IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA

PC CRIMINAL APPEAL NO. 1/2005

FROM NKASI DISTRICT COURT CR. APPEAL NO. 5/2004

(ORIGINAL CR. CASE NO. 99/2004 FROM NAMANYERE PRIMARY COURT)

LEONARD S/O SASALA.....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

JUDGMENT

(Dated 1ST NOVEMBER 2005
AND
13TH.12.2005)

Before: B. M. Mmilla, J.

The appellant in this case was amongst the four persons who were charged before the Primary Court of Namanyere of store breaking and stealing c/s 296(1) of the Penal Code. While the second and third accuseds were acquitted, the trial court convicted the appellant and the fourth accused of the charged offence. Each one of them was sentenced to a term of five years' imprisonment. His first appeal to the District court was dismissed, hence the instant appeal to this court.

The appellant's memorandum of appeal raises six (6) grounds all of which boil down to a single ground that the trial court wrongly founded his conviction on the unsatisfactory evidence of PW2, similarly that the first appellate court wrongly found that the trial court had properly weighed the evidence it relied upon in founding conviction. The facts of the case were as follows.

On the night of 24.6.2004 around 4.00 am, PW2 No. F.295 D/Cpl. Shaib was asleep at his home. Around that time, he heard some one calling him from outside. Upon

inquiry, the caller identified himself as Mr. Jackson who told him that he needed to talk to him. PW2 went out to meet the caller. He realised that the caller was someone he knew as Leonard Sasala and was accompanied by two other persons; Emmanuel Kalutwa who was the fourth accused before the trial court and another one who braved arrest. He noticed that they were armed with machetes. After inquiring from appellant why he misrepresented his name, the latter is alleged to have told PW2 that he did so because he was guarding against being overheard by other people. PW2 went ahead and asked them what they wanted him to do. It was then that the appellant told him that they had property which they were asking him to buy. Then, they had no any property. He asked them where they got that property and why they made the offer that time around. The appellant told him that they stole that property, and that they urgently needed the money because they intended to flee. He being a police officer, he thought of arresting them. In order to accomplish that goal, he played a good host and readily signified to buy those properties. He asked them to go in the house and demanded information regarding the whereabouts of the said property, and where they stole the same. After hesitating a bit, they told him that they stole that property from the store of PW1, adding that it comprised shop items. After reassuring them that he was interested, they went for the said items. They managed to send to him only one trip on account that they could not collect the rest of the items because the watchmen of that store seemed to have surfaced from where they had gone at the time they stormed the area. He had to settle with whatever was collected. While he cogitated how to nab them, he once again invited them in the house on pretence of discussing the price of the availed items. However, for fear of endangering the other members of his family, he avoided the idea of surprising them at the sitting room. He persuaded them to follow him in another room in which his daughters were ordered out on the explanation that it was more secure for that kind of discussion. The appellant and his team settled for shs. 100,000/=. On their instructions, he gave shs. 34,000/= to the appellant, and a further sum of shs. 33,000/= was given to that culprit who braved arrest. In that he had a balance of only shs. 17,000/= in his pocket, PW2 asked them to let him collect the balance from his sleeping room. They endorsed the idea. After he

was outside the room, he quickly locked the culprits in and called for help. On noticing that, the trio broke the door to that room. However, while his colleagues succeeded to escape, the appellant failed and was apprehended. He pledged to show them the whereabouts of his colleagues. Indeed, he took them to the house in which he said his colleagues dwelt at which, except for the second accused whom they found and managed to apprehend, the rest of them were not there. The appellant and second accused were taken to police together with the recovered property and subsequently charged together with the other two who were arrested later.

The appellant's defence constituted of general denial that he did not commit the alleged offence, asserting that he was framed up for no apparent reasons. His complaint to the first appellate court was basically that he was victimised by PW2 who was actually found in possession of the stolen properties. He had also alleged that he was actually not heard.

After carefully going through the proceedings and judgment of the trial court, the first appellate court was satisfied, as did the trial court, that the appellant and his colleague (the fourth accused before the trial court) were the persons who were found in possession of the alleged properties which they attempted to sell to PW2.

This court has often stated that a second appeal lies only upon questions of law. In such a case, the second appellate court is precluded from questioning the concurrent findings of fact of the two courts below provided however, that there was evidence to support those findings. In other words, the second appellate court can only interfere where it considers that there was no evidence to support the findings of fact, this being a question of law. I have in mind the case of **D.P.P. v. Jaffari Mfaume Kawawa (1981) T.L.R. 149.** In this case, the court of appeal said that:-

> "The next important point for consideration and decision in this case is whether it is proper for this court to evaluate the evidence afresh and come to its own conclusions on matters of fact. This is a second appeal brought under the provisions of section 5(7) of The Appellate Jurisdiction Act, 1979.

> The appeal therefore lies to this court only on a point or points of law. Obviously this position applies only where there are no misdirections or non-directions on the evidence by the first appellate Court. In cases where there are misdirections or non-directions on the evidence, a court of second appeal is entitled to look at the relevant evidence and make its own findings of fact".

Amratlal Damodar Maltaser and Another T/a Zanzibar Silk Stores v. A. H. Jariwalla T/a Zanzibar Hotel (1980) T.L.R. 31 is another such case in which a similar view was expressed. In that case the Court of Appeal (T) held that:-

> "(i) Where there are concurrent findings of fact by two courts the Court of Appeal, as a wise rule of practice, should not disturb them unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or a violation of some principle of law or procedure".

In view of the above, the issue becomes whether or not there were misdirections or non-directions in the present case by the first appellate court so as to entitle it to re-evaluate the evidence and make its own findings of fact.

After a thorough traverse of the record, particularly having looked at the evidence for the prosecution before the trial court, the defence of the accused persons and judgments of both, the trial and first appellate courts, I am satisfied that the trial court was justified to ground conviction on the basis of the evidence before itself, also that the first appellate court properly directed itself in upholding the trial court's conviction and sentence in respect of the appellant. It is clear from the trial court's record that the appellant was arrested by PW2 upon his attempt to sell some of the allegedly stolen properties to this witness. There was sufficient evidence to establish this fact. Also, the appellant's response was in the negative when he was asked if he had any grudges against PW2. This also fortifies the Republic's view that PW2 could not have decided to falsify his evidence against the appellant.

The appellant had also said that he was not properly identified by the witnesses. The trial court found, and the first appellate court affirmed, that the question of having he been misidentified did not arise because unlike his two colleagues who managed to escape after breaking the door of room in which they were locked , appellant's efforts to escape were thwarted by PW2 who managed to stop him. This witness never lost site of him and succeeded to send him to police station. In the circumstances, the first appellate court rightly held that the appellant's allegation that he was not properly identified was not well grounded.

In conclusion, this court is of the firm view that there is no justification for interfering with the findings of fact of the two courts below. In the premises, the appeal is demerit and is dismissed in its entirety.

B. M. Mmilla
JUDGE
13.12.2005.

Court: Judgment has been delivered today in the presence of Mr. Malata, State Attorney and Appellant.

(W.P.Dyansobera)
District Registrar
13/12/2005.

AT SUMBAWANGA
13/12/2005.

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

HIGH COURT OF TANZANIA

(W.P.Dyansobera)
District Registrar
SUMBAWANGA.