

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY AT KIGOMA)**

**APPELLATE JURISDICTION**

**(DC) Criminal Appeal No. 42 of 2020**

*(Original Criminal Case No. 74 of 2020 of the District Court of Kasulu at Kasulu before*

*Hon. C.A. Mushi - RM)*

**MATHAYO S/O ELIAS.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

23<sup>rd</sup> November & 10<sup>th</sup> December, 2020

**I.C. MUGETA, J.**

The appellant was charged and after trial was convicted of stealing by agent contrary to section 273 (b) of the Penal Code. The allegation against him is that on 17/12/2019 he was given by Maulid s/o Issa @ Omary a motorcycle with Registration No. MC 202 AXP to use for 'bodaboda' business but instead he stole the said motorcycle.



To protest his innocence, the appellant has filed a petition of appeal with four grounds of appeal these are:-

- 1. That, the trial Court Magistrate erred in law and fact by convicting and sentence the appellant without the cogent evidence to adduced by the prosecution side which was not proved the charge beyond reasonable doubt.*
- 2. That, the trial Court Magistrate erred in law and fact by convicting and sentencing the appellant regardless and consistence evidence provided by the prosecution witness and ignoring the strong defense of the appellant.*
- 3. That, the trial Court Magistrate erred in law and fact in convicting and sentencing the appellant that exhibit abused (sic) before the Court of the law admitted by the Court was not the crucial matter of the issue at end lather than convicting the appellant based on mere words.*

*4. That the decision of the trial Court was a reasonable and unfair since the conviction upon the appellant was done without sufficient evidence.*

When the case was called up for hearing, the appellant adopted his grounds of appeal and said he has nothing to add. Antia Julius, learned State Attorney, submitted for the Respondent in opposition of the appeal. Then the appellant made a brief rejoinder. Before dealing with the parties' respective submissions, here are facts of the case.

The four prosecution witnesses are Maulid Issa Omary (PW1), Vailet Dismas (PW2), Joseph Lucas (PW3) and F.7059 DC Elias (PW4). Maulid Issa Omar is the owner of the motorcycle. Vailet Dismass and Joseph Lucas were present when Maulid Issa handed over the motorcycle to the appellant. All these witnesses testified on how the appellant was given a motorcycle for 'bodaboda' business on agreement that he would be paying to the owner Tshs 35,000/= per week for the use of the same. DC Elias tendered the caution statement of the appellant as exhibit 'B' in which he admits to have been entrusted with the motorcycle.



In defence, the accused denied to have been entrusted with the motorcycle. That he was just arrested on allegation of stealing a motorcycle while on his usual business as a cat pusher.

MS Antia Julius submitted on the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> grounds of appeal jointly. The complaint therein is that the charge was not proved beyond reasonable doubts. The learned State Attorney submitted that the evidence of PW1, PW2 and W3 is undisputed direct evidence on how the appellant was given the motorcycle. She argued that that evidence is supported by the appellant's caution statement (exhibit 'B') which was tendered without objection from the appellant.

On the third ground of appeal, the learned State Attorney submitted that it is not always compulsory to tender exhibits where there is direct evidence on the fact in issue. He referred to the case of **Abas Kondo v. R.** Criminal Appeal No. 472/2017, Court of Appeal - Dar es Salaam (unreported) where it was held:-

*'where a fact may be proved by oral evidence,  
it is not necessary that documentary evidence  
must supplement that evidence'*

In rejoinder, the appellant simply complained that the caution statement was illegal for being recorded in the absence of either his relative or justice of the peace.

I shall start with the argument in rejoinder. I find the same to be untenable for two reasons. Firstly, it is not among the grounds of appeal and secondly, it was raised in rejoinder which denies the respondent the right of reply. I therefore, disregard it.

The issue for my determination is whether the charge was proved. As submitted by MS Antia, the evidence of PW1, PW2 and PW3 is positive evidence. These are witnesses who were present when the motorcycle was handed over to the appellant. In fact, PW3 is a friend of the appellant and he is the one who connect the appellant to PW1. Like the trial court, I find the evidence of the prosecution witnesses credible. On the complaint that the defence evidence was disregarded the trial court had this to say after reflecting on it:-

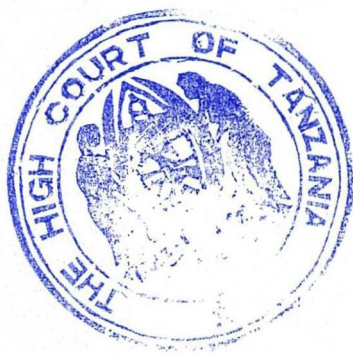
*'That was fabricated story made by the suspect before this court'.*



The defence evidence, I hold, was fully considered but the learned trial magistrate found it incredible. I have no reason to fault this finding.

Even if the third ground of appeal is not clear, I assume, like the learned State Attorney, that it is a complaint that the allegedly stolen motorcycle was not tendered as exhibit. Indeed, the same was not tendered. However, as submitted by the learned State Attorney, there is enough direct evidence to prove that the motorcycle was entrusted to the appellant and he never gave it back. In the final analysis I hold that the conviction was proper. The sentence of two years imprisonment is also in line with the law.

In the event, I dismiss the appeal. Conviction and sentence are upheld.



  
**I.C. Mugeta**

**Judge**

**10/12/2020**

**Court:** Judgment delivered in chambers this the 10<sup>th</sup> December, 2020 before the appellant in person and Clement Masua, State Attorney, for the Republic.

**Sgd: I.C. Mugeta**

**Judge**

**10/12/2020**