IIN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO 7 OF 2006

Original Criminal Case No. 64/2005of Kilwa Masoko District Court
Before S.G Cleophas Esq DM

ABDALLAH ISMAIL ATHUMANI .....APPELLANT

VERSUS

THE REPUBLIC .....RESPONDENT

15/7/2008 & 4/8/2008

Rweyemamu, J.,

Judgment

The appellant **Abdalla Ismail Athumani** was arraigned on a charge with two counts; House breaking c/s 294(1) and stealing c/s 265 of the Penal Code. The charge particulars were that on 15/6/2005 about 9.30 hrs, the appellant broke into the dwelling house of Hawa Mohamed (Pw1) and stole 2 packets of rice weighing 25 Kg. He was tried, convicted on both counts, and sentenced to 3 yrs and 12 months for the two counts respectively. The bag of rice involved was ordered to be returned to the owner.

Dissatisfied he appealed to this court claiming on the main that; he was wrongly convicted on the evidence of the complainant Pw1 which was uncorroborated Appellant continues; and evidence of Pw2 and Pw3 which was hearsay. What is hearsay defined as;

Mr. Mkude State Attorney for the republic/respondent supported conviction and submitted that; the appellant was seen by Pw1 in broad day light; he was caught in the act ("red handed" to use his exact words), Pw1's evidence was corroborated in material particulars by Pw2, an independent person. He was one of the villagers who participated in the pursuit of the appellant following the alarm raised by the complainant. He submitted further that the appellant's claim of buying rice from one Ally was not supported by any evidence as would raise doubt in the prosecution's case.

I have checked the DC record; while it was true the appellant made the claim at trial, he was given ample time to call the said witness ally- he failed. The record shows the case was adjourned 6 times to await the witness and on 3/8/2005, the appellant said he had decided to close his case as his witness was nowhere to be seen.

The evidence upon which conviction was based went as follows: Pw1 was returning home from her sister's place near by,

he saw the appellant coming from her room with a bag of rice. Rice had also been stolen therein a day before. She raised an alarm and a number of people turned up and started chasing the appellant. Among the people chasing him was Pw2 a mere villager.

According to his testimony, he successfully chased the appellant who was being chased by many other people, and that he in fact saved him from instant justice, because the mob wanted to lynch him. He did not tell the people who apprehended him that he got the rice from Ally, in any case he could not lie then to the mob, because the facts were still apparent that the complainant raised alarm after seeing him come from her room. According to the evidence on record, the appellant was handed over to Pw3 the village chairperson after he was apprehended.

The appellant has submitted that he was convicted on hearsay evidence. Hearsay is defined as;

> " *that species of testimony given by a witness who relates; not what he knows personally, but what others have told him, or what he has heard said by others* ". *Black is law Dictionary sixth Edition*

The submission by the appellant that he was convicted on hearsay evidence has no merit; his conviction was based on the complainant who saw the appellant come out of her room with her sack of rice; Pw2 who joined the people who chased him after the alarm; and Pw3 who came in the picture because of his position of leadership in the village. He testified to have been going on with his usual activities in his shamba when he was called and told that that the appellant had been brought to his house on allegation of stealing from the complainant- and his testimony in court was to such extent and no more.

On the above evidence I agree with the DC findings and submission by the state attorney that the appellant was caught 'red handed', but that is as far as I go.

The appellant was charged in the first count of house breaking. The offence is defined in part, under section 294 (1) as: Any person who

(a) breaks and enters and building.....
used as a human dwelling with
intent to commit an offence therein or".

Proof of that offence necessarily implies availability of evidence of break in, which connotes unlawful forceful entry. No evidence was adduced in the DC to prove that ingredient.

In view of the said reasons, I uphold the appellant's appeal in respect of the 1st count, quash his conviction and set aside the sentence of 3 yrs passed for that offence. The appellant's appeal in respect of the second count has no merit; I dismiss it. It is so ordered.

R M Rweyemamu
Judge
3/8/2008