

TANZANIA / JUDGMENT

ERICK FRANCISCO

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA BUKOBA SUB-REGISTRY AT
BUKOBWA CRIMINAL APPEAL NO. 28106 OF 2024 (Arising from Criminal Case No. 77 of 2022
District Court of Ngara) ERICK FRANCISCO..... APPELLANT
VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

25th February and 13th March, 2025 BAZL J.: On 27th June, 2022, the appellant was arraigned before the District Court of Ngara (the trial court), charged with the offence of stealing contrary to sections 258 and 265 of the Penal Code [Cap. 16 R.E. 2019] ("the Penal Code"). It was alleged that, on 19th June, 2022 at Murukukumbo village, within Ngara District in Kagera Region, the appellant stole a motorcycle with registration number MC548 CSN make KINGLION, the property of Bosco Miburo valued at TZS 2,400,000.00. The factual background leading to the conviction of the appellant reveals that, on the date of the incident around 1830 hours while at his home, Kabanga, the complainant, Bosco; Miburo (PW1) was summoned by Page 1 of 20 pastor Yusuph Sunzu to go to his house located at Murukukumbo area. PW1 went there with his motorcycle with registration No. MC548 CSN. On arrival, he parked it outside the house and entered into pastor's house. He stayed there until 2100 hours when he got out finding his motorcycle missing. The news about the stolen motorcycle was spread to different places while PW1 reported the matter to Kabanga Police Station. Sometimes later, in the same night, Yusuph Daniel Yangayanga (PW2) in cooperation with Aloyce Simon (PW3) and other people arrested the appellant pushing the said motorcycle around Ichacha at Kungiza area. PW1 was informed of his motorcycle to be found at that area whereby, he rushed there and managed to identify it. He also found the appellant had already been arrested. The appellant and the motorcycle were taken to Kabanga Police Station. At the station, he was interrogated by F.9874 D/CPL Athuman (PW4) and told him that, he was called by one Wisman Mboya who directed him where he was. Upon arriving there, he found that Mboya with the said motorcycle who told him to help him so that they could sell it to Burundi. Thereafter, PW4 seized the motorcycle (Exhibit P3) through the certificate of seizure (Exhibit P2). Page 2 of 20 In his defence, the appellant contended that, on 19th June, 2022, he left home to Juruligwa area to buy avocados and bananas which he took to Nzaza. While at Nzaza, he was arrested by the police officers who took him to Kabanga Police Station. Later, they took him to his house where they searched but nothing was found. On 22nd June, 2022, he was taken to Ngara Police Station where he was informed that, he was informed of his accusation accused of stealing

the motorcycle. He was later taken back to Kabanga and finally arraigned to Court charged with the offence of stealing the motorcycle (Exhibit P3). At the end of the trial, the appellant was convicted and sentenced to five years imprisonment. Aggrieved with his conviction and sentence, he knocked the doors of this Court armed with nine grounds of appeal, however, at the hearing, he abandoned ground number eight and remained with eight grounds which may be summarised as follows; first, evidence of identification was not watertight; second, the charge was defective; third, his conviction was based on incredible evidence of PW1, PW2, PW3 and PW4; fourth, material witnesses were not called to testify; fifth, the case against him was fabricated by PW2; sixth, his conviction was based on weakness of his defence; seventh, Exhibit P1, P2 and P3 were not read out loudly Page 3 of 20 after being admitted and eighth, the case against him was not proved beyond reasonable doubt. At the hearing, the appellant appeared in person unrepresented whereas, Ms. Agnes Awino, learned State Attorney represented the respondent, Republic. Starting with the first ground, the appellant submitted that, the prosecution witnesses failed to prove source of light and its intensity, hence, they failed to describe him. In respect of the second ground, he contended that, the charge was defective because he was not informed of the reason of substituting it. Concerning the third ground, he argued that, the witnesses were incredible as their testimonies contradicted each other. For instance, PW1 said that, the motorcycle was stolen at 2100 hours while PW2 said, it was stolen at 1930 hours. Also, while PW3 contended that, it was stolen by two persons, others said, it was stolen by one person. In addition, PW4 said that, he received a call at 1900 hours about the stolen motorcycle while PW1 contended that, he became aware of the stealing at 2100 hours. According to him, how could PW4 received information about stolen motorcycle while it was not yet stolen. Apart from that, the appellant contended that, PW2 said that, he was found 700 metres away while PW2 said that, he found him Page 4 of 20 at the distance of 400 metres from the crime scene. To him, these contradictions corrode prosecution case. Turning to the fourth ground, he argued that, the prosecution called the persons who contended to have received a call from PW3 instead of calling key witnesses namely Aram Thomas, Elia Andrea, Nestory Yohana and Musa Yohana who were said to have caught him with the said motorcycle. In respect of the fifth ground, he contended that, the case against him was fabricated by PW2 who is a close relative of Yusuph Lule, the manager of G45 Security Company whom they battled over other criminal and labour cases. Submitting on the sixth ground, he contended that, he was convicted on the weakness of his defence. According to him, it was not his duty to prove his innocence but it was the duty of the prosecution to prove the case against him beyond reasonable doubt. As far as the seventh ground is concerned, he submitted that, Exhibits P2 and P3 were not read out aloud after being admitted. Concluding with the last ground, the appellant claimed that, the prosecution failed to prove the case beyond reasonable doubt. According to him, there were many doubts on the prosecution case as witnesses adduced contradictory testimonies. In that regard, he prayed for the appeal to be allowed by quashing the conviction and setting aside the sentence and be released. Page 5 of 20 In her reply, Ms. Awino from the outset opposed the appeal. Responding to the first ground, she submitted that, the appellant was properly identified by PW1, PW2 and PW3 because PW1 and PW2 explained how they arrived at the place where the appellant was arrested and managed to recognise him by his name as he was known to them prior to the incident. Also,

PW2 had a torch which assisted them to recognise him. Apart from that, PW3 explained how he arrested the appellant whom he knew very well because they went to school together and graduated in 2004. In that regard, their evidence met the conditions for identification mentioned in the cases of *Abel Orua @ Matiku and Others vs Republic* (Criminal Appeal No. 441 of 2020) [2025] TZCA 78 (21 February 2025) and *Waziri Amani vs Republic* [1980] TLR 250. Arguing on the second ground, Ms. Awino contended that, the charge was not defective because its substitution was made under section 234(1)(2) of the Criminal Procedure Act [Cap. 20 R.E. 2022] (the CPA) and after substitution, the new charge was read over to the appellant and he was called upon to plead as reflected at page 2 of the proceedings. So far as the third ground is concerned, it was her submission that, there were no contradictions in the testimony of PW1, PW2 and PW3 in respect of time and the distance of arrest. Concerning the time when the motorcycle was stolen, Page 6 of 20 PW1 stated that, he became aware of stealing around 2100 hours, and PW2 and PW3 were informed of that stealing at 2200 hours. In respect of distance, Ms. Awino contended that, PW1 found his motorcycle about 700 metres from the crime scene while PW2 stated that, it was more than 400 metres. In that regard, according to her, since PW2 approximated more than 400 metres it can be 700 metres unless he would have mentioned less than 400 metres. Therefore, there was no contradiction on prosecution witnesses and their evidence was credible. Reverting to the fourth ground on failure to call key witnesses, she argued that, Aram Thomas, Elia Andrea, Nestory Yohana and Musa Yohana were not key witnesses as they were mentioned by PW3 on their involvement in pursuit of stolen motorcycle. According to her, the key witness was PW3 and failure to call the remaining persons is not fatal as their evidence was not important. Reverting to the fifth ground, Ms. Awino contended that, it is a new ground that was not stated in his defence and neither PW2 was cross-examined on that aspect. In that regard, the trial court did not get opportunity to decide on it and thus, this court cannot determine it. In respect of the sixth ground, she argued that, the appellant was convicted on the strength of the prosecution evidence not on the weakness of his defence. As for seventh ground, she argued that, Exhibit P1 and P2 were read over Page 7 of 20 to the appellant as reflected at page 10 and 20 of the proceedings. On the other hand, Exhibit P3 is physical exhibit which is not required to be read over to the appellant. Besides, as real evidence, it was admitted in accordance with the requirement of the law as stated in the case of *Director of Public Prosecutions vs Sharif Mohamed @ Athumani & Others* (Criminal Appeal No. 74 of 2016) [2016] TZCA 635 (5 August 2016). Arguing on the complaint that the case was not proved against the appellant, Ms. Awino submitted that, the witnesses managed to prove the case beyond reasonable doubt. PW1 proved ownership of the motorcycle by producing the registration card while PW2 explained how he found the appellant with the stolen motorcycle and PW3 explained how he arrested the appellant with the motorcycle. On his side, PW4 who seized the motorcycle, produced certificate of seizure and chain of custody record. In her view, the evidence of these witnesses proved the case beyond reasonable doubt. Thus, she prayed for this appeal to be dismissed for want of merit. In his rejoinder, the appellant contended that, he had never studied with PW3 and they did not know each other prior to the date of incident as he went at different school from the one mentioned by PW3. Citing the cases of *Issa Mgara @ Shuka vs Republic*, Criminal Appeal No. 37 of 2005 and Page 8 of 20 *Ibrahim Shaban and Another vs Republic*, Criminal Appeal No. 110 of 2002, he

insisted that, the intensity of light was not disclosed as required by the law. He then reiterated his chief submission in respect of other grounds. After concluding their submissions, parties were probed to comment on whether the sentence imposed on the appellant was severe considering that, he was the first offender. Ms. Awino was of the view that, it was proper and not excessive. On his part, the appellant contended that it was severe. Having considered the submissions from both sides and the evidence on record, the issue for determination is whether the appeal has merit. Starting with the first and third grounds, the evidence shows that, PW3 arrested the appellant while in pursuit of the motorcycle which was reported to have been stolen. He called PW2 who informed PW1 about his motorcycle to have been found there. Looking at the evidence produced by PW1, PW2 and PW3, the appellant was arrested with the motorcycle some distance between 400 to 700 metres from the crime scene and later he was taken to Kabanga Police Station. It is trite law that, where a suspect is arrested at the crime scene or pursued from there and arrested immediately thereafter, the question of identification does not arise. See the cases of Khalid Mohamed Kiwanga and Another vs The Republic (Criminal Appeal No. 223 of Page 9 of 20

2019) [2021] TZCA 467 (14 September, 2021) and Luhemeja Buswelu vs Republic (Criminal Appeal No. 164 of 2012) [2013] TZCA 369 (19 September 2013). In our case, the appellant though not arrested at the crime scene, he was arrested few hours later in the course of pulling the stolen motorcycle which was later identified by its owner. Under these circumstances, the question of identification does not arise. Concerning the alleged contradictions on prosecution witnesses, I have carefully examined the evidence of PW1, PW2, PW3 and PW4. It is undisputed that, PW1 said the appellant was arrested 700 metres away from the crime scene while PW2 said it was more than 400 metres. As correctly submitted by learned State Attorney, this contradiction is very minor and cannot corrode the prosecution case considering that, both witnesses just estimated the distance. Apart from that, there is no contradiction concerning the time when the incident was reported because the evidence of PW4 indicates that, on the date of incident at 1900 hours, he was at the station and he received a call about the stolen motorcycle around 2300 hours. Basing on that, the contention by the appellant that, PW4 received a call prior to the incident is unfounded. In that regard, in my view, the witnesses were credible and I find nothing to fault the findings of the trial court. Thus, the first and third grounds are unmerited. Page 10 of 20 In respect of the second ground, section 234(2) of the CPA requires the substituted charge to be read over to the accused person and he shall be called upon to plead. This was also insisted in the case of Clemence Mpondelo and Another vs The Republic (Criminal Appeal No. 347 of

2018) [2020] TZCA 297 (12 June, 2020) where it was held that: "The provisions of section 234(2)(a) of the CPA imperatively require that where a charge is altered or substituted, the court is obliged to call upon the accused person(s) to plead to the altered charge. In the case of ThuwayAkonaay v. Republic [1987] TLR 92 (CA) it was held that such a plea is mandatory and failure to do that renders a trial a nullity." The record of the trial court shows that, the appellant was arraigned before the trial court on 27th June, 2022 where the charge was read over against him and he pleaded of not guilty. On 11th July, 2022 when the case was called

for preliminary hearing, the prosecutor prayed to substitute the charge on the basis of adding Engine and Chassis numbers to the particulars of offence. After being substituted, the charge was read over to the appellant who once again pleaded not guilty. Thereafter, the preliminary hearing was conducted. On that basis, it is clear that, there were no defects with the substituted charge. I find this ground with no merit, hence, dismissed. Page 11 of 20

In respect of the fourth ground, it is the duty of the prosecution to call all witnesses whose facts prove the case against the accused person. In the case of *Azizi Abdallah vs Republic* [1991] TLR 71 it was stated that: "The general and well-known rule 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." Now, the issue is whether, Aram Thomas, Elisa Andrea, Nestory Yohana and Musa Yohana were material witnesses. The appellant contended that, as those persons were named to have been present when he was caught with the motorcycle, they were key witnesses to prove that he was caught with the said motorcycle. On her side, Ms. Awino contended that, they were not material witnesses as they were mentioned by PW3 on how they participated in search of the motorcycle. According to her, the material witness was PW3. It is trite law that, in proving the case, it is duty of the prosecution to choose the witness to call in order to prove its case. In the case of *Abdallah* Page 12 of 20 *Kondo vs Republic* (Criminal Appeal No. 322 of 2015) [2016] TZCA 189 (28 September, 2016), it was stated that: "It is the prosecution which have the right to choose which witnesses to call so as to give evidence in support of the charge. Such witnesses must be those who are able to establish the responsibility of the appellant in the commission of the offence. They must be material witnesses." Apart from that, there is no requirement on the number of witnesses to be called in order to prove any fact. This is per section 143 of the Evidence Act [Cap. 6 R.E. 2022] ("TEA") which provides thus: "Subject to the provisions of any other written law, no particular number of witnesses shall in any case be required for the proof of any fact." As it was submitted by Ms. Awino, the prosecution was not compelled to call every witness, if the summoned witnesses were able to prove the case and in line of section 143 of TEA, PW3 was enough to prove the case against the appellant. Reverting to the fifth ground, the appellant claimed that, this case was fabricated by PW2, a close relative of Yusuph Lule, the manager of G45 Security Company whom they battled over other criminal and labour cases. Page 13 of 20

Although this is one of the grounds of appeal, it is apparent that, this complaint is a factual issue and it was not brought to the attention of the learned trial magistrate for her determination. Also, it was not raised in his defence. Apart from that, during the trial, PW2 was extensively cross-examined by the appellant but the latter did not ask him any question concerning the alleged grudges between them or the issue of labour dispute with the said company or another criminal case. Besides, though the appellant contended to have attached the copies of the dispute between him and 'a close relative of PW2', a thorough perusal on record reveals that, nothing was attached in respect of the alleged dispute with that close friend. Thus, I am constrained to agree with Ms. Awino that, this is a new fact which has surfaced

before this Court for the first time. It is therefore my considered view that, this new issue is nothing but an afterthought. Coming to the sixth ground, the appellant raised the defence of alibi contending that, at 1500 hours he was at Nzaza where he was arrested by two police officers and at 2000 hours, he was taken to his house where the search was conducted but nothing was retrieved. The trial magistrate rejected his defence because, he failed to bring any witness or tender any exhibit to prove his presence at Nzaza. Much as I am aware that, the accused person has no duty to prove his alibi to be true, in this matter, the trial Page 14 of 20 magistrate just analysed the evidence and came into the conclusion that, the appellant's evidence did not shake the prosecution evidence. In that regard, the appellant's complaints that, he was convicted on the weakness of his evidence has no merit.

Concerning the seventh ground about Exhibits P1, P2 and P3 not to be read aloud after being admitted, there is plethora of decisions including the case of *Sabato Thabiti and Another vs Republic* (Criminal Appeal No. 441 of 2018) [2019] TZCA 421 (4 December 2019); *John Mghandi @ Ndovo vs Republic* Criminal Appeal No. 352 of 2018) [2019] TZCA 331 (30 September, 2019) and *Robinson Mwanjisi and Three Others vs Republic* [2003] TLR 218 just to mention a few, which emphasised that, after the exhibit is admitted, it should be read over to the accused and failure to do so is fatal which renders that exhibit to be expunged from record. In the case at hand, the record of the trial court shows that, when PW1 prayed to tender the receipt showing the ownership of the stolen motorcycle and its details, the appellant did not object. Thereafter, the receipt was admitted as Exhibit P1 and was read over to the appellant as required by law. In respect of Exhibit P2, it was tendered by PW4 and admitted without objection from the appellant. After being admitted, it was read over to the appellant. As far as Exhibit P3 is concerned, the same is the physical exhibit which after the Page 15 of 20 witness laid foundation, it was shown to the appellant and asked if he has objection. Likewise, the same was admitted without objection. In the premises, it goes without saying that, the law was observed in admission of all complained exhibits. This ground also fails. Returning to the last ground concerning proof of the case beyond reasonable doubt, according to section 3(2)(a) of TEA, in criminal matters, the case has to be proved beyond reasonable doubt and that is the duty of the prosecution side. That duty never shifts to the accused person unless the law provides otherwise. In the case of *Nkanga Daudi Nkanga vs Republic* (Criminal Appeal No. 316 of 2013) [2014] TZCA 213 (21 October 2014), it was stated that: "It is the principle of law that the burden of proof in criminal cases rests squarely on the shoulders of the prosecution side unless the law otherwise directs, and that the accused has no duty of proving his innocence." Back to our case, at the trial, witnesses narrated how they arrested the appellant with the said motorcycle and it was found between 400 to 700 metres away from where it was stolen. The appellant raised the defence of alibi contending that, at 1500 hours, he was arrested at Nzaza by two police officers and taken to Kabanga Police Station. At 2000 hours, he was taken Page 16 of 20 to his home where his house was searched but nothing was found. According to his defence, by the time he is alleged to have stolen Exhibit P3, he was at Kabanga Police Station. Looking closely at his evidence, the appellant raised the defence of alibi. However, his defence was raised in contravention with section 194(4)(5) of the CPA because, he did not

give notice of his intention to rely on the defence of alibi before the hearing of the case, and neither did he furnish the prosecution with the particulars of his alibi before the case for the prosecution was closed. However, the law provides that, even where the accused raised that defence contrary to the above cited provisions, the court at its discretion is obliged to analyse it and give reasons for rejecting it. This has been stated in numerous cases including the case of Edson Simon Mwombeki vs Republic (Criminal Appeal No. 94 of 2016) [2016] TZCA 266 (20 October 2016) where it was held that: "It is settled law that, when the court takes cognizance of alibi of which no notice was given it must analyse it and give reasons for rejecting it." The trial court rejected his defence on the reason that, he failed to bring any exhibit or witness to prove that he was doing such business on the material date. Passing through the record, the appellant was arrested and taken to Kabanga and then taken to his house for searching, but he said Page 17 of 20 nothing on why he was arrested at Nzaza and what causes the police to conduct search in his house. As alluded above, I am aware that, the accused person is not required to prove his alibi to be true. In my view, his defence was rightly rejected by the trial court because it did not raise any doubt on prosecution case. In that regard, it is my considered view that, the case against the appellant was proved to the required standards. Thus, I find nothing to fault the findings of the trial court in respect of conviction of the appellant. Without prejudice to the foregoing, as far as the sentence is concerned, having probed to comment on that, Ms. Awino insisted that, the sentence meted against the appellant was not severe while the appellant claimed that, it was severe. The appellant was convicted with the offence of theft whose maximum sentence is seven years. The wording used in the punishment section is "liable to imprisonment" which according to section 27 of the Penal Code, non-custodian sentence may be imposed in addition to or instead of custodian sentence. It is common knowledge that, one among the principles of sentencing stipulated in Tanzania Sentencing Guidelines, 2023 is that and I quote: Page 18 of 20 "Sentences that approach the maximum should only be imposed when the offence comes close to the worst of its type; and should rarely be imposed on first offenders;" (Emphasis supplied). According to the extract above, the sentence that approach the maximum should rarely imposed on the first offender unless the offence is nearly worst of its type. In the matter at hand, the appellant was sentenced to five years imprisonment that is nearly to seven years which is the maximum penalty for the offence of theft. It is undoubted that, the appellant was the first offender. Besides, looking at the circumstances of the case, where the appellant was arrested with the stolen motorcycle few hours after the incident, in my view, there was nothing to establish that, the offence was worst of its type. Thus, I find five years imposed on the appellant was severe considering that, he was the first offender. As a result, I set aside the sentence of five years and substitute it with two (2) years imprisonment to be counted from 26th January, 2023 when he was sent to prison after being sentenced. Having said so, the appeal is hereby dismissed for want of merit. Since the sentence is reduced to two years and the appellant had already stayed Page 19 of 20 in custody for two years serving his sentence, I order his immediate release from custody unless otherwise lawfully held. It is so ordered. I. K. BANZI JUDGE 13/03/2025 Delivered this 13th March, 2025 in the presence of Ms. Agnes

Awino, learned State Attorney for the respondent, the appellant in person, Hon. Audax V. Kaizilege, Judge's Law Assistant and Ms. Mwashabani Bundala, RMA. Right of appeal duly explained. I. K. BANZI JUDGE 13/03/2025 Page 20 of 20

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