IN THE HIGH COURT OF TANZANIA

AT MPANDA

DC CRIMINAL APPEAL NO. 46 OF 2013

(Appeal from the decision of the District Court of Mpanda in Original Criminal Case No. 83 of 2013)

PATRICK SIMWELA ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

26th & 30th May, 2014

JUDGMENT

MWAMBEGELE, J.:

The appellant Patrick Simwela was charged before the District Court of Mpanda with the offence of theft contrary to section 165 of the Penal Code, Cap. 16 of the Revised Edition, 2002. It was alleged that on or about 03.03.2013 at about 2330hrs at Kashaulili, Majengo area in Mpanda District in Katavi Region, he did steal one motorcycle make SANLG with Registration No. T864 CDS valued at Tshs. 1,850,000/= the property of Zahoro Said. Upon satisfaction that the case against the appellant was proved beyond reasonable doubt, the District Court convicted him accordingly and sentenced him to serve a three year jail term.

Aggrieved with the conviction and sentence, the appellant filed an appeal in this court comprising six grounds of complaint. The grounds of appeal are summarised by the first ground which states that the appellant was convicted of the offence of theft which was not proved beyond reasonable doubt.

The appeal was argued before me on 26.05.2014 during which the appellant appeared in person and unrepresented and Mr. Mwashubila learned State Attorney appeared for and on behalf of the respondent Republic. After hearing the parties I ordered that the appellant Patrick Simwela should forthwith be released from prison unless otherwise lawfully heard for some other offence. I promised to give reasons for that order today 30.05.2014 which I now proceed to give.

The learned State Attorney did not support the appellant's conviction and sentence. He submitted that the evidence adduced by the prosecution at the trial did not point to the guilt of the appellant. The appellant was charged with theft but his defence as well as the prosecution evidence had it that the motorcycle was actually stolen from the appellant. The learned State Attorney submitted further that the mere fact that the motorcycle was stolen while in the hands of the appellant does not necessarily mean that he stole the same. He therefore prayed that the appellant's appeal should be allowed

I entirely agreed with the learned State Attorney then and I hold the same position now. The prosecution fielded three witnesses; Juma Hassan PW1

who handed the motorcycle to Simba Raymond (third accused at the trial), Zahoro Said PW2; the owner of the motorcycle and No. G 7891 D/C Shadrack PW3; a policeman who investigated the case. It was not disputed that the appellant was given the motorcycle by Simba Raymond (the third accused at the trial) to ride as a daily worker. On the material day the appellant was hired by Selemani Abdallah (the second accused at the trial) to take hime to his residence at Majengo. On arrival at the destination Selemani Abdallah told the appellant to go with him inside his house where he could pay him the fare. The duo went inside the house where the appellant was paid his fare but alas! when he returned outside he did not find the motorcycle where he had left it. The motorcycle was nowhere to be found and consequently the appellant, Selemani and Simba were charged with theft of the same. Selemani and Simba were acquitted by the trial court for want of cogent evidence. However, the appellant, because when interrogated while under police custody, he allegedly told them to go and look for the stolen motorcycle in the Mwangaza Graveyard, was convicted and sentenced to a three year jail term.

This evidence did not support the guilt of the appellant to the required standard; beyond reasonable doubt. As rightly pointed out by the learned State Attorney, the evidence led by the prosecution pointed out that the motorcycle was stolen from the appellant in the circumstances enumerated above. The mere fact that the motorcycle was stolen in the hands of the appellant does not *ipso facto* point to his guilt. The prosecution, still, had to prove the charge leveled against the accused person; the appellant

herein, beyond reasonable doubt. The doctrine of *res ipsa loquitur* is not applicable in criminal law.

In proving the case beyond reasonable doubt, the prosecution, must prove the ingredients of the offence which are *actus reus* and *mens rea*. I find fortification in this proposition in the case of ***Christian Mbunda Vs Republic*** [1983] TLR 340 in which this court (Msumi, J.), quoting from the headnote, held:

> "It is an elementary rule of law that in order to convict an accused of theft the prosecution must prove the existence of *actus reus* which is specifically termed as asportation and *mens rea* or *animus furandi*".
> [Italics supplied].

In the case at hand the trial court, when acquitting the third accused person at the trial had this to say:

> "I do not think that the failure of a person to observe certain conditions make him a thief when the same gets stolen. He might [have] acted negligently but not fraudulently".

That was quite apposite. What perturbs me is why the trial court didn't apply the same principle in respect of the appellant. The fact that the

appellant told PW1 and PW3 (not including PW2 as the trial court seems to suggest in its judgment) that they should go and look for the motorcycle in the Mwangaza Graveyard and that the appellant left the motorcycle outside in the wrong side of the night, did not irresistibly point to the guilt of the appellant. It is my considered opinion that the trial court ought to have used the same "negligent but not fraudulent" yardstick in respect of the appellant as well.

The conviction of the appellant was therefore not well founded. The appellant might have been negligent in agreeing to go with his passenger inside the house to be paid his fare. But that alone will not point to the fact that he had a hand in the crime. As already observed above, it is an elementary criminal law that, in a theft case, the prosecution must prove beyond reasonable doubt *actus reus* which is specifically termed as asportation and *mens rea* or *animus furandi*. Unfortunately, this was not the case in the present case.

The prosecution managed to only establish suspicion against the appellant. It is settled law in this jurisdiction that suspicion alone, however strong it might be, cannot take the place of evidence and be used to found a conviction – see ***Benedict Ajetu Vs R.*** [1983] TLR 190, ***Nathaniel Alphonce Mapunda & Another Vs R*** [2006] TLR 395 and ***Noah Edward Gwalupama Vs R*** Criminal Appeal No. 124 of 2011 (unreported).

For what I have endeavoured to state hereinabove, the appellant's appeal is therefore abundantly meritorious. These are the reasons why I allowed the appeal and ordered that he should forthwith be released from prison unless otherwise was lawfully held for some other crime. The judgment of the trial court is quashed and the consequent sentence is set aside. Order accordingly.

DATED at MPANDA this 30th day of May, 2014.

J. C. M. MWAMBEGELE
JUDGE