

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

**(DODOMA DISTRICT REGISTRY)
AT DODOMA**

DC. CRIMINAL APPEAL NO. 47 OF 2019

(Original Criminal Case No. 245 of 2017 of the District Court of Singida at Singida)

ATHUMANI S/O ISSA.....1ST APPELLANT

JOHN S/O RAMADHAN @ OSCAR.....2ND APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

16/8/2021 & 26/08/2021

KAGOMBA, J

The appellants herein Athumani s/o Issa and John s/o Ramadhan @Oscar have filed their Petition of Appeal with a cumulative total of 13 grounds, eight grounds raised by Athuman s/o Issa and five grounds of appeal filed by John s/o Ramadhan, both challenging the conviction and sentence pronounced against them by the District Court of Singida at Singida (the "trial Court"). The trial Court convicted the appellants in a substitute offence of burglary instead of the offence of armed robbery which was originally preferred in the charge laid against them.

It was alleged before the trial Court that on 9/11/2017 at 2:00 am at Mwembe Mmoja area, Mtipa Ward, Unyakumi Division within the District and Region of Singida, the appellants did steal two crates of banana bear valued at Tshs. 21,000/=, two crates of safari bear valued at Tshs. 24,000/=, one take-away carton of Coca Cola valued at Tshs. 10,000/=, one carton of

Fursana drink valued at Tshs. 10,000/=; one carton of Swiss drink valued at Tshs.10,000/=, one solar battery make Sundar valued at Tshs. 117,000/=, one solar panel 50 inch make Sundar valued at Tshs. 130,000/=, three smart phones make Techno Y3 black in colour each valued at Tshs.150,000/= all total value Tshs. 450,000/= and one radio "X bass" properties of Yasin S/O Jumanne and immediately before and after such stealing did use machete to threaten one Ntandu s/o Nyoni in order to obtain and retain the said properties.

It was further alleged in the second count that the 1st appellant on the same day of 9/11/2017 at 6:00am at Mafumba area, Manga village, Mtipa Ward, within the District and Region of Singida was found in possession of one solar battery property of Yasin s/o Jumanne which is suspected of having been stolen or unlawfully acquired.

In a third count, the 2nd appellant John s/o Ramadhan together with one Helen d/o Ambrose on the 9/11/2017 at Kibaoni area, Majengo Ward within the District and Region of Singida was found in possession of one radio "Xbass" and 15 bottles of banana beer the properties of Yasin s/o Jumanne which were suspected of having been stolen or unlawfully acquired. Initially the said Helena d/o Ambrose was also charged as the third accused person alongside the 1st and 2nd appellants but wasn't found guilty.

After analysis of evidence adduced by eleven prosecution witnesses including PW1, Yasin Jumanne, the grocery owner who testified on how he found his grocery broken into and his watchman (PW2) tied up with ropes with a small piece of mattress inserted in his mouth; PW2 Ntandu Nyoni, the

watchman on duty during the incident, who testified on how he identified the appellants when they invaded him at night and tied him as well as other witnesses on how the search was done and properties found in the house of the appellant, and after considering the evidence adduced by the appellants in their defence, the trial Magistrate made a finding that the appellant had committed burglary and not armed robbery. He therefore acquitted them on the former charge and convicted them on the latter c/s 294 (2) of the Penal Code [Cap 16 R.E 2019]. He also convicted the 1st appellant on the 3rd count.

As for the offence of burglary the appellants were both sentenced to twenty (20) years in jail; on the 2nd count for the 1st appellant, he was sentenced to three (3) years in jail, and on 3rd count, 2nd appellant and one Helena d/o Daudi, who was not convicted of any offence, were both sentenced to serve three (3) years in jail.

It is against the said conviction and sentence the appellants have filed this appeal, with a total of thirteen (13) grounds in they essentially raise only one concrete ground that the prosecution side failed to prove the case against them beyond reasonable doubt.

During hearing of the appeal, the appellants appeared in person without legal representation, while the respondent was represented by Ms. Judith Mwakyusa, learned Senior State Attorney. The appellants, being lay persons, had nothing to elaborate on their petition of appeal but only prayed the Court to adopt the same as their submission on their appeal.

Ms. Mwakyusa, on her part, supported the appeal, with reasons. She firstly argued that the testimony of PW2 Ntandu Nyoni apart from testifying that he was a watchman who saw and recognized the appellants committing the offence at night by use of solar light, he fell short of describing the appellants by giving their physical description or appearance such as the clothes each was wearing. That, the witnesses also said that he didn't know the appellants before the incident. It was Ms. Mwakyusa's submission that such type of testimony was weak and not credible. To augment her point, she cited the case of **Faraji Ally Likenge vs The Republic**, Criminal Appeal No. 381 of 2016, CAT at Mtwara, available at www.Tanzalii.Org .

The learned Senior State Attorney elaborated that PW2 didn't testify on the intensity of the solar light and neither did he mention the distance between him and the appellants to appreciate if he was really able to properly recognize them under such solar light. She also cited the case of **Hamisi Yazidi vs The Republic**, Criminal Appeal No. 381 of 2015 CAT at Tabora, also available at www.Tanzalii.Org . She concluded that with such shortfalls in identification of the appellants, the ground of appeal that challenged the appellants' identification was full of merit.

Ms. Mwakyusa further submitted that the shortfalls in the identification of the appellants also weakened the subsequent identification parade. She elaborated that the person who conducted the identification parade contended that both appellants were identified by PW2. She argued that since PW2 had never described the physical appearance of the appellants anywhere before, the said identification parade lost its footing. She cited the case of **Flano Aphonce Masano @ Singu & 4 Others vs The Republic**,

Criminal Appeal No. 366 of 2018 CAT at Dar es Salaam, where from page 23 to 25 of the typed judgement of the Court of Appeal, it held: -

"It is further the law that for any identification parade to be of any value, the identifying witness (es) must have earlier given a detailed description of the suspect before being taken to the identification parade".

It was Ms. Mwakyusa's submission on this point that since PW2 didn't observe the guidance in the above cited authority, the identification was improperly done and cannot stand the test of the law.

The learned Senior State Attorney submitted her second reason for supporting the appeal being the decision of the learned Trial Magistrate to change the charge from armed robbery to burglary. She argued that, while section 300 of the Criminal Procedure Act, [Cap 20 R.E 2019] allowed substitution of conviction from a major offence to a lesser offence that is proved, the offence of burglary which the trial Magistrate convicted the appellants with, was not a lesser offence and the two offences of armed robbery and burglary were not the same.

She argued therefore that the trial Court misdirected itself in convicting the appellants on charges of burglary for which they were not given an opportunity to defend themselves. To this end, she cited the case of **Richard Estomihi Kimei & Another vs The Republic**, Criminal Appeal No. 375 of 2016, also available at www.Tanzlii.org where the Court of Appeal held that the High Court erred in law by changing the offence of rape to gang rape because the latter was not a lesser offence to rape.

Her third reason for supporting the appeal was poor identification of stolen properties. She argued that PW1-the grocery owner didn't identify the stolen properties in Court during trial. The learned State Attorney elaborated that while PW1 mentioned some marks of such properties as radio, speaker and solar battery by saying that the items had a mark "YJ", proceedings don't show that PW1 came the said mark "YJ" on those items before the trial Court. Besides, PW1 also didn't tell the trial Court about how he obtained title to such property. The learned Senior State Attorney submitted in this respect that by not proving the above marks on and title to properties, the properties were as good as they were not identified, a shortfall that should benefit the appellants. To this end, she re-cited the case of **Faraji Ally Likenge** (supra).

Yet on identification of property stolen, Ms. Mwakyusa pointed out contradiction between PW8 and PW1 in the identification of radio. She said, while PW8 testified that the radio that was found at the 2nd appellant's house was "MTech", PW1 had previously testified that the radio stolen from his grocery was "Xbase". She said that such a contradiction would make it difficult for the Court to know exactly what was found in the 2nd appellant's house.

Ms. Mwakyusa was not done. She pointed out to yet another flaw in tendering of documentary evidence. She submitted that the search warrant in respect of the search that led to the said radio to be found at the 2nd appellant's house was tendered in trial Court but was not read out as required by the law. She cited the case of **Robinson Mwangisi & 3 Others**

v Republic, [2003] T.L.R 218 for a legal position that omission to read an exhibit in Court after it was cleared for admission is a serious and incurable irregularity whose only consequence was to expunge the said exhibit from record.

Ms. Mwakyusa prayed the Court to find that there were serious contradictions in the prosecution evidence and decide the same for the benefit of the appellants.

The fourth and last reason for supporting the appeal as submitted by the learned Senior State Attorney, is that the defence of the 1st appellant was not considered in the judgment, as the 1st appellant himself stated in his ground of appeal. Ms. Mwakyusa elaborated that the typed trial Court's judgment, particularly on page 10, clearly confirmed the above complaint of the 1st appellant. She submitted that by not considering the 1st appellant's defence, the trial Court breached his right. Ms. Mwakyusa was however quick to state that the omission was curable through this Court entering into the shoes of the trial Court to consider the defence and decide accordingly. She cited the case of **Anthony Jeremia Sorya vs The Republic**, Criminal Appeal No. 52 of 2019, CAT at Dodoma. Having made this submission, Ms. Mwakyusa prayed the Court to find the appellants not guilty of the offence they were convicted with.

In this appeal, the main issue for determination is whether the appellants were properly convicted and sentenced by the trial Court. Having read the trial proceedings and judgment in the light of the powerful submission made by Ms. Mwakyusa, for once I have decided to apply the

teaching of one renowned advocate, the late Alhaj Yusuph Ahmed Mchora, who used to teach his disciples that "*the best economy is the economy of words*".

Since Ms. Mwakyusa has made such a powerful submission in the support of the appeal, and since she has demonstrated her points with support of relevant case law, which I have personally read and appreciated to be applicable to the points raised in this appeal, and since she has demonstrated that the appellants were not properly identified by PW2 who was the only eye witness being the watchman at the grocery, and since there were poor identification of the property allegedly found in possession of the appellants, among other conspicuous shortfalls in the trial proceedings, I agree with the submission of Ms. Mwakyusa in its entirety.

It is therefore my finding that the case against the appellants was not proved beyond reasonable doubts as complained by both appellants in their respective petitions of appeal. Accordingly, the appeal is allowed. The conviction and sentence are respectively quashed and set aside. The appellants should be set to enjoy their liberty forthwith unless held for some other lawful reasons. Ordered accordingly.

Dated at Dodoma this 26th day of August, 2021.




ABDI S. KAGOMBA
JUDGE