IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 92 OF 2010

(Original Criminal Case No. 211/2009 of Mpwapwa District Court at Mpwapwa)

GIDION SADICK KISONGELA & OTHERS..... APPELLANTS

Versus

THE REPUBLIC ..... RESPONDENT

J U D G M E N T

21/11/2011 & 05/12/2011.

KWARIKO, J:

The appellants herein were originally charged with two counts in the following manner: In the first count the three were charged with the offence of Breaking into a Shop and Stealing contrary to section 296 (a) and (b) of the Penal Code. It was alleged by the prosecution that the three had jointly and together on the 2nd day of December, 2009 at about 02.00 hours at Mkapa Street within Mpwapwa District in Dodoma Region broke and entered into the shop of one ANSILA D/O MASSAWE and stole assorted shop items all total valued at shs. 1,590,000/= the property of ANSILA D/O MASSAWE. In the second count the 1st appellant was charged with the offence of Receiving Stolen Property contrary to section 311 of the Penal Code where it was alleged that on

the 2nd day of December, 2009 at 02.00 hours at Hazina village within Mpwapwa District in Dodoma Region did receive 12 curtains, 4 bed sheets, 2 night dresses, 2 mosquito nets, 35 pieces of mobile phone batteries, 1 piece of soap, 9 pencils, one photo frame, I bottle of perfume, one packet of powder, one bottle of lotion and one sim charger the property which was believed to have been stolen.

The three denied the charge and thus their trial was conducted. The facts of the case as revealed from the prosecution show that on 2/12/2009 at 8.00 am the complainant ANSILA D/O MASSAWE, PW1 got information from her husband that her shop had been broken into and items had been stolen. In the night of 05/12/2009 at 11.00 pm the police, including Insp. MUSSA OMARY, PW4 got information that some stolen items were at the 1st appellant's home. PW1 was informed and went there. In the presence of a Sub-village chairman SAMUEL MAHEMBE, PW2 a search was conducted in the 1st appellant's home where assorted shop items were found and PW1 identified the same to be her stolen property (exhibit P1). A certificate of seizure (Exhibit P2) was prepared and duly signed by the witnesses. Upon interrogation the 1st appellant said it was the 3rd appellant who took the properties to him and when the police went to arrest him (the 3rd appellant ran away. The 1st appellant's caution statement having been written by WP 2424 CPL ITIKA, PW5 was admitted in court as exhibit P3.

The second appellant was said to have approached STAM ALLY, PW3 with some of the complainant's stolen property for sale. However,

before the sale transaction was concluded the police intercepted the same after PW2 had secretly informed them of the same, and the 2nd appellant ran away leaving behind the said property (exhibit P4) which PW1 positively identified as her stolen property.

In his defence the 1st appellant denied the allegations and said that the police brought the items into his home and tortured him into admitting the allegations. The 2nd appellant also denied the allegations and said he was arrested in the court premises where he had gone to attend another case on 6/12/2009 and was implicated with these allegations. The 3rd appellant said was arrested on 24/1/2010 while watching a match between KBC (Dodoma) and TTC (Mpwapwa) for these allegations which he denied.

At the end of the trial the court found that the evidence on record proved that the 2nd and 3rd appellants were guilty of breaking and stealing since they were the ones who took the stolen property to the 1st appellant shortly after the same had been stolen. That, this was sufficiently explained in the 1st appellant's caution statement, exhibit P3. Therefore, the 2nd and 3rd appellants were convicted with the breaking and stealing while the trial court found that the 2nd count was sufficiently proved against the 1st appellant and was convicted accordingly. The 1st appellant was sentenced to five (5) years imprisonment while the 2nd and 3rd appellants were sentenced to seven (7) years imprisonment each.

The three were not satisfied with the trial court's decision hence brought this appeal each with own grounds of appeal which have been heard together. The appellants are essentially complaining that the prosecution case against them did not prove the charge beyond reasonable doubt.

When the appeal was called for hearing the 1st appellant brought a notice that he did not wish to be present during the hearing. Whereas the 2nd and 3rd appellants only implored the court to consider and allow their appeal.

On the other hand the respondent Republic was represented by Mr. Katuli learned State Attorney who supported the three appellants' appeal. He gave reasons for this stance. This court has gone through the original record and the decision of the trial court. It has also considered the appellants' grounds of appeal and submission made by the learned State Attorney in support of the appellants' appeal. This court is in agreement with both parties that the prosecution case was not proved to the standard required in law against the appellants herein. The reasons for this stance are the same as given by both parties as will be shown hereunder.

As the record shows the 1st appellant was convicted in the 2nd count on account of being found in possession of alleged stolen properly. The 1st appellant maintained that the police did bring the property to his home and when he protested he was tortured and forced

to admit that he knew all about the properties. Firstly, the police officers who visited the 1st appellant's home for searching contradicted themselves on when the sub-village chairman, PW2 was called to witness the search. While PW3 said that the 1st appellant directed them to PW2's home before he was summoned, PW6 said it was PW2 who led them to the 1st appellant's house before the search was conducted. This contradiction, coupled with the 1st appellant's cry that the police went to his home with the said property creates a serious doubt as to whether the property was found in the 1st appellant's home and this shows that the police witnesses were not telling the truth.

Also, the 1st appellant was said to have confessed these allegations. However, from the very beginning the 1st appellant said that he was forced to admit the allegations and was tortured. When the 1st appellant objected his caution statement the trial court did not conduct any inquiry as to its admissibility. Instead, the trial court ruled out that from what he knew about the 1st appellant's history the statement was made voluntarily. With respect to the learned trial Magistrate this was not an inquiry to ascertain the voluntariness of the caution statement. The trial Magistrate adjudged the 1st appellant unheard. There ought to have been made a proper inquiry by hearing both parties before the ruling was made. Thus, the 1st appellant's caution statement (exhibit P3) was not good evidence and it is hereby discarded (***See PAULO MADUKA & 4 OTHERS, Criminal Appeal No. 110/2007 CAT, at Dodoma (Unreported)***).

Even though the alleged property were found in the 1st appellant's home but the complainant (PW1) did not identify them as rightly required in law. PW1 said that she was summoned by the police to the 1st appellant's home where the property (exhibit P1) was found and she identified the same as her stolen property. This was not a proper identification of stolen property by the complainant. PW1 ought to have explained the property's distinguishing marks first before she saw the same at the police. There is no evidence to show that PW1 had ever reported this incident to the police after the shop breaking and thus no any information about the marks of the property had been filed at the police.

Therefore, since the property was common shop items, PW1 ought to have explained how she believed the same belonged to her since any shop owner could have claimed ownership. Thus, PW1 did not sufficiently identify the property to be her stolen property(***See KIMBUNGA VR [1970] HCD 243***)

As for the 2nd and 3rd appellants the evidence against them was the 1st appellant's alleged confession. I have discarded the 1st appellant's caution statement and thus nothing from him which implicates the 2nd and 3rd appellants. If the 2nd and 3rd appellants really sent the property to the 1st appellant, his defence during the trial could have said so.

The 2nd appellant was said to have taken some property to PW3 for sale and before the deal was concluded the police appeared and the same

aborted. The 2nd appellant was not arrested at PW3 's place in possession of the said property (exhibit P4). Hence his identity was not proved as to whether he was the one who took the property to PW3. Since PW3 was a secret informer of the police (PW6), his evidence ought to have been corroborated. If PW3 was a shop keeper and the 2nd appellant approached him at his shop in a day time then there must have been other people around who may have witnessed the 1st appellant taking to his heels especially after the police had arrived. Also, there ought to have been an independent witness who should have been summoned to see the property left behind by the 2nd appellant at PW3's. No any independent witness came to support PW3 and PW6 as their evidence was suspect. However, the identify of the alleged stolen properly, exhibit P4 was not proved by PW1 as I have explained earlier.

Consequently, I find that the prosecution case against the three appellants was not proved beyond reasonable doubts, hence I allow the appellants' appeal, quash the conviction and set aside the sentences of imprisonment imposed on them.

The appellants are to be released from prison unless their continued incarceration is in relation to other lawful cause. It is ordered accordingly.

(M. A. KWARIKO)

JUDGE

05/12/2011

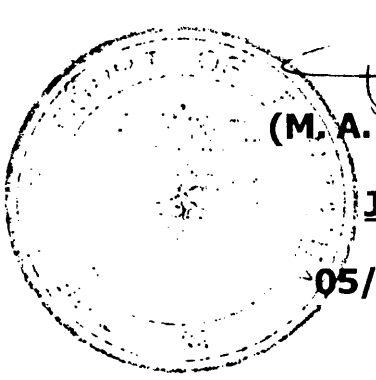
AT DODOMA.

05/12/2011

Appellants: 2nd and 3rd present.

For Respondent: Mr. Mwipopo Senior State Attorney.

C/c: Ms. Komba.



(M. A. KWARIKO)

JUDGE

05/12/2011