IN THE HIGH COURT OF TANZANIA
AT MTWARA

PC. CRIMINAL APPEAL NO. 12/2007
FROM NEWALA D/ COURT CRIMINAL APPEAL NO. 2/2007

ORIGINAL CRIMINAL CASE NO. 78/2006 OF NAMIKUPA PRIMARY COURT

(BEFORE: KHOJA H.O. ESQ – PDM)

AYUBU RASHIDI ... ...APPELLANT

VERSUS

AZIZA ABDALLAH ... ...RESPONDENT

25/3/2009 and 6/5/2009

JUDGMENT

S.A. Lila, J.

The Namikupa primary court sentenced the appellant, Ayubu Rashid, to a six months conditional discharge and ordered him to pay a mobile phone upon a conviction for theft contrary to section 265 of the penal code. The conviction, sentence and order aggrieved the appellant. He preferred an appeal to the district court of Newala which dismissed it. Dissatisfied, he again filed this appeal which he argued it himself. The respondent, Aziza Abdallah, could not be traced after she shifted to Dar es salaam. Hearing, therefore, proceeded in her absence.

It was the complaint's case that on 25/6/2006 at 10:00 am she passed at the place the appellant was doing the business of selling roasted meat, bananas and pawpaw from whom she was claiming Tshs.400/=. That the appellant (SU1) told her that he had no money then and told her to choose meat, instead. She chose meat. She added bananas and pawpaw fruit for which she paid Tshs.500/=. She said she left her mobile phone with the appellant for custody and went to take bananas. Upon her return, the appellant denied having been given the mobile phone. That she borrowed a mobile phone with which she phoned her number and it showed that it was still on air. That then the appellant went to his home. That when the appellant returned she tried to call her number again and it was silent. The matter was reported to the police and the appellant was arrested and charged.

In his defence at the trial of the case the appellant claimed that the complainant (SM1) went to his business bought meat, bananas and pawpaw and then left. That later, SM1 went back and asked where was her mobile phone which she said she had gone with it there. He denied knowing that. Rajabu Ahamad (SU2) who witnessed SM1 going and buying meat, bananas and pawpaw gave a similar evidence to that of SU1. In short the appellant and his witness (SU2) denied seing or SU1 being given a mobile phone by SM1 for safe custody.

With respect, this appeal is abundant in merit. The charge was brought under the provisions of section 265 of the penal code.

To succeed in a charge based on section 265 of the penal code, the prosecution must prove beyond reasonable doubt that (a) the person charged has taken something cabable of being stolen, and (b) with intent to defraud the owner of that thing. In the absence of proof of any of these ingredients conviction can not be abtained, or if obtained, cannot be sustained on appeal.

On the evidence and in the circumstances of this case, ingredients (a) and (b) were not established to the required standard. On the evidence it is a common ground that the complaint (SM1) went to where the appellant (SU1) was doing the business of selling meat, bananas and pawpaw fruit and bought the same. It is also a common ground that the appellant took meat, banana and pawpaw and left the place. The complainant (SM1) claimed to have left her mobile with SU1 (appellant). It does not occur to me that the complainant could take with her such big things like meat, bananas and pawpaw and leave a small potable thing like a mobile phone. Though it was a one against two evidence, yet the circumstances of the case did not suggest that the complainant was a reliable and credible witness. Even the

trial court did not indicate why it believed SM1 and doubted the appellant's defence. Instead, the trial court in its judgment simply said that SU1 admitted that SM1 went thereat his business having a mobile phone and this formed the basis of conviction. With respect, this finding is not supported by evidence in record. I have had enough time to peruse the record and I have seen nowhere the appellant admitted that SM1 went there with a mobile phone. Even SU2 was in support of this in his testimony.

What is apparent from the trial court judgment is that it acted on a wrong principle and erred in its approach in the evaluation of the evidence adduced hence arriving of a finding of fact rationally unsupported. It held, I quote;

> *"Hapa inaonyesha kwamba tatizo kubwa*
> *ni ukosefu wa uaminifu kwani kilichopo*
> *hapa ni kwamba SM1 alimwamini SU1.*
> *Hivyo yamkini kwamba kweli aliichukua*
> *au anamjua ni nani aliichukua."*

With respect to the trial magistrate, on the evidence, as indicated above, there was no sufficient evidence to prove that SU1 left her mobile phone with SU1. So his finding that SU1 either took the mobile or knew the one who took the same was unsubstantiated. Further the above finding shows clearly that the trial court was not certain as to who took the mobile phone

was it the appellant or somebody else. Under such uncertainty it was thus not proper for the court to convict the appellant. With respect to the trial court magistrate and first appellate magistrate that it takes evidence to convict a person of a crime. Such evidence has to prove the accused guilty beyond reasonable doubt. The burden of proving guilt to the required standard rests on the shoulders of the prosecution in this case the complainant. In this case, as amply demonstrated, the evidence lacked in that degree of proof necessary for a conviction with the result that the appeal by the appellant against conviction must succeed.

In the event, I allow the appeal, quash the conviction and set aside the sentence of six months conditional discharge and the order of restoration to SM1 of the mobile phone.

S. A. Lila

Judge

6/5/2009

Judgment delivered today in chambers in the presence of the appellant in person and in the absence of the respondent.

S. A. Lila

Judge

6/5/2009