

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

APPELLATE JURISDICTION

(DC) CRIMINAL APPEAL No. 137 OF 2016

*(Original Criminal Case No. 110 of 2013 in the District Court of
Bariadi at Bariadi, before R. A. Oguda, Resident Magistrate).*

JUMA MAKOYE @ IBRAHIM APPELLANT

Versus

THE REPUBLIC..... RESPONDENT

Date of last order: 6/11/2018

Date of judgment: 29/01/2019

JUDGMENT

KIBELLA, J.

The appellant, Juma s/o Makoye @ Juma s/o Ibrahim, stood charged with the offence with two counts, 1st count; Burglary c/s 294 (a) and 2nd count; Stealing c/ss 258 (1) (2) and 265 of the Penal Code, (Cap 16 RE 2002), vide criminal case No. 110 of 2013, before the Bariadi District court at Bariadi.

The particulars of the 1st count were that Juma s/o Makoye @ Juma s/o Ibrahim charged on the 10th day of June, 2013 at night hours in Bariadi town centre within the District of Bariadi in Shinyanga Region willfully and unlawfully did break and enter the shop of one Singu s/o Ruki with intent to commit an offence therein. The particulars of the 2nd count were that Juma s/o Makoye @ Juma Ibrahim charged on the 10th day of June, 2013 at night hours in Bariadi town within the District of Bariadi in Shinyanga

Region after breaking did enter the said shop did steal whitedent tooth pastes 3 packets Tshs 3500/= podoa lotion one pc Tshs 2000/=, cocoa lotion 1 pc Tshs 3000, cigarettes 11 packets Tshs 21,100/= Nice & Lovely lotion 1 pc Tshs 2500/=, perfume men 1 pc Tshs 4000/= Blue lady lotion 1 pc Tshs 2500/= sweets big ball 17 pc Tshs 3400/=, Protex soap 8 pc Tshs 8000/=, Nice and Lovely lotion 1 pc Tshs 3000/=, one soles lock Tshs 3500/=, Airtel voucher of 1000/=, 19 pc Tshs 19,000/= Vodacom voucher of 500/= 8 pcs Tshs 14,500/=, Vodacom voucher of 15 pc Tshs 15,000/=, Tigo voucher of 500/= 8 pcs Tshs 40,000= (sic). All Total valued at Tshs. 122,000/= the property of SINGU s/o RUKI.

The accused/appellant pleaded not guilty.

At the end of the trial, the appellant was found guilty, convicted and sentenced for the 1st count to twenty (20) years in jail and for the 2nd count to seven (7) years in jail. The sentences were ordered to run concurrently.

Aggrieved by the conviction and sentence he has preferred this appeal before this court.

Briefly the prosecution evidence which prompted the conviction and sentence of the appellant before the trial court was to the following effect:-

Singu Luki, PW2, and the victim testified that being a businessman owned a shop near Bariadi old stand. On 10/6/2013 at 07:00 hours he arrived at his shop, however, upon entering inside he saw the top iron sheet was cut and a person had entered inside the shop. A lot of goods

were displaced down and some were taken/stolen. Later a policeman arrived there who informed PW2 that he was informed of that act by PW2'S neighbours whose properties were also stolen. PW2 went on that, the properties which were stolen included cash Tshs 250,000/= mobile phone vouchers being those by Tigo, Airtel and Voda, different types of lotion, three whitedent, eleven cigarettes packets, seventeen sweet, eight pcs protex soap, and two phones (mobile).

Then PW2 was taken up to police station to report the matter and record his statement. However, at police station he found the accused/appellant who was arrested in possession of the goods stolen at that victim's (PW2's) shop and he had a pair of scissors which he used cutting the iron sheet. Upon re-examination, PW2 replied inter alia that, at the police his properties were with the accused in his bag.

The testimony of PW1, No. D. 7716 Sgt Mogela, testified as the investigator of the case whereby on 11/6/2013 was so assigned to investigate the case concerning the accused for the offence of burglary and stealing. While proceeding with preparation of his investigation he was informed that the accused was under arrest of people who were intending to kill him.

PW1, then decided to the place where he found the accused and rearrested and sent him at police station together with his bag containing stolen properties which they got at the Handa Guest house room no. 8. In the guests book he registered himself as Juma Charles. His bag was black in colour. At police PW1 did record the accused's cautioned statement as

he agreed to have broken and stole properties at the shop owned by the complainant one Singu and another shop owned by one Woman. The cautioned statement was admitted and marked as exh. P1. Also, he was found in possession of some Tigo vouchers, Voda and Airtel whose value was Tshs 60,000/=. However when arrested the accused was found in possession of cash Tshs 80,000/= which was among the cash stolen from the complainant's shop.

Zainabu Chiyuga, PW3, an attendant of Handa Guest House testified to have received the accused as a guest from Dar – es – salaam as he so told her. He had a black bag and it was at around 23.00 hours. He paid Tshs 4000/= for room No. 8. In the morning at 07:45 he left for a breakfast somewhere, after half an hour, PW3 saw the accused returned under police arrest where she PW3 was asked whether the accused was her customer and she replied affirmatively. He was sent up to his room, where his bag was later, opened and she saw that it contained things such as vouchers, malta, perfume and a pair of scissors etc.

That was all for the prosecution case.

In his defence, the accused/appellant, testified as DW1 and stated that, on 11/6/2013 in the morning hours phoned the area chairman of Malambo asking him for an introductory letter to vodashop. Having got that letter, within a short while, policeman called Mogella arrived at that place and arrested and sent him at police station for unknown offence. He was informed to have committed the offence of burglary which he did not

know. Thus prayed for the court to acquit him whereby he tendered his PF3 which was admitted as exh. D1.

From the above evidence, the trial court was satisfied that the prosecution case against the accused was proved beyond reasonable doubt for the two counts. Hence convicted and sentenced as prior stated.

The appellant in his petition of appeal has advanced five grounds of appeal which generally boil down into one major complaint that the prosecution case before the trial court was not proved beyond reasonable doubt against the appellant.

At the hearing of the appeal the appellant was unrepresented, and he had nothing substantial to add to his petition of appeal grounds. He prayed for the same to be considered and justice be reached.

The respondent Republic was under the service of Ms. Mushi, learned State Attorney who from the start declined to support the appellant's appeal except supported the conviction and the sentences imposed upon both counts. Ms. Mushi, learned State Attorney argued that, there was no hearsay evidence by the prosecution witnesses. This was because, the appellant was found arrested by people where he was re-arrested by PW1 who after had interviewed accused/appellant he admitted to have committed the offence and his cautioned statement was recorded and hereby referred as exh. P1. That he was as well found in possession of the stolen properties owned by the complainant PW2. And upon the fact that PW3 and PW4 were the people who tendered exhibits before the trial court

where no valued receipts and or special marks of the articles alleged found in his possession.

Ms. Mushi, learned State Attorney argued that, first of all there were only three witnesses that there was no PW4. She went on that, Exh. P1 was tendered by PW1, the investigator who recorded the accused's cautioned statement which was admitted in court as exh. P1. Also different items were admitted as exhibits as stolen from the shop owned by PW2 as well as Handa Guest House Register. Thus prayed for the appellant's grounds of appeal to be considered devoid of merit and be dismissed.

I will deliberate on these grounds as they suffice to dispose of this appeal. Having gone through the evidence on the record, the grounds of appeal and reply thereto as well as the submission in support and rival thereto, the central issue for determination is whether the prosecution case before the trial court was proved against the appellant beyond reasonable doubt.

To start with it is trite law that a person must be charged with an offence under a proper provision of the law, wrong citation of the proper section or non-citing the same renders a charge defective and the accused should be acquitted for lack of fair trial on his side.

In this case the accused was charged with the offence of burglary and stealing c/ss 294 (1) (a) (2) and 265 of the Penal Code (supra). These provisions provide as here under:-

"s. 294 (1) Any person who –

- (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit an offence therein; or...*
- (2) If an offence under this section is committed in the night, it is burglary and the offender is liable to imprisonment of twenty years." [Emphasis supplied]*

However, the particulars of the offence for both counts did not mention that accused entered into a building or house used as a human dwelling but it was a shop.

Therefore, the right provision of the law which the accused/appellant was supposed to be charged for the 1st count was section 296 (a) and (b) of the Penal Code which provides that;

"296 Any person who-

- (a) breaks and enters a school/house, shop, warehouse, store, work shop, garage etc...*
- (b) having committed an offence in any building referred to in paragraph (a) breaks out of the building is guilty of an offence and liable to imprisonment for ten years. [Emphasis supplied].*

Under the circumstances, I find that there was wrong citation of the Penal Code section which renders the charge defective where the accused/appellant could not be said to be fairly tried and conviction and sentence cannot be left to stand as was so held in the case of CHARLES MLANDE V. R, CRIMINAL APPEAL NO. 270 of 2013, COURT OF APPEAL OF

TANZANIA AT DAR – ES – SALAAM, (unreported) where his lordship, Kipenka, JA, stated:-

"Being found guilty on a defective charge based on the law it cannot be said that the appellant was fairly tried in the courts below. In view of the foregoing shortcomings it is evident that the appellant did not receive a fair trial in court ..."

However, upon such shortcomings such defect cannot be cured under s. 388 of the Criminal Procedure Code, (Cap 20 RE 2002) as was so stated in the case of JEREMIA CHIDOLE V. R, CRIMINAL APPEAL NO. 580 of 2015 COURT OF APPEAL OF TANZANIA AT DODOMA (unreported) where his lordship Mwambegele, JA, stated:-

"For a voidance of doubt we are certain in our mind that the three ailments discussed above cannot be saved by the provisions of section 388 of the Criminal Procedure Act, as held by the full bench in BAHATI MAKEJA .V. R, CRIMINAL APPEAL NO. 118 OF 2006."

Going by the evidence by the prosecution and especially by the victim PW2, it is gallantly clear that he just mentioned some of the stolen items but without mentioning the value of each item and as well never mentioned the total value of the stolen properties as was so in the charge sheet. This clearly proved that there was variance between the charge

sheet and evidence adduced by the prosecution side, which rendered the charge remain unproved and the accused/appellant could be acquitted as a matter of right short of which failure of justice could have been occasioned as was held in the case of HANDA MANYAMA V. THE REPUBLIC, CRIMINAL APPEAL NO. 115 OF 2013, COURT OF APPEAL OF TANZANIA AT MTWARA (unreported).

Not that withstanding, the victim, PW2 failed to identify properly the stolen properties as required by law that the proper procedure of identification of stolen properties is that, the complainant must describe the features of the stolen item before it is shown to him in court so when the same is shown to him he be able to identify it as it was so observed in the case of NASSORO s/o MOHAMED .V .R (1967) HCD 446, where it was held inter alia that:-

"2 The proper procedure for identification of property in court is that the claimant should describe the item before it is shown to him so that it can be clear to the court when the item is eventually tendered whether or not he was able to identify it."

Lastly is when can the doctrine of recent possession be invoked. It is trite law that in order to invoke the doctrine of recent possession the victim must properly identify the stolen property, short of which the doctrine cannot be applied as was in the case of ALLY BAKARI AND PILI BAKARI V. R (1992) TLR 10, where the Court of Appeal of Tanzania held inter alia:-

"(ii) as PW2 could not with certainty show that the sewing machine (exh P2) belonged to him the doctrine of recent possession could not be applied in this case."

From the above shortcomings mentioned, certainly I find that the prosecution case before the trial court was not proved against the accused/appellant beyond reasonable doubt. I thus answer the central issue in negative.

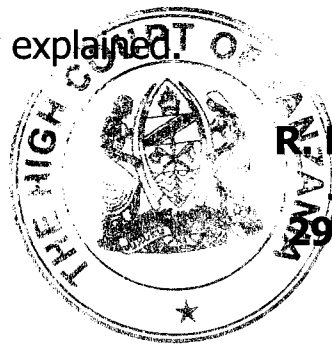
In the upshot, the conviction and sentences imposed upon both counts are hereby quashed and set aside. The appellant is hereby ordered to be released from prisons forthwith unless otherwise lawfully detained.

Appeal allowed.


R. M. Kibella
JUDGE
29/01/2019

Order: Judgment delivered in chambers this 29th day of January, 2019 in the presence of the appellant in person as well as in the presence of Ms. Mapunda, learned State Attorney, for the Respondent Republic.

R/A fully explained.




R. M. Kibella
JUDGE
29/1/2019