

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CRIMINAL APPEAL NO. 10 OF 2018

*(Appeal from the decision of the District Court of
Rufiji at Utete before Hon. Maroa, RM, dated 23rd of
November, 2016 in Criminal Case No. 126 of 2016)*

ALLY S/O HEMED MKETO @ KARDINALI PENGGO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

20 June & 30 July, 2018

DYANSOBERA, J.:

The appellant stood trial, along with Ramadhan Seif Mainde (2nd accused) in the District Court of Rufiji at Utete charged with two counts. In the first count, the appellant and his fellow were charged with house breaking c/s 294 and in the second count the duo was charged with stealing c/s 258 and 265 both of the Penal Code [Cap.16 R.E.2002]. While the second accused was discharged (sic), the appellant was found guilty on both counts. He was sentenced to fourteen (14) years term of imprisonment in the first count and in the second count he was sentenced to one year. The sentences were ordered to run concurrently.

The appellant was dissatisfied and he has come to this court on appeal. His petition of appeal is

comprised of seven grounds but a perusal of them reveals that the centre on one complaint that the case against him was not demonstrated beyond peradventure.

At the hearing of the appeal, the appellant stood on his own and had nothing useful to add while the respondent Republic was represented by Ms Faraja George, learned State Attorney. Learned State Attorney supported the appeal and her submission was simple and brief. She told this court that the evidence by the prosecution witness fell short of proving the case to the required standard. She explained that there was no eye wit who saw the appellant stealing the said items. She said that the principles underlying such aspect are clear and that most important is the certificate of seizure which was not produced in court; that the requirement is mandatory under section 38 of the Criminal Procedure Act [Cap.20 R.E.2002]. It was her further submission that there was no evidence to prove that the appellant was found with those items.

The appellant joined hands with the leaned State Attorney and said that she was right in her submission.

Before determining this appeal, I think pertinent to state, albeit briefly, the facts of the case.

Hadija Omary, the victim of the incident on 20th day of August, 2016 travelled away from home. When back she found her belongings namely, a mattress, a cellular phone make Tecno-black in colour and cash Tshs. 50,000/ missing. She reported the matter to Kibiti Police and was issued with an RB. Later she was informed that a person was seen carrying the mattress. With a police officer the victim went to the appellant's home and recovered the mattress. It was the evidence of the victim that the room in which the mattress was found was being occupied by the appellant but the house was the property of the 2nd accused and the appellant was a tenant. This witness tendered the mattress and was admitted as Exh.P.1.

Rajab Matimbwa (PW 2) and F.6846 DC Kwilasa (PW 3) supported the fact that the mattress was found in the room in which the appellant had slept.

In his defence, the appellant denied to have committed the offence and told the trial court that he was not occupying the room in which the mattress was retrieved. The second accused claimed that the appellant was his tenant and that the mattress was found in the room in which he was sleeping. The second accused was supported in this by his fiancée one Asha Rashid (DW 3).

The trial court magistrate was satisfied that the ingredients of the offence were proved and convicted him.

I have gone through the trial court's the grounds of appeal and the submissions learned State Attorney. I agree that the case the appellant on both counts was not proved alone proved beyond reasonable doubt.

In the first place, it was not proved how the breaking took place and when. The evidence of the prosecution, particularly that of PW 1 showed that on 20th day of August, 2016 when she came back she found her house broken and some items stolen. It was not stated how the breaking was committed.

Second, as correctly stated by learned State Attorney, none saw the appellant breaking and stealing anything.

Third, it is said that the mattress was found in the room the appellant was occupying but apart from the fact that the appellant denied this fact, there was nothing showing that the appellant was found, in legal parlance, with the said mattress. This is because there was nothing proving that the said mattress was claimed by the appellant to be his property and this is clear from the fact that there was no seizure certificate evidencing that the appellant was found with the said mattress and that the room in which the said mattress was found was one of the rooms which belonged to the house of the second accused. The evidence of the second accused that it is the appellant who was occupying that room

could not be believed and acted upon without corroboration as the second accused was an accomplice and his evidence was likely to assist him save his skin.

Fourthly, even if it was proved that the appellant was found with the mattress, still there was no evidence that the said mattress was positively identified and proved to be the property of PW 1. There was no evidence on her part that she had mentioned any specific features before she was shown the said mattress. Even in her evidence in chief, she was silent on this.

For those reasons, I agree that the case against the appellant was not proved beyond reasonable doubt. In other words, there was no evidence upon which the appellant's conviction could have been pegged. The conviction was, on the available evidence, uncalled for and the sentences were illegal.

I allow the appeal, quash conviction and set aside the sentences. I order that, unless lawfully held for other causes, the appellant should be set at liberty forthwith.


W.P. Dyansobera

JUDGE

30.7.2018



Delivered this 30th day of July, 2018 in the presence of Justus Ndibalema, learned State Attorney for the respondent and in the presence of the appellant in person.



W.P. Dyansobera

JUDGE

