IN THE COURT OF APPEAL OF TANZANIA
AT TANGA

(CORAM: MROSO, J.A., KIMARO, J.A. And LUANDA, J.A.)

CRIMINAL APPEAL NO. 58 OF 2007

BASHIRU EDWARD ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

(Appeal from the Decision of the High Court of Tanzania at Tanga)

(Mkwawa, J.)

dated the 20th day of December, 2006
in
Criminal Appeal No. 83 of 2005

JUDGMENT OF THE COURT

26 June & 3 July, 2008

MROSO, J.A.:

The appellant together with two others who were the first and second accused persons in the trial court were prosecuted in the District Court at Muheza for the offences of burglary contrary to section 294 (1) and also for stealing contrary to section 265, both sections of the Penal Code. Those first and second accused persons were acquitted on both counts but the appellant was convicted as

charged. He was sentenced to seven years imprisonment on the burglary count and 12 months on the stealing count. He appealed unsuccessfully to the High Court and has now resorted to this Court.

The appellant and the two other persons who were prosecuted with him were alleged to have broken into the house of one Jitahada Jumanne at about 03:00 hours on 20th June, 2004 and stole from therein an assortment of household goods including a Sonny Radio Cassette. A young man aged 17 years – PW2 – Ibrahim Juma, who lived in the house from which the things were stolen, claimed he saw and identified the appellant at the scene. Electricity light outside the house enabled him to see and identify him. Two days later PW3 – Issa Saidi, who was a ten cell leader, was requested by the police to witness a search in houses at the home of the first accused at the trial. During a search into a house at the homestead which was said to be occupied by the appellant, the second accused at the trial was found in the house. It was in that house a radio cassette, later identified to be one of the items stolen from the complainant, was found. Other items such as a TV deck, fan and a brief case were also found in the house. The second accused claimed that all those items

belonged to the appellant. The first and second accused persons were arrested by the police.

When, subsequently, the appellant was also arrested at first he denied that he kept things in the houses of the first accused but, then, changed his mind and admitted to have stolen the Sonny Radio Cassette from the complainant. PW4 – Policeman Mwakajinga, an Assistant Superintendent of Police (ASP) who was also the Officer Incharge CID for Muheza, recorded a caution statement from the appellant. The statement was tendered without objection as evidence at the trial. In the statement the appellant is recorded to have said that he had found the door to the house open. He saw a ***"Radio Cassette CD Sonny"*** in the house. He entered and took it away. He claimed that he did not take away anything else and that if other items were found missing from the house, then some other people may have stolen them. In his defence in court he admitted to have made the statement and to have signed it.

In his memorandum of appeal to the High Court one of his complaints was that he should not have been convicted for burglary

but for theft because there was no evidence of breaking. In the memorandum of appeal to this Court the appellant complained mainly that when he made his statement to the police he was not a free agent, that he would be a free agent only in court. He also claimed in the memorandum of appeal that a confession to a person, like the police, who has powers of arrest was inadmissible in evidence. Furthermore, the house in which the stolen things were found did not belong to him and that at any rate the prosecution witnesses were accomplices. At the hearing of the appeal the appellant did not say anything of substance.

The learned State Attorney, Mr. Oswald Tibabyekomya who appeared for the respondent Republic, did not support the conviction. Substantially, he argued that there was no proof that the radio cassette the appellant admitted to have stolen was the one which was stolen from the complainant. Besides, while the appellant said he walked through an open door and stole the radio cassette, the prosecution evidence was to the effect that there was burglary. To crown it all, he said, the first and second accused persons at the trial who said the stolen things were found in appellant's room were co-

accused persons and, therefore, accomplices who were trying to exculpate themselves.

With respect, the first and second accused persons at the trial may have been accomplices. However, the appellant was not convicted on the strength of their evidence, nor were they prosecution witnesses as alleged, but from his admission in the caution statement. Besides, it was not disputed that the house in which the appellant kept stolen goods belonged to the first accused who, apparently was a traditional healer. The appellant was known (to PW3 – the ten cell leader) to occupy the house at the homestead of the first accused and the appellant admitted that fact in his defence evidence.

There was indeed a difference between the evidence of PW2 – Ibrahim Juma – who lived in the house from which theft was committed, and the caution statement. While PW2 said the group of people who included the appellant stole a number of things from the house, the appellant said in the caution statement that the only item he stole from the house was the radio cassette. Also, in the caution

statement the appellant said he walked through an open door to steal from the house. PW2 did not claim in his evidence that there was any breaking or even the pushing of a closed door. So, indeed, there was no evidence of breaking. There was mere theft from the house. It would follow that there was no basis for the charge of burglary, which means breaking into a dwelling house at night.

Did the radio cassette which the appellant admitted in the caution statement to have stolen belong to the complainant – PW1? The complainant produced a receipt No. 44849 of 25th August, 2001 as proof that he had bought the radio cassette from a firm known as Tunakopesha Limited. The appellant did not dispute that evidence. So, there was no dispute that the radio cassette the appellant admitted in the caution statement to have stolen and which was before the trial court as an exhibit belonged to the complainant. PW4 – ASP Mwakajinga, had put the following question to the appellant:-

> *"Je wewe uliwahi kumwibia dada mmoja wa TANESCO anayeishi kule Ngwaru. Kama uliwahi kumwibia, ulimwibia nini na uliibaje?".*

Jibu:- "Niliwaibia radio Radio Cassette CD Sonny ..... nilikuta mlango uko wazi ..... niliingia nikachukua Radio Cassette Sonny nikatoka ..... sikuchukua kitu kingine baada ya kutoka na Radio Cassette ndipo walipofunga mlango."

Complainant indeed worked for TANESCO. When the complainant identified her radio cassette in court the appellant did not dispute that it was the one he stole from her.

The important question to consider in our view is whether the trial court was correct to have acted on the caution statement to convict the appellant.

It is noted that when PW4 – ASP Mwakajinga tendered the caution statement in evidence the appellant was not asked by the trial magistrate if he had objection to its being admitted as evidence against him. It is appreciated that since the appellant was a lay person it was the duty of the trial magistrate to ask the appellant if he had objection to the statement being tendered as evidence against him. We, however, do not think that the lapse by the trial

magistrate occasioned a miscarriage of justice. We say so because before PW4 tendered the statement as evidence, he spoke of the things the appellant allegedly told him in admitting that he stole the radio cassette. So, if the appellant wished to dispute what was imputed to him in the caution statement, he could have protested by saying that he never told the policeman any of the things he was alleged to have said. He did not do so when given the opportunity to cross-examine PW4. Even when giving his defence evidence he did not either retract or repudiate the contents of the statement.

As indicated earlier in this judgment, the appellant complained in his memorandum of appeal that he was not a free agent when he was before the police and that a person is said to be a free agent when he is before a court only. Unfortunately for him, that is not the law. A person can be a free agent before the police as well. It all depends on the circumstances prevailing. If a person is being assaulted or tortured when being interrogated by the police, he could be said to be not a free agent. But it is not the law that a suspect is never a free agent if he is in a police station under restraint. It is the law, however, that only a police officer of or above the rank of

corporal may take a confession from a suspect. See section 27 (1) of the Law of Evidence Act, 1967 read together with the definition of a ***"police officer"*** in section 3 of the same Act. The officer who recorded the caution statement from the appellant was well above the rank of corporal. Since there was no claim by the appellant that he made the confession in his caution statement as a result of undue influence, coercion or torture, it must be taken to have been voluntary and true and the trial court was entitled to act on it to convict him of theft.

It will be recalled that PW2 claimed to have seen the appellant outside the house from which theft was committed. Electricity light outside the house aided him to see and identify the appellant. The weakness of that evidence is that the witness did not say how far the light was from the house or even what the quality of the light was, that is to say, the intensity of the light. However, the shortcomings of that evidence are made up for by the appellant's confession to have stolen the complainant's radio cassette. It is pertinent, as mentioned earlier in this judgment, that a confession to a police

officer of or above the rank of corporal is good evidence under section 27 (1) of the Law of Evidence Act, 1967 which reads:-

> *"27 (1) A confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person."*

We also said earlier in this judgment that the circumstances in which, according to PW2, the theft was committed differed from those given by the appellant in his caution statement. We said that the fact that there were those different versions did not affect the guilt of the appellant on the charge of theft of the radio cassette. We are fortified in this opinion by inspiration from a previous decision of this Court in the case of **Christophoro Kimambo and Another** v **Republic** [1982] TLR 297. In that case the appellant Kimambo was convicted of the murder of a girl. The dead body of the girl showed that she had been raped before she was killed. The appellant made a confession to a policeman as well as to a civilian to have raped a girl other than the deceased. However, blood stains on

his shorts were found to be of the blood group of the deceased. This Court said:-

> *"The fact he (the appellant in that case) named a different girl other than the deceased as a victim of his rape, makes no difference in our view. It might be a diversionary tactic on his part similar to the one he made to one of the police officers (PW1) when he told him in the course of interrogation, that his pair of shorts got blood stained while he was slaughtering a goat".*

So, a confession is not rejected merely because it also contains some lies or some irrelevant facts.

From our full consideration of the case we have found that the offence of burglary was not proved and the courts below should have so found in view of the complete absence of evidence that there was any breaking either in the popular sense or in the legal sense which would include the pushing of a door to open it. The conviction for robbery is therefore quashed and the sentence of seven years imprisonment set aside.

As regards the conviction for the theft of the Sonny radio cassette, there was sufficient evidence which proved the offence. The conviction for theft, therefore, is sustained. The appeal against conviction and the sentence of twelve months imprisonment is dismissed in its entirety.

However, since the appellant has already served more than three years of imprisonment, well beyond the sentence for theft which was imposed on him, he should now be set free forthwith unless he is held for some other lawful cause.

DATED at TANGA this 1st day of July, 2008.

J. A. MROSO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(W. E. LEMA)
DEPUTY REGISTRAR