidence of PW3 and PW4 was not properly evaluated especially on the way they alleged to have forwarded the motorcycle to the police station and in the other side the appellant is alleged to have signed certificate of seizure. **Three**, the prosecution case is tainted with contradictions because PW1 did not witness theft and those alleged to have received the motorcycle are the thieves **four**, that trial magistrate could not comply to section 214 of CPA because the appellant was not involved in the change of magistrate.

At the time of hearing the appeal the appellant had nothing substantial to argue in support of each of the grounds of appeal, he prayed the court to



consider his grounds of appeal because they are proper and sound, the prosecution evidence based to the testimony of the people who took the motorcycle to police. He prayed the court to set him at liberty.

The respondent Republic was represented by Mr. Rajab Msemo learned State Attorney; from the outset the learned State Attorney stated that they do not support the appeal as filed by the appellant, instead they support conviction and sentence imposed. He said that the first ground of appeal has no merit because the offence was proved beyond all reasonable doubt the standard required in criminal cases because PW1 the owner of the motorcycle narrated how it was stolen. He identified it when it was recovered. PW3 the security guard narrated on how he received the said motorcycle from the appellant.

On the second ground of appeal the learned State Attorney said that they support the appellant that PW2 a police officer was contradicting. He said that he went to arrest the appellant with a motorcycle while the motorcycle while the appellant was arrested after the motorcycle had been recovered. The complaint about exchange of magistrates during trial has no problem because the appellant was fairly treated before the trial court. The defence case was well considered. The learned State Attorney prayed the court to dismiss the appeal in its entirety.



In rejoinder the appellant prayed the court to allow the appeal basing on the ground of appeal which is supported by the respondents.

Having in mind the record of appeal and the grounds of appeal, I with to determine the issue whether the offence was proved beyond all reasonable doubt or not. In determining the issue raised I will start with the controversial point which the appellant and the respondent are in agreement. In the second ground of appeal the appellant complained that the testimony of PW3 and PW4 was not properly evaluated because the witnesses say the motorcycle was forwarded to police and the other evidence is to the effect that the motorcycle was seized in presence of the appellant and he signed certificate of seizure. In their side the respondent attorney submitted that he supports the complaint of the appellant about contradiction because PW2 said that he seized a motorcycle and filled seizure note.

I have gone through the testimony of PW2, PW3 and PW4 word to word and I noted that a fatal contradiction in the respective evidence. PW2 said that on 23rd day of February 2022 he went to Kazibule guest house where he found the suspects with their motorcycle. PW2 seized the motorcycle and they recorded the seizure note. They took the accused persons with those motorcycles to the police station. The said witness PW2 tendered



the seizure note which was admitted as exhibit No. P3. I had time to peruse the seizure note which bears the signature of the appellant. In the other side the testimony of PW3 and PW4 is to the effect that they took the said motorcycle after the owner could not turn back to pick the same.

The subject matter of the charge against the appellant is the motorcycle which is alleged to have been stolen from PW1 on 11th February 2022. The appellant was convicted by the trial court on the point of recent possession. It was alleged that he was found in possession of the stolen property as reasoned by the trial magistrate relying to the evidence of PW3 and PW4 that the appellant is the one who went to the guest house with the motorcycle of which it was established that it was a stolen property. But the testimony of those two witnesses PW3 and PW4 who were relied by the trial magistrate as credible witnesses contradicts itself with the testimony of PW2. Since the contradiction touch and concern the subject matter of theft it is my considered view that the contraction is fatal as it goes to the root of the case. The way the prosecution evidence stands, there is no direct evidence connecting the appellant with the offence of stealing which is also the complaint in ground three of the appeal. The only evidence available is purely circumstantial that the



The rule under circumstantial evidence is that there must be no other possibility other than the appellant to be in the opportunity of committing the offence. But in this case, the contradiction noted above refutes the general rule because the way the motorcycle was received and forwarded to police is contradicting as to whether the motorcycle was seized by PW2 from the accused persons physically or it was received by PW3 and PW4 who forwarded the same to police. In my considered view the contradiction observed goes to the root of the matter thus conviction cannot be sustained in such a circumstance. In the case of **Nsamba Shapwata & Another vs Republic**, Criminal Appeal No. 92 of 2007 (unreported) it was observed that the contradictory evidence which goes to the root of the case makes the prosecution case to disintegrate. Having said and done, the offence was not proved beyond all reasonable doubt the standard required in criminal justice. Since the ground of contradiction disposes the appeal, I see no reason to dwell to other grounds of appeal.

In the end result conviction is hereby quashed and sentence set aside. I order immediate release of the appellant ASHERI AYUBU MWAKYUSA



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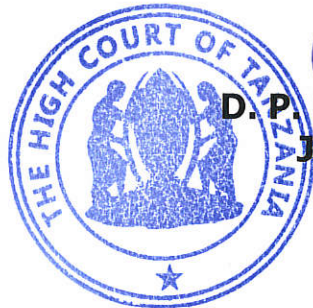
from custody unless lawful held with another good cause. Order accordingly.

Dated at Mbeya this 12th day of December 2023




D. P. Ngunyale
Judge

Judgment delivered this 12th day of December 2023 in presence of the appellant in person and George Ngwembe State Attorney for the Republic.




D. P. Ngunyale
Judge