

**IN THE HIGH COURT OF TANZANIA  
(SONGEA DISTRICT REGISTRY)**

**AT SONGEA**

**DC. CRIMINAL APPEAL NO. 38 OF 2022**

*(Originating from Criminal Case No. 67 of 2021, Mbinga District Court)*

**SADICK AUGUSTINO KAPINGA .....1<sup>ST</sup> APPELLANT**  
**HAMISI JULIUS KIPAKO.....2<sup>ND</sup> APPELLANT**

**VERSUS**

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

**JUDGMENT**

7/2/2023 to 17/2/2023

**E.B. LUVANDA, J**

The First and Second Appellants above named jointly presented a petition of appeal, against the decision of the trial court which convicted and sentenced them to a term of three years in jail for committing an offence of stealing contrary to sections 258 (1) and 265 of the Penal Code, Cap 16 R.E. 2019.

In the petition of appeal the duo Appellants grounded that:

1. The trial court erred in law and fact to convict the Appellants relying on the exhibit P1 because it was improperly tendered and admitted during the trial since it was tendered by a wrong person who was PW1, (the victim) and at this juncture a doubt was

raised on how the exhibit P1 had come in his custody from the police custody and it renders PW1, to alter the specific marks of the exhibit P1 so as to suit with the case at hand. Not only that but also the prosecution side failed to tender before (sic, the court) the chain of custody record form thus the procedures of chain of custody were flown.

2. The trial court erred in law and fact to convict the Appellants because the prosecution side failed to call a material witness, Charles Ndambwe who was the passenger so as to prove the charge beyond reasonable doubt.
3. The trial court erred in law and fact to convict the Appellants relying on the weak and doubtful evidence of PW1, because PW1, failed to tender any exhibit to prove that he was the owner of exhibit or to mention any specific mark of exhibit P1 to any person until he did so before the trial court. Also he failed even to do a follow up of the

said exhibit after he was discharged from the hospital.

4. The trial court erred in law and fact to convict the Appellants relying on the exhibit P3 while it was executed at Mbinga Police Station instead of the area in which the exhibit was seized, see pages 26 and 28 of the proceedings.

At the hearing of appeal, the First Appellant took a ride on behalf of his fellow Second Appellant the later noded in agreement to what was submitted by the former. For ground number one, the First Appellant submitted that the trial court erred to convict them by using exhibit P1, which was tendered by PW1 without explaining where and how he procured it. He submitted that the chain of custody was broken from seizure up to the stage of tendering in court, as such there is a possibility for PW1 to forge or alter marks of that exhibit in order to win a case.

Ground number two, the lower court erred in law to convict them, because the prosecution failed to prove a charge for failure to procure material witness one Charles Ndambwe who was a passenger of the

complainant, for fear that in case he could appear to testify, he could adduce evidence in their favour.

Ground number three, the lower court erred in law to convict them, by depending on incredible and weak evidence of PW1. PW1 failed to prove that he is the lawful owner of a stolen property which is a motorcycle exhibit P1. Because he did not tender a card or agreement for purchasing that motorcycle. PW1 did not mention a number or model of that motorcycle to any one after the incident, only mentioned number and marks of a motorcycle in court when adducing evidence. This creates doubts to them (Appellants) that he (complainant) might alter marks of that motorcycle in order to win a case.

Ground number four, the trial magistrate erred in law to convict us depending on a seizure certificate exhibit P3, because was not recorded at the scene, where that motorcycle was seized instead it was recorded at Mbinga Police Station, as stated by PW6, that he signed it at Police.

On reply, Ms. Tulibake Juntwa learned Senior State Attorney, supported the appeal, although she opposed the Appellants' grounds regarding identification of a stolen motorcycle. She submitted that that this motorcycle is a property of PW1, his evidence adduced indicate how he procured this motorcycle but even the chronological of testimony adduced show that a motorcycle belong to him and it pertain to this

incident. She submitted that this motorcycle was seized from PW5 who is a technician of motorcycle, who said it was handed over to him by the First and Second Appellant for PW5 to repair it. But the First and Second Appellant in their defence do not deny to have handed over a motorcycle to PW5. As such this whole chronologies prove that this motorcycle is the same, and is owned by PW1. The learned Senior State Attorney supported the appeal for one ground only in that prosecution side failed to procure or summon material witness and failure to summon him render this matter doubtful if at all the Appellants were involved and if were involved their role of involvement. She submitted that this witness is called Charles Ndambwe who was mentioned by PW1 being the passenger in his company when he got an accident. The evidence show after occurrence of this accident the First and Second Appellant assisted the victims by their (Appellants') car.

The learned State Attorney submitted that there is no evidence showing if the Appellants knew who was the owner of that motorcycle, they only assisted to carry the victim and a motorcycle. That this incidence occurred on 28/02/2021 when the Appellants rendered that assistance. Thereafter this motorcycle it is whereabouts was unknown until it was found to PW5. That in evidence nowhere reflect if at any

time the Appellants were asked regarding the where about of that motorcycle.

The learned Senior State Attorney submitted that the explanation of PW7, who is the investigator, indicate that Charles Ndambwe was at once arrested interviewed and explained that the motorcycle was taken by the motor vehicle which had assisted them, where one was a driver and the other a conductor. But the Appellants, in their defence explained that, they retained that motorcycle because they were given by Charles Ndambwe.

She submitted that none summoning of Charles Ndambwe create doubts, because, if he was summoned he could eliminate a doubt by the Appellants that he is the one who handed over to them a motorcycle. But also, an unexplained reasons as to why he was not summoned shade more doubts, because other witnesses ought to explain to eliminate a doubt that something was being hidden, although prosecution have a discretion as to who should be summoned.

The evidence of PW7 who indicate that he is the first one to know where the motorcycle was located indicate he was phoned call by a surety of Charles Ndambwe that he saw a motorcycle at the office of PW5, this was on 30/06/2021. She submitted that still there was a need for Charles Ndambwe in connection with a motorcycle, why his surety

revealed when Charles Ndambwe was hidden. She therefore supported the appeal, she prayed for the Court for order to handover a motorcycle to PW1 to remain undisturbed but the Appellants should be acquitted.

On rejoinder the First and Second Appellant had nothing to add, other than a vote of thank to the learned Senior State Attorney for supporting their appeal.

Arguably, Charles Ndambwe who is a key and material witness to this matter, for unexplained reasons was not summoned and procured to adduce evidence.

It is in record that at the material time where the complaint (PW1) is said to have experienced loss of consciousness (sycope) while riding a motorcycle in question, at Kihulila area, he was ferrying Charles Ndambwe to Mbinga with is cargo of sardine. It is also in record that after occurrence of accident and while the complaint was still unconscious, his passenger the alleged Charles Ndambwe was of sound mental faculty. The records of the trial court also suggest that the alleged Charles Ndambwe is the one who handed over a motorcycle to the Appellants. This fact is buttressed by a fact that PW1 explained to have been told by his a young brother one Tengeza that the passenger whom PW1 ferried is the one who took a motorcycle. The said Tengeza

was also not summoned to clear the atmosphere as to where he obtained those information and clues that one Charles Ndambwe took a motorcycle after occurrence of accident.

This by itself create doubt, because there was another theory introduced by Julius Romanus Ndunguru (PW2) that the First Appellant who was the conductor of a car which rescued the complaint, took both the complaint and a motorcycle. This fact was also supported by David Manyamba (PW2).

As submitted by the learned Senior State Attorney that DC Jonesia (PW7) who was the leading investigator, stated that at a certain point he apprehended the alleged Charles Ndambwe, thereafter one of his surety tipped PW7 that he saw the impugned motorcycle at a dust terminal. The alleged surety is anonymous (undisclosed).

It is true that the question as to who should be summoned to testify, is an exclusive domain of prosecution. But this rule cannot be applicable where material witnesses are omitted and left in hiding for an explained reasons.

In this regard, the testimony of Baraka Mbunda (PW5) who is a motorbike technician who stated that he received a motorcycle from the First Accused for fixing, is unsatisfactory. This is because the prosecution failed to fill the gaps and loop holes for failure to summon



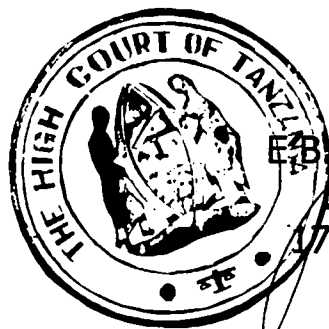
material witness to connect the dots and establish a full chain on how a motorcycle disappeared from the scene of accident and thereby landed into the hands of PW5.

In that way it cannot be said that the charge bevelled to the Appellants was proved on the required standard.

I therefore fault the findings, conviction and sentence by the trial court and order the Appellants to be released forthwith unless held for other lawful cause.

The trial court order for handing over a motorcycle (exhibit P1) to PW1, remain undisturbed.

Appeal allowed.



EB LUVANDA  
JUDGE  
17/02/2023

