

IN THE HIGH COURT OF TANZANIA

IN THE DISTRICT REGISTRY

AT MWANZA

PC. CRIMINAL APPEAL NO. 13 OF 2021

(From the decision of the District Court of Ukerewe District in Criminal Appeal No. 30 of 2020 and Criminal Case No. 81 of 2020 in the Primary Court of Ukerewe at Nasio)

SADICK HALIDAPPELLANT

versus

BAHATI BWIRE RESPONDENT

JUDGMENT

9th & 18th August, 2021

RUMANYIKA, J.:

The 2nd appeal is with respect to the charges of burglary and stealing Contrary to Sections 293 and 294 of the Penal Code against conviction and the concurrently running custodial sentences of seven years for each count meted on Sadick Halidi (the appellant) on 7/5/2020 much as, in its decision Ukerewe district court (the 1st appeal court) having had upheld the conviction and sentence on 18/2/2021. The particulars of the offence would read that the appellant did on 1/1/2020 at about 18:00 hours at Nakatunguru Ukerewe district steal a mattress valued at shs. 160,000/=, three pieces of kitenge (30,000/=), three gowns (95,000/=) and a jacket

valued at shs. 20,000/=hence a grand total of shs. 305,000/= the property of Bahati Bwire.

The 6 grounds of appeal revolved around and they could boil down to four (4) points essentially;

- (i)** That the respondent's case was not proved beyond reasonable doubts merely fabricated.
- (ii)** That the appellant was wrongly charged because he was improperly identified.
- (iv)** That the burden of proof was improperly shifted to the accused / appellant.

The parties appeared in person. By way of audio teleconference I heard them through mobile numbers 0735 828 292 and 0658 015 944 respectively.

In a nutshell the appellant submitted; (a) that Pw2 was not reliable much as she did not properly identify him and it defeated both common sense and logic that just at the scene of crime the appellant did introduce himself to her (b) that although there was neither a copy of search warrant

nor a certificate of seizure tendered in court as exhibit but only his mattress during the search just discovered and seized. That is all.

The respondent submitted that the appellant whom she knew before tenant of sm2 was properly identified one having had run away with the mattress but shortly came back for his bicycle that through a hole as special mark she identified it being her mattress.

Questioned by court for more clarity, the appellant stated that he was arrested on 27/4/2020 at Songambe area, Ukerewe district.

The evidence on record reads as follows: -

Sm1 Bahati Bwire stated that as she was on safari at Bunda, but just the incident having had been reported to her she rushed back home and noticed that indeed her house had been burgled and property stolen.

Sm2 Bituro Mashauri stated that as at the material time was just out for natural call, at the scene of crime she identified the appellant with the mattress but the latter ran away leaving a bicycle behind. That they reported the case to the local cluster chair and accordingly handed over the bicycle.

Sm3 Aidan Romanus stated that following the incident, as, together fellow policemen on 27/4/2020 at about noon they knocked at the appellant's door but the habitual offender appellant refused to let them in, in the presence of the local leaders the policemen forcefully broke into, and, on search they discovered the respondent's missing mattress (exhibit "P1"). That is all.

Su Sadick Halid (the appellant) stated that as he was in bed, but Sm3 and others having had stormed in, he suspected them therefore could not have let them in, in the absence even of the local cluster chair the latter just broke into. That on search they seized his mattress (Exhibit "P1") now alleged the respondent's property that he was arrested on 27/4/2020. That is all.

The central issue is whether Sm3 properly identified the appellant. The answer is respectfully no because; **(i)** Sm3 may have seen and identified the appellant on the spot yes, but in the absence of evidence to show that that for the previous three months ie until 27/4/2020 the appellant had been named and looked after but he remained at large, the possibilities that his arrested therefore charges were but after thought could not be ruled out **(ii)** Even when we assumed, basing on the mattress

story the appellant was convicted on the doctrine of recent possession, the respondent could not have been said that she worth the name identified the mattress being hers because the appellant did not, through copy of a cash receipt prove title or have the alleged Msukuma the lender in court just as the complainant did not meet the long established threshold inter alia namely; **(a)** the mattress had recently been stolen (given the lapse of 3 months) **(b)** that the mattress exclusively belonged to her **(c)** that really the mattress was, with respect to the incident the very one (see the case of **Joseph Mkubwa & Another v.R**, Criminal Appeal No. 94 of 2007 (CA) unreported much as neither a copy of the certificate of seizure nor the alleged appellant's bicycle if at all in the process seized was produced in evidence in court. It is very unfortunate that the burden of proof was improperly shifted to the appellant.

As a mitigating factor, the appellant may, or may have not been a habitual offender because when, if at all in which cases and proceedings he had been convicted and probably sentenced, the records were silent much as unlike what the 1st appeal court magistrate found and held, with regard to the mattress actually the appellant muted and or he also claimed title whether or not he did not prove title it was immaterial sufficed his evidence

to shake the respondent's claims. The issue of the appellant's failure to cross examine it was neither here nor there. It follows therefore that with greatest respect the case of **Cyprian A. Kibogoyo v.R**, Criminal Appeal No. 88 of 1992 (CA) unreported was distinguishable. Grounds 1,2, 3 and 4 and therefore the entire appeal is allowed.

With regard to the custodial sentence however, I would comment on the copy of Receipt S/N 364497 issued on 7/5/2020 by the Tanzania Prisons Service Ukerewe which one, contrary to judgment it raised it to 12 (twelve) years in jail. Now that it was neither a commitment warrant nor equivalence of, the same shall have no legal effects. The conviction and sentence are quashed and set aside respectively. The mattress (Exhibit "P1") is forfeited to the Republic. It is so ordered. Unless he was otherwise legally held further, the appellant be released from prison immediately.

Right of appeal explained.



S. M. RUMANYIKA
JUDGE
16/08/2021

The judgment delivered under my hand and seal of the court in chambers this 18/08/2021 in the absence of the parties.



S. M. RUMANYIKA

JUDGE

18/08/2021