

IN THE HIGH COURT OF TANZANIA

AT SONGEA

DC CRIMINAL APPEAL NO. 69 OF 2013

**(Originating from TUNDURU DISTRICT COURT CRIMINAL CASE
NO. 11 OF 2013)**

MOHAMED YASINI MKOKA.....1st APPELLANT

NASSORO MGAYA YASINI.....2nd APPELLANT

SAMWEL SIMONJE RAPHAEL.....3rd APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

Last Order: 9th June, 2014

Date of Judgment: 09th July, 2014

JUDGMENT

FIKIRINI, J:

The three appellants and one Michael Augustino were charged with one count of stealing contrary to section 258 and 265 (2) (b) of the Penal Code, Cap 16 R.E. 2002. The three were found guilty and convicted by

the Tunduru district court at Tunduru. This was followed by a five (5) years imprisonment sentence each. Aggrieved they all have appealed to this Court.

Brief background leading to this appeal is as follows: that on 10th day of January, 2013 at about 03.30 hours at an Extended area within Tunduru district in Ruvuma region, the appellants unlawfully did steal one tyre and one laptop. The items valued at Tzs. 1,470,000/= the property of Allen Tarimo. To support the charge the prosecution had three witnesses. According to PW1 – Allen Tarimo on the material night at around 3.00 hours he was awoken by PW2- George Mkwele that he heard footsteps going around the house. On looking out through the window, PW1 told the court that he saw the then 4th accused but now 3rd appellant. The 3rd appellant had black trouser, black T-shirt and a cap on. PW1 also saw the 3rd accused who is now the 2nd appellant carrying his laptop and he saw the 1st appellant carrying an iron bar. PW1 saw these people by the aid of the security light.

PW1 took his machete and raised an alarm which made the appellants run away. In a company of PW2 they went out inspected the scene and noticed that one spare tyre was missing, a laptop and a car window had been broken. PW1 drove to the Police station and reported the matter.

Assistant Inspector Athumani went to PW1's premises that night and inspected the area. This version of the story was shared by PW2. At the Police station, PW1 was issued with report book number (RB) so that he can look for the appellants. The 1st appellant was immediately arrested at his house and an iron bar he was carrying on the night of theft was recovered. Later PW1 learnt that the 2nd and 3rd appellants were as well leaving in the same house as the 1st appellant. He reported the matter with Police who assisted him arresting them too.

PW3- G. 1922 D/C Goodluck investigated the matter and recorded the 1st appellant cautioned statement. The statement was tendered into evidence and admitted as exhibit P₂. In the cautioned statement the 1st appellant mentioned the 2nd and 3rd appellants. The prosecution case was closed and charge against one Michael Augustino was dropped.

In their affirmed and sworn defence evidences, all appellants denied committing the offence. None of the appellants had a witness to call. The court proceeded to pronounce its judgment by finding all three guilty as charged and sentenced them upon conviction. The decision they are now appealing.

At the hearing all three appellants were present but had nothing to add to their respective grounds of appeal filed. All the appellants were challenging the trial court decision on the following aspects: identification, receiving into evidence of the 1st appellant's cautioned statement and that the prosecution did not discharge its burden of proving the case as required by the law. Mr. Wilbrod Ndunguru appeared for the respondent/republic and supported the appeal. He gave the following reasons: that the court did not observe proper procedure of conducting an inquiry when the 1st appellant cautioned statement was being tendered. The statement was therefore illegally obtained. To support his submission Mr. Ndunguru cited the case of **Maneno Katuma V R, Criminal Appeal No. 1 of 2012.**

Mr. Ndunguru as well submitted on the weak identification relied on by the trial court. It was his submission that, though the trial magistrate directed himself properly regarding identification principals yet he failed to consider the issue of the intensity of light used to identify the appellants. For this he referred the Court to the case of **Waziri Amani V R (1980) T. L.R. 250.** He as well pointed out on the defect on the charge sheet. That since the offence occurred at night the burglary charge contrary to section 294 (1) (2) and stealing from a motor vehicle

contrary to section 269 (c) of the Penal Code would have been proper instead stealing contrary to section 258 and 265 (2) (b) of the act. More so evidence adduced in court supported the two would be charges and was weak on the stealing charge. It is on these reasons he supported the appeal and urged the Court to allow it.

I have perused the record of the proceedings including the judgment. I have as well gone through the grounds of appeal as raised by each of the appellants. Finally, on examining the submission by Mr. Ndunguru counsel for the respondent/republic in support, I am content that this appeal is meritorious.

As rightly submitted by Mr. Ndunguru the trial magistrate did not observe the procedure in admitting the 1st appellant's cautioned statement into evidence. The 1st appellant denied recording any statement while at the Police station. Encountered with such predicament, the trial magistrate should have conducted an inquiry to find out two things: if the 1st appellant recorded a cautioned statement and whether the recording was voluntary. This is the requirement pursuant to section 27 (2) of the Tanzania Evidence Act, Cap 6 R. E. 2002, that the prosecution has to prove that the statement was recorded voluntary. The only way that could be ascertained was by way

of an inquiry. Otherwise the admission of the statement was illegal and the same deserves expunging from the record, the exercise which I proceed to conduct. The cautioned statement of the 1st appellant and admitted into evidence as exhibit P₂ is hereby expunged from the record.

See: Maneno Katuma V R, Criminal Appeal No. 1 of 2012. After expunging the 1st appellant cautioned statement we are now left with PW1 and PW2's identification evidence. This evidence was problematic as the identification made did not adhere to the principals laid down in several Court of Appeal cases including that of **Waziri Amani** (supra). The trial magistrate properly directed himself to the **Waziri Amani** and two other cases namely **Juma Ntandu & Another V R, Criminal Appeal No. 84 of 2007 –CAT – Dodoma** and **Said Chaly Scania V R, Criminal Appeal No. 69 of 2005 CAT**, both cases unreported. Surprisingly, he went ahead and convicted the appellants knowing the evidence before him was weak. I am saying so based on the evidence on record which I considered weak. **First**, both PW1 and PW2 could not tell the court the source of the light and its intensity. They both just stated that the light was coming from the security lights (see pages 6, 11 & 12 of the proceedings). **Second**, none of the two gave the length of the time they had the appellants under observation. The distance of

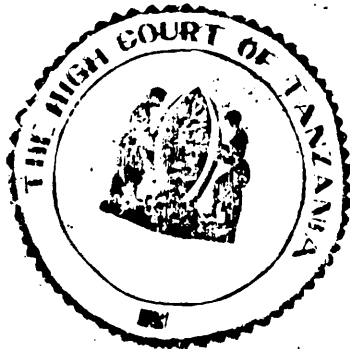
1¹/₂ meter mentioned by PW1 could have been a reasonable proximity had the court been given other description such as to whether it was direct vision, side - ways, from behind and so forth from where PW1 was standing. **Third**, both PW1 and PW2 claim to know the appellants prior to the incident but could not give physical description or marks of identification in respect of each appellant. The fact it was in the dead of the night that is 3.30 hours, I am inclined to consider the identification made was weak to rule out mistaken identity.


From the record I as well noted that the trial magistrate instead of sticking to the legal principal that it is the prosecution burden to prove its case and the defence's duty was only to raise doubt. In his judgment the trial magistrate shifted the burden. He demanded from the appellants if they were each alleging to be at their home; why they did not bring witnesses to that effect. And if they were away (defence of alibi) then they should have brought witnesses (see page 13 of the judgment). This was misdirection on the part of the magistrate. **See: Saidi Hemedi V R (1987) T.L.R. 117, Makondo Maginga V R, Criminal Appeal No. 20 of 2011 CAT-Mza (unreported)**

Finally, after examining the charge sheet and the evidence adduced before the trial court I am overwhelmingly, in agreement with Mr. Ndunguru that the charge was at variance with the evidence adduced.

In light of the above and as stated earlier I thus proceed to allow this appeal in its entirety by quashing the conviction and setting aside the sentence. All the appellants be released from prison forthwith unless lawfully held for other reasons. It is so ordered.

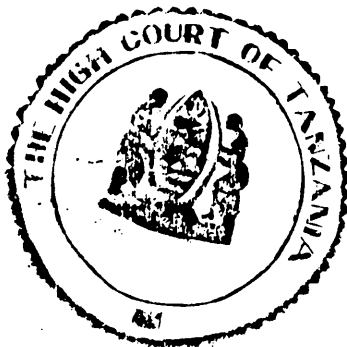
Judgment Delivered this 09th day of July, 2014 in the presence of Mohamed Yasini Mkoka, Nassoro Mgaya Yasin and Samwel Simonje Raphael the appellants and Ms. Tumaini Ngiluka - State Attorney appearing for the respondent/republic.




P.S. FIKIRINI

JUDGE

Right of Appeal Explained.




P.S. FIKIRINI

JUDGE

09th JULY, 2014