IN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO. 142 OF 2005

ORIGINAL MASASI D/COURT CR. CASE NO. 43/2004

IBADI HASSAN MTIMA ----------APPELLANT

VERSUS

THE REPUBLIC ----------RESPONDENT

Date of Last Order: 14/11/2006
Date of the Judgement 14/12/2006

JUDGEMENT

SHANGALI, J.

The appellant IBADI S/O HASSAN MTIMA was charged before the Masasi District Court with two counts namely; one, House Breaking c/s 294(1) and two; stealing c/s 265 both of the Penal Code Cap 16. After hearing the whole prosecution and defence evidence the trial District court was sutisfied that there was no sufficient prosecution evidence to establish the first count of House Breaking but in the altenative the trial Court was satisfied that there was sufficient prosecution evidence against the appellant to establish the offence of being found in possession of stolen properties contrary to section 311 of the Penal Code. In the result the appellant was convicted on the offence of being found in possession of stolen properties on the first count and at the sometime he was convicted on the second count of stealing contrary to section 265 of the Penal Code.

Consequently, on the first count the appellant was sentenced to serve a term of four (4) years imprisonment and on the second count he was sentence to serve one (1) year term of imprisonment. The sentence was ordered to run concurrently.

Being aggrieved with the Decision of the trial District Court, the appellant has now preferred this appeal intending to impugn the decisions on both conviction and sentence.

The facts of the case may briefly be summarized as follows; On the material day of 29th February at Namalenga Village, Masasi District, PWI ALFRED MNANIA locked his house in the morning and proceeded to attend church mass service with his family. While at the Church his young brother one RESILE rushed to him and informed him that he had seen the appellant with his (PW1's) bicycle tied with a cashewnut spraying on the bicycle carrier. Immediately PWI abandoned the mass, rushed home and discovered that his house had been broken into and several items missing including cash Tsh.78,000/=, one bicycle make AVON and one cashewnut spraying pump machine all valued at Tsh.285,000/.

PWI reported the matter to the village Authority and immediately manhunt insued. While PWI and his searching party including one DOMINIC and KAUKAW were along Manjaka road they spotted two people pushing the bicycle which was tied with cashewnut spraying pump on its back carrier. On reaching close to the said people PWI noticed that it was the appellant who was pushing the bicycle accompanied with another person. On seeing the searching party the appellant dropped the bicycle and together with his companion started to run away. The searching party including PWI were able to arrest the appellant who was later taken to police station and charged. PWI was able to identify and gave explanations about his bicycle which had frame No. 00798 and produced its purchasing receipts. He was also able to identify his Cashewnut straying pump machine No. 033431. Both items were admitted in court and marked Exibit PI collectively.

PW2 DOMINICK MBINGA testified corroboratively how they managed to arrest the appellant with the alleged items along Mangaka Road.

In his sworn defence the appellant claimed that on 29th February 2004 he was washing his clothes at the water well. Then he saw a person with a bicycle who stopped to drink water and later proceeded with his journey. He stated that later PWI arrived and arrested him for breaking the house and stealing. The appellant denied to have committed the offence and claimed that the bicycle and the pump machine were brought at Namalenga village

by OCTAVIAN, KAUKAW and KIZITO who also accused him for stealing.

As I have pointed above the trial District Magistrate concluded that there was no sufficient prosecution evidence to establish the offence of House Breaking but there was sufficient evidence to connect the appellant with the offence of being found in possession of stolen properties. The appellant was therefore convicted on that offence and also the second count of stealing.

In his memorandum of appeal the appellant filed about eight (8) circumverting grounds of appeal which may conveniently be crystallized to form only one ground of appeal namely whether there was cogent and sufficient prosecution evidence to establish beyond reasonable doubt the appellants guilty on both offences.

Ms. Shio, learned State Attorney who appeared for the Republic/Respondent supported the conviction and sentence imposed against the appellant on both offences.

She submitted that there is ample prosecution evidence to establish that the appellant was found with the stolen properties exibit PI which were properly identified to be the properties of PWI. She further stated that the two prosecution witnesses PWI and PW2 were found by the trial Court to be credible witnesses whose testimonies were straight forward and reliable. Ms. Shio requested the court to dismisss the appeal for lack of merits.

I dojoin hands with the learned State Attorney that there was cogent and sufficient evidence against the appellant to register conviction against him on the offence of being found in possession of stolen properties. The appellant was seen and found with the stolen properties in the broad day light along Mangaka road. His efforts to escape was thwarted by the searching party vigourness. The credibility of the two prosecution witnesses was correctly assessed by the trial District Court and I have no reason whatsoever to doubt that proper findings.

The only problem in this case is in regard to the second count of stealing. In law once a person has been convicted of the offence of being found in possession of stolen properties, he can not be convicted again on the same facts for the offence of stealing the same items. To me it sound

ridiculous and may amount to dublicity of the charge. Apparently, the trial District Magistrate decided to convict the appellant on the offence of being found in possession of stolen properties because there was no person who witnessed the appellant breaking the PWI's house. Likewise, it follows that there was no person who witnessed the appellant stealing the items from the house of PWI. Therefore it was legally wrong for the trial District Magistrate to convict the appellant on the second count of stealing having convicted him of the offence of being found in possession of stolen properties.

In conclusion, therefore this appeal is party allowed to the extent that the conviction and sentence against the appellant on the second count of stealing is quashed and set aside. On the other hand the appeal is dismissed in regard to the conviction and sentence against the appellant on the offence of being found in possession of stolen properties. The appellant shall continue to serve his four (4) years imprisonment as directed and declared by the trial District Court.

It is so ordered.

M.S. Shangali
JUDGE
14/12/2006.

Judgement delivered todate 14th December, 2006 in the presence of Mr. Luena, State Attorney for the Republic and in absence of the appellant. Appellant to be notified on this decision.

M.S. Shangali
JUDGE
14/12/2006.