IN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO 6 OF 2006

Original Kilwa Masoko D/Court Criminal Case No. 2/2005
Before S.G. Cleophas, -DM

MIKIDADI SAIDI MWICHANDE .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

1/7/2008 & 1/8/2008

Rweyemamu, J.

Judgment

In Kilwa District Court (DC) Cr. Case 2/2005 the appellant **Mikidadi Saidi Mwichande** was faced with a charged on two counts, Burglary c/s 294(1) and stealing c/s 265 of the Penal Code respectively. The particulars had alleged that about 05.00 hours of 21/12/2004, the appellant broke into the dwelling house of Hamisi Imbu, and therein stole the complainant's bicycle and various other items valued at shs. 128.000/.

He was tried, convicted and sentenced to 5yrs and 2 yrs for the two counts, that was after the prosecution disclosed that the

appellant was a habitual offender. Dissatisfied he filed 9 grounds of appeal and expressed his wish not to appear for hearing. The appeal was contested by the republic/respondent.

Briefly the prosecution case was that: Pw1 learned from another person that properties were stolen from his retail shop, that person had seen a trail of rice in the bush, he made a follow up and there found a number of cooking utensils some of which had the name of the complainant's wife. He went to his house to check and found some things missing including his bicycle. He reported to the Village Executive Officer (VEO), who assigned the village civilian police (*mgambo*) - Pw2 to follow up the matter.

The evidence of the two was similar. They reported to the appellant's Ten Cell leader, and with him went to the appellant's house searched and arrested him. He admitted to have stolen the rice which he had hidden under the bed and some cloths, thereafter he took them to the bush where he hid the rest of the items, and there they recovered the complainant's bicycle. He received beating from villagers who were arounc before he was returned the VEO's office. There he claimed to have committed the offence with one Hedo, they went to his house but he had escaped.

Pw2 deposed further that he was with two other *mgambo* in the exercise and after handing over the appellant and recovered articles to the VEO, their work was done. They left the officer to

proceed with usual legal processes. He tendered as exhibit the bicycle P1, cooking utensils P2, a tin of rice P3, and assortment of clothes P4.

The complainant's wife Pw3 testified that she was sleeping at the material day, that a thief stole a number of articles from her and another neighbor, that after the thief was arrested she went to the VEO office and identified her properties. Some of the stolen and recovered utensils had her name inscribed on them. She added that the appellant was a known habitual thief in the village who had stolen from a number of other people before.

The appellant in his MA generally protested his innocence; submitted that; he was not identified at the scene of crime; that there was no evidence of break; that he was not found in possession of the stolen property and therefore that the case against him was not proved. Supporting conviction Mr. Hyera state attorney for the respondent submitted that; the appellant was arrested immediately after commission of the offence; he led the search group to discovery of stolen property; The appellant was arrested immediately after the event; he was the one who led the search party in the bush where the stolen properties including a bicycle were found, and therefore that the evidence was very clear that he committed the offence.

There are two key issues for decision by this court; one. whether there was proof that the house of the complainant was broken into and at night; and two, whether there was proof that the appellant was found in possession of stolen properties identified to belong to complainant. I will examine proof in relation to the 1st count first. To sustain conviction for burglary, the following ingredients needed to be proved: One, that the appellants broke and entered the complainant's house with intent to commit a felony namely stealing; two, that they broke into the building on the stated date i.e 21/12/2004, three, that the offence was committed at night.

It is clear from the summarized facts above and as rightly although inarticulately submitted by the appellant that key ingredients were not proved on the required standard in the DC. There was no evidence of break in adduced by the complainant or his wife. In fact, there was no evidence that the village officials to whom the crime was reported visited the scene to verify the break in. Burglary connotes an entry which is forceful – a break, clearly wanting in this case was proof evidence of such forceful entry. In short conviction on the 1st count was made by the DC in the absence of evidence of burglary. I quash that conviction.

As regards the stealing, after reevaluating the evidence I am satisfied that the following facts were proved beyond doubt; that the appellant was found with stolen properties tendered as exhibits;

that he was so found after a short period-in fact within hours of their being stolen; that the said properties were properly identified as belonging to the complainant and his wife; and the appellant had/gave no reasonable explanation of his possession.

On those proved facts, the appellant was properly convicted of stealing under the doctrine of recent possession. A doctrine explained in a number of cases, see among others **DPP V. Joachim Komba** 1984 TLR 213 where it was held that:

> *".. If a person is found in possession of recently stolen property and gives no explanation depending on the circumstances of the case, the court may legitimately infer that he is a thief or breaker or guilty receiver"*

His appeal on this count has no merit, I dismiss it. The sentence passed was not excessive, I leave it undisturbed.

To conclude, the appeal against the 1st count is sustained, and the subsequent conviction and sentence of 5 yrs quashed. Appeal against 2nd count is dismissed. As a result the appellant will serve a sentence of 2 yrs only. It is so ordered. .

R.M. Rweyemamu
Judge
4/9/2008