IN THE HIGH COURT OF TANZANIA

AT DODOMA

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL NO. 79 OF 2008

(ORIGINAL CRIMINAL CASE NO. 341 OF 2007

OF THE DISTRICT COURT OF SINGIDA AT SINGIDA)

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1. MANASE HAMISI
2. RAMADHANI RAJABU ..... **APPELLANTS**

VERSUS

THE REPUBLIC ..... RESPONDENT

28/09/2009 & 6/11/2009

JUDGMENT

HON. MADAM, SHANGALI, J.

The two appellants namely **MANASE HAMISI** and **RAMADHANI RAJABU** were jointly charged before the District Court of Singida with two counts. The first count was house breaking contrary to section 296 (1) of the Penal Code, Cap. 16 and the second count was stealing contrary to section 265 of the Penal Code, Cap.16. At the end of full trial the trial District Court was satisfied

with the prosecution evidence and convicted the appellants on both counts. On the first count the appellants were sentenced to serve seven (7) years imprisonment each and on the second count they were sentenced to serve five (5) years imprisonment each. Sentence was ordered to run consecutively, meaning to serve a total of twelve (12) years term of imprisonment.

The appellants were aggrieved with that decision of the trial District Court hence this appeal against both conviction and sentence. In this judgement I shall refer **Manase Hamisi** as the first appellant and **Ramadhani Rajabu**, second appellant.

The facts of the case are actually not complicated and briefly may be stated as follows; In the early morning of 5/09/2007 at about 6.00 a.m, PW1 Peter Bazil discovered that his sitting room had been broken into and several items stolen therefrom. He listed the stolen items to be twelve (12) sofa cushions, one VCD speaker, four stools, one table and one two seat sofa/coach. Immediately PW1 reported the matter at the police station and wheels of investigation started to roll.

In the cause of investigation the police officers were tipped about some youths who were selling stolen properties around Kibaoni area. Equipped with a search warrant, pW5, Detective Coplo James in the company of other police officers ambushed the houses of the

first appellant, PW2 Magreth Joseph, PW4 Farijika Benjamin and PW6 Mwajuma Mughenyi. In their search exercise the police invited PW3, Mariam Shaban the ten cell leaders as independent witness.

In the house of the first appellant the police found and retrieved one mattress, four stools and one two - seat sofa/coach. PW1 was able to identify four stools and one two - seat sofa/coach exhibit "X2" as part of his stolen items. In the house of PW2 the police seized two sofa cushions with red covers part of Exhibit *"PEW1"* which were equally identified by PW1 to be part of his stolen properties. PW2 testified to the satisfaction of the trial court how the first appellant and second appellant approached her on 5/09/2007 at about 15.00 hours and sold two sofa cushions to her at TShs.10,000/= which were later found in her house. In the house of PW4, the police officers found and seized four sofa cushions of the same type, size and colour which were identified by PW1 as part of his stolen items. PW4 narrated at police station and before the trial court how, on 5/09/2007 at about 13.00 hours the first appellant and second appellant visited him and offered to sell the four sofa cushions Exhibit *"C1,"* to him for only TShs.25,000/=. PW4 stated that when he inquired to the first appellant as to why he was selling those items, he replied that he had a seriously sick child and he was looking for money to take it to the hospital.

In the house of PW6, the police found and seized one table which was also identified to the satisfaction of the trial court by PW1

as one of his missing items. PW6, a close friend of the first appellant informed the police that the said table was brought to her place for safe custody by one Peter, another good friend of the first appellant. The table was marked Exhibit *"F1"*.

In their sworn defences, the appellants denied to have committed the offences. The first appellant conceded that his house was searched by the police officers and witnessed by PW3. He claimed that the police seized his four stools and connected him with the offences. He said nothing about the testimonies of PW2 and PW4 against him.

The second appellant claimed that on 6/09/2007 at about 09.00 a.m. the police arrested him, searched his house and seized his TV and a radio. He stated that those two items were released when he produced receipts and PW1 failed to identify them as his stolen properties.

In their memorandum of appeal the appellants has filed several implausible and confusing grounds of appeal attempting to contest for their innocence and insisted that the trial district court was wrong to believe the prosecution story. In short their ground therefore, may conveniently be summarized and condensed to one ground of

appeal that is whether there was cogent and sufficient prosecution evidence against them.

During the hearing of this appeal, the appellants who appeared in person and unrepresented had nothing much to say other than to request the court to consider their grounds of appeal.

Mr. Wambali, learned State Attorney who appeared for the respondent/Republic strongly supported the conviction and sentence imposed against the appellants. He submitted that there is standing prosecution evidence that in the early morning of 5/9/2007 the house of PW1 was broken into and several items stolen therefrom. That, at the same date a proper search was conducted by the police, while witnessed by PW3 and part of the said stolen items were found to have been sold to PW2 and PW4 by the first appellant and second appellant. He stated that, some other items were found in the house of first appellant and others hidden in the house of PW6. Mr. Wambali argued that the said items were identified by PW1 and the appellants failed to challenge the credible evidence of PW1, PW2, PW3 and PW4. He therefore request the court to dismiss the appeal for lack of merits.

Having carefully gone through the trial District Court record of proceedings and having heard the appeal arguments from both sides, I am convinced that the decision of the trial District Court was based on cogent and sufficient prosecution evidence. The offence was committed in the early morning hours of 5/09/2007 at 6.00 hours. Within no time the first appellant in the company of second appellant were in the streets hawking the stolen goods. At 13.00 hours of that day they sold four sofa cushions to PW4 pretending that they were looking for urgent cash to take a sick child to hospital. At 15.00 hours on the same day they sold two similar sofa cushions to PW2. The rest of items were found in the house of the first appellant and PW6 who revealed to the trial court how the items was brought at her place by one Peter, a good friend of first appellant. All the items were properly identified by PW1.

Although the appellants were not seen or found breaking the alleged house nor stealing the said items, there is overwhelming evidence that they are the ones who sold part of the items found in the houses of PW2 and PW4. The rest were found in possession of the first appellant. Both the appellants failed to give sufficient explanation on how they acquired the possession of those stolen items.

The position of the law is that unexplained possession by an accused person of the fruits of a crime recently after it has been committed is presumptive evidence against the accused not only on the charge of house breaking or theft but of any other aggravated crime – See **MWITA WAMBURA Vs. R. Criminal Appeal No. 56 of 1992 – Mwanza** (Unreported).

In the present case the appellants were arrested for selling the stolen goods shortly after the housebreaking and theft of the same goods from the house of PW1. The other items were found in possession of first appellant. That means, the time available between the commission of the offences and the time the items were sold and found in possession was so short that the stolen items could not have changed hands. Therefore the presumption is sound and complete that it was the appellants who committed the offence. Therefore the doctrine of recent possession is applicable in this case and the appellants were correctly convicted on both counts.

On the part of sentence, I have noted that after sentencing the appellants on each count, the trial magistrate ordered the sentence to run consecutively. No reasons were given to warrant the sentence to run consecutively in offences arising from the same transaction.

Even the appellants mitigations were not fully considered by the trial magistrate.

In view of the mitigation raised by the appellants together with the fact that they are the first offenders, there was no justification for ordering the sentence to run consecutively. Furthermore, as I have pointed above, the stance of practice is that where the counts are part and parcel of the same charge arising out of the same transaction, the sentences must be made to run concurrently. House breaking and stealing are charges arising from the same transaction and therefore the sentence should have been made to run concurrently unless there are aggravating circumstances or sufficient reasons to justify otherwise – See the cases **of ROBERT S/O NYANGANGARE Vs. R (1967) HCD NO. 26** and **LENNI ARON Vs. R (1977) LRT NO. 40.**

For the foregoing reasons the order of the trial District Court directing the sentences against the appellant to run consecutively is hereby set aside and in substitution thereof, I now order that the sentences against the appellants to run concurrently.

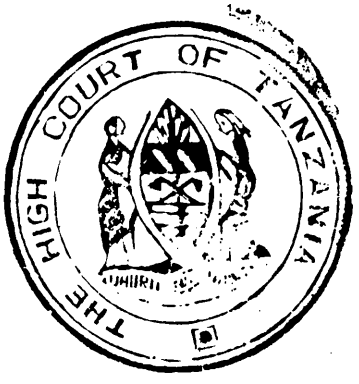
In conclusion, therefore, the appellants were rightly convicted on both counts and their appeal is hereby dismissed, save for the sentence which is ordered to run concurrently. The appellants are to serve a term of seven years imprisonment only.

M.S. SHANGALI

JUDGE

6/11/2009

Judgement delivered todate 6th November, 2009 in the presence of Mr. Kirumbi, Learned State Attorney for the respondent/Republic and the appellants in person.



M.S. SHANGALI

JUDGE

6/11/2009