

IN THE HIGH COURT OF TANZANIA

AT TANGA

CRIMINAL APPEAL NO. 40 OF 2013

*[From the Decision of Lushoto District Court at Lushoto in Criminal
Case no. 64 of 2013]*

FRANK NARISIS.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

U. MSUYA, J.

In the District Court of Lushoto at Lushoto, the appellant Frank Narisis along with Bakari Muya, Khalifa Issah and David John were charged with three counts of offence. These counts were burglary contrary to sections 293 and 294 (1) (a) (b) of the Penal Code Cap. 16 R. E. 2002, stealing contrary to sections 258 (1) 265 of the Penal Code Cap. 16 R. E. 2002 and neglect to prevent an offence contrary to section 383 of the Penal Code Cap. 16 R. E. 2002, the first, second and third, respectively.

It was alleged in the first count that on 25/2/2013 at about 21:00 hours at Tumaini Lodge within Lushoto District in Tanga Region, the appellant together with Bakari Muya unlawfully entered into the building of Tumaini Lodge with the intent to commit an offence of stealing. It was further alleged on the second count that on the material day, same place and time, the appellant together with Bakari Muya stole one laptop make I pad apple valued at Tshs. 1,000,000/=, one mobile phone make I phone 4 apple valued at Tshs. 600,000/=, cash money Tshs. 1,000,000/= and 200 Euro which were the properties of Johannes Maria. Further, it was alleged in the third count that Khalifa Issah and David John jointly and together unlawfully failed to use all reasonable means to prevent the commission of burglary and stealing.

The accused persons denied the charge. But after full trial, the trial court found the appellant guilty the offences of burglary and stealing. Also instead of the offence of neglect to prevent an offence, the court found David John guilty of conspiracy offence. The rest, Bakari Muya and Khalifa Issah were found not guilty and were accordingly acquitted. Lastly, the trial court convicted the appellant and David John. It proceeded to punish the appellant to serve a concurrent sentence of three years in jail in respect of burglary offence and two years in jail in respect of the offence of stealing. David John was punished to serve a sentence of one year in jail and both the appellant and David John were also ordered to compensate the victim the sum of Tshs. 3,000,000/=.

Briefly, the ground of conviction and sentences were based on the following evidence which were established on record. On the material day, the appellant (DW1) was a receptionist and custodian of keys of different rooms at Tumaini Lodge. On that day, the witness received various categories of guests and one of them was Johannes Maria. According to the witness, on that day and around 20.00 hours, electricity power went off and the area became dark. This forced him together with Bakari Muya (DW2) to switch on the generator fixed at the Lodge and they also supplied various candles to all rooms. The witness (DW1) also adduced that around 21.00 hours he was at the reception room where Johannes Maria came to him and complained that his properties were stolen from his room. The appellant decided to inform his boss (PW1) Lilian Isack, manager of the lodge who was not present at the lodge. The witnesses (DW1 and DW2) also notified the incident to Mariane Shekusa (PW2), a cashier of Tumaini Lodge. Also, they reported the incident at Lushoto police station. On their part, PW1 and PW2 adduced evidence to the effect that they received the information and went to the scene of crime. PW2 adduced further that at the scene of crime she observed that door locks were broken. They further adduced that the complaint informed them that his laptop, Euro 200, Tshs. 1,000,000/= were stolen. The evidence that the incident was reported to Lushoto police station by the appellant and DW2. Was confirmed by G 6016 D/C Asajile (PW3), a police officer from Lushoto police station. PW3 testified further that he investigated the matter

and at the scene of crime he observed that the door locks of the room from which the alleged items were stolen was disturbed by sharp object and, the keys were used to open it. The witness also interviewed the appellant as a custodian of the keys. Also, in the course of investigation, the witness noted that the keys of the room in question were in possession of Khalfa Issa (DW3) and David John (DW4) who were watchmen of the lodge. The investigator also noted that Bakari Muya (DW2) was supposed not to be at work because he had day off. This led PW3, an investigator to charge and arraign the appellant (DW1), Bakari Muya (DW2), Khalfa Issa (DW3) and David John (DW4) in the trial court. As indicated earlier, the trial court only convicted the appellant and David John and sentenced them accordingly. The appellant was aggrieved with both conviction and sentence and hence preferred this appeal. His grievances in the memorandum of appeal are couched as follows:

1. That the Learned Trial Magistrate grossly erred in law and in fact by convicting the Appellant Solely on circumstantial evidence.
2. That the Learned Trial Magistrate erred on a point of law and fact by convicting the appellant against the weight of evidence on record.
3. That the Learned Trial Magistrate grossly misdirected himself in imposing the sentence in utter disregard of the law and principles of sentencing.

4. That the Trial Magistrate erred in law and in fact in ignoring the germane grounds submitted in mitigation before imposing the sentence.

At the hearing of this appeal the appellant was represented by Mr. Sanga Learned Counsel whereas the Republic was represented by Miss Msalangi who did not oppose the appeal.

In his submissions, Mr. Sanga Learned Counsel insisted that the case was not proved to the required standard on the ground that, the charge was based on circumstantial evidence which did not irresistibly point a finger to the appellant and second that there was no direct evidence adduced in support of the charge. The Learned Counsel referred this court to the decision in the **case of ally Fundi V. R. [1983] T. L. R.** to the effect that the appellant was charged on suspicious grounds and suspicion however grave it cannot be a substitute of proof in the court of justice. Lastly, the Learned Counsel insisted that the trial court did not take into consideration the factors for imposing a sentence and hence arrived at excessive sentence. For these reasons, the Learned Counsel insisted that since the appellant was suspected because of being a receptionist of Tumaini Lodge, then such suspicion ought to have not been the basis of conviction. He therefore urged the court to quash the conviction, set aside the sentence imposed against the appellant and hence set him free.

As correctly submitted by the Learned Counsel and State Attorney, the evidence on record indicates that the appellant was suspected to have committed the offences because he was the custodian of the keys. As regards, various authorities insist that suspicion however strong cannot be the basis of conviction. Some of the cases which insist on the matter are the *case of Ally Fundi V. R. [1983] T. L. R. 210* and the *case of Erasmus Daudi V. R. [1993] T. L. R. 102*. In the present case none of the prosecution witnesses adduced to have seen the appellant breaking the door locks and stealing the items mentioned. In that regard, the case was based on circumstantial evidence. Now, for circumstantial evidence to lead into conviction, it must irresistibly prove that a person is guilty of the charged offence. The principle is enunciated in the *case of Simon Msoffe V. R. [1958] E. A. C. A. 715* in which at page 716 where the East Africa Court of Appeal insisted that:

"A case that depends on circumstantial evidence the court should not convict unless the circumstantial evidence irresistibly prove that the accused is guilty of the offence charged against him".

In the present case, the evidence on record does not irresistibly point a finger to the appellant. Further to that, this court has observed that the complainant, Johannes Maria who was the victim of the crime was not called as a witness in the trial court. Johannes Maria was a key witness who ought to have been summoned. His