

IN THE HIGH COURT OF TANZANIA
AT MTWARA

CRIMINAL APPEAL NO. 8 OF 2013

Original Masasi District Court at Masasi
Criminal Case No. 146 of 2010

Before: E.R. Rwehumbiza, Esq; RM

MUSTAPHER DIVENA @ CHEGE APPELLANT

VERSUS

THE REPUBLIC RESPONDENT

Date of last Order – 05/8/2013

Date of Judgment – 07/8/2013

JUDGMENT

KIBELLA, J.

In Criminal Case No.146 of 2010 before the District Court of Masasi, the appellant Mustafa Divena @ Chege was prosecuted with two offences namely; House breaking, and Stealing contrary to sections 294(1) and 265 respectively of the Penal Code [Cap.16 R.E 2002]. It was alleged that on 2nd day of June, 2010 at or about 04:00 hours at Masasi District in Mtwara Region, the appellant did break and enter a dwelling house of George s/o Habi and stole therein one hand set make Nokia 1661 valued at Tshs.80,000/= the property of George Habi.

The appellant denied the charges and a full trial was conducted. At the end the trial Magistrate was satisfied that the evidence laid before it supported the charge of stealing, and not house breaking. The appellant

was therefore convicted of stealing and sentenced to serve seven (7) years imprisonment. He was aggrieved by conviction and sentence and lodged this appeal. In his memorandum of appeal, the appellant has advanced six (6) grounds of appeal which mainly centres on only one major ground that:-

The charge of stealing against him was not proved beyond reasonable doubt.

At the outset, even without scanning the entire trial court's record, it has been apparent to me, and as rightly viewed by the learned State Attorney Ms. Mangu that the prosecution testimony laid before the trial court does not tally with the charges leveled against the appellant. While the particulars of the charge sheet, and the facts read before the trial court show that, a mobile phone make Nokia 1661 valued TShs.80,000/= was stolen from the complainant, the complainant testified that it was Nokia make 1680 which was stolen from him. For easy reference the particulars of the charge partly read:-

"..... did steal therein one handset make Nokia – 1661 valued at TShs.80,000/= the property of George s/o Habi."

The prosecution side had a burden to prove that Mobile Phone make Nokia – 1661 was stolen from the complainant. Even in the memorandum of facts before the trial court they acknowledged such duty when they stated:-

"THE PROSECUTION INTENDS TO PROVE THE FOLLOWING FACTS:

1. That the accused name is Mustapher s/o Divena @ Chege....
2.
3. That they steal [sic] therein one, handset make Nokia – 1661...."

In his testimony before the trial court, the complainant George Habi stated that:

"... My phone was stolen... It is NOKIA 1680. I bought at 80,000/=" [Emphasis mine].

As noted above the charge sheet and the facts which the prosecution had a burden to prove showed that Mobile phone make Nokia 1661 was stolen from the complainant. However the complainant himself as quoted above claimed that his mobile phone make Nokia 1680 was stolen. Under those circumstances not only that the charge of stealing against the appellant was not proved beyond reasonable doubt, but also a prima facie case was not established against the appellant.

It is now a well settled principle that the property alleged stolen and found in possession of the accused must relate to the charges leveled against him. The prosecution must lay evidence to prove the charges as contained in the charge sheet beyond reasonable doubt. This is because, it is through the charge sheet that the accused is informed and becomes aware of the charges he is facing so as to be prepared and give his defence. In the instant case the prosecution never discharged their duty with regard to the appellant's charges.


In the result I agree with Ms. Mangu, learned State Attorney, and proceed to quash the conviction imposed by the trial court and set aside the sentence, it is ordered that the appellant be released forthwith unless held for other lawful cause. Appeal allowed.


R.M. Kibella,
Judge
7/8/2013

Order: Judgment delivered in chambers today 7th day of August, 2013 in the presence of the appellant in person as well as in the presence of Ms. Mangu, learned State Attorney for the Respondent Republic.

Right of Appeal fully explained.




R.M. Kibella,
Judge
7/8/2013

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