

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF BUKOBA  
AT BUKOBA**

**CRIMINAL APPEAL NO. 116 OF 2020**

*(Originating from Criminal Case No. 173/2017 of Muleba District Court)*

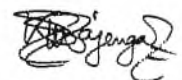
**BARAKA MICHAEL @ NDELEMA.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*28<sup>th</sup> May & 04<sup>th</sup> June 2021*

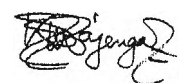
***Kilekamajenga, J.***

The appellant was arraigned before the District Court of Muleba for the offence of armed robbery contrary to **section 287A of the Penal Code, Cap. 16 RE 2002**. After the full trial of the case, the appellant was final convicted and sentenced to serve 30 years in prison. Being aggrieved with the decision of the trial court, he appeared before this Court in search of justice. His memorandum of appeal was packed with six grounds of appeal which I take the discretion not to reproduce them in this brief judgment. During the hearing of the appeal, the appellant appeared in person and without representation while the respondent was represented by the Learned State Attorney, Mr. Grey Uhagile. The appellant was ready to defend his innocence by challenging the contradictory prosecution evidence. He cited some few examples from the contraction observed in the evidence. For instance, PW2 only identified the appellant in court; at some point,

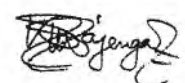


PW2 alleged that he saw the appellant at the police station. He also raised the legal effect of failure to conduct identification parade in this case. The appellant further contended that all the exhibits tendered were not read in court. He urged the court to expunge them. Also, the prosecution failed to prove whether the motor vehicle involved in the accident was the one stolen. The appellant insisted the failure on the prosecution to prove its case to the required standard.

When prompted for the response, the learned State Attorney supported the appeal due to the following reasons. **First**, where a crime has been committed to the victim that he did not know the accused, there must be prior description of the accused person. In this case, the victim reported the incident but never described the accused person. Therefore, it is not clear whether the victim knew the accused person before the robbery. On the other hand, the identification parade was not conducted to establish the identity of the accused person. He invited the court to consider the case of **R v. Mohamed [1942] EACA 72**. **Second**, Mr. Uhagile conceded to the contradiction on the evidence of PW2 and PW3. Such contradiction went into the root of the case. **Third**, the prosecution case was not proved to the required standard and the appellant has the right to benefit from the doubt revealed in this case. The learned counsel invited the Court to set aside the decision of the lower court and set the appellant at liberty.

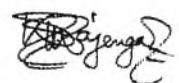


The major point for determination is whether the prosecution's evidence was sufficient to sustain the conviction against the appellant. It is a well settled principle of law for any criminal case to satisfy the requirement of proof beyond reasonable doubt. **See, Section 3(2) of the Evidence Act, Cap. 6 RE 2019.** In this case, the prosecution relied on the evidence of six witnesses. PW1 who was the owner of the motorcycle was not an eye witness. He was informed about the loss of the motorcycle and commenced a search. He was later informed that the motorcycle was found in another place. PW2 who was riding the motorcycle on the day of the robbery remembered to have been hired by the accused person to Marahara. Upon approaching the agreed destination, the accused robbed PW2 at knife point. The accused was later arrested after being involved in an accident while riding the same stolen motor bicycle. On the other hand, PW3 testified that he met PW2 holding a helmet on 28/06/2017. PW2 informed PW3 that he was robbed the motor bicycle. PW3 assisted PW2 in finding the motorcycle. They finally found the accused involved in an accident with the motorcycle. PW4 also confirmed that the accused hired PW2 on 28/06/2017; few minutes later, he was informed that PW2 was robbed the motorcycle. He actually saw the accused person bargaining with PW2 on the trip to Nshamba. He was later informed that the motorcycle was found at Nyakabango. PW4 and PW5 were police officer hence they did not witness the robbery and their evidence was just corroborative. During his defence, the



appellant stated that, on the way to Nyakamika where he went to buy rice, he hired a ride of a motorcyclist. When the motorcycle was on higher speed, they were involved in an accident and he was seriously injured. He was later taken to the police.

I understand, the role of the accused person in any criminal charge is merely shading doubt to the prosecution's case. There are two flaws in this case which worthy noting. **First**, there is no evidence from the prosecution to dispute the allegation leveled by the accused. Suppose the motorcycle was stolen somewhere and the accused happened to hire the robber and finally involved in an accident as alleged. Unless there was evidence to show that the accused was the one riding the motorcycle before the accident. Such evidence should go further telling that he (accused) was the one who robbed the motorcycle from the victim. **Second**, as argued by the learned State Attorney, when the exhibits were admitted, the court did not take a step to ensure that they were read in court in order to afford the accused a fair hearing. It is a well settled principle of the law that where documentary evidence is admitted in court and not read, it suffers the consequence of being expunged from the proceedings of the trial court. This stance of the law has been reiterated in a number of cases including the case of **Robert P. Mayunga and David Charles Ndaki V. R; Criminal**



**Appeal No. 514 of 2016**, CAT at Tabora where the Court of Appeal of Tanzania stated that:-

*"...documentary evidence which is admitted in court without it being read out to the accused is taken to have been irregularly admitted and suffers the natural consequences of being expunged from the record of proceedings."*

The court went further stating that:-

*"In essence the requirement to have the document read out to the appellant after it is cleared for admission is meant to let the appellant aware of what was written in the document so that he can properly exercise his right to cross-examine the witness effectively."*

In the instant case, when I expunge the documentary evidence available in the file, the act of violently taking the motorcycle from the victim (PW2) becomes shaky. The only evidence remains behind is that of PW2 and PW3 who also had no opportunity of explaining about the accused before identifying him before the police. In the circumstances of the case, it was difficult for PW2 and PW3 who were searching for the stolen motorcycle to dissociate the accused from the robbery. The major reason was that the accused was involved in an accident with the same robbed motorcycle. In the eyes of PW2 and PW3 it could not matter whether the accused was a mere passenger to the robbed motorcycle or not. This court is left in uncertainty on whether the accused really robbed the motorcycle. It is always safe to resolve the doubt in favour of the accused. I

hereby allow the appeal and set aside the decision of the trial court. The appellant should be set free unless held for other lawful reasons. It is so ordered.

**DATED** at **BUKOB**A this 11<sup>th</sup> Day of June, 2021.


**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**11/06/2021**

**Court:**

Judgement delivered this 11<sup>th</sup> June 2021 in the presence of the appellant and the learned State Attorney, Mr. Juma Mahona (for the respondent). Right of appeal explained to the parties.


**Ntemi N. Kilekamajenga.**  
**JUDGE**  
**11/06/2021**

