IN THE HIGH COURT OF TANZANIA

AT MTWARA

PC. CRIMINAL APPEAL NO. 5 OF 2007

FROM CRIMINAL APPEAL NO. 12 OF 2006
IN THE DISTRICT COURT OF MASASI
ORIGINAL CRIMINAL CASE NO. 80 OF 2006
OF CHIKUNDI PRIMARY COURT

ROSE EDWIN MPINGA ..... APPELLANT

VERSUS

MOHAMEDI BOHOLA ..... RESPONDENT

DATE OF LAST ORDER – 8/11/2007
DATE OF JUDGMENT – 6/12/2007

JUDGMENT

MJEMMAS, J.

This is an appeal by Rose Edwin Mpinga who was a complainant in Criminal Case No.80 of 2006 before Chikundi Primary court. In that case she complained against the respondent Mohamedi Bohola who was charged with two counts of house breaking contrary to section 294(1) of the Penal Code and theft contrary to section 265 of the same Penal Code, chapter 16 of the Laws. The trial Primary Court acquitted the respondents of both counts. The appellant who was the complainant was aggrieved so she appealed to the District court of Masasi District which dismissed the appeal. She has therefore come before this court for a second appeal.

The background of this matter is that on 3/4/2006 in the morning the appellant closed the door of her house and went to her farm. She returned in the afternoon around 12.30 pm and found the door of her house open and padlock broken. She called her neighbour (PW.2) to witness the incident. The neighbour advised her to report the matter to the Police. She complied with the advice and reported the matter to the Police. According to the appellant she was asked who was she suspecting to have committed the crime. She mentioned the respondent who was her tenant. The respondent was arrested and according to the appellant he admitted to break the door. No Police was called as a witness to support the appellant about that. The story or defence of the respondent was that on the material day he was called by a certain person and told to go and open the door for his boy (DW.2). He went to the said house and found that the door was locked and the boy was inside. He opened the door for him. During cross examination he said he opened the door because he had a key and that he carries the business of a shop. DW.2 testified that on the material day he opened the shop in the morning and took oil outside. At around 10.00 am a client came who wanted to purchase oil. When he tried to open the shop he discovered that it was locked from outside so he called the respondent to open the door. At around 12.00 noon the complainant came and asked who opened the door. According to DW.2 the complainant said "Basi mwaka huu mtu atafika Polisi au Mahakamani" and then she broke the door.

In acquitting the respondent the trial court said that the appellant did not report to the Police that her money was stolen during the incident. That she did not reveal that information to her

neighbour nor did she say so during her testimony. It also wondered why the alleged broken item was not shown in court as evidence. It also found that there was a tenancy relationship between the appellant and the respondent and the only way to resolve any problems aring from that relationship was to open a case before the Housing Tribunal.

The District Court upheld the decision and reasons of the trial court. In addition to that it observed that no Policeman was called to testify to prove that the respondent admitted to have broken into the house. It therefore dismissed the appeal.

The appellant has raised five grounds of appeal to challenge the decision of the lower courts. The grounds are as follows:

(1) That both the trial Magistrate and the first Appellate Magistrate erred in law for rejecting glaring evidence advanced at the trial by the complainant who caught the respondent physically into her broken house (complainants) and reported the incident to a Cell Leader.

(2) That both the trial and first appellate Magistrate approached the evidence laid on the scale against the Respondent with very slight observance the result of which they made a finding of not guilty.

(3) That non production of the property broken door lock (kitasa) cannot be shifted to be the burden of the complainant as all those items were supposed to have

been taken to court right from the day the charge was taken to court in the first instance by the Police.

(4) That the first Appellate Magistrates' judgment did not properly observe and take note of the last date of the Respondent's tenancy in the complainant's house that is 31/3/2006 when compared to the date he was caught into the locus in cell that is 3/4/2006.

(5) That both the trial Magistrate and the first Appellate Magistrate miserably failed to reason out that formerly being the tenant of the appellant the respondent did not enjoy the privilege of tempering with the complainant's property as he did.

The respondent has filed a reply to the petition of appeal. As expected the respondent is resisting the appeal.

During the hearing of the appeal both the appellant and the respondent appeared in person, unrepresented. The respondent said that the appellant was his landlady and the tenancy agreement started on 1/6/2005 and came to an end on 30/9/2006. He went to say that he has a shop in the house of the appellant. He insisted that on the material day he opened the door using a key and there was no breaking as alleged. He was called to the police and informed about the charges against him which he denied. In reply the appellant said that she had the key and wondered where the respondent got the key to open the door as he alleges. She went on to say that the tenancy agreement started on 1/1/2006 and it was for one year. She however said that she gave the respondent notice to leave the house. She did not tell the court the exact date the notice was given.

All in all, let me consider the grounds of appeal as raised by the appellant and resisted by the respondent.

On the first ground of appeal I agree with the respondent that the records of the lower courts do not support what the appellant is alleging. There is nowhere in the court proceedings and particularly in the evidence of the appellant where it is shown that she caught the respondent physically breaking into her house. That ground has no merit and it is dismissed.

With regard to ground two of appeal, I again agree with the respondent that the appellant did not prove her case against the respondent beyond reasonable doubt. I have already referred to the evidence adduced in the Primary Court and I find no reason to reproduce the same here. The trial could correctly analysed the evidence and arrived at the correct decision so I have no reason to interfere with its decision.

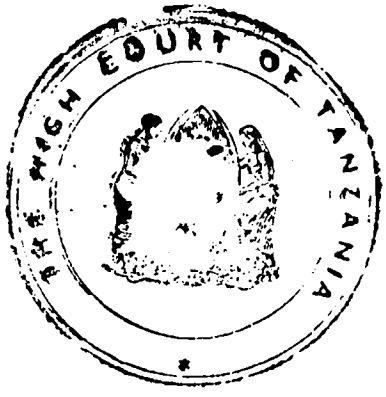
The third ground of appeal is certainly based on misconception of the law. No public prosecutor is allowed to appear before a Primary Court. If the appellant wanted the said "exhibits" to be brought to the court by the Police she could have asked the court to issue summons to the relevant police who visited the scene of incident or the one who took the items to appear before the court as a witness of the appellant and produce the same. In addition to that the burden of proof in criminal cases does not lie on the accused person but it lies on the prosecution and in this matter it was the appellant

who was prosecuting as complainant. This ground therefore fails and it is hereby dismissed.

I will address grounds 4 and 5 together because they are founded on the same issue of tenancy agreement. The appellant did not explain in her evidence that the respondent was no longer his tenant. She did not even produce any evidence to show that she had given him a notice to vacate the premises and the same had expired. That issue came out briefly during cross examination by the respondent. But even if we assume that the appellant had given the respondent notice to vacate the premises and the same had expired but he (respondent) continued to occupy the room the appropriate course of action as correctly pointed out by the trial Primary court was to seek remedy before the relevant bodies, in this matter, the housing tribunal which is empowered to determine the matter according to law. I therefore find that these two grounds of appeal i.e No.4 and 5 have no merit at all and I dismiss them accordingly.

From the foregoing this appeal therefore has no merit and it is accordingly dismissed.

Order accordingly



G.J.K. Mjemmas,
Judge
6/12/2006

Date: 6/12/2007

Coram: Hon. G.J.K. Mjemmas, J.

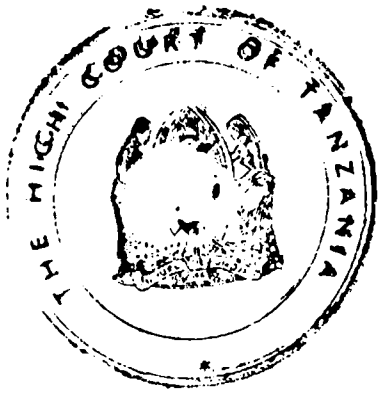
Appellant: Present

Respondent: Present

B/C: G.Luoga, RMA

Court: This appeal is coming up for judgment today.

Order: Judgment delivered in Chambers this 6th day of December, 2007 in the presence of the parties.



G.J.K. Mjemmas,
Judge
6/12/2007