IN THE HIGH COURT OF TANZANIA

AT IRINGA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 41 OF 2008

ORIGINAL CRIMINAL CASE NO. 35 OF 2006

OF THE DISTRICT COURT OF NJOMBE DISTRICT AT NJOMBE

BEFORE P.S MAZENGO ESQ RESIDENT/DISTRICT MAGISTRATE

ESSAU S/O LIGOMBE..... APPELLANT

(ORIGINAL ACCUSED)

VERSUS

THE REPUBLIC..... RESPONDENT

(ORIGINAL PROSECUTOR)

JUDGMENT

MKUYE,J

The appellant ESSAU LIGOMBE, formerly the 1st accused and Patrick Mwanyika (former 2nd accused) were charged and convicted of burglary and stealing contrary to sections 294 an 265 both of the Penal Code, Cap 16, R.E 2002. They were each convicted of both offences and sentenced to 3 years imprisonment for the offence of burglary and 5 years imprisonment for the offence of stealing which sentences were to run concurrently. The 2nd accused was convicted in absentia. The appellant is aggrieved by both conviction and sentence, hence this appeal.

The facts constituting this appeal are:-

On 28/1/2006, one Giliard Ngewe (PW1) while at Njombe, asked one Kayombo to fetch some plank makers to make planks at Kidegembye village. Kayombo brought to PW1 one Wenslous Mlage whom upon agreement with PW1 brought 5 more plank makers. Among them was Patrick Mwanyika who was the 2nd accused. PW1 together with plank makers proceeded to the village. PW1 handed the plank manufacturing machine to Wenslous Mlage who was the incharge. The machine was tested and was found to be defective. The 2nd accused was given money for buying main fold of exhost pad, 80 litres of petrol, 20 litres of diesel, some shs. 35,000/= for food and advance of shs. 70,000/= for all plank makers. PW1 left with the 2nd accused to Njombe and they purchased the items. Meanwhile, PW1 had shown the 2nd accused the place to keep the fuel in his dwelling house, in which a generator, chain saw and 20 bags of maize were kept. He also handed the key to him.

On the following day at Njombe, PW1 gave the 2nd accused shs 10,000/= as fare for conveying the items, shs 10,000/= for motivation and a handset for easy communication with him while he is in Dar es Salaam.

On 1/2/2006 PW1 was informed that his dwelling house at Kidegembye was broken into and the generator, chain saw and 20 bags of maize went missing.

PW1 went to Njombe and traced the 2nd accused whom after interrogation told him that he had handed over the key to one Kihaule. The said Kihaule @ dog @ dogman after being traced and arrested at Makambako, introduced himself as ESSAU LIGOMBE (the appellant). The said Essa Ligombe following interrogation disclosed that the chain saw

was with Ismail Sanga (PW3) and the generator with Sigali Kiboki (PW4) who eventually in the presence of the appellant, admitted to have purchased the items from one Mwajombe who was an agent. The items were recovered. The appellant was charged with offences.

On his defence, the appellant generally denied involvement in the commission of the offences.

The appellant in his grounds of appeal complains that there was no eye witness to the breaking of the house and stealing; his conviction based on mere suspicion; PW3 and PW4's evidence was rebuttable as they were co-accused or accomplice; he should have been charged with retaining stolen property rather than burglary and stealing; that the prosecution failed to prove the case beyond reasonable doubt and lastly that the sentence was harsh.

He appeared in person during the hearing of the appeal while Mr. Mwandalama learned State Attorney appeared for the respondent Republic.

Mr. Mwandalama, learned State Attorney for the respondent Republic sought to support both conviction and sentence. In rebuttal he submitted in relation to grounds No.3 and 4 jointly that PW3 and PW4 were not co-accused or accomplices as when they purchased the chain saw and generator they were not aware of the same to be stolen properties. He further argued that the appellant had assured them that the properties belonged to him and promised to issue them receipts. Hence their evidence did not require corroboration.

It was Mr. Mwandalama's further contention that the prosecution proved that PW1's house was broken into and some properties such as the generator, chain saw, 20 litres of petrol were stolen from therein. The breaking was constructive as the key was used to open the door. The 2nd accused was entrusted with a key but he gave it to 1st accused (appellant) who probably broke into and stole. Mr. Mwandalama argued further that, the properties were found to PW3 and PW4 after the appellant had mentioned them and the same were recovered from them hence, the doctrine of recent possession could apply against him. He cited the case of DPP V Joachim Komba (1984) TLR 213 (HC) in support.

He further submitted with regard to ground No 5 that since the properties were stolen on 2/2/2006 and recovered on 8/2/2006 they were properties which could not change hands fast, much as the appellant claim that he should have been charged with retaining stolen properties.

After looking at the grounds of appeal critically, I find that they hinge on two main issues which are:

1) Whether the case against appellant was proved beyond reasonable doubt.

2) Whether the doctrine of recent possession was properly invoked.

On whether the case against appellant was proved beyond reasonable doubt, the appellant's complain is that there was no eye witness to the breaking and stealing; that he was convicted on

suspicion and that PW3 and PW4 evidence did not carry weight as they were accomplices or co accused.

It is obvious from the evidence from the prosecution witnesses that no one witnessed the breaking and stealing from PW1's dwelling house. This fact did not feature in the proceedings or court record in anyhow. However, the evidence of burglary and stealing is circumstantial. There is evidence of PW1 and PW2 that 2nd accused had told them that he had given the key to the appellant. On 1/2/2007 PW1 was informed that his dwelling house was broken into and the items went missing from the place they were kept in the house. Since the items, generator, chain saw and 20 bags of maize were stolen and there was no sign of breaking, it means there was constructive breaking as rightly pointed out by Mr. Mwandalama. The key was used to open the door. The appellant must have spearheaded it as he was the custodian of the key. After the incident, the 2nd accused absconded from the place he was entrusted. There are no good reasons advanced for his absconment immediately thereafter. Further to that, the appellant promptly mentioned where the items were and the same were recovered. I think the appellant's claims have no merit.

Further more there is evidence of PW2, PW3 and PW4 which proves the appellants' involvement to the offence. The appellant's complaint is that PW3 and PW4's evidence is rebuttable as they were accomplices. But PW2, PW3 and PW4's testimony connected the appellant with the offence.

PW2's testimony was to the effect that the appellant after his arrest in Makambako, disclosed that the chainsaw was with Ismail

Sanga (PW3) and the generator with Sigali Kiboki (PW4) and they promptly admitted to have purchased the alleged items.

PW3 on his part told the court that he was approached by one Mwajombe, an agent that he has a chainsaw for sale and the owner was present. He agreed to purchase it at shs. 200,000/=. He paid shs 175,000/= as they had no receipt. But after 3 days he was needed by the police and when he went at police station, the appellant pointed him to be the person to whom he had sold the chainsaw.

PW4 on his part testified that on 4/12/2006, through Mwajombe got to know about the generator, make Honda, on sale. On inspecting it, it was found to be defective. Nevertheless they negotiated the price. It was agreed to purchase it at shs. 600,000/= and he was to service it for shs 200,000/=. PW4 paid shs. 250,000/= as advance but appellant refused while demanding more money as he wanted to pay for his child's school fees. PW4 was informed that the appellant had forgotten the receipt in Njombe. On the following day he was questioned about the generator by the police and admitted to have bought it through Mwajombe who told him it belonged to Essau. It can be observed from PW3 and PW4 that tough they purchased the items from Mwajombe, infact, they knew the same belonged to the appellant. It is not suprising that the appellant named in the presence of PW2, PW3 and PW4 by names to be the ones having the items in questions. I find that PW2's evidence corroborated PW3 and PW4's evidence in two ways. One, that the appellant disclosed at the police station that the chainsaw was with PW3 and the generator with PW4 while mentioning their names. Two, PW2 also witnessed PW3 and PW4's admission to have bought the two items which were identified by him.

PW3 and PW4's prompt admission shows that they were innocent purchasers of the items. If they were accomplices, they would not have asked for the receipts. They were assured that the receipts were available and promised to issue to PW3 after completion of instalment while PW4 was told that the appellant had forgotten it in Njombe. The appellant and Mwajombe had to assure them about the receipts so that the items could be disposed of fast. Under the circumstances, the appellant cannot exculpate himself from involvement in selling the items since he was able to name the persons who purchased them and identified them to be the purchasers.

On the other hand, even if PW3 and PW4 were co-accused or accomplices as claimed by the appellant I think the position under the law is clear. In both situations their evidence can be used against the accused persons in different ways.

Under section 33 of Evidence Act, Cap 6 R.E 2002, a confenssion, and it must be a confession, may be taken into account against a co-accused but his evidence cannot solely be used to convict the accused. (Emphasis mine). His evidence requires corroboration. Also, in order for a confension to be taken into consideration against the other person the two or more persons must be tried jointly for the some offence or different offences arising out of the same transaction.

In the instant case however, PW3 and PW4 were not jointly charged together with the appellant. Hence, they cannot be taken as co-accused.

As regards to the evidence of an accomplice, section 142 of the same Act provides:

"142. An accomplice shall be a competent witness against an accused person, and conviction is not illegal merely because it proceeds upon uncorroborated testimony of an accomplice". (Emphasis mine)

In the case at hand, there is no evidence that shows that PW3 and PW4 had knowledge on their part that the properties in question were stolen. But even if they were accomplices, under the above provision of law, they were competent witnesses whose evidence could be relied upon without corroboration.

With these reasons, I agree with the learned State Attorney that PW3 and PW4 were not accomplices. They were independent witnesses whose evidence was a stand alone evidence. The appellants claim that he was convicted on suspicion is also baseless in view of the evidence against him. The appellant's other complaint was that he should have been charged with retaining stolen property rather than burglary and stealing. Mr. Mwandalama has construed this as admission. So do I. The stolen properties which were properly identified by PW2 were recovered only six days after burglary took place. Mr. Mwandalama argued, the doctrine of recent possession could apply against the appellant because PW3 and PW4 whom he mentioned to have purchased the items were indeed found with them. He cited the case of DPP V Joachim Komba (1984) TLR 213 insupport. I find the appellant's claim to be ridiculous. From the court record, there is no evidence whatever suggesting that the appellant retained a stolen property. The appellant himself mentioned PW3 and PW4 to be the ones having the stolen items. When PW3 and PW4 went to the police station where he was, he personally confirmed to have sold the

properties to them. PW3 and PW4 admitted to purchase them from him. The same were identified by PW2 who was acquainted with them. The appellant however, did not give a reasonable explaination as to how he come to own them. In DPP V Joachim Komba's case (supra) the circumstances under which the doctrine of recent possession could be invoked were stated. Further in Ramadhani Ayubu V The Republic Criminal Appeal No. 122 of 2004 (Unreported) the Court of Appeal stated:

> *" ... if a person is found in possession of recently stolen property and he fails to give an explaination or gives one which is unreasonable depending on the circumstances of the case the court may infer that he is either a breaker and a thief ...."*

In this case, the appellant gave no explaination, leave alone a unreasonable one on how he possessed the same. At most he revealed where the items were and were indeed recovered and identified by PW2. The chain saw and generator were stolen on 1/2/2006. PW3 and PW4 struck a deal on 4/2/2006. The properties were recovered on 6/2/2006. It was 6 days after the same were stolen. They were items which could not change hands fast as rightly submitted by Mr. Mwandalama. The period within which they were found is reasonable for the invocation of the doctrine of recent possession.

Under the circumstances, like Mr. Mwandalama, I am of the view that the doctrine of recent possession can safely be invoked against the appellant. And according to the above cited cases, the

appellant can be inferred to be the one who broke into (burgled) and stole the properties from PW1's dwelling house.

Lastly the appellant has complained against the sentence that it is too harsh as he is an HIV/AIDS victim. He mitigated the same in the trial court. The trial court considered his mitigation. The offence of burglary contrary to section 194 of the Penal Code attracts the sentence of twenty years imprisonment while stealing under Section 265 is seven years. I think the trial magistrate considered them satisfactory. However, looking at the sentence of 5 years imprisonment for the second count of stealing, I think it was excessive in the circumstances. Considering the value for stolen property i.e 3,024,000 and the sentence metted out, I think they are not proportional. The appellant deserved a lesser sentence. As such I reduce the sentence imposed by the trial court from 5 years to 3 years. In the upshot, the appeal is dismissed in its entirety. Sentence on the first court is sustained. The sentence in the second count is reduced to 3 years imprisonment.

It is so ordered.

R.K.MKUYE

JUDGE

23/9/2009

Right of appeal explained.

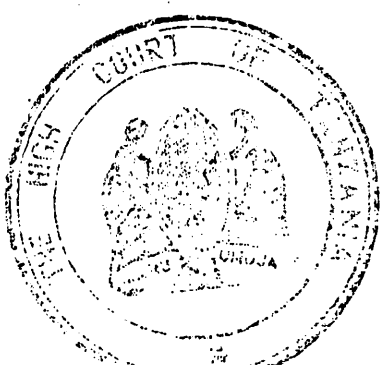
Coram: R.K.Mkuye,J

Appellant: Absent

Respondent: Ms Ngilangwa S.A for respondent Republic.

Ms Ngilangwa: The appellant indicated that he does not wish to be present.

Delivered on this 23rd day of September 2009 in the presence of Ms Ngilangwa State Attorney for respondent Republic but in the absence of the appellant who did not wish to be present.



R.K.MKUYE

JUDGE

23/9/2009