

TANZANIA / JUDGMENT

RASHID MDETE

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THE UNITED REPUBLIC OF TANZANIA JUDICIARY IN THE HIGH COURT OF TANZANIA MBEYA
SUB - REGISTRY AT MBEYA CRIMINAL APPEAL NO. 20331 OF 2024 CASE REFERENCE NO.
202407192000020331 (Orignating from Criminal Case No. 34 of 2023 In the District Court of
Momba District at Chapwa) RASHIDI S/O ALLY MDETE
APPELLANT VERSUS THE REPUBLIC RESPONDENT

JUDGMENT

14th & 17th February 2025 NONGWA, J. Rashidi S/O Ally Mdet, the appellant herein was convicted and sentenced to term of 30 years imprisonment for the offence of Armed robbery contrary to section 287A of the Penal Code [Cap 16 R.E 2022]. Particulars of the offence was that on 11st December 2022 at about night time at Mpemba bus Terminal area Tunduma within Momba district in Songwe region the appellant did steal one motorcycle with registration number MC 810DNS and Chassis No. LZL15P909IJA made kinglion valued at Tzs 2,500,000/= the property of Elaija s/o Leward Simbeya, immediately 1 before and after such stealing did grievous harm to one Daniel s/o Richard Mwasenga on his fingers by using knife in order to obtain or retain the said property. He died to commission of the offence. At the trial court, the prosecution paraded a total of six witnesses namely; Daniel Richard Mwanga (PW1), Elija Leward Simbeye (PW2), Leonard Modestus Kazimzuri (PW3), Grace Desidery (PW4), H. 9102 DC Castor (PW5) and G. 8387 D/CPL Angelo (PW6). They also had four exhibits; the motorcycle (PE1), registration card (PE2), cautioned statement (PE3) and PF3 (PE4). It was PW1 testimony that on he was a motorcyclist rider commonly known as bodaboda used to park at Kilimanjaro area. On 11th December, 2022 at 7pm he was hired by the appellant to take him to Mpemba bus stand for Tzs 6000, on arrival at destination, the appellant demanded the he be taken at a further distance on refusal the appellant suddenly took up the knife to stab PW1, fortunately, through the moonlight he saw the knife and tried to hold it but he was injured on right and left fingers as the appellant pulled it, he was then tied with a rope and the face covered with a piece of cloth and taken at a distant place and the appellant disappeared with the motorcycle. He was taken to Tunduma police station by good Samaritans around, went for 2 medical examination and later on he heard that the motorcycle has been found at Njombe. Together with the owner and Police named Castor went to Njombe, saw the motorcycle and appellant whom he recalled to be the robber. PW2 the motorcycle owner stated to have got the information on robbery, went to see PW1 who was injured and then heard about the Motorcycle being found at Njombe, on arrival at Njombe they

found the appellant with a motorcycle. PW3 recorder extra judicial statement of the appellant who admitted to have robbed the motorcycle. PW4 is the one who attended PW1 who was injured during commission of the offence and filled in the PF 3. PW5, the investigator stated to have received the complaint and went to Njombe with PW1 and PW2 and recovered a motorcycle, lastly was PW6 who stated to have got the information that appellant was selling a motorcycle, with the assist of an informer they seized the motorcycle from the appellant who claimed ownership of the same in presence of an independent witness. On his defence, the appellant was the only defence witness, denied to have been found with stolen motorcycle alleging to have been called to Police station at Njombe tortured and forced to admit to have robbed the 3 motorcycle, and that he did not know what the justice of peace wrote as he was also forced to state what the justice of peace wanted. Impressed by the prosecution evidence, the trial court convicted and sentenced as stated earlier. Being aggrieved by proceedings, conviction and sentence of the District Court of Momba at Chapwa, appeal to this court on the following grounds; One; That, the learned trial magistrate erred in law and facts to convict the appellant relying on mere evidence of identification by PW1 who failed to describe the source and intensity of light, nevertheless no identifications parade conducted as the incident alleged to have occurred at night time; Two; that, the learned trial magistrate erred both in law and fact for convicting and sentencing the appellant basing on exhibit PE1 and exhibit PE2 which at page 09 of the proceeding it is stated motorcycle MC 810 DNS but what was tendered is exhibit PE1 MC 819 DNS; Three; that the learned trial magistrate erred in law and facts to overrule objection of extra judicial statement while appellant tended PF3 and received by the court to show that appellant was not in good condition since he was beaten before it was recorded. Four; that, the learned trial magistrate 4 erred in law and fact by convicting and sentencing the appellant while the key witnesses was not called to clear the doubts. Five; that the learned trial magistrate erred in law and fact by convicting and sentencing the appellant as shows an opinion that the appellant was guilty before his defence. Six; That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant while the chain of custody was not laid down properly and exhibit PE1 obtained from illegal search. Seven; that the learned trial magistrate erred in law and fact by convicting and sentencing the appellant basing on weak prosecution evidence of PW1, PW2, PW3, PW4, PW5 and PW6 leaving strong evidence from DW1 and his exhibit. When the appeal was placed for hearing, the appellant appeared in person, unrepresented. The learned State Attorney Mr. Elibariki Mpinga, represented the respondent, Republic. When called upon to argue his appeal, the appellant, standing for himself did not have more than to request for the adoption of the seven grounds in the petition of appeal earlier filed, in its totality suggesting that the prosecution side did not prove the case beyond reasonable doubt. He thereafter opted to hear the response of the Republic. 5 At the very outset of his response, the learned state attorney maturely, supported the appeal. His concession to the appeal was not nailed exactly on all seven grounds of appeal but on the point of law of which was disposing all other grounds. The learned State Attorney submitted that, after going through the appeal grounds and record, the Republic was hesitant in convincing the court that the offence was proved beyond reasonable doubt, as such he found wise and prudent to concede with the appeal. It was the submission by the state attorney that upon going through the records, found pertinent to submit on issue of visual

identification that going through page 8 of the proceedings, he finds that the victim failed to identify the suspect, no anywhere the victim stated how the suspect looked like at the crime scene. Citing the case of *Waziri Aman vs Republic* [1980] TLR 250 the attorney stated that the description of the accused who was unknown by the victim before the incident was important. In the present appeal, it has been noted that the victim did not give the description of the appellant as seen at the crime scene since he was unknown to him, he ought to have done saw instead of basing on doc identification. 6 As to the motorcycle tendered which was admitted as exhibit at the trial court, the state attorney submitted that at page 63 of the proceedings, PW6 the arresting officer and the one who conducted search at Njombe, stated to have seized the motorcycle but the certificate of seizure was not tendered in evidence. That the court relied on the doctrine of recent possession however, the prosecution failed to tender the certificate of seizure thus creating doubts on part of the prosecution. The state attorney referred the case of *Gift Briton @Mwakasunga and Another vs Republic*, Criminal Appeal No. 534 of 2021 [2024] TZCA 1258 (11 December 2024; TanzLII) at page 13 on the conditions for doctrine of recent possession to be proved. He insisted that failure to tender the certificate of seizure brings doubt as to whether the appellant was real found with the motorcycle. The attorney conceded to all complaints by the appellant as the prosecution failed to prove the case. Rejoining, the appellant supported all what have been stated by state Attorney, and added that the independent witness who witnessed search was not called, he prayed the appeal be allowed, conviction be quashed, sentence be set aside and he be set free from prison. 7 It is an elementary position of law under section 3(2)(a) of the Evidence Act [Cap 6 R: E 2022] that, in criminal cases, the burden to prove the allegation by the prosecution is beyond reasonable doubt. The phrase 'prove beyond reasonable doubt' was discussed in the case of *Magendo Paul and Another v. Republic*, [1993] TLR 219 where the Court stated as follows: 'For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed.' I have given consideration of the two sides submissions, the shortcomings on part of the prosecution evidence as stated by the state attorney are clearly seen on the proceedings. The reasoning by the trial magistrate is that the appellant was found in possession of the robbed motorcycle (Exhibit PE1) at Njombe and that the same was seized from the appellant. However, no certificate of seizure was produced in evidence and the state attorney is of the view that the conditions for proving recent possession were not met. In the cited case of *Gift Briton Mwakasunga and another vs Republic* (supra) the court of appeal discussed the 8 conditions for the principle of recent possession to apply that are; first, that the property was found in possession of the suspect; Second, that the property is positively the property of the complainant; third, that it was recently stolen from the complainant and lastly, that the stolen thing in the possession of the accused constitutes the subject of the charge against the accused. It must be the one that was stolen or obtained during the commission of the offence charged, same position in *Alex Joseph Kasharakoro vs Republic*, Criminal Appeal No. 156 of 2013 [2014] TZCA 2175 (3 March 2014; TanzLII) and *Joseph Mkumbwa & Anmother vs Republic*, Criminal Appeal No. 94 of 2007 [2011] TZCA 118 (23 June 2011; TanzLII). For the powers of the court when the Republic concedes to the appeal, I find solace in words of Mruma J. in the case of *Abel Kayusi Mchengesi & Germanus Venus Libweha vs Republic*, Criminal Appeal No. 39547 of 2023 & 12166

of 2024) [2024] TZHC 8280 (28 August 2024; TanzLII) when he stated; ‘... in my opinion where the Republic (i.e. the prosecution) concedes at the appeal level that it did not have sufficient evidence to support the conviction during the trial, unless there is any good, sufficient and serious reasons, to hold otherwise, court must accede to the Republic or complainant's view. To hold otherwise may put the impartiality nature of courts in jeopardy.’ With the shortcomings pointed by the prosecution is sufficient to dispose of the appeal. As stated earlier dwelling on other grounds of appeal will only amount to a wasted effort. Consequently, I allow the appeal, quash the conviction and set aside the sentence knotted on the appellant. I further direct that the appellant be released from prison custody unless he is held there for some other lawful cause. V.M. NONGWA JUDGE 17/2/2025 Dated and Delivered at Mbeya this 17th February, 2025 in presence of the parties. 10 V.M. NONGWA JUDGE 11

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