IN THE HIGH COURT OF TANZANIA
AT DODOMA

DC CRIMINAL APPEAL NO. 90 OF 2008
(ORIGINAL DODOMA DISTRICT COURT AT DODOMA
CRIMINAL CASE NO. 77 OF 2007
BEFORE: B.A. MPEPO ESQ. RESIDENT MAGISTRATE)

FARAJA BAKARI ..... APPELLANT

Versus

THE REPUBLIC ..... RESPONDENT

24/09/2010 & 29/10/2010

JUDGEMENT

HON. MADAM, SHANGALI, J.

The appellant **FARAJA S/o BAKARI** was charged prosecuted and convicted of two counts, That is first count of burglary contrary to section 294 (1) of the penal Code, Cap 16 and Stealing contrary to section 265 of the same code. On the first count he was sentenced to serve ten (10) years imprisonment while on the second count he was sentenced to serve seven (7) years imprisonment. Sentences were ordered to run concurrently. He was aggrieved by both convictions and sentence hence this appeal.

The facts leading to this appeal may be briefly states as follows:

In the night of 17th February, 2007 at about 01.00 hours at area "A" within Dodoma Municipality PW1 Saidi Ramadhani was asleep in his house with his family including his wife PW2, Hadija Mohamedi. Suddenly he was put under arrest by three bandits who bangled into his house and started to attack him. One of the bandits was the appellant. The other bandits managed to steal one bicycle and a radio cassette. They then disappeared out and to the darkness. The appellant who was equipped with an iron bar remained behind demanding for a mobile phone from PW1. PW2 quickly lamented that mobile phone was on the charge. When the appellant turned to search and take the mobile phone from the charge, PW1 ambushed him from behind and a wrestle fight between them ensued. PW2 raised alarm shouting for help and several neighbours quickly responded to the alarm. According to the testimony of PW3, Mohamed Ibrahim, he heard an alarm being raised from the room of PW1 in the middle of the night. He quickly responded to it with his Landlord and other neighbours, only to find PW1 fighting the appellant in his room.

PW3 and the Landlord joined the fight in order to restrain the appellant. In that fracas the appellant was able

to bite the hand of PW1 and injured PW3 on his hand with an iron bar. Eventually the appellant was apprehended and suffered a serious beat from the people who responded to the alarm.

The matter was reported at Police Station. The appellant was taken and admitted at Dodoma General hospital under arrest. Later the appellant's left leg was amputated due to the severe injuries caused by the mob beat in that night of incident.

According to the evidence of PW4 Detective Coplo Patrice, the appellant was interrogated while at hospital and agreed to give a caution statement Exhibit P1. In that caution statement the appellant admitted to have been in the company of his two colleagues in that night and at the incident without knowing that their colleagues were up for burglary and stealing. He stated that they had told him that they were going to take their bicycle at their room in order to escort him to his place at Chinangali.

In his sworn defence before the trial District Court the appellant stated that he is a hawker (machinga) dealing with petty business. He stated that on the material date after closing his business and taking some beer he started to return home at about 23.45 hours. On the way he met

PW2. PW2 asked him to escort her home. He accepted and escorted PW2 but on reaching at her place, her husband PW1 came out and started to accuse him (appellant) for flirting with his wife. That, PW1 suddenly grabbed him and started to beat him up. That, PW1 was supported by his colleagues to beat up the appellant with iron bar and bricks. He lost conscious only to wake-up at the hospital.

In his memorandum of appeal the appellant has raised three main grounds. **One**, that the exhibit P1, the caution statement was recorded contrary to sections 53, 54 and 57 of the Criminal Procedure Act, Cap. 20; **Two**, that the trial District Court failed to analyse and consider his defence and **Three**, that there was no sufficient prosecution evidence to prove the case beyond all reasonable doubt.

At the hearing of this appeal the appellant appeared in person and unrepresented while the Respondent/Republic was represented by Mr. Nchimbi, learned State Attorney. The appellant did not have much to say, he simply request the court to consider his grounds of appeal.

Mr. Nchimbi, learned State Attorney submitted to the effect that although the appellant was arrested at the scene of crime he was not in position to support conviction for the following reasons. **One**, the caution statement exhibit P1

was wrongly admitted in court because the appellant repudiated it but no inquiry was made by the trial District Court according to the law; **Two**, that evidence of PW1, PW2 and PW3 was weak and full of contradictions hence incapable to form a conviction. Mr. Nchimbi argued that there is no evidence to prove that the person who entered in the house of PW1 was the appellant. He further submitted that there was no clear evidence on who actually arrested the appellant. Mr. Nchimbi contended that there is doubt on whether the appellant went at PW1's house to commit offences or he went there in response to the alarm raised. He supported the complaint by the appellant that the trial District Court failed to analyse and consider defence evidence, stating that no reasons were given in the judgement as to why the trial District magistrate decided to believe the prosecution evidence and disbelieved the appellant defence.

In my considered opinion, I agree with both the learned State Attorney and the appellant on the issue of caution statement, exhibit P1. It was wrongly recorded, wrongly produced in court and wrongly admitted. Section 53, 54 and 57 of the Criminal Procedure Act were all contravened. The appellant was not addressed as required nor given option to call his near relative or advocate. The caution statement was recorded while the appellant was still admitted in the

hospital meaning that he was not in good health nor in conducive conditions for such exercise. Furthermore the caution statement was not recorded in questions and answers as required and when it was produced in court it was not readover before the trial District Court. Lastly having been repudiated and retracted no inquiry was made by the trial District Court in accordance to the law.

Therefore that piece of evidence is valueless and indeed it contain totally different story from what the appellant said in his defence. The trial District Court was wrong to rely on it.

The crucial question is whether the conviction may stand even after expunging exhibit P1. Let me venture on other grounds of appeal and the learned State Attorneys position before I answer that question, starting with the third ground of appeal, whether there was sufficient evidence to prove the case beyond all reasonable doubt.

Honestly speaking, from my point of view this case is very clear and straight forward in terms of evidence against the appellant. The offence was committed in the middle of the night. The appellant and his co-bandits managed to enter into the house of PW1. In the course of stealing the bandits took a bicycle and a radio cassette but the appellant

remained behind demanding for a mobile phone. Out of fear PW2 shouted that the mobile phone was on the charge. The appellant quickly move to snatch the mobile phone but courageously PW1 attacked him from the back and a fight ensued. Out of the alarm raised by PW2 several neighbours responded including PW3 who was occupying the next room. The appellant was beaten unconsciously by the angry mob and he was lucky that he escaped death. Is there any contradiction in this evidence? Was the appellant not arrested in the commission of the offence. Could PW1, PW2 and PW3 fabricated such a story against the appellant?

With due respect to the learned State Attorney the appellant was arrested inside the house of PW1 by PW1 himself and his helping neighbours including PW3. There is no evidence at all to suggest that the appellant went to the house of PW1 in response to the alarm raised. In his defence he claimed that he went there to escort the wife of PW1.

I may agree with the learned State Attorney that minor contradictions, or what we call loose knots are possible in any prosecution case, but for sure in this case there were no such contradictions capable to degrade the credibility of

the prosecution witnesses. In the case of **Capt. Lamu and Another vs. Rep Criminal Appeal No. 145 of 1991, (CA)** Mwanza Registry, (unreported) the Court of Appeal had this to say:

> *"The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not in the least possible" the case is proved beyond reasonable doubt - -"*

In addition to that, the stance of the law is that in most cases matters of credibility of witnesses are the domain of the trial court which had the advantage of assessing the demeanour of the witnesses and evaluating the credibility of such evidence. An appellate court will not lightly interefere in the trial courts finding on credibility unless the evidence reveals fundamental factors of a vitiating nature to which the trial court did not address itself or address itself properly – see **Pia Joseph vs Rep (1984) TLR 161**. In the present case there is no such fundamental factors of vitiating nature

which have been revealed in the evidence. Ground three of the appeal is therefore without substance.

Going by the record of proceedings and the judgement of the trial District Court, there is no chance to accede to the appellants complaint that the trial District Court failed to consider and analyse the defence evidence. In his judgement at page 3, the trial District magistrate critically discussed the defence evidence vis-à-vis the prosecution evidence and came to conclusion that the prosecution case was strong and cogent.

The appellant claimed that in that night he escorted the wife of PW1 home and PW1 suspected him of having affairs with his wife. In other words, the appellant admitted to have been arrested and attacked at the house of PW1 and PW2 in that dead night. It was the same night when PW1's house was bangled. It is surprising that when Hadija Mohamed, PW2, the wife of PW1 was adducing evidence against the appellant, the later failed to cross-examined her about the alleged night escort. If the appellant was truthful about that night escort and PW1's suspicion, he should have at least raised the matter in the cross-examination against both PW1, PW2 and even PW3 who found him at the scene. In my considered opinion the trial Resident

Magistrate was correct to dismiss the defence evidence having considered it.

From the foregoing it means even without the evidence of exhibit P1, the caution statement, the conviction of the appellant stands.

I have noted that on the first count, the appellant was charged under section 294 (1) instead of section 294 (1) and (2) of the Penal Code which provide that if the offence of housebreaking is committed in the night, it is burglary. Nevertheless, having carefully perused the trial courts record of proceedings, I am convinced that the charge was properly read over to the appellant and pleaded thereto in accordance to the provision of section 228 of the Criminal Procedure Act. In my considered opinion non-citing of subsection (2) was a minor oversight or topographical error which did not in any way occasion any injustice on the part of the appellant. The appellant knew precisely well the charge laid against him and he responded thereto accordingly. Thus that minor defect is not fatal to the case.

I am aware that the appellant is now a crippled person. Despite of the fact that he lost his leg in the commission of the offence, the trial District Court was required to seriously

consider his situation during sentencing. In his mitigation the appellant who is a first offender prayed for lenient sentence stating that the is now a lame person. I think he deserved lenience.

In light of above reasons I hereby set aside the sentence of ten (10) years imprisonment on the first count and seven (7) years imprisonment on the second count. Instead the appellant's sentence is reduced to five (5) years imprisonment on the first count and three (3) years imprisonment on the second count. Sentence to run concurrently. The appeal is otherwise dismissed for lack of merits.

M.S. SHANGALI
JUDGE
29/10/2010

Judgement delivered todate 29th October, 2010 in the presence of Ms. Shio, Learned State Attorney for the respondent/Republic and the appellant present in person.

M.S. SHANGALI
JUDGE
29/10/2010