

IN THE HIGH COURT OF TANZANIA

AT TABORA

APPELLATE JURISDICTION

(Tabora Registry)

(DC) CRIMINAL APPEAL NO. 121 OF 2013

ORIGINAL CRIMINAL CASE NO. 168 OF 2012

ON THE DISTRICT COURT OF, KAHAMA

AT KAHAMA

BEFORE: HON. F.K. NYALADA Esq. RESIDENT MAGISTRATE

SAMWEL S/O NYALADAAPPELLANT
(Original Accused)

VERSUS

THE REPUBLICRESPONDENT
(Original Prosecutor)

JUDGMENT

23rd & 26th May, 2014

S.M.RUMANYIKA, J

On 03/05/2013, at Kahama District Court (trial court) Samwel Said (the Appellant) and another, having been charged together and jointly, only the former was convicted for burglary and stealing Criminal Sections 294 (1) (b) and 265 respectively of the Penal Code Cap 16 R.E 2002. He suffered the custodial sentences of ten (10) and three (3) years respectively. He is aggrieved. Hence this appeal.

The six (6) grounds of appeal boil down essentially to two (2):

- (1) The learned trial magistrate convicting him erroneously based on the extrajudicial statement and repudiated cautioned statements of the accused.
- (2) The learned trial Magistrate having passed excessive penalty on the Appellant.

There was at the hearing, no submissions made by the Parties. However, it is imperative one taking note that though duly served (as the Respondent was in court when the hearing date got fixed), this court dispensed with their presence during the hearing.

The evidence of the four public witnesses in a nut shell had it that the Appellant admitted before justice of the piece (Pw1) being a habitual thief. Assisted by co – accused. That he maintained the story to the police officer (Pw2). The two statements recorded by Pw1 and Pw2 were admitted as exhibit "P1" and "P2" Pw4 the victim complainant states that having threatened to refer the case to witch doctors, the Appellant then got scared and he became suspicious. The latter was suspected and was brought to book just like that.

The accused having denied the charges leveled against him, he repudiated and or retracted the said cautioned statement (exhibit "P2"). Like stating in his evidence, that it is the Police officers who just

had written all what could fit their interests while torturing him physically.

In fact the evidence is based on the two statements essentially. Therefore purely circumstantial. The Appellant having sort of admitted the offence, mentioned another as co – accused. No material stolen property was recovered. Looking at the two pieces of evidence, exhibit P1 (a cautioned statement), it is not worth the name. Like it is the case for extrajudicial statement, cautioned statement must be voluntary, disclosing all the ingredients of the offence(s) charged in terms of type of property, material time and date. Place and owner of property stolen, also nothing exonerating the maker. Which details must tally with those in the material charge sheet. In fact the statements concern only with the past and or past events. Not necessarily connected to the case at hand. Whereas in exhibit P1 the accused admits offences committed in July 2010, the material charge only refers it to the 2nd April, 2012 incident. With exhibit P2, the Appellant admits to have stolen from else whom else where. Leave alone type of property stolen.

The purported cautioned and extra judicial statements imply only evidence of bad character of the Appellant. The effect of which can not be proof of the charges, but crucial only when courts were assessing and exercising their powers of sentencing.

In other words had the learned trial magistrate respectfully not misapprehended the evidence, no conviction should have been grounded. After all the complainant (Pw4) cut a long story short. In that the Appellant became suspicious as the former had threatened to lodge the complaints with witchdoctors. Then one was charged. It is trite law that suspicious however strong might be can not be proof of the charge.

As such, the charges of burglary and stealing having not been proved beyond reasonable doubts, the Appellant was entitled to acquittal. Appeal allowed. Conviction and sentence are quashed and set aside respectively. Appellant be released forthwith. Save for any lawful cause.

R/A explained.

S.M.RUMANYIKA

JUDGE

23/05/2014

Delivered under my hand and seal of the court in chambers this 26/05/2014. In the presence of Ms. Elizabeth State Attorney and the Appellant.

S.M.RUMANYIKA

JUDGE

26/05/2014