

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(IN THE DISTRICT REGISTRY AT KIGOMA)**

**(APPELLATE JURISDICTION)**

**CRIMINAL APPEAL NO 38 OF 2020**

(Original Criminal Case no 134/2018 of Kibondo District Court, before Hon. M.P.  
Kamuntu - RM)

**IDRISA YAHYA @ HAYANITISHI..... APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

11/2 & 25/2/2021

**I.C. MUGETA, J.**

The appellant was convicted of the offence of shop breaking contrary to section 294 (1) (a) (2) and 297 of the Penal Code [Cap. 16 R.E 2002]. Consequently, he was sentenced to five years jail imprisonment. He is aggrieved and he challenges both the conviction and sentence on a petition of appeal containing five grounds of appeal. These grounds of appeal are clear but I shall try to reproduce them in a manner which makes sense as hereunder: -

- i. That he was arrested at the scene of crime as passerby.*
- ii. That he was forced to confess committing the crime.*



- iii. That the charge was fabricated against him out of ill will.*
- iv. That the evidence of PW1 and PW2 is hearsay.*
- v. That the prosecution failed to prove the charge beyond reasonable doubts.*

I shall determine these complaints by considering the fifth ground of appeal under the issue whether the charge was proved beyond reasonable doubts. Other grounds shall be determined as sub issues constituting reasons for the decision I shall reach.

The appellant appeared in person. Antia Julius, learned State Attorney, appeared for the respondent and she opposed the appeal. In his submission, the appellant argued generally and insisted that the case against him was fabricated by his mother in order to imprison him so that she can sell the land left by his deceased father. He was just a passerby at the scene of crime. On her part, Antia learned State Attorney, dealt with one ground after another. On the first ground she argued that the appellant was arrested by PW1 and PW2 having broken into the shop not as a passerby. She submitted on the second ground that the appellant made the confession at the police station while civilian assaulted him at the scene of crime. Therefore, she argued, at that time when she made the confession there was no active threat for his safety and life.

Regarding the third ground, she submitted that there is no evidence that either PW1 or PW2 who arrested the appellant had any interest in the case to the extent of testifying falsely against him and the allegation against his mother is afterthought as it does not feature in the proceedings. She submitted regarding the fourth ground that the evidence of PW1 and PW2 is direct evidence and not hearsay. The learned State Attorney concluded that the evidence on record proved the case beyond reasonable doubts as the appellant was arrested ready handed.

The facts of the case are that on 11/4/2018, the appellant was arrested by Enock Bryton (PW1) and Malingumu William (PW2). These are watchmen who guards at the Kibondo District hospital. At a distance of about 50 meters from their work place, is a shop of Camillius Kalikala (PW3). Their evidence is that on the incident date at 03:00 hours, they heard unusual sounds from the direction of PW3's shop. Out of curiosity, they pursued the sound. They found the door of PW3's shop having been broken as the two padlocks which were tendered as exhibits PW3 and PW4 had been cut by a person who had entered into the shop. Thereat, was also two breaking instruments, namely, a bent iron bar and a cold chisel (Tindo). Consequently, PW1 and PW2 locked the door from outside. The person who was inside used a bench to break

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the door and on getting outside he was arrested. He turned out to be the appellant. PW1 informed PW3 and the police who came and took away the culprit after he had been assaulted by civilian who responded to a theft yell. At the Police Station, H.830 DC Emmanuel recorded the appellant's caution statement on 13/4/2018. The same was tendered as exhibit P5 without objection from the appellant.

As a first appellate court, I am entitled to reevaluate the evidence to make my own conclusion. To start with the caution statement (exhibit P5) was illegally recorded. The evidence is clear that the appellant was arrested on 11/4/2018 and the statement was recorded on 13/4/2018. According to section 50 (1) (a) of the Criminal Procedure Act [Cap. 20 R.E 2019], the period available for interviewing a person is four hours commencing from the time when he was taken under restraint. There is no explanation for the delay and evidence illegally obtained is inadmissible. On that account I hereby expunge exhibit P5 from the record.

Expunging from record exhibit P5 notwithstanding and as argued by the learned state attorney, PW1 and PW2 are witnesses without any interest in the case. They arrested the appellant ready handed having broken into PW3's shop. Their evidence is direct evidence and they are reliable witness.

His evidence that he was a passerby, I find, is false. Here in court the appellant blamed his misery to sour blood with his mother. However, this allegation does not feature in his evidence at the trial. For that reason, I am entitled to treat his claim as an afterthought. On being forced to confess, this complaint has become irrelevant after I expunged from the record the caution statement. It in my view that the charge was sufficiently prove and the appellant was rightly convicted. The sentence was proper too.

In view of the foregoing the appeal is dismissed.



  
**I.C. Mugeta**

**Judge**

**25/2/2021**

**Court:** Judgment delivered in chambers in presence of the appellant and in the presence of Miss Antia Julius State Attorney for the respondent.

**Sgd: I.C. Mugeta**

**Judge**

**25/2/2021**