IN THE HIGH COURT OF TANZANIA

AT MOROGORO

H/C CRIMINAL APPEAL NO.59/1994

ORIGINAL CRIMINAL CASE NO. 7 OF 1993 OF THE

DISTRICT COURT OF MOROGORO DISTRICT AT MOROGORO

BEFORE:..................SADUKA V. DISTRICT MAGISTRATE

SAMWELI PETER.................................APPELLANT

VERSUS

THE UNITED REPUBLIC..........................RESPONDENT

JUDGMENT

BUBESHI, J:

The appellant before me, SAMWEL s/o PETER was charged and convicted with other persons of the offence of burglary and stealing c/ss 294 and 265 of the Penal Code. They were sentenced to serve a custodial term of 5 years and 1 year respectively.

The appellant being aggrieved he has appealed.

The facts, which are not in dispute, can be summarised as under.

On 28/12/92 at around midnight the house of TORE TOUSTAD, who was working Morogoro Catchment Forestry Project, situate at Kigurunyembe within the Municipality of Morogoro, was broken into and various household items stolen. Mr. Toustad and his family were away in Nairobi at that time. Left behind was PWI Stephen Miswala a co-worker of Tore. PW2 Zainab Mlinga housemaid and PW7 Said Ally the watchman.

PW7 testified during trial that on 28/12/92 while guarding the house of Tore, he was attacked by a gang of thieves who tied both his hands and legs. He was also blindfolded as a result he never identified any of the thieves. Early on 29/12/92 he went to inform PWI who then reported the incident to the police and search mounted. As to PW2. She reported for duty at around 8 a.m. when she found her masters house broken into and various items of value missing. PW2 was the only one (apart from Mr. Tore of course) to identify the stolen items as she knew what was kept where. PW3 Zainab Abas told the Court that on 29/12/92 at around 6 pm. she was visited by appellant with two other persons, one of whom was accused no 1 Kassim Kombi her husbands young brother. That they came to her home on two bicycles carrying two bags - one yellow, the other black in colour. Kassim asked her sister-in-law to keep their bags in their PW3 house. The witness was not impressed with the idea, she was worried, if not suspicious. She went into her house to feed her baby and later she discovered the two bags which were left at her premises by the trio.

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She took the bags and kept them at the back yard. This is how the appellant comes into the scene.

It may not be necessary to recount all the evidence but suffice it to say that, the appellant was convicted on the evidence of PW3, PW4 D/CIP Fredrick the investigating who also recorded the appellants statement at the Police-P4. Another co-accused Adam s/o Uliza also made a statement at the police P3 in which he alleged to have been given a juice making machine by the appellant. This machine was one of the items stolen from Tore's house.

According to PW3 she was emphatic that the trio visited her home and left there two bags. PW3 had never seen the appellant before.

PW4 recorded the statements made by the appellant and his co-accused. These were admitted in court as PI-P4. The appellant's statement is marked as PW4. The trial magistrate in course of her judgment remarked, inter alia:

> "Accused themselves admitted in their admission statement that they brought the bags to PW3."

My immediate reaction to this remark is what were the accused admitting to? In order to answer that question let us read what the appellant actually said. The appellant stated that he met the 1st accused who came to hire abicycle as he had some luggage he wanted picked up from Kichangani. The appellant agreed to stand as surety while he hires the bicycle. One Adam 4th accused also joined them and the three with two bicycles went and took the luggage - in fact two bags which they took to the 1st accused sister-in-law's house PW3 at Mafisa According to the appellant's version, the two bags were taken into the house by 1st accused and the latter then paid them the hire charges and the two, appellant and 4th accused then left. What the appellant is actually saying is that they assisted the 1st accused to carry the bags from where presumably they were hidden to PW3.s/house. The appellant is not admitting to the burglary nor the stealing. In fact this was not an admission statement at all as remarked by the trial magistrate. This piece of evidence cannot even sustain a conviction under S.311 (I) of the Penal Code. More corroboration of evidence is required. I would hesitate to convict on such evidence alone.

One Adamu s/o Uliza was the 4th accused during trial. He also voluntered a statement to the police which is somewhat identical to what the appellant said. The only variation is when the 4th accused added to his statement two days later that the juice making machine found on him was brought by the appellant for safe custody. This then is evidence of an accomplice which definetly requires corroboration if one was to rely on it. If indeed the juice making machine belonged to the appellant why would he want to hide or keep it at some one else? When a search was made at the appellant's house room nothing was found.

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Having analysed the evidence as I believe I have endeavoured to, I am left with only the evidence of PW3 to hail the appellant. The question that I have to ask myself is, whether this piece of evidence is sufficient to prove the charges beyond reasonable doubt. The simple answer to that is no. The learned State Attorney Miss Lwasye did not support conviction and I may add rightly so.

In the final result I allow the appeal. The conviction is hereby quashed the sentence set aside and the appellant to be released unless otherwise lawfully held.

A. G. BUBESHI
JUDGE
4th July, 1995

Delivered:

Miss Lwasye for Republic
Appellant present.