

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

**CRIMINAL APPEAL NO. 69 OF 2021**

*(Arising from District Court of Biharamulo at Biharamulo in Criminal Case No. 270/2019)*

**JONAS PASCHAL.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

*Date of Judgment: 23.12.2021*

*Mwenda, J.*

Before the District Court of Biharamulo District at Biharamulo the appellant here in above was arraigned for stealing by agent contrary to Section 273 (b) and 258 (1) of the Penal Code [Cap 16 R.E 2019].

The brief facts of the matters leading to his arraignment are that the appellant was on 4<sup>th</sup> day of November 2019 at Chibitoke Village within Biharamulo District in Kagera Region entrusted by one NOAH S/O PASCHAL, his brother, with a motorcycle make SANL G with Reg. MC 320 BFR worthy 1,300,000/= to use it in a business of ferrying passengers popularly known as Bodaboda business. In the said transaction it was agreed that the appellant would be paying his brother Tsh. 45,000 on weekly basis.

Having received the said motorcycle the appellant never honored their agreement, rather a week thereafter the complainant (his brother) was informed that his motorcycle has been stolen. He travelled to Katoro and upon reaching there he asked the appellant on the motorcycle's whereabouts but ended up receiving unsatisfactory response. He then reported the matter to the relevant authorities where investigation ensued and upon its completion, the appellant was charged for stealing by agent. At the end of the judicial day, the trial District Court found the evidence adduced by the prosecutions side cogent to warrant conviction. He thus was convicted and sentenced to serve a term of five years jail imprisonment. Aggrieved by the conviction and sentence, the appellant preferred this appeal with seven grounds to wit:

1. That the trial court erred in law and fact to convict the appellant on shaky And weak evidence whereby the said contract between the appellant and the defendant NOAH PASCHAL (the victim who claims to hire (sic) the motorcycle to the appellant) was not tendered in court as to prove the allegations.
2. That the trial court faulted disregard the appellant's defence evidence being one sided wrongful in law (sic).
3. That the trial court erred in law and fact to convict the appellant on the charge of theft without any witness testifying theft as tested in the charge sheet (sic).

4. That the exhibits tendered in court i.e Registration card and the sales agreement (sic) of the motorcycle were irrelevant to the case in (sic) hand as they displayed the complainant's ownership not the alleged theft or handling over to the said property.
5. That the judgment laid before the appellant (sic) is total violating (sic) section 312 (2) of the Criminal Procedure Act, [Cap 20 R.E 2019].
6. That the Hon. Trial court failed to narrow itself as to discover trial game (sic) against the appellant whereby the witnesses appeared (sic) in court were only wife and husband without any other witness from outside the family of the defendant.
7. That the case was not proved to the required law standard (sic) that's to say beyond the reasonable doubt (sic).

When this appeal was fixed for hearing, the appellant appeared in person that is without any legal representation while for the respondent republic Mr. Juma Mahona learned State Attorney was in attendance.

Having been invited to submit in support of his grounds of appeal, the appellant responded that he have nothing to submit and he prayed this court to adopt the contents of the said grounds of appeal in making its decision.

On his part Mr. Juma Mahona informed this court that the republic is opposing this appeal and that he is going to argue the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> ground together

(collectively), 2<sup>nd</sup> and 5<sup>th</sup> ground of appeal collectively and the 6<sup>th</sup> ground independently (separately).

With regard to the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> ground of appeal, the learned State Attorney submitted that the prosecutions side proved its case beyond reasonable doubt. He said, to prove its case, the prosecution's side called PW1 and PW2 who testified on how they handled the said motorcycle to the appellant and that there was an agreement that the appellant would pay the victim (PW2) Tsh. 45,000/= on weekly basis. The learned State Attorney submitted that the said agreement was made orally as they trusted that the appellant would honour their agreement. He said the victim (PW2) tendered the motorcycle Registration card as exhibit P.1 which was not read in court. Relying on the authority from the case of **Anania Clavery vs. Republic, Criminal Appeal No. 355 of 2017** (unreported) he prayed the said exhibit to be expunged from the record. He however insisted that even if the said exhibits are expunged, the evidence adduced by the prosecution's side prove the case beyond reasonable doubt. He said there is evidence that the motorcycle was handled to the appellant who later on failed to pay an agreed sum of Tsh. 45,000/= to the victim (PW2).

With regard to the 6<sup>th</sup> ground of appeal, the learned State Attorney while making reference to Section 143 of the Evidence Act, [Cap 6 R.E 2019] submitted that no specific number of witnesses is required to prove a case because even one witness is enough to prove the case. On the appellant's query that PW1 and PW2 are a

couple who testified in court without any outsider, the learned State Attorney submitted that both PW1 and PW2 are competent witnesses.

In regard to the 2<sup>nd</sup> and 5<sup>th</sup> ground of appeal the learned State Attorney submitted that it is true that the Honourable trial Magistrate did not consider the appellant's defence. He thus prayed for this court to step on the shoes of a trial court and deliberate on that matter. He made reference to the case of **Kasim Said vs. Republic Criminal Appeal No. 391 of 2019**, Court of Appeal of Tanzania (unreported). He further stated that failure of the trial court to evaluate the appellants defence prejudiced him and in support thereof he cited a case of **Hussein Eid and Another vs. Republic** [1986] TLR.166. He however faulted the appellant's failure to cross examine PW1 and PW2 regarding their conflict and according to him the said defence does not help him as still, the prosecution's case was proved beyond reasonable doubt. He thus concluded with a prayer for this court to dismiss this appeal for want of merits.

When invited to reply on the submissions made by the learned State Attorney, the appellant said he leave it to the court to decide this matter basing on the evidence.

Having summarized the facts of the case and the submissions made the issue for determination is whether the present appeal is meritorious. In answer to the said issue this court is going to analyze the grounds of appeal as were grouped by Mr. Juma Mahona, learned State Attorney.

With regard to 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, and 7<sup>th</sup> grounds of appeal, it is important to note that the prosecution's side called two key witnesses to prove their case. PW1, the appellant's sister in-law and wife to the complainant (PW2) testified that on 04.11.2019, the appellant went at their (PW1's and PW2's) homestead to pick a motorcycle to be used in a business of ferrying people (bodaboda business). She said the appellant was in agreement with PW2 in that he would be paying Tsh. 45,000/= on a monthly basis. She further testified that one week after the appellant had left with the motorcycle, her husband received a call that the said motorcycle was stolen. She said further that the incident was then reported to the police authorities who arrested the appellant. In cross examination by the appellant, PW2 stated that she was present during the motorcycles handing over and that they did not sign anywhere as the appellant was trusted by her husband.

On his part PW2, the victim of theft and a husband to PW1 testified to the effect that on 4/11/2019 the appellant requested to be handed with a motorcycle with Reg. No. MC 320 BFR make, SANLG. He said he bought the said motorcycle to one Shadrack S/O Ntongo and the transfer agreement was prepared and signed which was tendered, together with the original registration card as exhibit P.1 and P.2. He further testified that having handled the said motorcycle to the appellant with the terms as was testified by PW1 above, he received an information from his brother in-law one **Michael S/O Pascal** that the motorcycle was stolen. Looking at PW1's and PW2's evidence it is clear that the prosecution's case left a lot to be

desired. As was rightly pointed out by the learned State Attorney, exhibit P1 and P2 was tendered in court without being read in court. It is trite law that failure to read the content of exhibit is fatal irregularity. In the case of **Hassan Said Twalib vs. The Republic, Criminal Appeal No. 92 of 2019** Court of Appeal of Tanzania (unreported), the court held inter alia that:

***"It should suffice to state that the exhibit was not read out in court after admission which is a fatal irregularity."***

That being the case the effect of it is to expunge exhibit P1 and P2 from the record which I hereby do. Having expunged exhibit P1 and P2 from the record, the only evidence to establish ownership of the stolen motorcycles is PW1's and PW2's words. Again in the case of **Hassan Said Twalib vs. The Republic**, (supra) the Court of Appeal held inter alia that:

***"Secondly, ownership of the stolen item was not established. PW1 who is stated in the charge sheet to be its owner did not so testify. No document was ever tendered to establish that PW1 was the owner of the allegedly stolen motorcycle. What we have is just a word from PW1 that the appellant stole his motorcycle. No registration card was tendered to show that he***

***owned it. Neither was any receipt tendered to verify this. This infraction watered down the prosecution case greatly.” [Emphasis added]***

Guided by the above authority, this court is of the view that in the circumstances of this case where no contract was signed, the prosecution’s side ought to have called one **MICHAEL S/O PASCHAL**, PW2’s brother in-law who called him (PW2) to air the information that the motorcycle was stolen.

This court is mindful of the legal position under S. 143 of evidence Act that no particular number of witness is required to prove a case but since there is no written agreement between PW2 and the appellant, then the said **Michael Paschal** ought to be summoned to testify in support of PW1’s and PW2’s evidence that the appellant was in fact handled with the said stolen motorcycle. The prosecution’s failure to summon him greatly affected their case. In the case of **Nkanga Daud Nkanga vs. The Republic Criminal Appeal No. 316 of 2013, Court of Appeal** (unreported) the court citing the case of **Gabriel Simon Mnyele vs. Republic** held inter alia that:

***“...Under Section 143 of the Evidence Act [Cap 6 R.E 2002] no amount of witnesses is required to prove a fact...But it is also the law (section 122 of the Evidence Act) that the court may draw adverse inference in certain circumstances***



***against the prosecution for not calling certain witnesses without showing any sufficient reasons see Aziz Abdallah vs. Republic (1991) T.L.R 71.”***

*[emphasis added].*

In our present case, PW2's brother in-law (Michael S/O Paschal) was a necessary witness in the circumstances of the case because he is the one who aired information to PW2 that the motorcycle in question was stolen while in possession of the appellant in katoro. This witness would tell if he ever saw the appellant with the said motorcycle and how did he know that it was in fact stolen. For that matter this court draws adverse inference against the prosecution's case.

In regard to the 2<sup>nd</sup> and 5<sup>th</sup> grounds of appeal, this court went through the copy of judgment only to note that despite the appellant raising a defence of existence of a quarrel between him and PW2 resulting from the land they inherited from their father, the matter which was reported at Katahoka Village Government's Office, the trial Magistrate did not analyzed and consider it. The Hon. Magistrate having summarized the defence evidence came up with reasons as to why there were no written agreement between the appellant and PW2.

In his reasoning he said he believe PW2 handled the motorcycle as a way of helping his young brother to boost his life. On the issue of handling over the motorcycle the Hon. Trial magistrate said the mode adopted in handling over was due to the fact that the business involved brothers and that there were no need

of complicating things like calling witnesses or even signing anywhere. The Hon. Magistrate's reasoning is not backed by evidence. Probably he reached to that conclusion relying on section 122 of Evidence Act, [Cap 6 R.E 2019]. He however forgot to consider the appellant's evidence that there was a conflict between him and PW2 over ownership of land, and this was a serious misdirection.

In the case of **Kaimu Said vs. The Republic, Criminal Appeal No. 391 of 2019** Court of Appeal of Tanzania (unreported) the court while making reference to Section 235 (1) of CPA held:

*"From this provision of the law, it is clear to us that in composing the judgment (decision) a trial magistrate is obliged to consider the evidence of both sides as presented to it so as to arrive at a finding of guilty or not. The analysis and evaluation of the evidence as well as the findings should be apparent in the record."* [emphasis added].

Again in the above cited case the court while making reference to the case of **Hussein Idd and Another vs. Republic** [1986] TLR 166, the court held:

*"It was a serious misdirection on the part of the trial judge to deal with the prosecution evidence*



***on its own and arrive at the conclusion that it was true and credible without considering the defence evidence."***

Under the circumstances where the trial court failed to consider the defence evidence, this court has, as was rightly submitted by Mr. Juma Mahona, powers to step into the trial courts' shoes and reconsider it. In the case of **Kaimu Said vs. The Republic (supra)** the court held that:

***"In the event a trial court fails to perform its duty under the law to consider the defence evidence, a High Court, being a first appellate court has powers to step into the trial court's shoes and reconsider the evidence of both sides and come up with its own findings of facts."***

Guided by the authority above, this court is duty bound to analyze the prosecution's evidence as against the defence and come up with own findings. From the trial court's record, the appellant testified that he was charged before the trial court due to a quarrel with PW2. The appellant testified further that (in cross examination) their quarrel reached the village Government's Office of Katahoka. Looking at this evidence (defence), in the circumstances where PW1 and PW2 did not tender any written document to prove handling over of the stolen motorcycle, this court is of the view that it raises reasonable doubt leading to a

presumption that the said case was framed up as against the appellant. The said presumption hinges on Section 122 of the Evidence Act (supra) which reads:

***"A court may infer the existence any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case"***  
*[emphasis added].*

From the foregoing reason this court finds the appellant's defence raised reasonable doubt where upon the benefit of which goes to the appellant. The second proviso to section 114 (1) of Evidence Act, reads:

***"...the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either prosecution or the defence creates a reasonable doubt as to the guilty of the accused person in respect of that offence."*** *[Emphasis added].*

Guided by the above provision of the law, and on the reasons advanced in other grounds of appeal, this court finds merits in the appellant's appeal. This appeal

therefore succeeds, conviction entered by the trial court is quashed and the sentence passed is hereby set aside.

The right of appeal fully explained.

It is so ordered.




  
A.Y. Mwenda

**Judge**

23.12.2021

This Judgment was delivered in chamber under the Seal of this Court in the presence of the Appellant Mr. Jonas Paschal and in the absence of the Respondent.



  
A.Y. Mwenda

**Judge**

23.12.2021

