IN THE HIGH COURT OF TANZANIA

AT MTWARA

CONSOLIDATED CRIMINAL APPEALS NO.11 & 75 OF 1986
Original Criminal Case No.161 of 1984 of the
District Court of Songea District At Songea
Before G.M. Nkwera, Esq. Resident Magistrate

YASINI RASHIDI MWINUKA
NASIBU RASHIDI MWINUKA ..... APPELLANTS

Versus

THE REPUBLIC ..... RESPONDENT

J U D G M E N T

RUBAMA, J.

YASINI RASHIDI MWINUKA, NASIBU RASHIDI MWINUKA and 5 others were charged with burglary and stealing. All were convicted except that the last having jumped bail was convicted in absentia.

Yasini Rashidi Mwinuka and Nasibu Rashidi Mwinuka appealed against both convictions and sentences. Their appeals have been consolidated, with Yasini Rashidi Mwinuka hereby referred to as the first appellant and Nasibu Rashidi Mwinuka as the second appellant.

There is sufficient evidence to establish that the house of Menas Nayombo (PW10) had been burgled on the night of 10th September, 1984. There is further credible evidence to show that several items had been stolen from the burgled house. The houses of Yasini Rashidi Mwinuka, his fiancee and his mother were searched by the police on the 19th September, 1984 and from those houses some items seized. Some of those items were later identified by the complainant as having been some of the items stolen from his burgled house on the night of 10th September, 1984. The trial magistrate accepted as true that those items taken from

the houses of the first appellant, his fiancee and his mother had been stolen from the burgled house. Proceeding on this finding and invoking the doctrine of recent possession, the first and second appellants were found guilty of having burgled the house of the complainant some nine day before and of having stolen several items from therein.

Mr. Sangawe learned State Attorney for the Republic did not support the finding of the trial magistrate. He submitted that the trial magistrate did not properly addressed himself on the issue of identification of things taken from the appellant, his fiancee and his mother. He maintained that all that the complainant had done in respect of these things was just to point out that those items were his without first pointing out which identification marks he was going to rely on identifying the seized items or to put it differently the complainant had not given the description of the items before being shown the same by the police. I find merit in the submissions of Mr. Sangawe in respect of the items recovered from the appellant, his fiancee and his mother. The description given in respect of items taken from these three houses was in-sufficient. The identifying marks given in respect of foam mattress and pieces of sponge in the light of evidence given by the appellant is not sufficient enough to justify sustaining the convictions. There was nothing special about them. Both the complainant and the appellant clained ownership of these items with the appellant producing receipts said to have been issued to him on the days he had purchased the same. The complainant had relied on the fact that pieces of sponge fitted the seat covers he had, were of the same size as one of the pieces alleged not to have been stolen on the 10th of September, 1984 and further had properly fitted the chairs he had. Good evidence but not strong enough to establish the fact that those were his items and not of the appellant. There is still room for existence of coincedence. The evidence of complainant does not exclude the possibility that the appellant could have been telling the truth.

The trial magistrate in his judgment had wanted the appellant to establish his ownership of the goods recovered from his house, that of his fiancee and that of his mother. It was this stand that led Mr. Sangawe to submit to this court that the trial magistrate seemed to have shifted the burden of proof to the appellant, a submission that has merit. It was the duty of the prosecution to establish that the goods in dispute were owned by the complainant and not the appellant. In this respect the prosecution failed to establish complainant's ownership in respect not only of the mattress and pieces of sponge but also in respect of the neck tie, a mass produced item which surely cannot sufficiently be identified by its colour or a snap to show that once upon a time the complainant had a tie like that; the speakers, also mass produced and readily available in the market cannot be said sufficiently identified by stating that they fitted ones radio. The appellant's evidence established reasonable doubt and benefit of this reasonable doubt is to be given to him.

In view of the reasons outlined above I find merit in the appeal of Yasini Rashidi Mwinuka which is hereby allowed. I quash the convictions entered and set aside the sentences. The first appellant is to be set free at once unless he is otherwise held on another matter.

The trial magistrate's approach in respect of the evidence covering the 2nd appellant (3rd accused) was not in accordance with the law. He seems to have expected the second appellant to establish his innocence, crowning this expectation by acting on assumptions. He stated at page 20 in his judgment:

> "... The accused said he was given that pyjama by 7th accused who was at large who ran away during the trial and that when he was given the said pyjama by the 7th accused one Nasibu Mussa Mwenda was present. The explanation of third accused was not convincing enough it seems to me that this defence by the accused came as suprise since he knew that the 7th accused could not come before the court to

> answer the allegations. His allegations were imposed upon the 7th accused simply because he ran away. The witness of this accused didn't impress the court. When the accused was ordered by the court so summon his witness on the first day, he was reluctant to do so. The accused decided to bring his witness after a week. This court has all reasons to believe that the witness was not told by telling truth. I have all reasons to believe that the witness was told by the accused what to say before the co- court on the material day. In view of the above analysis I have all reasons to believe that the accused was among the people who committed the offences, this is due to the fact that the case against him has been sufficiently proved and I hereby convict him for both counts". (emphasis supplied)

Convictions entered on such evidence cannot be allowed to stand. As stated above, the trial magistrate had shifted the burden of proof to the second appellant and secondly the assumptions made by the trial magistrate were wrong as is clearly shown by the evidence the trial magistrate had himself so laboriously recorded. The evidence shows that the second appellant's mention of the seveth accused had nothing to do with the said accused absence in court nor was it intended to suprise the court or the prosecution. The second appellant, going by the evidence of B 6556 Detective Cpl Steven (PW2), had in reply to the police question soon following the discovery of the night dress in his house during a police search, stated that he had been given that night dress by the seventh accused. He mentioned this in the open and in the presence of many people. He had not at this time even been arrested; no pressure could be said to have been applied on him. Of even greater significance is the fact that he had mentioned this to the police search party even before the seventh accused had been arrested. The second appellant being human could not be said to have known the arrest and charging of the seventh accused the granting of bail to him and

eventual jumping of it. The analysis of the trial magistrate was therefore based on incorrect material. His findings equally were faulty The police had enough time to check the truth of the second appellant's story to which he had consistently stuck. The police apparently did not. But I find the story credible partly judging from the seventh accused subsequent conduct and the willingness and promptness with which it had been voluntered. The convictions against the second appellant cannot be allowed to stand. They are hereby quashed. The imposed prison sentences are also set aside. The second appellant is to be set free at once unless he is otherwise lawfully held on other matters.

Juma Rashidi Mwinuka (the second accused during the trial) was not convicted as charged but was convicted of receiving and retaining property which was stolen or unlawfully obtained contrary to section 311(1) of the Penal Code. The items said to have been received by him were some loud-speakers whose ownership the first appellant had categorically accepted. The evidence of Juma Rashidi Mwinuka was that he had been given all these speakers by the first appellant. To this the trial court stated:

> "... Nevertheless, taking into consideration the fact that the relationship of the 1st accused /the first appellant/ and 2nd accused was very strong, this court is of the opinion that although the 2nd accused alleged that he was given those speakers by the 1st accused his brother, but the 2nd accused actually knew at the time when he was given the said properties that the speakers and covers were illegally acquired. The two accused persons are brothers (1st accused and 2nd accused they belong to one family) due to that fact I am quite sure that the second accused knew that the said properties which he received from his brother the 1st accused were stolen somewhere. Due to that fact I acquit the accused person on the charge of Burglary and stealing but I convict the accused on the charge of receiving and retaining property which was stolen or unlawfully obtained contrary to section 311 (1) of the Penal Code".

I have above already stated that the prosecution failed to establish that the loud speakers had belonged to the complainant and not the first appellant (1st accused). This means the prosecution had failed to prove that the loud speakers found in possession of Juma Rashidi Mwinuka were stolen. But even if the prosecution had proved that the loud speakers had been stolen, the brotherly relationship between the first appellant and the second accused (Juma Rashidi Mwinuka) would not have been sufficient to justify the inference of guilty knowledge on him (Juma Rashidi Mwinuka). This blood relationship does not make people fully confide in each other. It is therefore difficult to understand the reasoning of the magistrate which is not supported by any evidence. The trial magistrate made assumptions which are dangerous for basing a conviction. Acting on revisional powers I quash this conviction and set aside the sentence imposed on the accused. It is ordered that he be released from prison at once unless he is otherwise lawfully held on another matter.

In totality therefore, the appeals have been allowed in full.

Yahya Rubama
Judge
29.10.86

Coram: RUBAMA, J.
Parties absent.
Judgment delivered.

Yahya Rubama
Judge
29.10.86