IN THE HIGH COURT OF TANZANIA

AT DODOMA.

(DC) CRIMINAL APPEAL NO. 78 OF 2009

(Original Criminal Case No. 353 of 2006

Of the District Court of Dodoma at Dodoma)

AMAN AMBONISHI @ NGOSHA ..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

14/4/2010 & 05/5/2010.

KWARIKO, J:

The appellant herein was arraigned before the trial Court where he faced two counts namely; Shop breaking and Stealing contrary to aections 296 (1) and 265 and an alternative second count of Receiving Stolen Property contrary to section 311 (1) both of the Penal Code Cap. 16 Vol. 1 of the Laws Revised Edition 2002. At the end of the trial the appellant was found guilty in both counts, was accordingly convicted and was sentenced to ten (10) years imprisonment.

Having been dissatisfied with both conviction and sentence, the appellant has filed this appeal.

The facts of the case as revealed by the prosecution can be recapitulated as follows.

One MATHIAS NHONYA, PW2 was a watchman at the shop owned by WISAKA NYAMSUKA, PW1. On 23/5/2006 at midnight while PW2 was guarding the said shop was invaded by two thugs who were armed with a machete where they threatened and ordered him to keep quite. That among the two thugs PW2 managed to identify the appellant herein whom he knew before. While the an unidentified thug kept guard of him (PW2) the appellant entered the shop and collected the items which were various mobile phone accessories. After the stealing the thugs left and PW1 visited the shop at about 6.30 am where he found PW2 standing on the door of the deserted shop.

PW2 informed the shop owner how the thugs had invaded him and that he identified the appellant herein. PW1 reported the matter to the Police and when he was leading home he met one Khalid who informed him that the appellant could be the thief of the shop items since he had asked him for bus fare to go to Gairo and that he had a suspected luggage. Also, Khalid informed PW1 the following day that the appellant had returned and was in possession of several mobile phones. PW1 led the Police to the appellant's home and they arrested him where he was found in possession of stolen phones. He was thus charged with the aforementioned offences.

However, the appellant did not give his defence since the trial against him was conducted in his *absentia* for he had absconded just after a preliminary hearing had been conducted. Thus the provisions of Section 226 of the Criminal Procedure Act Cap 20 Vol. 1, Revised Edition 2002 hereinafter to be referred to as the Act referred to as the Act were applied against him until he was convicted and sentenced on 16/7/2007.

Apparently, the appellant was apprehended and appeared in Court on 31/12/2007 and he was given opportunity to explain why he had jumped his bail. The appellant explained that he had received a call from his brother in Tabora to the effect that his mother had been assaulted and sustained a broken leg hence he went to attend her. However, on arrival to Tabora he encounted the Police, was arrested and implicated with robbery allegations. He was charged in Court but fortunately was discharged on 6/12/2007 and upon returning to Dodoma he was arrested for the present allegations.

Seemingly, the Court did not believe his story hence the appellant was ordered to start serving his sentence of then (10) years in jail.

Through Mr Kuwayawaya learned Advocate, the appellant filed two grounds of appeal namely;

1. That, the trial Magistrate erred in law and in fact in convicting the appellant without proof of his guilty on a required standard i.e beyond all reasonable doubts.

2. That, the trial Court erred in law and in fact in refusing to give chance to put up his defence having been apprehended.

When the appeal came up for hearing Mr Kuwayawaya learned Advocate appeared and argued the grounds of appeal and on the other hand Mr Katuli learned State Attorney represented the respondent Republic where he did not support the appellant's conviction and sentence by the trial Court.

This Court is in agreement with the parties that the prosecution case did not prove the appellant's guilt. The following are reasons for my assertion.

Firstly, the prosecution witnesses did not prove that the appellant was sufficiently identified at the scene. PW2 who said that was invaded around midnight did not mention any source of light that might have helped him to identify one of the thugs to be the appellant herein. It is my opinion that if the appellant had entered the shop soon after the invasion as PW2 stated, then he (PW2) could not be able to identify him as the assailant since there was no ample time for him to observe and identify him. Actually, PW2's evidence was very casual and did not at all prove that he identified any thug at the scene.

As for PW1, his was a hearsay evidence in respect of the identification of the appellant at the scene. I have already ruled out hereinabove that the identification of the appellant was not proved by

PW2 who was at the scene. PW1 came out with another piece of evidence which was to be effect that one Khalid had informed him that the appellant could be the suspected mobile phones thief, and actually later he was arrested and found in possession of the stolen phones.

Also the foregoing piece of evidence is not free from doubts. Firstly, an independent evidence ought to have been brought especially from the alleged Khalid to prove that the appellant was seen in possession of suspected stolen mobile phones and that he was actually found in their possession. The alleged Police who arrested the appellant and allegedly found him in possession of stolen mobile phones ought also to have testified to corroborate PW1's story. In the absence of these two pieces of corroborative evidence, PW1's evidence remains tainted with serious doubts.

Also, closely related to the foregoing, is the record of the trial court which did not show that the alleged mobile phones were tendered in Court as exhibits. Since PW1 testified that upon arrest the appellant was found in possession of stolen mobile phones, one would expect that the same must have been tendered in Court as exhibits to prove that they were his stolen property. Not even the alleged mobile phone accessories were tendered in Court as exhibits to prove the appellant's guilt. In the absence of the physical evidence against the appellant, the allegations against him that he was found in possession of stolen phones remain to be empty shells.

Surely, one would not be surprised with the shortcomings of the foregoing evidence since the charge sheet does not mention that any phones were stolen from PW1's shop but all that were mentioned were mobile phone accessories. Thus the charge was at variance with evidence adduced in Court to prove it. Not even the appellant's landlord was called to testify to prove that the appellant was found in possession of any stolen items since PW1 testified that he was among the witnesses during the appellant's arrest. Therefore, the prosecution did not prove any of the charged offences against the appellant.

Secondly, I agree with Mr Kuwayawaya learned Counsel that the trial court erred in law when it did not afford the appellant an opportunity to give his defence after he was apprehended after the alleged abscondment. If the trial court magistrate found that the appellant had no probable defence on merits he ought to have stated so as it is clearly provided under section 226(2) of the Act which is given in the following terms;

> ***"If the Court convicts the accused in his absence, it may set aside the conviction, upon being satisfied that his absence was from causes over which he had no control and that he had a probable defence on merits,"***

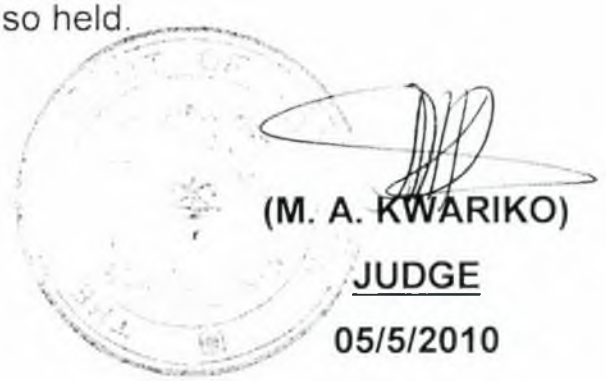
I have read the trial court's record after the appellant was apprehended. I have seen that after the appellant had given his explanation as to why he had absented himself from his trial, the Court did not give its ruling. Instead it was a Public Prosecutor who decided that the appellant's reasons for his absence were nothing but pure lies which were not proved by documentary evidence. This was contrary to the law herein above cited since it was the trial court magistrate who had the duty to decide if the appellant spoke the truth or not. Very clearly, if the trial Court had ruled out in relation to the appellant's causes for his absence and considered the prosecution case with an open mind as it has been done herein above. He might have found out that he had a probable defence on merits and could have set aside the conviction and allowed the case to be heard and determined fairly.

Not only the foregoing, but also the trial magistrate erred in law when he convicted the appellant with the offence of Shop Breaking and Stealing and an alternative offence of Receiving Stolen Property. One cannot steal and then receive the same property. This was an error, one can only be convicted with one of the mentioned offences.

Consequently, I find that the prosecution case against the appellant was not proved beyond reasonable doubts and I hereby allow the appeal, quash the conviction and set aside the sentence of ten (10) years imprisonment the appellant has been serving.

It is hereby ordered that the appellant be set at liberty unless his continued incarceration is in connection with other lawful causes.

It is so held.



(M. A. KWARIKO)

JUDGE

05/5/2010

AT DODOMA.

05/5/2010

Appellant: Present/ Mr Kuwayawaya Advocate.

For Respondent: Mr Katuli assited by Ms Magoma State Attorneys.

C/c: Ms Komba.