

**IN THE HIGH COURT OF TANZANIA  
(MTWARA DISTRICT REGISTRY)**

**AT MTWARA**

**CRIMINAL APPEAL NO. 109 OF 2019**

(Originating from Lindi District Court in Criminal Case No. 19 of 2019,

Before: Hon. F. S. Kiswaga, Esq – RM)

**KIJAZI ALLY BENDERA.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

15 & 25 June, 2020

**JUDGMENT**

**DYANSOBERA, J.:**

In the District Court of Lindi, the appellant was charged with two counts of burglary and stealing c/ss 294 (2) and 265, respectively, of the Penal Code [Cap.16 R. E.2002]. The allegations in the first count were that on 27<sup>th</sup> day of November, 2018 at Likotwa area within the Municipality and Region of Lindi, the appellant did break and enter into the house of one Iman s/o HemedKulaga with intent to commit an offence therein. In the second count, it was alleged that on 27<sup>th</sup> day of November, 2018 at Likotwa area within the Municipality and Region of Lindi, the appellant, after having entered into the said house did steal therein cash money Tshs. 350, 000, two mobile phones one make Tecno valued at Tshs. 20,000/- and another Samsungtablet 4 valued at Tshs. 600,000/=, a motor vehicle registration card, brief case, identification

card and a motor vehicle driving licence, all making a total value of Tshs. 970, 000/=, the properties of one Iman s/o HemedKulaga.

The appellant denied the charge and, after the end of the trial, he was found guilty on both counts, convicted and sentenced to thirty six (36) months in the first count and thirty six (36) months in the second count, as well. The sentences were ordered to run concurrently.

Dissatisfied, the appellant has appealed to this court on the following six grounds:-

1. That, the appellant pleaded not guilty to the offence charged against him because he did not commit the alleged offence.
2. That, the trial court erred in law and facts in convicting the appellant without considering that the appellant was not caught with any exhibit support the charge thereof.
3. That, the trial Magistrate erred in law and fact in convicting the Appellant without considering that no prosecution witness testified to have seen him committing the crime and the prosecution evidence is not corroborated to support the conviction.
4. That, the trial Magistrate erred in law and fact in convicting the Appellant without considering that the charge was not proved beyond reasonable doubt.

The brief facts of the case is the following. ImaniHemediKilanga the victim who testified at the trial as PW4 had, on 26<sup>th</sup> November, 2018 travelled to Nachingwea and his house was closed. On 27<sup>th</sup> November, 2018 PW3 rang him telling him that he had seen the doors broken and the house was open. PW4 directed PW3 to enter inside the house. PW 3 entered the house and found things at a mess. He accordingly informed

PW 4 who, when back, reported to the police. Investigation was mounted and Assistant Inspector Mutalisi (PW 1) discovered the appellant to be the culprit. The appellant was apprehended and in the presence of PW5 Juma Said led the police to the places where the appellant had kept the stolen loot. He had hidden the stolen properties at two places. At Mitema beach, the stolen items had been hidden underground. He also led them to the bush area where the other properties were hidden. A black brief case and an identity card were identified to be the property of Imani Said Kulaga (PW4). He identified them through special marks – name and the damage on the brief case. PW 3 also managed to identify his stolen properties which included a bag with clothes. Certificate of seizures and the retrieved items were tendered in court as exhibits.

PW2 G 7805 DC Baraka interrogated PW 4, inspected the house outside and inside, found the rear door broken and drew a sketch plan (exhibit P5).

In his defence, the appellant told the trial court that on 30<sup>th</sup> November, 2018 he was at Newala at his brother in law. He was then arrested by police on allegations that he had stolen voucher. On 2<sup>nd</sup> December, 2018, the police from Newala tortured him and asked him about the voucher he had stolen. He was shown a suspect by the name of Salum and the appellant admitted that he knew him but denied to have handed him anything. Both were taken to Mitema beach then to Mchinga village where the police arrested one Kasimu Said. The police then showed him a mobile phones, laptop, black bag, adapters and other

things. The appellant told them that he did not know them. On 4<sup>th</sup> December, 2018 the police interrogated him and put in custody for fourteen days. The appellant denied having committed any offence. He also denied to have been found with any exhibit and claimed that this was a case concocted against him. He admitted to be acquainted to PW 5.

At the hearing of the appeal on 15<sup>th</sup> June, 2020, the appellant appeared in person whereas the respondent was represented by Mr. Paul Kimweri, learned Senior State Attorney. The appellant, when invited to argue his appeal, opted the respondent to start first. Mr. Paul Kimweri supported the conviction and sentence contending that the whole evidence levelled against the appellant incriminated him. He said that the appellant led the search party to the place where he had hidden those items which were amply identified by the complainant who testified in court as PW 4.

The appellant on his part, protested his innocence maintaining that he was not apprehended with anything and that the case was a concoction.

Having considered the trial court's record, the grounds of appeal and submissions of the learned Senior State Attorney and the appellant against and in support of the appeal, respectively, I am in no doubt that there was no direct evidence implicating the appellant; only circumstantial evidence.

In **Ally Bakari&PiliBakari v. R** [1992] TLR 10, the Court of Appeal observed that:

“Where the evidence against the accused is wholly circumstantial the facts from which an inference adverse to the accused is sought to be drawn must be proved beyond reasonable doubt and must be clearly connected with the facts from which the inference is to be inferred”.

As rightly pointed out by the appellant, none of the witnesses saw the appellant burgling the house and stealing the said items. However, as correctly pointed out by learned Senior State Attorney, the evidence being circumstantial, there was unbroken chain of circumstantial evidence. The appellant led the search party to the place where those items were hidden. The police in the presence of the appellant's neighbour (PW 5) seized those items some of which were identified by PW 3 to be his properties while other items were identified by PW 4 and these items were the subject matter of the present matter. Certificate of seizures were signed and produced in court. The fact that the house of PW 4 was burgled was not disputed but was supported by PW 2 who inspected the locus in quo, drew a sketch plan and tendered it in court (exhibit P. 5) but also PW 4 as well as PW 3 supported the burgling of PW 4's house. There was nothing indicating that PW 1, PW 2, PW 3, PW 4 and PW 5 had any reason of concocting the evidence against the appellant and even the appellant did not suggest any reason.

As to whether the case against the appellant was proved beyond reasonable doubt, my answer is in the positive. Lord Diplock in the case of **Walter v. R** (1969) explained “*reasonable doubt as that quality and kind of doubt which when you are dealing with matters of importance in*

*your own affair, you may allow to influence you one way or the other. It can also be said that it a doubt that can be given or assigned reason as opposed to speculation."* This position was adopted by the High Court of Kenya in the case of **Humphrey WachiraKarim v. R**, Criminal Appeal No. 43 of 2018 also found in 2019 eKLR.

I agree that the case against the appellant was proved beyond reasonable doubt. I find nothing to impugn the trial court's decision which was justified according to the evidence tendered and received. I therefore endorse it.

The conviction was deserved and the sentence was within the powers of the trial Court. The appeal fails and is dismissed in its entirety.



Handwritten signature of W.P. Dyansobera in black ink.

**W.P. Dyansobera**

**JUDGE**

**25.6.2020**

This judgment is delivered under my hand and the seal of this Court on this 25<sup>th</sup> day of June, 2020 in the presence of Mr. Paul Kimweri, learned Senior State Attorney for the respondent Republic and in the presence of the appellant (virtually present in court).



Handwritten signature of W.P. Dyansobera in black ink.

**W.P. Dyansobera**

**JUDGE**

**25.6.2020**