IN THE HIGH COURT OF TANZANIA

AT DODOMA

(APPELLATE JURISDICTION)

(DC) CRIMINAL APPEAL NO. 64 OF 2009

(Original Criminal Case No. 31 of 2009 of the District Court of Singida District at Singida)

MUSA ALUTE ..... APPELLANT

VERSUS

THE REPUBLIC ..... RESPONDENT

JUDGMENT

12/5/2010 & 12/7/2010.

KWARIKO, J:

The salient facts of the case which led to this appeal can be recapitulated as follows; The appellant herein had been working as a watchman with Singida Municipal Council on alternating day and night shifts with one RAMADHAN LIMU, PW2. On 12/8/2008 the appellant took over the guard post from PW2 at about 7.00 pm and found one GERALD MUSHI, PW1 who was an architect in that office and was counting his personal money totaling Tshs. 4,500,000/= which he had intended to give someone else the following day. That,

PW1 locked the money in his drawers and left when the following morning the appellant called him to come to the office since his office had been broken into and drawers of his office table were also broken and papers had been scattered on the ground.

When PW1 got at the office he inspected the drawers and found the money missing. He reported the matter to the police and accordingly the appellant was held a suspect because of the following: Since he disappeared from that day until he was arrested on 22/8/2008; he had seen PW1 counting the money and asked for some cash for buying coffee; that since the padlock was crushed by using stones (which were found there) then definitely he must have heard noises of the breaking and failed to prevent the same and his failure to report the matter to the Police immediately.

For the foregone facts from the prosecution the appellant was formerly charged with three counts of Breaking into a Building contrary to section 296(1) and (2); Theft contrary to section 265 and Neglect to Prevent Commission of Offence contrary to section 383 both of the Penal Code Cap. 16 Vol. 1 of the Laws, Revised Edition 2002.

The appellant had denied the charge and in his defence he did admit almost all the facts of the case as propounded by the prosecution except that he was the perpetrator of the alleged theft.

He also denied that on the material evening he found PW1 in his office and saw him counting money. He also lamented that the stolen money like any other property kept indoors were not handed over to him as the outside structures hence he had no knowledge of the money in the office. He also wondered why PW1 kept such amount of money in the office instead of banking the same. It was the appellant's defence that he did not report the matter immediately to the police not by design but he first called PW1 in order to verify what could have been missing in the broken office.

For the foregone evidence the trial court found the appellant guilty in all counts and was accordingly convicted. He was thus sentenced to ten (10) years imprisonment, Seven (7) years imprisonment and two (2) years imprisonment for the first, second and third counts respectively. The sentences were ordered to run concurrently and an order of compensation of the stolen money Tshs. 4,500,000/= to the complainant was made against the appellant.

Having been aggrieved with the trial court's decision the appellant filed this appeal where he raised about eight (8) grounds of appeal where he essentially harmered that the prosecution case was not proved beyond reasonable doubt against him. During the hearing of the appeal the appellant only implored this Court to consider his grounds of appeal he had filed and he did not add anything of importance.

On the other hand Mr Katuli learned State Attorney appeared and argued the appeal on behalf of the respondent, Republic. Mr Katuli refrained to support the appellant's conviction in respect of the first and second counts in the charge whereas he supported the conviction in respect of the third count.

This court agrees with the learned State Attorney that the appellant was convicted on purely circumstantial evidence in relation to the first count of Breaking into a Building and the second count of Stealing. This is so because there was no a single witness who testified and said he saw the appellant committing these offences. The circumstances that the appellant was a night watchman and present at the scene during the time of breaking and stealing are not enough to prove that he was the offender, without proof that he was seen perpetrating the commission of the offences.

Also, the circumstances that the appellant saw PW1 count the money before the same was stolen is not conclusive evidence that he was the thief without proof of the ingredients of theft which is ***actus reus*** and ***mens rea***. At most one would suspect that if the appellant saw PW1 count his money then he could be tempted to steal it. However, suspicion however strong cannot be a basis of conviction (see also ***HAKIMU MFAUME VS R [1984] T.L.R 201***).

Thus, the circumstantial evidence against the appellant was not so much connected to prove that he could be the thief. There ought to be other proved circumstances in relation to the appellant which are closely connected with the facts in issue. For instance; if it was proved that the appellant was seen after the alleged theft in possession of an unusually a huge sum of money or had purchased something very expensive which is inconsistent with his known income then one could come forward and accuse him and thus it could add to other circumstances to prove the appellant's guilt.

The allegation that the appellant did not report to the Police immediately after he discovered the breaking was satisfactorily answered by him when he stated that he wanted first to learn from the office holder as to what might have been stolen from the broken office. I find also this explanation to be sound since it is usually principal officers who are supposed to report the loss or theft from their offices since they know what could be missing after theft or breaking. Since there was no any evidence to prove that the stolen property had been handed over to the appellant one would not expect that he knew of its existence and that he could know that the same was missing and immediately report to the Police.

As for the absentism from work after the incident the appellant explained in his caution statement (exhibit P2), (which was wrongly

labeled exhibit P1) that he had been sick during that period. This piece of evidence was not controverted by the prosecution. Therefore, the Court finds that the appellant did not deserve a conviction in the 1st and 2nd counts he stood charged.

As for the third count the prosecution evidence was to the effect that since the padlock was broken by stones which were found at the scene the appellant who was the watchman ought to have heard noises of the breaking and failed to prevent the theft. Mr Katuli learned State Attorney also supported the conviction for the same reason.

In order to decide the foregoing allegations let me reproduce the provision of the law under which the offence is created. Section 383 of the Penal Code thus provides;

> ***"Every person who knowing that a person designs to commit or is committing an offence, fails to use all reasonable means to prevent the commission or completion thereof, is guilty of an offence".***

Therefore, according to the quoted provision of the law, in order for one to be convicted of the offence of Neglect to Prevent

Commission of an Offence, it must be proved that he had knowledge that someone was planning to commit or was committing the offence and he failed to use all reasonable means to prevent the commission of completion thereof.

In the present case the prosecution alleged that since there were some stones at the scene and the padlock and drawers had been broken then the appellant must have heard noises of the breaking and failed to prevent the same. In my part I do not think that this piece of evidence is enough to prove this offence. Firstly, the prosecution did not bring in Court the alleged stones found at the scene so that it can be confirmed that their impact with the padlock and/or drawers could produce enough noise for anyone present in the guard post to hear the same. The size of the stones was not explained in Court and also the material made up of the drawers and padlock was not explained. This is so because different materials can produce different noises upon impact with another object.

Secondly, the size of the guard post was not explained so as to decide if the appellant's presence at any one point in the same compound could enable him to hear or see anything done in another point in the same compound.

Thus, in the absence of proof of the foregoing matters one could not say with certainty that the appellant heard the breaking

and stealing and neglected to prevent the same. After all there was no any corroborative evidence to the allegations that the complainant (PW1) had left his money in the purportedly broken office. The bank withdrawal slips (Exhibit P1) could be genuine ones but they do not prove that after PW1 had withdrawn the money he stored it in his office. There was either no any corroboration to the effect that PW1 stored the money in his office and the appellant had knowledge of the same.

Even if it was proved that the complainant left his money in his office then one could wonder as to how he could have left such huge amount of money in the office? Had the same been stored in a safe box then it beats one's comprehension. Otherwise, I find the whole of this episode doubtful. Or else, if the complainant had left the money in the office he should have alerted the appellant to take extra caution near the said office during his night shift.

For the foregone observations therefore, I find that the prosecution case was not proved against the appellant beyond reasonable doubts. I therefore allow the appeal, quash the conviction in all three counts and set aside the sentence of ten (10) years imprisonment, seven (7) years imprisonment and two (2) years imprisonment the appellant has been serving concurrently. An order of compensation is also quashed.

Thus, the appellant is ordered to be released from prison unless he is held for some other lawful causes.

It is so held.

(M. A. KWARIKO)

JUDGE

12/7/2010

Court: Rights of Appeal fully explained.

(M. A. KWARIKO)

JUDGE

12/7/2010

AT DODOMA

12/7/2010

Appellant: Present

For Respondent: Ms Seif State Attorney.

C/c: Ms Komba.

(M. A. KWARIKO)

JUDGE

12/7/2010