IN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO 7/2004
Original Criminal Case No. 35/2002, District Court of Kilwa Masoko: Before S.G Cleophas Esq, DM.

SHABANI KASSIM SAIDI .....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

22/7/2008 & 5/8/2008

Rweyemamu, J.,

Judgment

In Kilwa District Court (DC) Cr. Case 35/2002, the appellant **Shaban Kassim Saidi** and four others were arraigned on a charge with four counts namely; Conspiracy to commit a felony c/s 384 and Robbery with violence c/s 285 and 286 of the Penal code. These two accounts were against the 1st to 3rd accused - the appellant was the 2nd accused. The third count-, Neglect to prevent a felony c/s 383 (1) was against the 4th accused and the fourth count-, Retaining stolen property c/s 311 (1) was against the 5th accused only. The rest of the accused were acquitted save the appellant who was convicted on the second count for a lesser

offence of stealing, and sentenced to 5 years internment, (which decision he appealed to this court, and the 4th accused, who was sentenced to 1 year.

The relevant charge particulars were that on 12/11/2002, the three conspired to commit felony namely robbery with violence at Kitumbi TTCL, and on 14/7/2002 they committed robbery with violence at such a place; stole 35 solar panels and used violence to retain them. The 4th accused a watchman employed by TTCL, from whose premises the solar panels were allegedly stolen and the 5th accused retained 7 out of those stolen solar panels. Dissatisfied, with that decision, the appellant filed a Memorandum of Appeal (MA) with 27 grounds and therein expressed his wish not to appear at the hearing of the appeal.

Before evaluating the parties' evidence, I shall in brief revisit the evidence at trial. The story of the prosecution can be told thus: On 15/72002, Pw8 a manager of TTCL Lindi learned of the theft of 35 solar panels at the Katope station. He and the village leadership of the particular area visited the scene and verified that 35 solar panels worth shs. 17 million were indeed stolen. The 4th accused whose's salary was being paid by the village government

was the watchman on 14th, when the stealing was supposed to have occurred.

On 25/7/20022, Pw2 a Village Executive Officer (VEO) received information from an informer that some stolen panels were to be transferred from Katope to Somanga, he informed villagers and laid a trap assisted by some local police – *mgambo(interchangeably used with sungusungu)* who patrolled the area. At midnight of the 26th of that month, he was awakened by some *mgambo*, they were with the appellant who they had arrested/apprehended with 11 pieces of solar panel.

The story of that arrest was testified to by Pw4, Pw5 and Pw6. according to the three; they were among the 11 *mgambos* requested by the VEO (Pw2) to keep a watch out for thieves of the solar panels. The group had split in two. One group kept guard at katope and the other at Mchela. At about 8.30 of 26/7/2002, the katope group saw the appellant with another pushing a bicycle; they had 11 solar panels; one of those two people run, they apprehended the appellant and took him to VEO.

The witness then went on to testify that the issue was there after reported to the police. The police investigator Pw1 testified

that he and two other colleagues were assigned the matter and went to Kijumbi village on 27/7/2002, where the appellant was already apprehended by the VEO. They had a search warrant P1, arrested the appellant and recovered 11 solar panels which he tendered in exhibit as part of P2. In total, 18 solar panels were tendered as exhibit; the other 7 were recovered by Pw[1] in the course of investigation from a different village and related to the case against the 5th accused. As the latter was acquitted I need not go into the matter save to comment on the court's conclusion that evidence of the 5th accused's possession also implicated the appellant; but I will resort to that issue shortly.

In defense, the accused denied the offence and his story was; that on 26/7/2002 he went to the VEO to report that his bicycle had been stolen, while there and after seeing his bicycle at the VEO, the police came and he was arrested. He admitted the 5th accused was his brother in law.

In his MA to this court, the appellant submitted in 27 grounds whose key arguments were that the DC erred; one, when it failed to believe his defense regarding how he was arrested; two, when it believed that there was proof on the required standard that he admitted possession of P2 to Pw[2] and led the investigation team of

the police and *mgambo* to another village where the other 7 panels were recovered; three, when it failed to find that there was no proof that he stole the solar panels in question; four, when it found without sufficient proof that he took the 7 panels to the 5th accused; five, that it ignored the evidence of Pw3 who said the stolen panels were recovered in the forest; six, when it believed that the stolen panels were to be transported from Kitope to Somanga, while he was arrested on a different place between ingirito and kijumbi and therefore that he was convicted on insufficient evidence.

This appeal was contested. Mr. Mkude state attorney for the respondent supporting conviction submitted that; conviction was proper, based on strong circumstantial evidence which was well corroborated; that there was credible evidence that the appellant was caught with the stolen panels on a bicycle and gave no reasonable explanation of the said possession; further there was strong evidence that the other 7 panels were recovered from a room belonging to the appellant.

I should state at the outset that part of the learned attorney's submission is not supported by evidence on record. Recovery of the 7 panels was testified to by Pw3, the VEO of a different village; the panels were recovered in a room part of the house where the 5th

accused used to occupy; the 5th accused's brother in law was alleged to have gone at his place with the appellant and left the panels there; (evidence supported by the 5th accused's two defense witnesses); and the DC believed that the appellant and some relatives of the 5th accused were the ones who left the 7 panels (part of P2) where it was recovered-incidentally a search and recovery also witnessed and testified to by Pw3 and Pw7 the VEO of Somanga village. I differ with SA is that conclusion.

I should also clear another aspect - the appellant faulted the DC for believing the evidence that, the last 7 panels found in the backroom of the 5th accused's house were taken there by the appellant as testified to by the 5th accused. I agree with the appellant's conclusion that there was no sufficient evidence to prove that fact. First, that was evidence of a co accused, two, there was no sufficient evidence to prove that the room belonged the 5th accused- the appellant's in law, or that he the appellant took them there.

The DC probably concluded as it did based on the fact of the appellant having been apprehended with 11 out of the 35 stolen panels. That however, would only amount to strong suspicion, and as it has been held a number of times by this and the CAT that

suspicion however strong can not be substitute for proof. I agree with the appellant that there was no sufficient proof that the 7 panels whose recovery was also witnessed by Pw[3] and Pw[7] were taken there by the appellant. In view of that, the appellant's complaint against the DC evaluation of Pw[3]'s testimony need not retain me.

That said, the remaining question for decision by this court is whether there was sufficient proof that the appellant was found with 11 solar panels (part of P2) and if so, whether there was proof that he stole them.

I have carefully considered the above evidence in light of the DC decision, and find no basis to differ with its conclusion that there was sufficient proof of the fact that the appellant was intercepted by witnesses, Pw[4] Pw[5] and Pw[6] who were on guard following their VEO (Pw[2]'s) instructions to keep a look out for thieves of the panels. The basis of Pw[2's] instructions were also credibly testified to; after the TTCL manger's report, the VEO following a tip from an informer some days later, sent the 3 *mgambo* on a mission, which resulted into the appellant's arrest, probably a successful example of community policing.

There was no evidence to suggest that the three witnesses had any reason to fabricate the story, a story given with consistency by all the witnesses, that they apprehended the appellant with stolen panels. The DC rightly rejected the appellant's story because the same was not plausible. He never suggested either in his evidence in court, during cross examination or even in his MA, that the witnesses were people he knew before or who were out to get him. I find that there was sufficient evidence to prove that the appellant was found in possession however, that is not the same thing as saying he was proved to be the thief.

On the basis of strong evidence of possession of 11 panels part of the 35 stolen panels, and the appellant's failure to give reasonable explanation of possession thereof, the DC was justified to find an offence of possession of stolen panels proved. Due to lapse of time however, the panels in question were stolen on 14/7/2002, and the appellant was found in possession some days later -on 25/7/2002, it can not be concluded that the appellant was 'the robber or stealer' under the doctrine of recent possession. In the absence of more evidence to connect the appellant with the offence of stealing, he can not be convicted of that offence, but should be convicted of the offence proved, that of being a guilty receiver. I accordingly quash his conviction for stealing c/s 265

and replace it with receiving stolen property c/s 311. The sentence of 5 yrs was deserved either way, given the value to the community of the property involved, I leave it undisturbed.

It is not clear if the 4th accused appealed the DC decision, but, as there was no evidence adduced at all regarding circumstances of the theft, apart from mere allegation that he was the watchman of the area where the offence occurred; I find that the case against him was not proved. For whatever it is worth, (for he must have completed serving his sentence) I quash his conviction and set aside the sentence.

It is so ordered.

R.M. Rweyemamu
Judge
5/7/2008

THE HIGH COURT OF TANZANIA