

THE UNITED REPUBLIC OF TANZANIA
IN THE HIGH COURT OF TANZANIA
AT MOSHI

(PC) CRIMINAL APPEAL NO.9 OF 2006
C/F CRIMINAL APPEAL NO.13/2005 ROMBO DISTRICT COURT)
(ORG. CR.CASE O.110/2005 MASHATI PR/COURT)

1. JOSEPH COSMA	}	
2. EMMANUEL MKWE	}APPELANTS

VERSUS

THE REPUBLICRESPONDENT

JUDGMENT

HON. S .E. MUGASHA, J

The appellants were charged and convicted for House breaking contrary to section 294(1) and stealing contrary to section 265 of the Penal Code, and sentenced to imprisonment for a term of three years in respect of the 1st count and a term of 1 year for the 2nd count, both sentences to run concurrently. The particulars of the charge were that the appellants on 21st

August, 2005 at 9.00 hrs in Mohorosha Mforo Rombo District the appellants did burgle the house of Kandida w/o Moshili and did steal Tshs.150, 000/=, 20 iron sheets 3m valued at Tshs.130, 000/=, a bicycle make SANSI valued at Tshs. 70,000/=, all total valued at Tshs.350, 000/= the property of Kandida w/o Moshili when the charges were read against the appellants the pleaded not guilty. The Magistrate relying on evidence adduced by the prosecution witnesses convicted the appellants as charged.

The appellants aggrieved with that decision appealed to the District Court and the appeal was dismissed and judgment of the lower Court upheld. Dissatisfied with the decision of the District Court the appellants have appealed to this Court raising nine grounds of appeal, all centered on failure by the prosecution to prove charges against the appellant beyond any reasonable doubt.

Mr. Rwegerela, State Attorney who represented the Respondent conceding to the appeal submitted against conviction and sentence. In support of his submission Mr. Rwegerela submitted that evidence paraded by the prosecution was insufficient to prove charges against the appellants because the appellants and the stolen items were not properly identified. Moreover, the State Attorney submitted, charges and particulars of offence the appellants which are a subject of this appeal are

similar in terms of the date and time when charges which are Criminal Case No.100/2000 of Rombo primary Court. On that aspect Mr. Rwegerela submitted that it is not possible for the same appellants on the same day and time to commit offences in two different houses. Moreover, the State Attorney submitted that, the trial Magistrate did not conduct proceedings nor summon the appellants to be present during the hearing of the appeal.

Also the State Counsel submitted that the charge sheet was defective as the appellants were charged under a wrong section because burglary is an offence under section 294(2) and not 294(1) of the Penal Code.

The grounds of appeal raised by the appellants and the submission by the State Counsel raise three points which are for determination by the Court. Firstly as to whether the prosecution paraded sufficient evidence to prove a charges against the appellants, secondly if at all the Magistrate erred in not summoning the appellants to be present during the hearing of the appeal and whether the charge sheet was defective and vitiated the trial.

In order to tackle the issue pertaining to whether the prosecution paraded sufficient evidence to prove a charge against the appellants, two

questions need to be answered, namely, if the appellants were properly identified at the scene of crime and whether stolen items were properly identified.

At this juncture it is pertinent to evaluate the testimony of PW1 and PW4. PW1 testified that, the appellants twice broke into her house ,firstly being on 21/8/2005 when they stole 3 goats and on 22/8/2005 the appellants did steal 20 iron sheet, a bicycle and cash money 150,000/=. PW1 further stated, and I quote:

“washitakiwa waliingia ndani wakia na nyundo wakidai ukipia kelele tutakuua walivunja mlango wa dirisha. Nawafhamu washtakiwa kabla ya uvunjaji tena niliwaona kwa macho na wakaongea nao.”

The incident occurred at night and PW1 knew the appellants before the alleged incident and she had the opportunity of conversing with the appellants at the scene of crime. According to PW3, the story was narrated to him PW3 by PW but fell short of describing the appellant and giving terms of description of the appellants as was held inv. R .

According to PW4, he testified to have found appellants arrested by the masais who alleged that the appellants were Tanzania and thieves and

those they arrested with goats, Bicycle and Iron sheets. PW4 also testified that and I quote:

“tulipata msaada wa wananchi kuatambua washtakiwa. Mshtakiwa No.1 anayo RB alimwibia Mzee mmoja mahindi gunia 7, tukamtafuta bila mafanikio.”

But all the same the assistance which PW4 alleged to have received from the people fell short of indicating as to how they managed to identify the appellants it being that the identification parade was not conducted. With this prosecution testimony, I am satisfied that the appellants were not properly identified at the scene of crime.

As regards the identification of stolen property, PW1 stated that after hearing that some persons have been arrested she went to the Police and found his bicycle and iron sheets but the goats were not found at the Police Station. However, the testimony of PW4 contradicts the later because PW4 testified that stolen properties including the 3 goats were all at the Police station. Besides PW1 stating that he found his bicycle and iron sheets at the Police Station, nothing is stated as to whether the bicycle and the Iron sheets had peculiar marks before he had the opportunity to see the stolen properties at the Police Station. In the case ofvr R. It was held

In the circumstances I am satisfied that the stolen properties were not properly identified and the trial Magistrate faulted in convicting the appellants basing on the sane.


Moreover evidence paraded by the prosecution contradicts with the charge sheet. While the charge sheet indicates that the offence was committed on 21/8/2005, PW1 stated that 3 goats were stolen on 21/8/2005 and iron sheets, a bicycle and Tshs.150,000/= were stolen on 22/8/2005. Therefore the paraded prosecution evidence does not support the charge.

Moreover, and as rightly stated by the Sate Counsel the offence which is a subject of this appeal is similar to Criminal Case No.100/2005 and Criminal No.....in the High Court. In the earlier appeal , I allowed the appeal and quashed conviction and sentence due to failure by prosecution to prove a charge against the appellants. It is not possible for the same persons on the same day and time to commit offences in two different houses. Moreover, even the complainants are different in the earlier appeal it is Angelina Yusto and in the current appeal is Kandida and no evidence has been paraded to show that the two complainants resided in the same in the same house.

As regards the defectiveness of the charge, I do agree with the State Attorney but nothing can be redressed with insufficiency of prosecution evidence which does not in any case warrant for a retrial, because the purpose of a retrial. Moreover the purpose of a retrial is not to fill in or supplement prosecution evidence gaps.

In the upshot of the stated circumstances, uphold the appeal, quash conviction and sentence and order the appellant to be released forthwith.

Right of appeal Explained.


S. E. MUGASHA
JUDGE
29/8/2007