

IN THE HIGH COURT OF TANZANIA
AT MTWARA
CRIMINAL APPEAL NO.80 OF 2008
C/F CRIMINAL APPEAL NO.81 OF 2008
ORIGINAL LINDI DISTRICT COURT
~~CRIMINAL CASE NO. 47 OF 2008~~

Before: C.E. Qollo, Esq: RM

RAJABU RASHIDI NAMKOLA AND ANOTHER APPELLANTS
VERSUS
THE REPUBLIC APPELLANT

Date of Last Order - 04/3/2009

Date of Judgment - 29/4/2009

JUDGMENT

MIPAWA, J.

The appellants Rajabu Rashid Namkola and Abdallah Selemani Hamisi were charged before the Lindi District Court on four counts the first count and the second count was in respect of the first accused/appellant while the third and fourth counts were laid on the second accused/appellant's door. In the first count the first appellant was arraigned on the indictment of Being in possession of stolen or unlawfully acquired property c/s 312(1) of the Penal Code it being six solar panels worth at 4,800,000/=. In the second count he faced the offence of uttering a cash sale receipts no.0042 of 4/3/2008 c/s 342 and 337 it being alleged that he uttered the receipt dated on 4/3/2008 in order to show that on 24/3/2008 he bought six solar panels valued at 4,809,000/= which was not true.

As for the second appellant he was also faced with an offence of being in possession of goods suspected of having been stolen or unlawfully acquired c/s 312(b) of the Penal Code and importing goods without paying tax c/s 47(2) of the Value Added Tax Cap. 48 R.E 2002. However at the end of the day they were convicted in the first, second and third counts respectively and reaped a prison term of 36 months for the first accused/appellant and 36 months jail for the second count. While the second accused/appellant was sentenced to 36 months imprisonment for the third count. The sentences in respect of the first accused/appellant was ordered to run consecutively. The appellants were dissatisfied and hence this appeal.

The gist of the matter was that the police got information that the two appellants were at a certain guest house styled "Nangeiya" Guest house in possession of stolen properties to wit "solar panels". When PW.1 E.7489 searched the guest house room in which the appellants had hired they did not find them but later on they were arrested at Mchangani street selling the items. PW.1 constable Keneth E.7489 interrogated the appellants on the possession of the solar panels. The first appellant told PW.1 that he bought the items in Dar es Salaam while the second appellant claimed to have purchased at Moçambique. However according to PW.1 the first appellant's delivery receipt showed that he bought the items in Dar es Salaam but when they phoned the call numbers shown on the receipts the owner denied to have sold any solar panels. The second appellant failed to bring any panel receipt and told the court that they passed through illegal outlets commonly known as "njia za panya". His fellow prosecution witness PW.2 ASP. Jacob Kiango testified more or less the same as PW.1 and told the court that they

arrested the first appellant with six solar panel and the second appellant with one piece of solar panel selling then at Mchangani street both appellants claimed to have bought the solar panels legally. However PW.2 inspite of that explanations from the appellants he directed or ordered them to bring the receipts from Mocambique where the second appellant claimed to have brought the panels nevertheless according to PW.2 the second appellant just brought a permit which allowed him to go to Mocambique and the first accuse/appellant was found with a forged receipts according to PW.1.

The appellants denied in their defence to have unlawfully possessed the solar panel. The first appellant averred that he bought 10 pieces of solar panel in Dar es Salaam on 24/3/2008 which he began to sale them to his customers at Ruangwa he denied to have altered receipt no.0042. the second appellant told the court that it was his uncle one Msham Twalib Mmeke who handed to him the solar panel which he had brought at Mocambique. His uncle bought the panels in Nampula town Mocambique at a price not known to him.

The learned State Attorney who appeared for the Republic declined to support the conviction of the appellants he gave reasons that the appellants who were found with solar panels had offered a reasonable explanations as to their being in possession of the solar panel that the first appellant produced a receipt which had a TIN number but unfortunately the police did not take further steps of tracing the receipts. The appellants produced the receipts and therefore it was not right for the trial magistrate to order the appellants bring the owner of the shop where they bought the solar panels because that was the duty of the police and theretore they have failed to prove their case beyond any reasonable doubts.

To my mind, I think by and large that the learned State Attorney Mr. Hyera was entitled not to support the convictions and sentence(s) of the appellants by the lower court. I entirely and respectfully agree with the learned Counsel for the state because as the evidence shows the prosecution side had shifted the burden of proof to the accused persons. The offence in which they were charged only needed them to offer a reasonable explanations as to how they came into possession of the alleged items suspected of having been stolen or unlawfully acquired and on this, they did, as rightly pointed out by the learned State Attorney. It appears that the police were not satisfied with the appellants production of the receipts to the extent that they labeled the receipts produced as "forged receipts" without any proof of the alleged forgery. They claimed that the receipts were altered on the dates to suit the case. However there was no evidence produced in court to prove the fact that actually the receipt were forged or altered by the appellants. Further the learned trial magistrate was wrong to shift the burden of proof in a criminal case to the appellants listen to what the learned Magistrate erred:

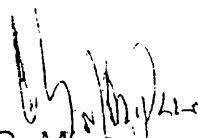
.... But are they in lawful possession? As reveals 1st accused is not the one who bought the one who bought is Mr. Rashid Namanjole. He never appear (sic) to establish whether he bought one cartoon of solar power lawfully. First accused didn't bring the buyer to exculpate against him and no reasons has tendered (sic) as to why the buyer is not available but only that he is at Newala.....

With respect to the learned Resident Magistrate the above excerpt was as well as shifting the burden of proof to the appellants/accused which in

criminology is not the right path to undertake. He was wrong. It was the duty of the prosecution side as rightly pointed out by the learned State Attorney to prove its case beyond any reasonable doubt which duty they have failed to discharge as correctly submitted by the State Attorney. It follows therefore that the prosecution did not establish the guilty of the appellants beyond any reasonable doubt and thence their conviction by the lower court were bad in law.

In the event I proceed to allow the appeal and quash the convictions for the appellants set-aside the sentences imposed on them and order the appellants immediate release from prison unless they are otherwise held in connection with other matters lawfully and legally. Similarly the order by the lower court to forfeit the seven (7) solar panels is equally set – aside the seven solar panels to be returned to the appellants immediately.

It is so ordered.


I.S. Mipawa,
Judge
29/4/2009

Judgment delivered today in the presence of the appellants and the learned State Attorney Mr. Mkude.


I.S. Mipawa,
Judge
29/4/2009

~~Date: 29/4/2009~~

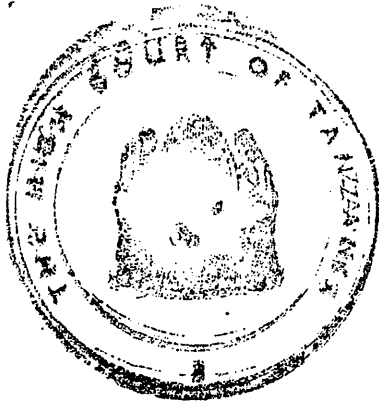
Coram: Hon. I.S. Mipawa, J.

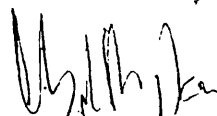
The Republic: Mr. R. Mkude, State Attorney

Appellants: Both present

B/C: Namanga, RMA

Court: Judgment delivered today in court before the appellants and the
State Attorney Mr. Mkude.




I.S. Mipawa,
Judge
29/4/2009