

**IN THE HIGH COURT OF TANZANIA
AT SUMBAWANGA**

APPELLATE JURISDICTION

**DC CRIMINAL APPEAL NO. 44 OF 2013
(From Original Criminal Case No. 3 of 2012 in the District Court of
Sumbawanga)**

**ZACHARIA CLAVERY APPELLANT
Versus
THE REPUBLIC RESPONDENT**

20th August & 8th October, 2014

JUDGMENT

MWAMBEGELE, J.:

In the District Court of Sumbawanga, the appellant Zacharia Clavery was charged, tried and convicted in Criminal Case No. 3 of 2012 of offence of stealing c/s 265 of the Penal Code, Cap.16 of the Revised Edition, 2002. Upon conviction, he was sentenced to seven years imprisonment. He was aggrieved with both conviction and sentence, hence this appeal.

The appellant lodged his petition of appeal containing four grounds of complaint. The four grounds can be summarized into only one ground: that the prosecution's case was not proved beyond reasonable doubt.

This appeal was argued on 20.08.2014 during which the appellant appeared in person and unrepresented while on the other hand Mr. Mwandoloma, learned State Attorney appeared for the respondent Republic. Arguing the appeal, the appellant opted to adopt his grounds of appeal as his submissions. In response, Mr. Mwandoloma, learned State Attorney, did not support the appellant's appeal. He was of the view that the case against the appellant was proved beyond doubt. He submitted that the appellant was caught red-handed having stolen a solar panel. He submitted that Titus Simon PW2 heard some awkward noises outside. He went thither and saw the appellant running away with the solar panel. He then ran after him and arrested him. The solar panel was tendered in evidence without any objection from the appellant, he submitted. The learned State Attorney submitted further that upon interrogation by the Police, the appellant admitted to have committed the offence and his cautioned statement was admitted in evidence without his objection.

In a short rejoinder, the appellant testified that he was not arrested at the scene of crime with the solar panel, but he was arrested in the morning when he went to pick up his client as he hired a motorcycle for that purpose. With regard to the cautioned statement, the appellant stated that he did not make it voluntarily. He testified that he admitted to have committed the offence so that the police would not continue beating him.

To prove the case against the appellant, the prosecution fielded four witnesses. After hearing their testimonies the trial court was satisfied that the case against the appellant was proved beyond doubt.

I have had ample time to go through the record and the respective submissions by both parties. The basic complaint by the appellant is that the prosecution failed to prove the case beyond reasonable doubt. The appellant's story at the hearing of his case was to the effect that he went there together with a person named Peter to collect some head of cattle. However, at the hearing of this appeal he said he went there to pick a passenger after he hired a motorcycle for that purpose. Be that as it may, I am of the considered view that the trial court rightly convicted the appellant. No D 5286 D/Cpl Setiel PW1 testified during the trial that he interrogated the appellant and that he admitted to have been found with solar panel, the same was tendered and admitted in court without objection from appellant. PW1 also recorded a cautioned statement of the appellant in which he admitted to have committed the offence. The statement was tendered and admitted in evidence without objection from the appellant. Titus Simon PW2 told the trial court that he saw through his window two people stealing a solar panel, he screamed for help and later many people arrived, they managed to arrest the appellant and later they took him to the village office.

No doubt that the present appellant was caught red-handed while holding a solar panel stolen few hours before the item was stolen. And he gave no sufficient reasons or explanation as to how the stolen solar panel came into his possession. As was held in ***Mwita Wambura Vs R***, Criminal Appeal No. 56 of 1992 (unreported) failure of the appellant to explain to the court how he came into possession of the fruits of crime recently after

it was committed, is presumptive evidence against an accused not only on the charge theft but also on receiving with guilty knowledge. I am in agreement with Mr. Mwandoloma, learned State Attorney that the case against the appellant was proved to the standard required by law. I find the appellant's complaint to be of no merit and the same is rejected.

The appellant is also complaining against the sentence imposed upon him. Neither of the parties argued as to the legality of the sentence. I am aware that sentencing is a discretionary power of the trial court and in a few circumstances the appellate court can interfere with that discretion. However, it is the law that, that such discretion must be exercised judiciously. This court [Samatta, J. (as he then was)] held in ***Tabu Fikwa Vs R*** [1988] TLR 48, held at 52 that:

"In determining or assessing the sentence the court is perfectly entitled to take into account the necessity of deterring other person from perpetrating a similar offence, but that factor is not the sole or predominant basis for assessment of sentence. Generally speaking imprisonment is only justified if it is necessary that the criminal be removed from society. Save where the nature of the offence and the circumstances of its commission call for a custodial sentence or where the court has no discretion in the matter because the offence