IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 38 OF 2005

(Originating from Criminal Case No. 1392 of 1999 at Kisutu Resident Magistrate's Court)

MANOJ HALILAH & 7 OTHERS ..... APPELLANTS

VERSUS

THE REPUBLIC ..... RESPONDENT

Date of last order – 23/8/2006
Date of Judgment – 25/9/2006

JUDGMENT

Shangwa, J.

The appellant namely Zully Dewji, Hasmuk Gerag Jetha, Atish Katahir, Edward Kambuga, Kaileshi Premji Davda, Ameey Bhupendra and Rasamulch Larji and the late Manoj Halah whose trial abated upon his death were jointly charged on the first count with the offence of house breaking c/s 294 (1) of the Penal Code. On the second

count, they were charged with theft c/s 265 of the Penal Code.

The prosecution alleged that on 20/9/1999 along Senegal Street, Plot No. 824, Upanga area within Ilala District, Dar es Salaam Region, they broke and entered into the dwelling house of one Larji Galkal with intent to commit an offence therein termed theft. It was further alleged that after breaking into the said house they stole four necklaces, eight gold wrist rings, four gold neisypins, various types of clothes and cash shs.10,000,000/= all valued at shs.15,524,000/= the properties of Larji Galkal.

The appellants were acquitted on the first count but were convicted on the 2nd count and each was sentenced to pay a fine of shs.40,000/= or one year imprisonment in default. They were not satisfied with both conviction and sentence. They engaged Mr. Rutabingwa, Advocate who

filed this appeal on their behalf in which he raised four grounds of appeal.

The first ground is that the learned Resident Magistrate erred in law and on evidence by holding that the offence of house breaking and theft was committed by the first accused the late Manoj Halah accompanied by the rest of the accused (appellants) whereas the exercise was of removing the personal effects of the occupant namely Savitri Damji Visran and her family in their presence and in the presence of the police officer.

The second, third and fourth grounds of appeal may be reduced into one ground that the learned Resident Magistrate erred in law and fact by convicting the appellants of theft on the second count without evidence to prove that they did so.

First of all, I wish to state that as the appellants were acquitted of the offence of house breaking which was

charged on the first count, it is of no use for this court to consider as to whether the learned Resident Magistrate erred in law and on evidence in holding that the appellants accompanied the late Manoj Halah (1st accused) in committing that offence. So, I will not do so. Instead, I will only consider the question as to whether or not the appellants were rightly convicted by the trial Resident Magistrate of the offence of theft charged on the second count and properly sentenced thereof.

At page 6 of his typed judgment, the leaned Resident Magistrate held that there is ample evidence to prove beyond reasonable doubt that the appellants committed the offence of theft c/s 265 of the Penal Code and he accordingly convicted them thereof. At the same page onwards, the learned Resident Magistrate observed while sentencing the appellants as follows and I quote:

"Sentence: Accuseds are first offenders, they had no intention of stealing they thought, being represented by a policemen they were not committing any offence. . ."

From the above quoted observation, it can be seen that the learned Resident Magistrate contradicted himself by saying that the appellants had no intention to steal and yet still he convicted them of theft. One of the essential element of the offence of theft is the intention to commit that crime. Therefore, if a person takes anything belonging to another person which is capable of being stolen without intention to steal such thing, he cannot be blamed for stealing it.

On perusal of the trial court's record, I have not found any evidence to show that the appellants did steal the

properties of Larji Galkal as alleged by the prosecution on the second count.

During trial, the prosecution called five witnesses to prove its case namely PW1 Shabhana Navate, PW2 Savitri Damji Visran, PW3 Larji Galkal, PW4 B. Lalji, PW5 Rajesh Jenki and PW6 99998 Ssgt Bashire.

PW1 and PW2 did not give any direct testimony that they saw any of the appellants stealing Larji Galkal's properties. In fact, even the rest of the above mentioned witnesses did not give any direct testimony to that effect. PW3, PW4 and PW5 told the court that on 20/9/1999, the appellants broke their house at Upanga during their absence. PW3 said that after receiving a telephone call that some people were breaking their house at Upanga, he rushed there and found the appellants inside their house. PW4 said that when the appellants broke their house and entered therein they stole his parents golden ornaments and

that on 21/9/1999, they got a court order for restoration of their personal effect from the appellants. PW5 said that when he received a telephone call from someone that some people were breaking their house at Upanga, he went there and found the appellants inside their house and that the appellants claimed to have won their civil case at Kisutu in February, 1999. PW6 said that on 20/9/1999, the complainant (PW3) went to Selander Bridge Police Station and reported that the appellants had taken away his personal effects from his house.

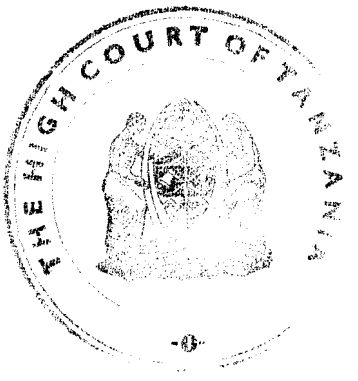
On examining the testimony of PW3 and PW5, I have asked myself a question as to what action did they take against the appellants immediately after finding them in their house which is alleged to have been broken into by them. There is nothing in their testimony to show that they did arrest them or called upon the police to come and arrest them. This means therefore that the appellants did not steal

anything from the complainant and that the charge of theft was merely cooked against them. I so find.

The trial court's record shows that some of the appellants namely Hasmuk Gerag Jetha, Atish Katahir, Edward Kambuga and Ameey Bhupendra were not put on defence on grounds that they would have told the court a similar story such as the one which was told by the appellants. That was quite wrong. In criminal trials, each accused who is ready to give evidence on his or her behalf or to call witness in his or her defence has to be given an opportunity to do so irrespective of whether he or she has a similar story to tell or a similar defence to give as his or her co-accused person or persons.

For the aforesaid reasons, I hereby quash the appellant's conviction and set aside the fine sentence which was imposed on them by the trial court. The money which

was paid as fine should be refunded to them. It is so ordered.



A. Shangwa

JUDGE

25/9/2006

Delivered in open court this 25th day of September, 2006.

A. Shangwa

JUDGE

25/9/2006