IN THE HIGH COURT OF TANZANIA

AT IRINGA

DC CRIMINAL APPEAL NO. 22 OF 2010

(Originating from District Court of Njombe
Criminal Case No. 239/2006

DAMAS MLOWE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

MKUYE J,

The appellant Damas Mlowe and two others who were acquitted were collectively charged in the District Court of Njombe at Njombe for the offences of burglary and stealing contrary to sections 294(2) and 265 of the Penal Code, Cap 16 R.E. 2002. The appellant was found guilty of the offences, convicted and sentenced to three years imprisonment in respect of the 1st count and five years imprisonment for the 2nd count and the sentences were ordered to run concurrently. Convinced of his innocence, he has lodged his appeal to this court.

The basis of his complaints is that:

1) The prosecution witnesses failed to prove the offence against him beyond reasonable doubt.

2) Nothing in connection with the offence was found in his possession but it was his co - accused who was found with the items connected with the offence.

3) The trial magistrate erred in accepting and relying on the repudiated statement.

In convicting the appellant the trial magistrate's findings were founded on the three prosecution witnesses who were Gasia Mahali (PW1), E. 8812 D/Cpl Jonathan (PW2), E 9929 D/C Nuaka, (PW3). The totality of their evidence was to the effect that the appellant worked as a servant at the complaint (PW1's) house before the incident. PW1 had gone to Dar es Salaam while leaving the appellant there. On coming back from Dar es Salaam on 22/7/2007 she found her house broken into and some of her items stolen. The appellant who was left there was no where to be found. Following the report to the police and investigation the appellant was apprehended. The appellant after arrest provided information which led to the recovery of the said items and apprehension of the other accused persons who were eventually acquitted.

In this appeal the appellant appeared in person while the respondent Republic was represented by Ms Kasana Maziku, learned state attorney whom with respect sought to oppose the appeal.

When the appellant was called upon to substantiate his appeal he informed the court that he was more comfortable to hear what the Republic had to say before providing elaboration on his ground of appeal.

In support of the conviction and sentence the learned state attorney argued with regard to the first ground of appeal, and quite rightly in my considered view, that it has no merits. To substantiate this position the learned state attorney submitted that the evidence of PW1 proved that the appellant was a house keeper of PW1's house when it was broken into and some items stolen therefrom. He was no where to be seen after the incident. Following his apprehension he mentioned Geofrey Kilasi to have received the stolen items and after making a follow up the same were recovered and others found at Mundindi Village. The learned state attorney further submitted that PW1's evidence was corroborated by the evidence of PW2 and PW3 who witnessed the recovery of items.

The appellants' major complaint was that no witness saw him committing the offence. Admittedly, there was no eye witness to the incident. No person saw the appellant breaking into PW1's house. This case was therefore, built upon circumstantial evidence. Circumstantial evidence can be relied upon to mount conviction against the accused if it irresistibly points to guiltiness of the accused. (See Protas John Kitogole and Another V R (1992) TLR 51. Also where the evidence against the accused is wholly circumstancial, the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be infered (See Ally Bakari & Pili Bakari V R (1992) TLR 10).

In this case the evidence in relation to the appellants' involvement in the offence which was not seriously controverted by the appellant shows that the appellant was a servant of PW1. This fact was not disputed in any how by the appellant. According to PW2 and PW3, he

confessed to have been involved. PW1, PW2 and PW3 also testified to the effect that he mentioned and led them to DW2 at Ibumila where the radio was recovered. He then took them to the 3rd accused (DW3) who also led them to Mundindi where the TV and deck were sold and the same were recovered. In my view, it cannot be coincidental for him to mention DW2 and DW3 and thereafter recover the stolen property from them. In my view, the appellant unveiled the truth of the matter. And as there was no explaination as to how he was able to know that the items were in possession of DW2 and DW3 and how they reached there, I find that the circumstancial evidence irresistibly pointed out the guiltiness of the appellant or rather his participation to the offence. As such, like Ms Maziku, learned state attorney, I do not hastate to hold that this ground is basiless.

With regard to the 2nd ground of appeal that the appellant was not found in possession of the stolen items but his co-accused, the learned state attorney's argument which I find to be valid is that it would not have been possible for him to be found with the stolen properties as he was not arrested at the scene of crime.

Admittedly, the appellant was arrested in connection with this offence on 26/8/2007 while allegedly as a convict. However, the stolen items were recovered following the information provided by him to PW1, PW2 and PW3. The three witnesses proved in court that it was the appellant who had told them the whereabouts of the stolen properties which information led to their recovery. Further to that PW1, the complainant's testimony was that she had left the appellant when she had gone to Dar es Salaam. She was surprised on her coming back to find that the appellant was absent and her house was broken into and some of her properties were stolen. The trial

magistrate found the witness to be credible and reliable and acted on her evidence in which case I have no reason to fault her findings.

But again, learned state attorney argued that the caution statements of DW5 and DW7 admitted as Exh. P2 and P3 corroborated the evidence of PW1 and PW3 on the issue. However, I note that the same were tendered in court in the absence of the 5th and 7th accused persons respectively. Under section 34 B (2) of the Evidence Act Cap 6 R.E. 2002 a written statement may only be admissible if among other reasons all reasonable steps have been taken to procure the witnesse's attendance but he cannot be found. DW5 and DW7 were accused persons who jumped bail. It means the prosecution ought to have proved that their attendance could not be procured. Also, their statements ought to be tendered in court under section 34 B (2).

My perusal in the court record does not show that caution statements were tendered in accordance with the provision of section 34B (2). There is no indication of the law relied upon in tendering and admitting them as evidence.

PW2, E. 8812 D/Cpl Jonathan when testifying in court stated at page 13 of proceedings:

> *"PW2 says I hish (sic) to read the 5th accused contn (sic) statement in court.*
>
> *Ct: PW2 reads the 5th accused caution statement in court.*

PW2 says: *I pray to tender the since (sic) as an Exhibit.*

Ct: *The 5th accused caution statement admitted & marked as Exh. P2".*

As for the 7th accused caution statement the proceedings went on as follows:

"PW2- *I wish to read the 7th accused caition (sic) statement Ct.*

Ct: *The PW2 reads the 7th accused caition (sic) statement Ct.*

PW2 says:
I pray to tender the scene (sic) as an exhibit.

Ct. The 7th accused caution statement is coasted (sic) and marked as Exh. P3.

What I am trying to demonstrate is that the caution statements ought to be tendered in compliance with section 34B of the Evidence Act after proving to the court that their attendance could not be procured. There is no indication from the court record that the prosecutor or the witness (PW2) told the court about that fact.

Also, admitting the statement under the section depended on compliance with the conditions set out in section 34 B 2(a) – (f) of the Evidence Act. (See DPP V Ophant Manyacha (1985) TLR 127).

But in this case, no attention to those conditions was paid by the trial court. Under the circumstances, I think the trial magistrate wrongly admitted the two cautioned statements since she did not satisfy herself that the conditions set out under section 34 B (2)(a)-(f) were met. I therefore discredit the two cautioned statement evidence.

Of course the appellant claimed in his evidence and in this court that at the time the offence was committed he was in prison serving a six months imprisonment sentence. In other words, he raised a defence of alibi. The learned state attorney everred that the trial magistrate had considered it and arrived at the conclusion that it was raised contrary to sections 194(4) and (5) of the Criminal Procedure Act, Cap 20, R.E. 2002. It was raised during his defence.

I have anxiously examined this issue and have realized that the appellant was apprehended in connection with this offence on 26/8/2007 while he was a prisoner. The offence was committed on 22/7/2007. Much as the learned state attorney is of the view that the trial magistrate properly accorded no weight to the defence of alibi as it contravened the provisions of section 194(4) and (5) of the Criminal Procedure Act, but I think the trial magistrate dealt with both the prosecution and defence evidence and came up with her own findings as shown hereunder:

> *"It is true that at the time of his arrest he was facing another charge and the evidence reveals that he was arrested at Mbeya after he committed the offence, the fact that he was at prison cannot defeat the fact that he commit (sic) the offence since after commission he was no where to be availed."*

Clearly, this is a situation where cognizance of the defence was taken and the court came to the conclusion that the appellant was at the scene of crime. (See Abass Matatala V R Crim. App No. 331 of 2008 Iringa (Unreported).

With this said, I do not hastate to find that it was possible for the appellant to have committed the offence on 22/7/2007 because he was apprehended later (after more than a month) at Mbeya after he had escaped from custody. That did not exonerate him from being involved with the offence. In fact I find that the prosecution successfully brought the appellant to the scene of crime and the commission of the offence. And, the evidence of PW1, PW2 and PW3 regarding the information provided by him which led to the recovery of the stolen property which evidence was not seriously controverted, added value.

May be in passing, when I probed the appellant's defence, he failed even to tell me his case number at the primary court.

At any rate, I am of the view that the trial magistrate properly rejected it as it was brought in contravention of section 194(4) and (5) of the CPA. (See Masudi Amlima V R (1989) TLR 25).

With that said, I find that this ground to have no merits as well.

With regard to the complaint relating to the trial magistrates' acceptance of the repudiated caution statement, the learned state attorney conceded but on a different reason. It was Ms Maziku learned state attorney's argument that the trial magistrate had erred in admitting the repudiated caution statement without conducting an inquiry so as its voluntariness could be ascertained. But she was

quick to submit that even if it is discredited, the evidence of PW1, PW3 sufficiently proved the offence.

I think, this cannot detain me much. Admittedly, the appellant's caution statement (confession) was admitted in evidence despite the fact that the appellant objected to its admission. It means, it was a repudiated confession. It is well established principal that the trial court should accept with caution a confession which has been retracted or repudiate or both retracted and repudiated and that the court is required to be fully satisfied that in all the circumstances of the case that the confession is true. As the appellant had repudiated the caution statement, the trial court ought to have conducted an inquiry so as to ascertain its voluntariness. It was held in Masanja Mazambi V R (1991) TLR 200 that:

> "A *trial within a trial has to be conducted whenever the accused person objects to the tendering of any statement he has recorded."*

As the appellants' caution statement was admitted as Exh. P1 without any such inquiry it is hereby expunged. It may, however, be not irrelevant to mention at this juncture that the trial magistrate did not rely on the confession in convicting the appellant. It did not therefore affect the appellants' conviction. To that extend this ground of appeal succeeds.

With or without the repudiated caution statements still I am of a firm view that he evidence of PW1, PW2 and PW3 proved the offence against the appellant beyond reasonable doubt.

Now, from the foregoing, this appeal lacks merits. It deserves dismissal. Accordingly it is ordered dismissed in its entirety.

R.K.MKUYE

JUDGE

3/11/2010

Right of appeal is explained.

R.K.MKUYE

JUDGE

3/11/2010

Date: 3/11/2010

Coram: R.K.Mkuye, J

Appellant: Present

For Respondent: Ms Kassana Maziku State Attorney.

C/C: Mr. Charles.

Delivered on this 3rd day of November 2010 in the presence of Damas Mlowe, the appellant and Ms Maziku learned state attorney for respondent Republic.

THE HIGH COURT OF TANZANIA

UHURU NA UMOJA

R.K.MKUYE

JUDGE

3/11/2010