

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF BUKOBA

AT BUKOBA

CRIMINAL APPEAL NO. 41 OF 2022

(Arising from Criminal Case No. 16 of 2021 Resident Magistrate's Court of Bukoba)

EVERIUS JUSTINIAN REVELIAN..... APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

16th and 26th May, 2023

BANZI, J.:

This is an appeal against the judgment of Bukoba District Court whereby the Appellant was arraigned with the offence of stealing contrary to sections 258 (1) and 265 of the Penal Code [Cap.16 R.E. 2019] ("the Penal Code"). It was alleged that, on unknown dates between November, 2020 and 31st March, 2021 at Bukoba Municipality in Kagera Region, the Appellant stole a motorcycle with registration number MC702 CDW make Bajaj Boxer valued at Tshs.2,500,000/= the property of Hidayah Farida Ibrahimu. At the end of the trial, he was convicted and sentenced to four (4) years imprisonment.

Briefly, the facts leading to the conviction of the Appellant runs as follows. The Appellant being a bodaboda rider, and Hidayah Farida Ibrahimu

(PW1) owning the said motorcycle entered into a written contract that the said motorcycle would be used to carry passengers in which the Appellant would submit Tshs.10,000/= daily to PW1 for eleven months. Upon completion of that period, the motorcycle would be handed over to the Appellant as his own property. However, according to PW1, the Appellant defaulted payments and he was running away whenever he saw her until he was arrested by the police after she had reported that matter to Bukoba Central Police.

In his defence, the Appellant conceded to have entered into a written contract with PW1 on consideration to pay Tshs.10,000/= per day and that he was paying the same on each day despite the fact that, PW1 rejected to give him contract for eight months. Then, he sent the motorcycle to PW1 but she rejected to receive the same. Later PW1 reported to Police accusing him that he had not paid for four months. According to him, he surrendered himself to the police with the motorcycle in question. Thereafter, he was arraigned to trial court and charged accordingly.

The Appellant is now before this court challenging his conviction and sentence with seven grounds. When the appeal was called for hearing, Mr. Dastan Mujaki, learned Advocate appeared for the Appellant, while the Respondent Republic was represented by Mr. Erick Mabagala, learned State

Attorney. Mr. Mujaki prayed to abandon ground No. 1, 2, 3, 5 and 6 and sought to argue ground No. 4 and 7 which are reproduced as hereunder:

- 1. That, the trial magistrate erred in law and fact by convicting and sentence the appellant in the base of a planted case on the appellant.*
- 2. That the case against the appellant was not proved beyond reasonable doubt.*

Submitting on the two grounds, Mr. Mujaki faulted the findings of the trial court which convicted the Appellant basing on the testimony of PW1 and PW2, while the evidence of these witnesses did not prove the alleged offence against the Appellant. He clarified that, PW2 did not witness the Appellant stealing the motorcycle in question and thus, his evidence is hearsay which is contrary to the dictates of section 62 (1) of the Evidence Act [Cap.6 R.E. 2022] ("the Evidence Act"). He further challenged the prosecution evidence claiming to be an afterthought because the testimony of PW1 and PW3 shows that, PW1 went to report about the alleged theft after seeing the Appellant with another motorcycle. He added that, the prosecution evidence did not show how the motorcycle ended up at police station. Besides, the Appellant did not steal the motorcycle in question but he surrendered it at the Police station after PW1 refused to receive it. If the trial court disbelieved the evidence of the Appellant, then there must evidence from the

prosecution to prove how the motorcycle was ended up at police but that was not the case. Therefore, under the surrounding circumstances, the Appellant cannot be said to have stolen the motorcycle in question under the ambit of section 258 (1) of the Penal Code while the ingredients stipulated under that section were not proved. He therefore prayed for the appeal to be allowed by quashing the judgment, setting aside the sentence and releasing the Appellant from prison.

In his reply, Mr. Mabagala on the outset supported the appeal on the view that, the prosecution failed to prove the case beyond reasonable doubt as the ingredients of the offence under section 258 (1) of the Penal Code were not established. The fact that the Appellant failed to hand over the agreed sum within time did not prove that he intended permanently to deprive PW1 of the motorcycle in question. If he had such intention, he wouldn't have surrendered it to the police. He further stated that, PW1 and the Appellant had contractual relationship which was proved by Exhibit PW1A and hence the Appellant was in lawful possession of the motorcycle in question. Apart from that, the claim by PW1 that she found the Appellant with another motorcycle does not conclude that, the Appellant intended to steal the motorcycle from PW1. He concluded by praying for this appeal to

be allowed as prosecution evidence is full of doubts which should be resolved in favour of the Appellant.

Having considered the grounds of appeal and submissions of both sides in the light of evidence on record, the issue for determination is whether the prosecution had managed to prove the case against the Appellant beyond reasonable doubt.

It is worthwhile noting here that, according to section 258 (1) of the Penal Code, for a person to be held responsible for stealing, the prosecution must prove that; **one** there was movable property; **two**, the movable property under discussion is in possession of a person other than the accused; **three**, there was an intention to move and take that movable property; **four**, the accused moved and took out the possession of the possessor; **five**, the accused did it dishonestly to himself or wrongful gain to himself or wrongful loss to another; and **six**, the property was moved and took out without the consent from the possessor. These conditions were by the Court of Appeal of Tanzania in the case of **The Director of Public Prosecutions v. Shishir Shyamsingh** [2022] TZCA 357 TanzLII.

In the case at hand, looking at the exhibits that were tendered especially Exhibit PW1A, it is undisputed that PW1 and the Appellant entered into a written contract which would last for eleven (11) months whereby, the

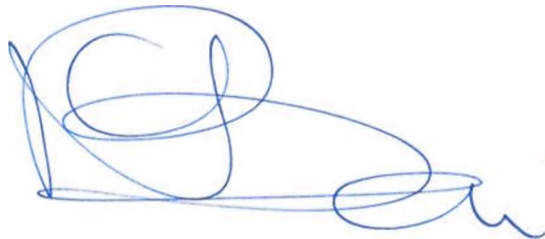
Appellant was required to pay Tshs.10,000/= per day, and after the lapse of that time, the motorcycle would be handed to the Appellant as his own property. However, according to PW1, the Appellant defaulted to submit the payment as agreed. On the other hand, the Appellant contended that, he intended to hand over back the said motorcycle to PW1 but PW1 refused to receive it. With that refusal, the Appellant surrendered it to Police. In order to secure conviction of theft, the prosecution side was required to prove all the elements that were underlined in section 258 (1) of the Penal Code and expounded in the cited case above.

Nonetheless, in this case, it is evident that the prosecution side failed to prove the elements underlined above because the parties having entered into agreement which is a civil matter, any default thereafter, ought to be referred as a civil dispute. In other words, what transpired between the parties was purely a contractual issue which should not be ended up into criminal court in case of default. As conceded by counsel of both sides, the Appellant was in lawful possession of the motorcycle in question according to their agreement. Besides, from the evidence of PW1 and the Appellant himself, it is undoubted that, the Appellant had no intention to take or to permanently deprived her the said motorcycle. In short, there was no scintilla of evidence to prove any of the ingredients of theft stipulated under

section 258 (1) of the Penal Code which were expounded in the cited case of **The Director of Public Prosecutions v. Shishir Shyamsingh** (*supra*).

On that basis, it is apparent that, the prosecution had failed to prove the offence of theft beyond reasonable doubt. Thus, I find the appeal with merit and I hereby allow it. Consequently, I quash the conviction and set aside the sentence meted against the Appellant. I order his immediate release from prison unless otherwise lawfully held.

It is so ordered.



I. K. BANZI
JUDGE
26/05/2023

Delivered this 26th May, 2023 in the presence of Mr. Eric Mabagala, learned State Attorney for the Respondent and Mr. Dastan Mujaki, learned counsel for the Appellant who is also present. Right of appeal duly explained.



I. K. BANZI
JUDGE
26/05/2023

