**IN THE COURT OF APPEAL OF TANZANIA**

**AT MBEYA**

**(CORAM: LILA, J.A., KITUSI, J.A. And MASHAKA, J.A.)**

**CRIMINAL APPEAL NO. 410 OF 2020**

**FURAHA ALICK EDWIN ..... APPELLANT**

**AND**

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

**(Appeal from the decision of High Court of Tanzania at Mbeya)**

**(Nzowa, SRM, Ext-Jur.)**

**dated the 17th day of July, 2020**

**in**

**Criminal Appeal No. 49 of 2019**

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# JUDGMENT OF THE COURT

15th & 23rd February, 2023

## MASHAKA, J.A:

This is a second appeal by FURAHA ALICK EDWIN, the appellant who was convicted before the District Court of Rungwe at Tukuyu with the offence of armed robbery contrary to section 287 A of the Penal Code. The prosecution alleged that, on 10th March, 2018 at about 05:45hrs at Ndembela village within Rungwe District, Mbeya Region, the appellant did steal money cash TZS, 4,000,000 and one motor cycle, make SUNLG registration number

MC 492 ANK valued at TZS. 2,100,000 all total valued at TZS. 6,100,000 the properties of EPHRAIM NATHAN MWANKUSI and immediately before and after such stealing did use bush knife and iron bar to hit EPHRAIM NATHAN MWANKUSI in order to obtain the said properties.

The appellant denied the charge and the case proceeded to a full trial. A total of five (5) witnesses were called by the prosecution and four exhibits tendered to prove its case. The defence relied on appellant's own evidence as he did not call any witness.

In a nutshell, the prosecution case as found in the record of appeal stated that, on 10th March, 2018 at about 05:45hrs, Ephraim Nathan Mwankusi (PW1) a businessman running a butcher shop at Tukuyu town left his residence and was heading to Ileje to purchase cattle from a "mnada" for his shop. He was driving his motorcycle make SUNLG with registration number MC 492 ANK and had in his possession cash money TZS. 4,000,000 for purchasing the cattle. As PW1 approached Ndembela Secondary School he saw the road ahead was blocked by two people using bamboo stick. PW1 tried to turn back to where he came from but these two people and another third man overpowered him and started beating him using an iron bar and a

bush knife. He could not identify the faces of the three people who attacked him. The three attackers fled from the crime scene after stealing his money and the motor cycle when PW1 cried for help. Shortly thereafter two other people one a *bodaboda* driver Ipyana Solomon (PW2) and the other a watchman at Ndembela offered to help him. PW1 informed PW2 on how he got robbed his motorcycle and money. PW2 informed his fellow driver PW4 who parked his motor cycle at the intersection (Njia Panda) at Ndembela Secondary School.

People assisted PW1 to take him to the Police station where a PF3 was issued by a police office, he was admitted at Makandana District Hospital for four days. Dr. David George Malambugi (PW5) attended to PW1 and filled the PF3 (exhibit P4). After being discharged from the hospital G.220 D/C Alex (PW3) the investigator interviewed PW1 who found that one of the robbers who attacked him was arrested at '*Njia Panda ya Nyembela*' on the same day of the attack. PW1 produced the registration card of the motor cycle with engine number 1393357 and identified his motor cycle model SUNLG, red in color with a green seat and its registration number plate was

missing. PW1 tendered the registration card of the motorcycle in court which was admitted in evidence as exhibit P1.

After PW1 had described the incident to PW2 and sought for assistance PW2 called Israel Mbinile Mkubwa (PW4), the Chairperson of '*bodaboda*' at the *Njia Panda Ndembela* parking area and a driver who normally parks at the said parking area where the bandits were heading to and informed him about the incident. After a short while, PW4 and his fellow *bodaboda* drivers, saw a motorcycle with three people onboard, the driver was moving towards them and they tried to stop them. Two passengers jumped and ran away while the driver fell and they apprehended him, the appellant in possession of the motorcycle. PW4 informed the police who came and arrested the driver/appellant. A certificate of seizure was filled which the appellant signed, and PW3 took the appellant and the motorcycle to the police station. On the other side, after PF3 was issued PW1 was taken to the hospital and attended by PW5 who filled the PF3.

In his defence, the appellant denied any involvement in the alleged offence that he was arrested while in possession of the motorcycle. He raised the defence of *alibi* claiming that on the fateful date he was on a bus from

Kyela to Mbeya and when the bus stopped at Tukuyu bus stand he went for a call of nature. He returned to the bus to continue with his journey only to be stopped by '*bodaboda*' drivers who informed the driver of the bus that they suspected a person who had boarded the bus. He was told to disembark, was asked where he came from and he told them his name was Furaha from Masukulu. They suspected him of having committed a robbery with others, was interrogated and eventually arraigned in court for the offence of armed robbery.

The conviction against the appellant was substantially based on the doctrine of recent possession. He was sentenced to thirty years imprisonment and for an order to pay compensation of TZS. 4,000,000.00.

Aggrieved, the appellant unsuccessfully appealed to the first appellate court where the trial court's conviction and sentence were upheld. Still undaunted, the appellant preferred this appeal.

In the self-crafted memorandum of appeal, the appellant raised nine (9) grounds of complaint which can conveniently be paraphrased into the following complaints; **one**, that the prosecution evidence failed to prove the charge beyond reasonable doubt; **two**, the first appellate judge failed to

analyse the prosecution evidence and ignored the defence evidence; **three**, the chain of custody was not properly established; **four**, that there was no proper identification of the appellant; **five and six**, that the first appellate court confirmed conviction and sentence by merely believing PW1's evidence; **seven**, crucial prosecution witnesses were not called to testify to prove his arrest; **eight**, PW1 failed to tender his driving license, and; **nine**, PW3 failed to produce PF3 of the appellant in evidence.

At the hearing of the appeal, the appellant appeared in person without representation, whereas the respondent Republic was represented by Messrs. Edgar Luoga, learned Principal State Attorney and Davice Msanga, learned State Attorney. The appellant was called upon by the Court to expand on his grounds of complaint in which he commenced by adopting his grounds of appeal and submitted on each ground of appeal. Mr. Msanga who argued for the respondent strongly resisted the appeal .

Amplifying some grounds of appeal, the appellant contended in his first complaint that the charge was not proved beyond reasonable doubt due to several discrepancies in the evidence of the prosecution. He submitted that PW1 identified his motor cycle by its engine number 13933572 while exhibit

P2 the seizure certificate tendered by PW3 showed a different engine number 1393572 hence it was not the motorcycle alleged to have been the property of PW1. Further he argued that the engine number and colour of the motor cycle were not stated in the charge and the seizure certificate was not read over before the court after it was admitted in evidence. He supported his arguments with the cases of **Maziku Shija v. Republic**, Criminal Appeal No. 382 of 2015, **Mwita Wambura v. Republic**, Criminal Appeal No. 56 of 1992, **Ali Ayubu @ Msumari and Others v. Republic**, Criminal **Appeal No. of** 2019 (all unreported) and **Hamisi Neule v. Republic** (1993) TLR 213. The appellant contended further that the prosecution failed to observe the requirements of sections 132 and 135 (c ) of the Criminal Procedure Act, Cap 20.

Arguing for complaint two, he submitted that the first appellate court failed to adequately reevaluate the prosecution evidence and totally ignored the defence evidence which resulted in reaching a wrong decision. To support his arguments, he referred us to the cases of **Adamson Mwaitembo v. Republic**, Criminal Appeal No. 28 of 2015, **Leonard Mwanasoka v. Republic**, Criminal Appeal No. 26 of 2014 and **Prince**

**Charles Junior v. Republic**, Criminal Appeal No. 250 of 2014 (all unreported).

On complaint three, the appellant argued that the chain of custody of the motorcycle was not properly established and there is a possibility of it having changed hands. He claimed that the certificate of seizure bears an engine number which differs to that on the motorcycle itself and as stated by PW1, hence a possibility that the charge was fabricated against him.

The appellant's complaint four is that there was no proper identification of the appellant due to the investigator not conducting an identification parade according to the requirements of the law. He was not identified in any identification parade. He complains in grounds five and six that the first appellate court confirmed conviction and sentence by merely believing the evidence of PW1 as he testified before the trial court that he managed to remember only the appellant's clothes while there were three attackers. He questioned the credibility of PW1 to be doubtful and not worth to be believed questioning how could he fail to identify the clothes of the other attackers. Further in complaint six, the appellant doubted the evidence of PW1 to have

identified one of his attackers wearing a blue coat and jeans trouser, while he had testified that he could not identify his assailants.

On complaint seven, the appellant further amplified that PW2 who was the first person to arrive at the crime scene stated that when he reached there, he saw two people, one was lying down (PW1) and could not identify the other person. He contended that there was no evidence to prove who was the other person at the scene. Further he argued that there was a discrepancy in the evidence of PW4 who stated that he received a phone call on the armed robbery at 5:00 am while the incident is alleged to have taken place at 7:00 am. It was his contention that it was not possible for such a call to have been made before the attack took place. Further he submitted that the prosecution alleged that two *'bodaboda'* drivers assisted PW4 to successfully arrest him but only PW4 was called to testify on how he was arrested and found in possession of the stolen motorcycle. He questioned why the said drivers or the local leaders from the village were not called to prove his arrest. His complaint in ground eight is that the prosecution failed to prove that PW1 had a driving license or even a registration plate number to prove ownership of the motorcycle. He urged the Court to find that the

prosecution failed to prove PW1's ownership of the motor cycle. Lastly, in ground nine is that the evidence of PW3 stated that the appellant sustained injuries when escaping arrest and was taken to the hospital for treatment. But, PW3 failed to tender PF3 of the appellant in evidence as proof that it was the appellant and no one else. Also, he faulted the prosecution for not tendering the PF3 of PW1 in evidence as proof that he was indeed injured during the armed robbery.

At the outset in reply, Mr. Msanga informed the Court that they were resisting the appeal against the appellant. Arguing conjointly grounds four, five and six, he stated that the complaints are centered on identification of the appellant at the crime scene, which are baseless because his conviction was grounded upon the doctrine of recent possession. Both the trial and first appellate courts found and confirmed the conviction based on the evidence adduced by the prosecution that he was found in possession of stolen property; the motor cycle property of PW1 who identified it after it was stolen from him that morning a few moments before the arrest of the appellant by PW4.

On grounds one, three, seven, eight, and nine, Mr. Msanga argued conjointly that PW1's evidence explained clearly what transpired at the place he was attacked and his motor cycle stolen. When PW2 arrived at the scene of crime to offer assistance, PW1 informed PW2 what happened to him, in which he offered his assistance by calling PW4 who was stationed at a '*bodaboda*' parking area to look out for three people on board a red color motor cycle, model SUNLG. He argued that immediately thereafter PW4 informed his fellow drivers and they saw a motor cycle with three people who were moving towards them; two of them jumped and the driver fell with the motor cycle and could not run; he was apprehended. PW4 inquired from the appellant his name and where he was going to but did not cooperate and remained quiet. PW4 reported to the police who arrived at the scene, searched the driver, seized the motor cycle and arrested the driver. Mr Msanga submitted that the incident as narrated by PW1 occurred at 5:05am while the police arrested the driver who was identified by PW4 to be the appellant at 7:00am. On the difference of engine number 13933572 of the motor cycle when compared to the evidence of PW1, PW3, exhibits P1 (registration card and motor cycle) and P2, Mr. Msanga conceded that there was a difference of one number missing, which is an error that does not go

to the root of the case. He bolstered his argument with the case of **Issa Hassan Uki v. Republic**, Criminal Appeal No. 129 of 2017 (unreported). He maintained that exhibit P2 was properly admitted because the appellant raised no objection and was read out in court. He tried to convince us in his submission that probably the witnesses had a lapse of memory. He further submitted that the stolen motor cycle of PW1 was instantaneously found in the possession of the appellant after it was stolen from PW1. Referring the complaint that the chain of custody of the motor cycle was not established, Mr. Msanga argued that a motor cycle cannot change hands easily, reinforcing his assertion, he referred us to the case of **Hassan Twaha@ Ramadhani v. Republic**, Criminal Appeal No. 290 of 2017 (unreported). Regarding the complaint in ground two that the trial and first appellate courts failed to consider his defence, Mr. Msanga contended that was baseless. He argued that both the lower courts considered and reevaluated the defence evidence referring us to pages 37 to 40 and 61 to 62 of the record. He prayed to the Court to dismiss the appeal.

Apart from reiterating his submissions in chief when accorded an opportunity to rejoin, the appellant maintained that the record of appeal speaks for itself and implored the Court to set him free.

Having summarized the submissions for and against the appeal by both sides, we are in a position to determine the issues raised in the appeal. It has raised some procedural irregularities which as a matter of practice we propose to dispose of first before determining it on merit. The first complaint had two limbs that the charge was defective for failing to comply with the requirements of sections 132 and 135 (c) of the Criminal Procedure Act, [Cap 20 R.E. 2019] (the CPA). The first limb is whether the charge was defective. Section 132 provides that : -

> *"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".*

As gleaned from the substituted charge dated 17th April, 2018 at page 3 of the record of appeal which we reproduce for ease of reference: -

***"SUBSTITUTED CHARGE SHEET***

***PARTICULARS OF THE PERSON CHARGED***

*NAME: FURAHA ALICK EDWIN*

*AGE: 29 YRS*

*TRIBE: KYUSA*

*OCC: PEASANT*

*RELIG: CHRISTIAN*

*RESD: SOWETO – MBEYA CITY*

***STATEMENT OF THE OFFENCE:*** *Armed Robbery c/s 287A of the Penal Code Cap 16 as amended by Section 10 of Miscellaneous Amendment Act No. 3 of 2011.*

***PARTICULARS OF THE OFFENCE:*** *That FURAHA S/O ALICK EDWIN charged on 10th day of March, 2018 at about 5:45 hours at Ndembela Village within Rungwe District in Mbeya Region did steal cash money Tsh. 4,000,000/= and one motorcycle make SUNLG Registration number MC 492 ANK valued at Tsh. 2,100,000/= all total valued at Tsh. 6,100,000/= the properties of EPHRAIM NATHAN S/O MWANKUSI and immediately before and after such stealing did use bush knife and iron bar to hit*

*one EPHRAIM NATHAN S/O MWANKUSI in order to obtain properties".*

From the record, the charge was proper as it contained a statement of offence and the particulars of offence which clearly gave sufficient notice and information of the offence charged concerning the date, time, place the offence was committed, nature of the offence, name of the victim and the properties stolen.

The second limb was that the engine number and color of the motor cycle were not stated in the charge. As stipulated under section 135 ( c) (i) of the CPA, it suffices for the particulars of offence to describe with practical clarity the property referred to, and the property is so described. For the purpose of describing an offence depending on any special ownership of property or special value of property to name the person to whom the property belongs or the value of the property, which was also correctly done in the charge. PW1's name as owner of the stolen motor cycle model SUNLG, Registration number MC 492 ANK valued at Tsh. 2,100,000/= was described in the charge. We find that the prosecution complied with section 135 (c) (i) of the CPA. Hence, ground one is devoid of merit and we dismiss it.

We propose to follow the line of arguments presented by Mr. Msanga as we determine the appeal on merit, starting with grounds four, five and six, which centered on identification of the appellant at the crime scene, which should not take much of our time as the appellant's conviction was grounded on the doctrine of recent possession. As alluded to earlier the trial court convicted the appellant after invoking the doctrine of recent possession and this was upheld by the first appellate court. According to PW1's evidence, after he was attacked by the three assailants, they made away with cash money and his motor cycle, he could not identify his assailants at the crime scene.

As evidenced by PW2 who passed the same road on his way to Nyembela and found PW1 laying on the ground PW1 informed PW2 on what happened to him and sought for further assistance from fellow drivers in recovering the stolen motorcycle, PW4 was among them. Few minutes passed and PW4 saw a motorcycle which the appellant was the rider with two people. The appellant was asked to stop, instead he tried to run away but the motor cycle fell and the two passengers jumped off the said motor cycle and ran for their life escaping arrest. The appellant was arrested with

the stolen motor cycle and taken to the police station where PW1 eventually identified his property exhibit P1 upon tendering the registration card which had been stolen.

It is not in dispute that the appellant was not identified at the scene of the crime. However, what linked the appellant to the offence was the fact that he was immediately arrested and found in possession of the stolen motorcycle of PW1. We find grounds four, five and six to be unmerited and are dismissed.

Moving to grounds one, two, three, seven, eight, and nine conjointly on whether the prosecution proved the charge beyond reasonable doubt on the basis of the doctrine of recent possession. We agree with arguments advanced by Mr. Msanga that the prosecution proved its case beyond reasonable doubt against the appellant.

The first appellate court performed its obligation to re -evaluate the entire evidence adduced by both prosecution and the defence at the trial and subjected it to critical scrutiny before reaching at its independent decision. A cursory glance at the judgment of the first appellate court, reveals that in upholding the conviction and sentence by the trial court firstly

it reexamined the findings of the trial court as gleaned from pages 56 of the record on whether the court below was entitled to apply the doctrine of recent possession of the motor cycle with registration number MC 492 ANK (exhibit P1) to anchor conviction for armed robbery. The burden of such proof lies with the prosecution and the fact that the accused does not claim to be the owner of the stolen property does not relieve the prosecution of its obligation.

Going to ground seven, that the trial court failed to call other witnesses who according to the evidence of PW4 assisted him to apprehend the appellant, there is no doubt that, PW4 testified to that effect. Pursuant to section 143 of Tanzania Evidence Act, [Cap 6 R.E 2019] there is no number of witnesses required to establish a fact in evidence. In the case of **Amiri Hassan Kudura v. The Republic**, Criminal Appeal No. 271 of 2013 (unreported) which referred to the case of **Yohanis Msigwa v. Republic** [1990] TLR 148, it was held that under section 143 of the Evidence Act, there is no particular number of witnesses required for the proof of any fact, what is important is the witness's opportunity to testify on what he/she

claims to have seen and his/her credibility. (See **Daffa Mbwana Kedi v. Republic,** Criminal Appeal No.65 of 2017 (unreported)).

In the instant appeal, the prosecution was satisfied that PW4's evidence did suffice to prove that he apprehended the appellant while in possession of the stolen motorcycle and the trial court gave credence to PW4 that he was a credible and reliable witness. Therefore, there was no need to summon other witnesses as they would have nothing different from the evidence by PW4. This ground also fails.

On ground nine which the appellant challenges his conviction to be grounded on the evidence of PW3 while he failed to tender the PF3 to prove that he was afforded treatment, this is misconceived. It is correct that the PF3 of the appellant was not tendered, however such omission did not weaken the prosecution case. At page 20 of the record, it is evident that the appellant was taken to hospital for treatment of his injuries which he sustained while trying to escape arrest. The relevance of PW3's and PW4's evidence was that the appellant was apprehended while in possession of the stolen motorcycle. This ground fails.

Another complaint under ground two was that his defence was not considered. Both the trial court and the first appellate court convicted and upheld the conviction and sentence of the appellant based on the doctrine of recent possession. For the doctrine of recent possession to apply it must be established that, the suspect was found with the property; or there should be a nexus between the property stolen and the person found in possession of that property; that the property is positively identified as the property of the complainant; that the property was recently stolen from the complainant; and that the stolen property in possession of the accused must have a reference to the charge laid against him. (See **Mohamed Hassan @ Said v. Republic**, Criminal Appeal No.410 of 2015).

In his defence, the appellant did not testify anything regarding how he came into possession of the stolen property. He testified that he was not arrested with the said motorcycle because he claimed he was arrested on his way from Tukuyu to Mbeya City. The defence was considered and re-evaluated by both trial and first appellate courts as gathered at pages 37 – 40 and pages 61 – 62 of the record in which it did not cast doubt on the prosecution evidence.

The evidence of PW4 was supported by PW3 that the appellant was arrested as stated earlier in possession of the stolen motorcycle and the motorcycle was seized. The appellant did not raise any objection to the admission of the seizure certificate (exhibit P2). The record shows that the appellant signed it to signify that he was arrested in possession of the said exhibit. It was not disputed that the motorcycle belonged to PW1 and was identified in court. There was an error by PW3 who filled exhibit P2 in which one digit '3' was missing from the engine number 13933572 as seen in exhibit P1. We, on our part find it as a slight slip of the pen, hence not fatal.

Thus, the application of the doctrine of recent possession by both lower courts was justified. As rightly pointed out by the two lower courts, the appellant did not explain how he came by the stolen motor cycle that could raise doubts or shake the prosecution evidence nor did he establish that he was traveling by bus to Mbeya. The fact that the appellant signed exhibit P2 and did not object to its admission infers that he was not in the bus as alleged but at the place where he was arrested. In those circumstances, we find the charge was proved beyond reasonable doubt.

In fine, we find the appellant's conviction was properly grounded on being found in possession of stolen property which correctly activated the application of the doctrine of recent possession. The sentence of thirty years' imprisonment, being the statutory minimum, was properly imposed. The appeal, is unmerited. We dismiss it in its entirety.

**DATED** at **MBEYA** this 23rd day of February, 2023.

S. A. LILA
**JUSTICE OF APPEAL**

I. P. KITUSI
**JUSTICE OF APPEAL**

L. L. MASHAKA
**JUSTICE OF APPEAL**

The Judgment delivered this 23rd day of February, 2023 in the presence of the Appellant in person and Mr. Stephen Rusibamayila, learned State Attorney for the respondent/Republic is hereby certified as a true copy of original.

D. R. Lyimo
**DEPUTY REGISTRAR**
**COURT OF APPEAL**