IN THE COURT OF APPEAL OF TANZANIA
AT IRINGA

(CORAM: MBAROUK,J.A.,MMILLA,J.A., And MWARIJA, J.A.,)

CRIMINAL APPEAL NO. 270 OF 2014

FESTO KOMBA .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

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

(Kaganda, J.)

dated 30th day of April, 2007
in
Misc. Criminal Application No. 18 of 2013

JUDGMENT OF THE COURT

24th & 31st August, 2015

MWARIJA, J.A.:

The appellant was charged in the District Court of Songea with two counts under the Penal Code, [Cap. 16 R.E. 2002]. In the first count, it is shown that he was charged under S. 294 (a) of that Act. The proper section of the Act is however S. 294 (1) (a). As to the second count, the appellant was charged with the offence of stealing contrary to section 265 of the Penal Code. He was convicted of the two counts and sentenced to five years imprisonment term on each count with an order that the sentences shall run concurrently. He was also awarded a corporal punishment of six strokes of the cane on the second count.

The appellant was aggrieved and therefore appealed to the High Court. His appeal was dismissed hence this second appeal.

The facts giving rise to the appellant's conviction are fairly simple. On 21st August 2003, at 7.30 p.m while she was busy in her kitchen, Beatrice Nindi (PW2) heard a loud noise in the direction of her room. She immediately went into the room to see what had caused noise. To her surprise, she found a person taking away a radio. She tried to prevent him from going out with the property by getting hold of his shirt but, the person overcame her and ran away into the darkness.

Disturbed by that incident, she raised an alarm which was positively respondent to by people who after hearing it, convened at the scene. In the same night, the incident was reported to the Ward Secretary who advised that the matter should be dealt with on the next day.

On the following day, the 22nd August 2003, PW2 sent one youth, January Mponji to Songea town to inform her husband, Adilikina Nyoni (PW1) about the incident. Upon his return, PW1 went to the office of the Ward Secretary and upon being asked to name the suspect, he said that he suspected the appellant. He was then assigned a militiaman, one Bakari Soko (PW4). Together with other persons, PW4 and PW1 went and arrested the appellant at his residence.

What followed after the appellant's arrest was that PW1, PW4 and other persons went with him to an area where the radio which was the subject of the charge, was recovered. The same was uncovered from the ground where it was buried in between banana plants. The appellant was thereafter taken to police where he was later charged.

In the course of investigation, on 25th August, 2003 the police went to search the appellant's residence. The search was conducted by D/C. Humfrey (PW3) who seized one Yuasa battery and three radio cassette tapes from the appellant's

residence. This was done without the presence of the appellant.

At the hearing of the appeal, the appellant appeared in person and unrepresented. On the other hand, the respondent Republic was represented by Mr. Shaban Mwegole, learned State Attorney. In his memorandum of appeal, the appellant raised five grounds of appeal which, as submitted by Mr. Mwegole, boil down to three grounds; firstly that the learned appellate judge erred in law and fact in upholding the appellant's conviction on the basis of the identification evidence which was not watertight, secondly, that the learned appellate judge erred in law and fact in upholding the decision of the trial court while there was no sufficient evidence establishing that it was him who led to the recovery of the stolen radio. As to the third ground, the appellant contended that the evidence of PW3 should not have been relied upon because it did not support the charge.

When called upon to argue his appeal, being unrepresented, the appellant did not have useful arguments to make. He submitted generally that the case against him was not proved because, firstly, he did not lead to the recovery of the radio and that such recovery was not witnessed by any of the area leaders. Secondly, he complained that the search which was conducted at his residence was not lawfully done because it was conducted in his absence and without a search warrant.

In his reply, Mr. Mwegole began by addressing the Court on the point of law that the charge sheet had defects. He stated that, since the offence in the first count was committed in the night at 7.30 p.m, the appellant should have been charged with the offence of burglary, not housebreaking. He argued however that the defect is not fatal because it is curable under s. 388 of the Criminal Procedure Act, [Cap. 20 R.E. 2002] (the CPA).

The learned State Attorney submitted also that, the second count was defective, because firstly, the value of the stolen property, the radio, shown in the charge is not the value which was stated by PW1 in his evidence. Secondly, he submitted that, the Yuasa battery which the appellant was found guilty of having stolen, was not shown in the charge sheet as one of the properties stolen from PW1. According to the learned State Attorney however, this defect is also curable under s. 388 of The CPA.

Concerning the grounds of appeal raised by the appellant, Mr. Mwegole argued that, as regards the contention that the appellant was not properly identified, there was sufficient evidence of PW2 who stated in her evidence that she encountered the appellant at a close range such that she got hold of his shirt when she found him in her room. According to the learned State Attorney, her evidence was supported by available circumstantial evidence to the effect that the appellant led to the recovery of the radio as testified by PW1 and PW4.

On the ground that the evidence of PW3 was lacking weight, Mr. Mwegole argued that the evidence of the said witness, who was the investigator of the case, was important as regards the establishment of relevant facts which were discovered in the course of the investigation.

In his rejoinder submission, apart from his prayer that his appeal be allowed, the appellant did not have any useful arguments as regards the point of law raised and argued by the learned State Attorney.

As a principle, since a point of law has been raised, we have to consider it first before we embark on to discuss the grounds of appeal. We agree with the learned State Attorney that the charge sheet has the defects which he has pointed out in his submission. For ease of reference, we hereby reproduce the charge sheet. The relevant part reads as follows:

> ***" 1st Count : OFFENCE SECTION AND LAW:***
>
> *Stealing c/s 294 (a) of the Penal Code Cap. 16. vol. 1 of the laws.*

PARTICULAR OF OFFENCE: *That Festo s/o Komba on 21st day of August, 2003 at or about 19:00 hrs at Mlilayoyo village within the Songea Rural District in Ruvuma Region did break and enter into the dwelling house of one Adillkiana s/o Nyoni in order to commit an offence from therein.*

2nd Count: OFFENCE SECTION AND LAW: *Stealing c/s 265 of the Penal Code Cap. 16.vol. 1 of the laws.*

PARTICULARS OF OFFENCE: *That Festo s/o Komba on 21st day of August, 2003 at or about 19:00 hrs at Mageuza Mlilayoyo village within Songea Rural District in Ruvuma Region after breaking and enter into the dwelling house of one Adilikina s/o Nyoni did steal one Radio Cassette make Sony CD Radio 4 band valued at Tshs. 185,000/= the property of one Adilikina s/o Nyoni".*

It is apparent, as submitted by Mr. Mwegole, that from the particulars of the two counts, the offence took place at 19:00 hrs which, according to section 4 of the Penal Code, is a night time. The fact that the offence took place at night was testified to by PW2. According to her evidence, the offence

took place at around 7.30 p.m. This being the position therefore, the offence with which the appellant should have been charged is burglary, not house breaking.

As to the second count, we do not, with respect agree with Mr. Mwegole that the same was defective because it does not indicate the Yuasa battery as one of the properties stolen by the appellant. A charge sheet does not become defective because it ommits to charge a person of a particular property. If a stolen property is not included in a charge, such a charge does not become defective. The irregularity would only arise in a decision if a person is convicted of stealing a property which was not included in the charge framed against him.

From the submission by the learned State Attorney and the appellant's reply, the matter which arises for consideration is whether the defect in the first count rendered the charge sheet defective. We find, with respect to the learned State Attorney, that the defect was not curable. The reason is that, although the appellant was charged in the first count with the offence of Housebreaking contrary to section 294 (1) (a) of the

Penal Code, like in the particulars of the offence, the evidence at the trial disclosed the offence of burglary which is provided for under section 294 (2) of the Penal Code. By convicting the appellant of the offence of housebreaking therefore, the trial court erred because the evidence was not in support of that offence.

The facts of this case are somewhat similar with those found in the case of **R v. Damas Herman** (1961) I EA 591 (CAD). In that case, the respondent was convicted by the District Court of Songea on two counts of housebreaking contrary to section 294 (1) and stealing contrary to sections 258 and 265, all of the Penal Code. On appeal, the High Court allowed the appeal as regards conviction on the first count on the ground that the evidence did not disclose the time of the day or night at which the complainant's premises were broken and entered.

The appellant Republic successfully appealed to the erstwhile Court of Appeal for Eastern Africa. In allowing the appeal, the Court (Per Newbold, JA) held as follows:

" (1) under s. 294 of the penal code burglary is not a completely different offence from but an aggravated form of housebreaking which carries an enhanced sentence if additional element, commission in the night, ***is both charged in the Court and proved at the trial.***

(2) if the additional element is either not charged or, if so charged, is not proved, the offence is nevertheless housebreaking no matter at what time it may be committed." (Emphasis added).

The irregularity in that case was that there was no evidence showing at what time of the day or night was the offence committed so as to be established whether it was housebreaking or burglary. The Court of Appeal found thus that the conviction on the offence of housebreaking was proper.

In the present case however, it was clearly stated in the particulars of the offence that the time at which the offence was committed was at night. The evidence also disclosed that fact. In the **Damas Herman case** (supra) the Court quoted

with approval a passage from Archbold's Criminal Pleading (34th Ed), at page 687 on the applicable procedure where a person is charged with the offence of housebreaking but the evidence establishes the offence of burglary. The learned author states as follows:

> " *if it (the breaking and entering) is proved to have been done in the night time so as to amount to burglary, the prisoner may not withstanding* ***be convicted*** *upon this indictment* (housebreaking)".

This means therefore that in the present case, although the appellant was charged with the offence of housebreaking, since according to the evidence, the committed offence is burglary, he ought to have been convicted of this latter offence. That was however not done. From that irregularity, there is no gain saying that the appellant is now serving a sentence founded on the offence which he was wrongly charged with and convicted.

To correct the illegality therefore, we hereby quash the conviction on the first count and set aside the illegal sentence of five years imposed on the appellant.

Having so decided, the remaining issue for consideration is the appropriateness or otherwise of the conviction on the second count. In the case of **Damas Herman** (supra), the Court of Appeal did not interfere with the decision of the High Court in which, despite quashing the conviction on the first count of housebreaking, sustained the appellant's conviction on the offence of stealing.

In the case at hand, we have considered the particular circumstances which are obviously different from the ones pertaining in the above cited case. It was the same evidence leading to the conviction of the appellant on the first count which founded his conviction in the second count. We find it unsafe therefore, to uphold the conviction on that count.

On the basis of the reasons stated above, we deem it proper to also exercise our revisional powers and hereby quash

Since the decision on the raised point of law suffices to dispose of the appeal, the need to consider the grounds of appeal does not arise.

The appellant shall as a result, be released from prison unless he is otherwise lawfully held.

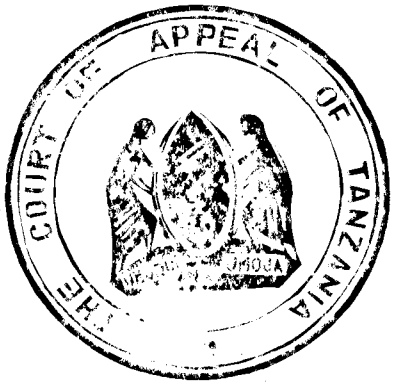
DATED at **IRINGA** this 31st day of August, 2015.

M. S. MBAROUK
JUSTICE OF APPEAL

B. M. MMILLA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original



E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL