IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 73 OF 1997

(Originating from ILALA District Court Criminal Case No. 161\95)

KATEMBO MRISHO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

J U D G E M E N T

KALEGEYA, J.

The Appellant, Katembo Mrisho Mohamed was the only accused to earn a conviction out of 12 others jointly charged in count two with Godown breaking and stealing c\s 296 (1) and 265 of the Penal Code. He appeared as 1st accused. Count one concerned 4 - 12th accuseds and this alleged conspiracy to commit an offence c\s 384 of the Penal Code. The third count, which is in the alternative, neglect to prevent felony c\s 383 of the penal code, stood for 4th - 6th accused. The accuseds in their respective numbers were Katembo Mrisho s\o Mohamed, Hemedi s\o Hassan Hussein, Rajabu s\o Juma Hamisi, Selemani s\o Omari Ally, Andrew s\o Mtali Chimogo, Rajabu s\o Changama Chadimba, Peter s\o King'ombe Masudi, Ely s\o Hassani, Emmanuel s\o William, Njeli s\o Nesphory Parashi, Hamisi s\o Salum Jangala Mnomola and Athanas s\o Alex Kwayu. The 2nd count alleged that on 16\3\95 they had, jointly and together, with 2 other people not before the court, broken into the International Islamic Relief Organisation godown at Tabata and stole various articles including 40 mattresses, 20 bales of mitumba clothes, 94 rolls of Textile material, Bales of mitumba shoes, one compressor machine, 49 pieces of carpet all valued at shs. 2,425,000/=. In the 1st count it was alleged that the 4th - 12th accused had conspired to break and effect theft of those items while in the alternative third count it was stated that the 4 - 6 accuseds being watchmen

of Nahad Transport Company failed to prevent commission of the offence of stealing. All others were acquitted while Appellant (as first accused) was convicted and sentenced to 5 years imprisonment on 1st count and 1 year on 2nd count. In this appeal he is assailing these decisions.

The Appellant challenges the finding of the District Court on three maingrounds - that the trial Magistrate erred in relying on cautioned statement whose authenticity was not tested by holding a trial within trial; that such confessions have to be corroborated, and that the evidence of accomplices (fellow accuseds) should have been corroborated. He concluded that had the trial court considered all this and analysed the evidence it should have acquitted him.

The learned State Attorney supported the conviction arguing that the offence was duly proved; that reliance was not put on accomplice evidence alone but also on a cautioned statement whose tendering was not challenged by the Appellant.

With greatest respect to the learned State Attorney this appeal must succeed.

First, there is an incurable procedural error committed by the trial court. The accuseds never pleaded to the charge as legally required. The charge on which the accuseds were brought to court (dated 20\3\95) was substituted with another charge dated 18\7\95. While the former charge contained just a single count of godown breaking and stealing the latter contained 3 counts as already explained. On 18\7\95 when the substitution was made, the trial court simply recorded an omnibus plea of not guilty by all accusseds as if they were being faced with a single count. This error was again committed on 18\10\95 when hearing commenced. The court remained harbouring under this mistake till end when it composed the judgement as exemplified by the

following excerpt from the very judgement,

> "The accuseds who are (?) appeared before this court are twelve in number and both of them was (?) charged with two offences of Godown breaking c\d 296 (1) and stealing 265 of the penal code".

However, there is only one offence in the above statement and not two - godown breaking and stealing c\s 296 (1) and 265 of the penal code and it is not true that all the accuseds had been charged with two offences (the substituted charge speaks aloud on this). The trial court seems to appreciate the existence of the substituted charge in the last part of its judgement for then it makes reference to conspiracy, and counts one and two while sentencing.

Secondly, even if the above error did not exist, there is no evidence to support a criminal charge.

The trial court's judgement is on 9 typed pages of A - 4 size papers. Out of all this the only analysis and finding is contained in the following (the rest being the summary of the evidence, mitigation and sentence) -

> "According to the testimony tendered before the court the evidence given against the accuseds the same was proved against the first accused as he is the one who planed (!) with other accuseds who is at large to commit the offences and made away with the larger amount of properties which owned with International Islamic Relief Organisation.
> The prosecution side, the evidence tendered before the court pointed to the first accused as he is the one who informed the rest accused that there is a job to unload the luggage at Tabata where the lorr which was coming from Iringa had developed a mechanical faults, the first accused with other accuseds who is
>
> not in the court left the accused at Tabata relini where the number of accused persons was arrested by the police.

> The accuseds on they are (!) testimony except accused No. 4 both of them mentioned the first accused as the one who informed them that there is a job to do at Tabata Relini.
>
> To go further the caution statement which the accused gave before the police (PW2) the first accused with others accused who was not (!) in the court conspired to commit the offences which is the subject matter before the court.
>
> The court through the evidence concluded that the first accused is the one who committed two offences and in this respect the rest accused except the first accused are acquitted and set free.
>
> The first accused the court found guilty in all the offences as charged".

I have quoted the above to show the reasoning leading to the conviction.

Apart from the inelegancy of the language the above quoted lacks analysis and is indeed contradictory of what the evidence portlays.

The prosecution case rested on very brief evidence of 4 witnesses.

PW1 a police officer simply deposed to have visited the scene of crime - the godown, where he found all the accuseds except accused 1 and 12 and a store keeper who was enlisting the stolen property. He interrogated the accuseds who told him that "first accused was the one who hired them". He got information that some stolen property had been recovered at Mbezi, and he found them at Oysterbay police where they were identified. The witness simply added hearsay account on how the recovered articles had been found in one house at Mbezi whose watchman escaped. He disclosed that the recovered articles included la compressor, 3 carpets, 12 Baibui Rolls, one box of shoes and

clothes. This witness ends his testimony without linking in anyway the accuseds with the theft let alone establishing how they came to be at the godown.

PW2, the storekeeper of Mahad Co. Ltd godown where the stolen property was being stored briefly deposed to have received information regarding breakage into their godown and theft; to have compiled a report. He went further to produce the bill of lading to establish that the goods belonged to the International Islamic relief Organisation. Neither does this witness link accuseds with breakage or theft, for he even goes further and states,

"I don't know the accused persons".

PW.3, another police officer, deposed on a piece of evidence which sets in more confussion than clarity. His evidence is so brief that it deserves to be reproduced:

> "I reside at Pugu Kajiungeni. I am working with Buguruni Police Station. On 16\3\95 we were directed to go to Tabata as theft occured there. We went to Tabata Relini in the godown of Mohad, the watchman opened the door, they showed two people third accused was among them. We arrested them. That is all". (emphasis mine).

Lastly, on the prosecution side we have PW4 who recorded the Appellant (1st accused) cautioned statement. He deposed to have come across the Appellant at the CID offices through the hands of Dsgt. Amon who required him to take down his cautioned statement; that 1st accused voluntarily agreed to this hence Exh. P2. In that statement the 1st accused (now Appellant) stated that though a watchman at Ahmad Salum shop, Kariakoo, (Gunzo Enterprises) having been approached by one Rashidi who asked him to assist him unload and load some goods from a defective vehicle to another he decided to have some side earnings and took up the offer. He went

further to state that they gathered other accuseds who were lying idle around Kariakoo and boarded a min-bus; that Rashid had told them that the defective vehicle was along Mandela Raod but that they led to a godown instead where they found it open, and a lorry parked and were instructed to load the goods from the godown into the lorry which they did and got paid. He stated further that there was some misunderstandings with the watchmen of that godown over payments but did not clarify.

That was the end of the prosecution case.

In defence, the 1st accused deposed that he participated in off loading goods from Iringa on part time basis as he is a watchman with Gunza Enterprises and that he was later arrested and led to Buguruni Police Station.

Accuseds 4 - 6 deposed that they are the watchmen of the godown which was broken into and that the rest of the accuseds descended upon them, broke into the godown and stole.

The rest of the accuseds deposed that the 1st accused had implored them to join him on a casual goods' off loading and loading exercise (for pay) as a vehicle had broken down at Mandela road; that they were however driven to Tabata and told to wait and that while waiting the police came and arrested them.

I have been forced to summarise the evidence tendered to show that the trial court's findings are not supported at all.

Apart from the caution statement we close the prosecution case without linking the Appellant to the offence charged. I must observe that the matter was very poorly investigated as the clues at hand could have produced more than what was disclosed. The accuseds' stories may ring a big suspicion in one's ears but this is not enough to found a conviction in a criminal charge. In any

case it is trite law that conviction is not found on the weakness of the defence but rather on the strength of the prosecution case.

It would seem that the trial court was greatly influenced by the caution statement. That statement in itself does not admit conspiracy to commit offence nor committing any offence at all. Appellant simply says that him and others were hired by one Rashid to go and off load some goods from a defective vehicle only to be led to the godown. Again it may highly be suspicious but conviction cannot be found on this.

For the reasons discussed above the conviction and ensuing sentences are hereby quashed and set aside. The Appellant is to be set at liberty unless otherwise lawfully held.

(L. B. Kalegeya)
JUDGE

Judgement delivered today the 15\1\99 in the presence of the State Attorney, Mr. Mdema.

(L. B. Kalegeya)
JUDGE
15\1\99