

IN THE HIGH COURT OF TANZANIA

AT SONGEA

DC CRIMINAL APPEAL NO. 13 OF 2016

**(Originating from the decision of the Songea District Court in
Criminal Case No. 03 of 2015)**

DANIEL LAZARUS KUMBURU.....APPELLANT

Versus

THE REPUBLIC.....RESPONDENT

JUDGMENT

Last Order: 2nd May, 2016

Date of Judgment: 11TH May, 2016

CHIKOYO, J.

At the District Court of Songea, DANIEL LAZARUS KUMBURU, the appellant was charged and convicted with three counts, first; House breaking contrary to section 294 (1) (b) of the Penal Code [Cap.16 R.E. 2002]. Second; stealing contrary to section 265 of the Penal Code [supra] and third; being in possession of the service stores contrary to section 312 A (3) of the Penal Code [supra]. Upon being convicted, he was sentenced to serve five (5) years in jail for the first and second counts and in regard

to the third count, he was sentenced to serve two (2) years in jail. The sentences were ordered to run concurrent against the appellant.

The appellant was aggrieved with the said conviction and sentence; he has filed the instant appeal where in his memorandum of appeal, four grounds of appeal have been raised, however upon my perusal of those grounds, I find them to fall in one fold that is the trial court erred in law and fact by convicting him on the alleged offences while the prosecution side failed to prove the alleged offence beyond reasonable doubts.

The facts leading to the instant appeal are as follows; according to the testimony of DONATUS KOMBA (PW1) that on 25/12/2014 at about 7:00 pm while he was at Tunduru was informed by his wife HILDA DANIEL KOMBA (PW2) via mobile phone that, at home there is an incident of theft has occurred, then PW1 advised PW2 to report the said incident to the police station in the next day since it had already become night. Then around 04:00 am, PW1 received another call from a person introduced himself as the Location Chairman of KINDIKUNDIKU within Lusonga Village in which they informed him that they have apprehended a person at night who had a bag, which contained the items belonged to the Tanzania Peoples' Defense Force, then PW1 informed the PW2 to make a follow up.

According to PW2 testified that, 25/12/2014 at noon she left her home and went to the church with her family and she locked the doors, and left behind the appellant at home as a labourer for about three days. But when they returned back home around 03:00 pm PW2 found the small house's padlock had been broken, and when PW2 entered therein she found her and her husband's items scattered and found various items missing including the mobile phones; clothes of PW2's son and since it was night, PW2 informed PW1, who advised her to report the matter to the Village Authority and Police Station. Around 04:00 am that is when PW1 notified PW2 that the suspect has been apprehended at Lusonga Village and when PW1 told PW2 to go there, she was informed by PW1 that the said suspect had ran away but has left a bag. On 26/12/2014, the following day PW2 hired a motorcycle but when they arrived at Pachambili Area, PW2 and the driver stopped so as she could search for the mobile network as she was not sure on the direction she was instructed, suddenly PW2 saw the appellant at a nearby house, that is when the appellant was re-apprehended since many people responded to her call for an help when the appellant was trying to ran away. When the appellant was interrogated, it was alleged that he confessed to have committed the said offence and when PW2 took the said bag she found it having the belts,

sweaters of the TPDF, gifts of PW2's children; clothes of PW2's son, medals and massai bed sheets; which were admitted as Exhibit P3 collectively. There were also the three mobile phones make; bird, small Nokia and techno touch screen which were admitted as Exhibit P4 collectively. The appellant was sent to Magagula Police Station, and then he was arraigned in the trial court. In his defence, the appellant strongly opposed the allegations put to him but at the end of the trial, he was convicted and sentenced as stated above.

When this appeal was called for hearing, the appellant appeared in person and he defended himself while Mr. Nkoleye the learned State Attorney appeared for the respondent who opposed this appeal.

The appellant in his submissions argued that, the prosecution side failed to prove the alleged offence since there was no eye witness who witnessed as he was committing the alleged offence; there was no alleged street leader was called by the prosecution side as a witness to testify against the appellant.

In reply, Mr. Nkoleye argued that this appeal has no merit because the evidence from the record reveal that, at first the appellant after being arrested, he ran away leaving behind the bag which contained items as far

as Exhibit P3 and P4 collectively are concerned. Also Mr. Nkoleye admitted the fact that there was no one who saw the appellant committing the alleged offence but according to the testimony of PW2, the appellant was the one who was left home while the doors were locked and the appellant was found in possession with the stolen items, thus at the end, Mr. Nkoleye prayed this appeal to be dismissed.

As to me, the issue here is as to whether this appeal has merit or not. I have gone through the entire court records and the submissions from both parties where I have found two major observations, which can easily assist me in determining this appeal. **One;** the testimonies from the prosecution side reveal that there was no eye witness who witnessed the appellant committing the alleged offences, however the prosecution side's case depends on the testimony of PW2 and the alleged recovery of the stolen items. **Two;** in line to the that, the prosecution side's evidence is based on the doctrine of recent possession, together with an allegation that the appellant was at first apprehended but he ran away.

Having in mind with my above observations, and upon scrutinizing the entire court records specifically the testimonies from both parties at the

trial court, the submissions from both parties herein, I find this appeal has merit. I say so because of the following reasons;

First; the court records is uncertain as to whether the alleged stolen items (Exhibit P3 and P4 collectively) were positively identified by the complainant. The testimony of PW2 as a complainant does not reveal in any manner as to whether she gave out be it a general descriptions or peculiar marks over the alleged stolen items. For the sake of clarity, at page 23 - 24 of the typed proceedings, PW2 in examination in chief had this to say and I quote;

*'At that village **they** gave me the three mobile phones, the massai bed sheet, sweaters of the TPDF belts, gifts of my children, medals, clothes of my son, **the bag which contained all items**. Here is the massai bed sheet, the trousers of my son and shirts, tshirts. Also sweaters of the TPDF, belts, gifts, medals, the bags. I pray to tender them in court. [Emphasis is mine]*

PW2 went further by testifying as follows;

*'Also there were recovered the three mobile phones. **I could not remember their names as were of my sons and were bought***

by their uncle. But one of them was techno. The other one was the touch screen mobile phone. I pray to tender them in court' [Emphasis is mine]

In my view, the above extracted piece of evidence from PW2 does not reveal that she positively managed to identify the alleged stolen items because her testimony does not reveal as to whether before she searched the said bag, she had already mentioned and gave out the peculiar descriptions on those items which were put therein, considering the fact that, there were other items as shown above suggests to be unfamiliar to PW2. In the case of **Mustafa Darajani Versus Republic, Criminal Appeal No. 242 of 2008 (CAT-IR) (Unreported)** at page 13 the Court of Appeal of Tanzania had this to say on at what time a complainant is supposed to identify his stolen item;

'In such cases, description of special marks to any property allegedly stolen should always be given first by the alleged owner before being shown and allowed to tender them as exhibits.'

In the instant appeal, at the trial court the above legal position was not complied accordingly. Be as it may, the question is why the prosecution side did not call PW2's sons or their uncle as witnesses to prove that the

said mobile phones were really stolen, instead of PW2 to tender those items which she did not own them? This is because it is trite law that, the alleged stolen items should be conclusively identified by a complainant and not otherwise as in the instant appeal. **See; Haji Bukho Versus Republic, Criminal Appeal No. 279 of 2011 (CAT-AR) (Unreported)**. In the event, I find it is obvious that, this doubt must be resolved in the appellant's favour.

Second; PW2 in her testimony testified that, before the appellant was re-arrested, she raised an alarm for a help since the appellant was alleged attempted to ran away, then many people responded with her alarm came there and arrested the appellant. For the sake of clarity, at page 22 of the same proceedings, PW2 in examination in chief had this to testify;

*'But before he was apprehended, he tried to bolt and run, I shouted for help, **many people gathered there and they managed to apprehend him...**'* [Emphasis is mine]

I have gone through the entire court records but I have failed to find any witness who was involved in arresting the appellant after responding to PW2's alarm, thus in my view failure for the prosecution to call even a single witness including the neighbors who responded to PW2's alarm as a

witness at the time of the alleged appellant's arrest was fatal since it raises doubts as to whether the appellant was real a culprit or not. **See; Chacha Pesa Mwikwabe Versus Republic, Criminal Appeal No. 254 'B' of 2010 (CAT-MWZ) (Unreported).**

As if it is not enough, in regard to the allegation that the appellant was first arrested but managed to ran away as alleged by PW1 who was informed by the Location Chairman of KINDIKUNDIKU within Lusonga Village in where they have apprehended a person at night who had a bag, again this is also a mere statement which lacked evidence since the prosecution side did not call even the said Chairman of that Location who informed PW1, in the event I find it appropriate to draw an adverse inference against the prosecution side, as I hereby do.

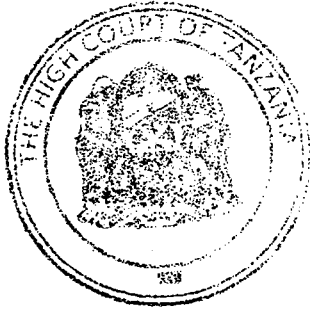
Third; in similar vein, I do not agree with the allegations that, the appellant upon being arrested, he confessed to have committed the alleged offence in front of PW2 and PW4 D. 9044 D/CPL MOHAMED appeared to testify on that account (see pages 22 and 31 of the typed proceedings) since if real the appellant confessed even in front of PW4, why PW4 did not record the appellant's cautioned statement in regard to that fact and at the trial, then PW4 could have tendered the said cautioned statement as an

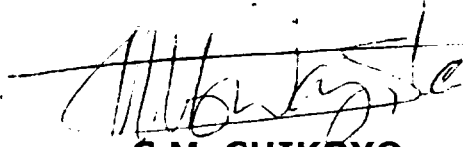
exhibit to back up on what PW2 had testified on this account? Under those circumstances, I find it inappropriate to rely on mere words from PW2 and PW4 that the appellant confessed to have committed the alleged offence.

In its totality, I find the prosecution side had failed to prove the alleged offences beyond reasonable doubts, and the fact that whether the appellant was working as labourer of PW2 and was left behind at home alone cannot sustained his conviction since as I have analyzed the above doubts which have been resolved in the appellant's favour and again it is trite law that, mere presence of an accused person at the scene of crime is not a guarantee for his conviction as in the circumstances of the instant appeal. In the event, this appeal is found with merit hence allowed, and I hereby quash the imposed convictions imposed by the District Court of Songea in Criminal Case No. 03 of 2015 against DANIEL LAZARUS KUMBURU, the appellant, on the above stated counts and I proceed to set aside the above imposed sentences in regard to those above stated counts.

The appellant is hereby ordered to be released from prison unless he is held with another lawfully cause.

It is so ordered.

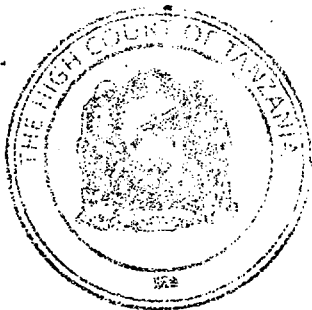


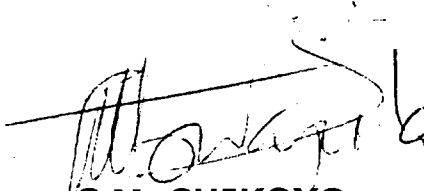

S.M. CHIKOYO

JUDGE

11/05/2016

Judgment delivered in chambers in the presence of the appellant in person, Ms. Hellen Chuma Learned State Attorney for the respondent and Mr. Komba Court Clerk, this 11th day of May, 2016.

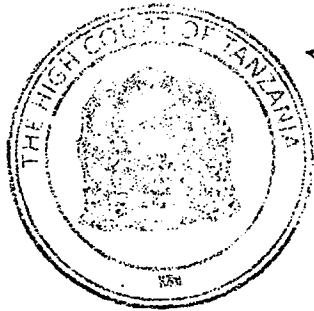


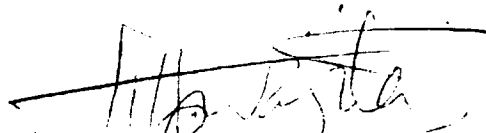

S.M. CHIKOYO

JUDGE

11/05/2016

COURT: Right of appeal explained.




S.M. CHIKOYO

JUDGE

11/05/2016