

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
SUB - REGISTRY OF SHINYANGA  
AT SHINYANGA**

**CRIMINAL APPEAL NO. 132 OF 2023**

*(Originating from Criminal Case No. 44 of 2023 before Shinyanga District Court at Shinyanga)*

**REVOCATUS PASCHAL BUSUNGU .....APPELLANT**

**VERSUS**

**THE REPUBLIC .....RESPONDENT**

**JUDGMENT**

*7<sup>th</sup> & 25<sup>th</sup> March, 2024.*

**MASSAM, J.:**

Before the District Court of Shinyanga at Shinyanga, the appellant with his fellow who did not appeal in this court were convicted of the offence of Stealing contrary to Section 258 and 265 of the Penal Code Cap 16 R:E 2022 and sentenced to face imprisonment of 4 years in jail.

It was alleged that, the complainant is involving in boda-boda activities and on 17<sup>th</sup> day of January, 2023 he was with DW1 as his passenger and he took him to Chinese Grocery, while at the grocery, DW1 met with the appellant and told the complainant to wait for them, as they were going to take money from NMB bank by using the complainant's motorcycle but unfortunately, they did not return back. The matter was reported to the police station and upon investigation both the accused persons were

arrested and brought before the court and denied to have committed the offence.

At the trial, the prosecution succeeded to prove the charge against the appellant, and subsequently was convicted and sentenced to serve four years imprisonment.

Aggrieved therein, the appellant appealed to this court with 4 (four) grounds of appeal namely,

1. *That, the trial court erred in law by convicting the appellant depending on mere suspicious.*
2. *That, the learned trial Magistrate erred in law and in fact when convicted and sentenced the appellant by using poor evidence of PW2 who did not tender the said motorcycle with the names of the victim before the court to prove the ownership of the alleged stolen motorcycle.*
3. *That, the trial Magistrate failed to judicially evaluate the evidence and come to a wrong decision.*
4. *That, the trial court erred in law by convicting and sentencing the appellant for the offence which was not proved beyond reasonable doubt.*

At the end, the appellant prayed to this court to allow this appeal, quash the conviction, set aside sentence and release him from custody. The appeal was heard orally, and the appellant was self-represented, whereas Mr. Goodluck Saguye learned State Attorney represented the respondent.

In his oral submissions, the appellant claimed that he did not commit the alleged offence as he was at Mwanza and prayed to this court to consider his grounds of appeal.

On his reply, the learned state attorney addressed the grounds of appeal by stating that, he is not supporting the appeal but the conviction and sentence, and argued on grounds number 1 and 4 jointly, while other grounds were argued separately.

Submitting on the 1<sup>st</sup> and 4<sup>th</sup> grounds as complained by the appellant that, he was convicted on suspicious evidence since the offence was not proved beyond reasonable doubt, the respondent answered it that, the appellant was arrested in connection with the offence of stealing the motorcycle and it was the 1<sup>st</sup> accused who led the police to arrest the appellant.

Again, he was convicted according to the caution statement of the 1<sup>st</sup> accused person which incriminate the appellant who did not object it as



it is the requirement of the law that failure to object the tendering of any exhibit, means that, it has been accepted. Further to that, he submitted that, it was the evidence of PW2 while interrogated the 1<sup>st</sup> accused person, he admitted to know the appellant as his friend and the one who took that motorcycle from the complainant after being introduced by the 1<sup>st</sup> accused to the appellant as a doctor, hence they properly knew each other as the 1<sup>st</sup> accused person also has used his motorcycle for a week.

He submitted that, during investigation at Mwanza is the house of the appellant, PW2 did recognized the appellant to be the one introduced to him by the 1<sup>st</sup> accused as his friend and the appellant after seeing the complainant and the police he locked himself inside until when the police threatened him to open the door, and therefore that act establish malice which the appellant had, thus the allegations that his conviction was based on a mere suspicious evidence is not true by referring this court at Pg. 21-22 of the court proceedings.

Regarding the issue of proving the case beyond reasonable doubt, he submitted that, the 1<sup>st</sup> accused person managed to give full details of the appellant about where he was living, the evidence which was supported by PW3 who testified that, PW2 was the one who identified the accused

person. Yet again, the 1<sup>st</sup> accused person in his defense admitted to be at Shinyanga with the appellant who told him that, he has intention to hire the complainant's motorcycle to go at the ATM. He referred this court at Pg 30 of the court proceedings.

Submitting on the 2<sup>nd</sup> ground, that, the evidence of PW2 was not credible, he contended that, PW2 was a credible witness who proved that he was the owner of the said motorcycle by tendering a registration card and by giving a proper description of it to have Reg. No. 798, DNF make Sun Lg, red in colour, and also, he mentioned the name of the owner to be Modeva enterprises since he was in the process of changing the ownership to his name, and he bought it for the tune of Tsh. 2,400,000/=. Again, if the appellant had dispute with the registration card, he could had objected it or cross examined the Complainant on its legality.

On the last ground, that is ground number 3 which was criticized that the trial court did not properly make analysis of the evidence, it was from the respondent that, the entire evidence was properly analyzed which made the court to reache into that conclusion. He refered this court at Pg. 6 of the court judgment hence this appeal has no merit and needs to be dismissed.

Resting his submission, the appellant submitted that, he was arrested at Mwanza and connected to the offence which was committed at Shinyanga and detained for six days before his statement was taken. Also, the evidence of PW2 revealed that, he had no receipt of purchase of the said motorcycle. Again, the registration card shows that the said motorcycle was bought on 3/10/2022 while the complainant testified that, he bought it on Dec. 2022. PW1 also did not recognize him but only the 1<sup>st</sup> accused person identified him as Paschal Maganga while he is not Paschal Maganga hence he was not found with the said motorcycle, he never knew the complainant thus he prayed to this court to allow his appeal.

Having heard the submissions from both parties, this court will now make a determination on the merit of this appeal, and the issue for determination is ***whether this offence was proved beyond reasonable doubt.***

Back to the grounds submitted by the appellant, this court will argue grounds number 1,2 and 4 mutually as they have the same significance, while ground number 3 will be argued separately.

With the first sets grounds, it was from the appellant that, the prosecution did not prove the offence of theft beyond reasonable doubt as



the evidence adduced was suspicious and PW2 was not credible witness, Those grounds were replied negatively by the respondent to the effect that, they managed to prove their case to the required standard as the evidence tendered by the prosecution connected the appellant with the offence charged.

To be satisfied, it is clear under the provision of Section **258 of the Penal Code Cap 16 (supra** provides that,

***"a person who fraudulently and without claim of right takes anything capable of being stolen, fraudulently converts to use of any person other than the general or specific owner thereof anything, capable of being stolen |is said to steal that thing."***

It is in this regard that under section 258 (2) of the Penal Code it is explicitly provided that the taking or conversion of something capable of being stolen must be done fraudulently, (dishonestly). Thus, and from the above provisions of law, it is also clear that, in order to convict an accused of the offence of stealing or theft, it must be proved that the act was done fraudulently and without claim of right.

In the case at hand, and according to the particulars of the offence of theft as explained herein above, I have visibly examined the evidence

from both sides and the records from the trial court and observe that the appellant before the trial court was convicted and sentenced due to the strength of the evidence tendered by the prosecution, preferably that, of PW1, PW2, PW3, PW4 and exhibit Pe1, to wit, the caution statement of the first accused persons and the evidence of DW1

On the issue of proving the case beyond reasonable doubt, this court is blessed to start by inspecting the evidence of DW1 at Pg. 29 which displays that, the appellant was with the 1<sup>st</sup> accused person and the complainant before commitment of the said offence and thereafter, the appellant requested the Motorcycle of the complainant for the purpose of going to withdraw money and come back, but unfortunately and fraudulently he disappeared with it.

Funny enough, and during cross examination by the respondent the DW1 testified at Pg 31 that, **"Revocatus was arrested due to my cooperation, it is true Revocatus was the one who stole the motorcycle of the victim"**.

The above evidence was supported by the complainant that, it was DW1 who introduced the appellant to him as a doctor, and during the commission of the offence they were together at the Restaurant of PW3, but regrettably, the appellant left with his motorcycle after he had deceived



him that, he is going to withdraw cash. This evidence was again supported by the owner of the restaurant that, on the material date both the complainant, DW1 and the appellant were his client.

Additionally, the confession evidence by Dw1, that is the caution statement, is supporting the prosecution evidence. From this, it is cardinal law that the court should accept with caution a confession which has been retracted or repudiated or both retracted and repudiated unless the court is fully gratified that in all the circumstances of the case the confession is true this was debated in the case **of Tuwamoi v. Uganda** (1967) EA 84. The East African Court of Appeal, by stating that:

***"The same standard of proof is required in a cases and usually, a court will act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is not necessary for law and the court may act on a confession alone if it is fully satisfied after considering ail the Material points and surrounding circumstances that the confession cannot but be true."***

It is also well settled that, where the cautioned statement is retracted, it needs to be corroborated. This stance was taken in the case of **Mabala Masasi Mongewe v. Republic**, Criminal Appeal No. 161 of 2010 (Unreported)

In the instance case, since the evidence on records revealed that the caution statement of the 1<sup>st</sup> accused person, to wit, exhibit Pe1 also led to conviction of the appellant as it was supporting the evidence of DW1 and that of the prosecution, that the appellant was the one who stole the said motorcycle and led PW1 and PW4 to where the appellant resides, this court is therefore well satisfied that, the evidence tendered was enough to convict the appellant.

With the issue of credibility of PW2, the records reveal that, he properly managed to prove ownership of the stolen motorcycle by describing it to have Reg No. 798, DNF make Sun Lg, with red color and through exhibit Pe2 which was his registration card. Although it bears the name of the Company but he managed to testify that, he was in the process of changing the name the facts which was not objected by the appellant hence he accepted his testimony and if it was in dispute he was supposed to cross examine for clearance of his doubt as it is a matter of principle that, a party who fails to cross examine a witness on a certain matter is deemed to have accepted that matter and will be estopped from asking the trial court to disbelieve what the witness said. See the case of **CYPRIAN A. KIBOGOYO v R**, Criminal Appeal No. 88 of 1992, **PAUL YUSUF NCHIA v NATIONAL EXECUTIVE SECRETARY, CHAMA CHA**

**MAPINDUZI AND ANOTHER**, Civil Appeal No. 85 of 2005 (both Unreported).

Again, neither the appellant or anyone else came before the court and complained that, he/she is the owner of the said stolen motorcycle. Therefore, upon concluding on grounds number 1,2 and 4 this court is of the opinion that, prosecution managed to prove both the offence properly as per the provisions of, ***Section 110 (1) which offers that,***

***"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

Consequently, the contents of the first sets grounds of appeal are found to be useless to the extent explained above.

With the third ground that, the trial court did not make analysis and evaluate the evidence tendered is that, the Courts of Tanzania in numerous cases made it clear that, the trial court and first appellate court are imperatively required to consider and evaluate the entire evidence so as to arrive at a balanced conclusion. An omission to do so is a serious misdirection and a clear indication that there was no fair trial.

Besides, the court in the case of **Petro Ngoko Versus Republic**, while making reference to the above position went on saying at Pg 10 that,



***"Having found that the trial court failed to properly analyze the evidence before it, I think, this Court, being the first appellate court is duty bound to re-evaluate and weigh the evidence by both sides (as a whole) so as to arrive at a just and fair finding"*** See also the case of **Charles Thys vs. Hermanus P. Steyn, Civil Appeal No.45 of 2007**".

From the above cited case, this court is honored to say that this ground has been answered as per the findings made early due to analysis and evaluation of the evidence tendered by both sides and satisfied that, the evidence tendered by the prosecution does not creates any doubts that the appellant was a thief that is why he was convicted.

Consequently, and from the above analysis this court finds the appeal without merit and I dismiss it in entirety. The conviction is hereby supported.

It is ordered.

**DATED** at **SHINYANGA** this 25<sup>th</sup> day of March, 2024



  
**R.B. Massam**  
**JUDGE**  
**25/03/2024**