IN THE RESIDENT MAGISTRATE COURT OF DODOMA

AT DODOMA

(APPELLATE JURISDICTION)

PRM. CRIMINAL APPEAL NO. 28 OF 2012

(DC) CR. APPEAL NO. 10 OF 2012

ORIGINAL CRIMINAL CASE NO 130 OF 2011

OF THE DISTRICT COURT OF KONDOA

DISTRICT AT KONDOA

FRED MINJA .....APPELLATE

VERSUS

THE REPUBIC .....RESPONDENT

15/8/2012 & 18/9/2012

J U D G M E N T

R.I. RUTATINISIBWA- PRM. EXT. J.

The appellant, **FRED MINJA** and two others were produced before Kondoa District court in Criminal case No. 130/2011. The appellant faced a count for breaking and stealing c/s 206 and 265 of the Penal Code

Cap. 16 R.E. 2002 . The other two met the count for receiving stolen property c/s 311(1) of the Penal Code Cap.l16 RE. 2002. While the other two were set free, the appellant was convicted and sent to jail for a term of six years. The brief story of what transpired as per evidence on the prosecution side can be narrated as follows. The appellant was not happy with the decision, hence the instant appeal was preferred .

The brief story of what transpired a per evidence on the prosecution side can be narrated as follows:

The complainant, Mercy Benson (PW1) is a business lady with hardware at Chemchem street at Kondoa. On 19/7/2011 the hardware was broken and various properties were stolen.

On the same date PW2, Emmanuel Malaika, the employee of PW1 while on the way to Iboni street he met the appellant with a wheel barrow which carried a table. PW2 saw and identified a table as a property stolen from PW1. He approached the appellant to clear the doubt. Seeing that the appellant dropped everything and took on heels. He chased and caught him. PW2 called the police for assistance. That the appellant was escorted to police station and further interrogation continued. It was said that in the course of interrogation the appellant admitted and mentioned that he sold the spare parts of the tractor which he stolen from the store of PW1 to the 2nd and 3rd accused. The places of the 2nd and 3rd accuseds were searched and various spare parts recovered. These were identified by PW1 being her properties.

In the endeavor to contest for the innocence the appellant filed the petition of appeal which contains a number of four counts but in essence, these can be summarized and come up with three. Thus,

- That the offence of store breaking and stealing was not proved, that adduced evidence, shown being found with properties purported to be stolen.
- That the evidence adduced by PW2 was admitted while PW2 did not take oath.
- That the evidence adduced by PW5 was not correct because the appellant did not admit the offence. He called the court to set him free.

The Respondent was fully represented by Mr. Kyando learned state attorney. He was not ready to support the conviction.

When the matter came for hearing the appellant stated that he was found with nothing.

The learned state attorney took a chance to defend his stances.

The first ground that the appellant pleaded not guilty was obvious.

On the second ground, Mr. Kyando said that no body was caught or seen at the scene when the breaking was done. That being the case the offence for breaking and stealing was not proved.

He argued that the appellant was found in possession of the table and it was said and proved and not challenged that he sold spares to the 2nd and 3rd accuseds.

He went on that there was no clear proof that the properties found in the possession of the appellant belonged to nobody but the complainant, PW1.

He submitted that the appellant who was found in unlawful possession of the properties suspected to have been stolen can properly be convicted with that offence under section 312(1) (b) of the Penal Code.

In the case of **David Chacha and 8 others V.R. (CAT)** Cr. App. No. 12/97 MZ. (Unreported) a trite principle of law that properties suspected to have been found in the possession of accused person should be identified by the complainants conclusively. In a criminal charge it is not enough to give generalized description of property.

In the instant case the appellant was found in possession of the table which do not belong to him. The 3rd accused who was dealing in used

spare parts was found with spar parts of the tractor and he explained that he bought them from the appellant. The appellant did not dispute.

The appellant when was called to defend himself opted to keep quite. That option suggests that has no dispute, or argument to challenge the adduced evidence against him.

The position of the law is that when the property is alleged to have been stolen, the complainant has to give detailed explanation to sustify that the found property belong to nobody else but to herself.

In the instant case PW1 did not give details or descriptions which could prove beyond doubt that the property found in the possession of the appellant belong to her.

That said, I agree with Mr. Kyando that the offence of breaking and stealing the property of PW1 was not proved to the required degree.

That being the case the conviction is quashed and the sentence is set aside.

I said that the appellant was found in possession of the property suspected to have been stolen. He deserves to be found guilty and convicted for being in unlawful possession of property suspected to have been stolen c/s 312(1)(b) of the Penal Code Cap. 16 Vol. 1.

The charge faced by the appellant is hereby substituted.

The appellant in his third ground said that PW2 adduced evidence without oath.

Mr. Kyando, in his submission simply gave the position of the law that once a witness enters a witness should take oath. He did not explain if PW2 either took oath or not.

I made a careful visitation to the proceedings. I found no prosecution witness who gave evidence without oath. The 3rd ground is devoid of merits. On the 4th ground the appellant wrote that the evidence given by PW5 was not true. That he did not admit to have committed the offence.

Mr. Kyando, argued that PW5 can not be condemned for telling lies. That what he testified was true. That the appellant was interrogated and he revealed where the stolen properties were located. That he mentioned the 2nd and 3rd accused. The two were searched and found in possession of the stolen properties.

After having heard the submissions of the learned counsel I also painstakingly perused the proceedings. I am in full support of Mr. Kyando,. I say that PW5 did not tell lies. Because what was said by PW5 was supported by the 3rd accused who said that the spares found at his store were brought by the appellant. In any how the appellant did not challenge.

The 4th ground is baseless.

Mr. Kyando submitted on the punishment. He said that it was on the high side. He argued that under the provision of section 170 of CPA Cap. 20 RE. 2002 subordinate courts have no powers to pass such sentence. That if passed then it has to be confirmed by the higher court, unless it is passed by a senior magistrate.

That much I agree. The sentence of six years passed by the resident magistrate was illegal. He has limited power which ends at five

years for the offences which are not scheduled under the minimum sentence act.

The matter has ended as here above. The offence was substituted with being in possession of property suspected to have been stolen. The sentence of six years is set aside and substituted with three years. The sentence to run from 16/02/2012 when the appellant was convicted.

It is so ordered.

RESIDENT MAGISTRATE COURT, DODOMA TANZANIA

(R.I. RUTATINISIBWA)

PRM. EXT. JURISDICTION

18/9/2012

Delivered in the presence of the appellant and Ms. Magessa State Attorney.

Right of appeal explained.

(R.I. RUTATINISIBWA)

PRM. EXT. JURISDICTION

18/9/2012

PRINCIPAL RESIDENT MAGISTRATE
(EXTENDED JURISDICTION)
RESIDENT MAGISTRATE COURT DODOMA