IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: RUTAKANGWA, J.A., LUANDA, J.A., And MJASIRI, J.A.)

CRIMINAL APPEAL NO. 150 OF 2012

FRANK NDUNGURU.....APPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Iringa)

(Kalombola, J.)

dated 14th day of March, 2000
in
Criminal Appeal No. 24 of 2011

JUDGMENT OF THE COURT

24th & 26th July, 2013

RUTAKANGWA, J.A.:

The appellant was charged before the District Court of Mbinga District (the trial court) with two counts, namely, Burglary (1st count) and Stealing (2nd count). He had denied both counts. After a full trial, he was found guilty as charged in both counts and convicted. He was sentenced to two consecutive terms of imprisonment of 10 and 7 years respectively. His appeal to the High Court sitting at Songea was dismissed in its entirety. Unfortunately for him, the High Court enhanced the sentence imposed on

the first count to twenty years imprisonment, although the sentences were ordered to run concurrently. Aggrieved, he has preferred this appeal.

The appellant's memorandum of appeal contains three crucial grounds of complaint against the High Court judgment. He was aggrieved by that judgment because:-

a) The learned first appellate judge erred in relying on very weak visual identification evidence to sustain the conviction.

b) He was not found in possession of the property he had allegedly stolen.

c) The case against him was not proved beyond reasonable doubt.

To prosecute the appeal, the appellant appeared before us in person. When the grounds of appeal were read out to him, he opted to adopt them and had nothing to say in elaboration thereof.

The respondent Republic, on the other hand, was represented by Mr. Maurice Mwamwenda, learned Senior State Attorney. Mr. Mwamwenda supported the appeal because the prosecution case which depended solely

on the identification evidence of a single witness was totally wanting in cogency. Furthermore, he supported the appeal because no scintilla of evidence was led to prove the charge of burglary. He accordingly urged us to quash the convictions of the appellant and set aside the sentences.

We have carefully read the evidence of the prosecution. This evidence came from PW1 Sophia Komba, PW2 Alanus Ndimbo, PW3 No. F. 355 D/Sgt. Seif and the statement of one Scholastica Kapinga (Exh. P1) which was admitted in evidence under section 34B of the Evidence Act, Cap. 6 R.E. 2002 (the Act). PW1 Sophia was the owner of the salon premises which were allegedly broken into on the night of 3rd March, 2010 and a video deck, make Samsung, stolen therefrom. She did not witness the break in but testified on what she was told by one Scholastica. PW2 Alanus was supposedly a watchman at the salon on the material night. PW3 D/Sgt. Seif, recorded the statement of Scholastica, who was sleeping in the salon on that night. The statement, all the same, was curiously recorded over a month later on 12/04/2010. Scholastica could not be traced to testify. It was only PW2 Alanus who purported to implicate the appellant. He claimed that he heard the appellant talk with Scholastica inside the salon and later saw him running away "carrying a Black deck"

but could not arrest him. The appellant was accordingly convicted on the basis of the evidence of PW2 Alanus and Exh. P1.

In disposing of this appeal, we have found it convenient to begin with a brief discussion of the second reason given by Mr. Mwamwenda in support of the appeal. As already shown above the appellant was, in the first count, charged with and convicted of the offence of burglary c/s 294 (1) (a) of the Penal Code, Cap 16 R. E. 2002. This sub-section reads as follows:-

> *"294 (1) Any person who-*
>
> *(a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit an offence therein or*
>
> *(b) ..... not relevant.....*
>
> *is guilty of housebreaking and is liable to imprisonment for fourteen years."*

If the offence is committed at night it becomes burglary (s. 294 (2)).

In spite of the clear provisions of this section, the particulars of the 1st count read thus:-

"That Frank s/o Ndunguru "a" GEAR BOX charged on 3rd MARCH, 2010 at or about 00.02 hrs. at stand street within the district of Mbinga in Ruvuma Region did break the salon of one SOFIA d/o KOMBA with intent to commit the offence therein."

We have found this charge to be fundamentally defective as the above particulars do not show that the said "salon" was a "building, tent or vessel used as a human dwelling" and/or that the appellant did enter therein. They do not, in short, disclose these essential ingredients of the offence of burglary. It is settled law that charges of this nature must give reasonable information to the accused as to the nature of the offence and the particulars of the charge must disclose all the essential elements or ingredients of the offence. This Court has persistently held that "a charge which does not disclose an offence in the particulars of the offence cannot be salvaged under section 388 of the Act" (i.e the Criminal Procedure Act): **Kashima Mnadi v. R.,** (CAT) Criminal Appeal No. 78 of 2011 (unreported). See, also, **Uganda v. Hadi Jamali** [1964] E.A. 294, **Mussa Mwaikunda v. R.** [2006] TLR 387, **Isidore Patrice v. R.,** (CAT) Criminal

Appeal No. 224 of 2007 (unreported), **Khatibu Kanga v. R.,** (CAT) Criminal Appeal No. 290 of 2008 (unreported), etc.

We believe it will be instructive here to return to what we said in **Isidore Patrice**. We said:-

> *"It is now trite law that the particulars of the charge shall disclose the essential elements or ingredients of the offence... Accordingly, the particulars, in order to give the accused a fair trial in enabling him to prepare his defence, must allege all the essential facts of the offence and any intent specifically required by law."*

Alive to the above mentioned defects in the charge, we proceeded to ask ourselves on whether or not if the particulars of the charge had disclosed these essential ingredients of the offence, we would have sustained the conviction of the appellant. Our perusal of the evidence on record gave us a negative answer. As correctly contended by Mr. Mwamwenda, no evidence was given by the prosecution to show that the salon was a dwelling house, tent or vessel. Furthermore, no evidence was given to prove that there was a breaking into the salon, even if it were shown that it was a dwelling house. No evidence was led to

show which part of the salon was broken. We are accordingly settled in our minds that the offence of burglary was not proved at all. We accordingly quash the conviction of the appellant in the first count and set aside the twenty years prison sentence.

Regarding the theft conviction, we are equally settled in our minds that it, too, was predicated on very weak identification evidence. We found exh. P1 to be of very little evidential value. This is because, while the offences were allegedly committed on 3rd March, 2010, Scholastica, who reported the theft to PW1 Sophia on the same day, recorded her statement to PW3 D/Sgt. Seif on 12/04/2010. This was over a month later, long after the appellant had been arraigned in the trial court. Furthermore, she was categorical in her statement that although she had a conversation with the thief inside the salon, she did not identify him at all. It was PW2 Alanus, who told her that the thief was one Frank Ndunguru, the appellant. This, then, leaves us with the evidence of PW2 Alanus.

PW2 Alanus claimed to have identified the appellant by his voice, while he was inside the salon talking with Scholastica. Testifying in an incoherent manner, he said:-

> *"I saw the accused from inside of the room of salon carrying a black deck and running away to*

the direction of Mitumbani. I raised an alarm...

Before the incident I knew the accused. I saw the accused through the light of tube light of electricity and a torch. The accused threatened Scholastica who slept inside the salon room..."

We must confess that we have failed to trace a grain of truth in these assertions. First of all, they contradict the contents of exh. P1, wherein Scholastica claimed to be the one who raised the alarm to which many people responded including PW2 Alanus. If PW2 Alanus responded to Scholastica's alarms, then he was not anywhere near the salon. He could, therefore, not have heard the conversation between Scholastica and the thief assuming the former was indeed inside the salon. Furthermore, Scholastica did not state anywhere that she was threatened by the thief. Secondly, we have found it inconceivable that either PW2 Alanus or the thief could have flashed a torch if there was light from an electric tube light. Thirdly, as we have already shown above, it was Scholastica who reported to PW1 Sophia about the theft and apparently the identity of the thief from information got from PW2 Alanus. Nowhere in the evidence does PW1 Sophia mention the name of Alanus at all. Neither did she testify that it was PW2 Alanus who revealed the identity of the thief to her. If indeed PW2 Alanus had recognized the appellant, why did he not mention him immediately to those who responded to the alarm? It goes without saying,

therefore, that the evidence of PW2 Alanus left much to be desired. Had the two courts below, critically analysed his evidence, as they were duty bound to do, they would not have grounded the convictions of the appellant on it, not even the theft charge, which was of course superfluous, as the appellant ought to have been charged with one composite offence under section 296 of the Penal Code. We accordingly quash and set aside the conviction for theft as well as the seven years prison sentence.

All in all, we allow this appeal in its entirety as rightly urged by Mr. Mwamwenda. We order the immediate release of the appellant from prison unless he is otherwise lawfully held.

DATED at **IRINGA** this 25th day of July, 2013.

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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

M.A. MALEWO
DEPUTY REGISTRAR
COURT OF APPEAL