

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

**(SONGEA DISTRICT REGISTRY)**

**DC CRIMINAL APPEAL NO 10/2021**

**(Originating from the District Court of Mbinga in Criminal Case No.  
136/2020)**

**STANLEY ODDO TILIA ..... APPEALANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Date of Last Order: 09/08/2021**

**Date of Judgment: 18/08/2021**

**BEFORE: S.C. MOSHI, J.**

The appeal was not contested. The appellant was arraigned before the District court of Mbinga for the offence of House breaking contrary to section 294 (1) (a) (b) of the Penal Code Cap. 16 R.E 2019 for the first count and stealing contrary to section 258(1) and 265 of the Penal Code Cap. 16 R.E 2019. It was alleged that on 19<sup>th</sup> day of August 2020 during day time at Bethrehemu street within Mbinga District in Ruvuma Region the appellant did break and enter a dwelling house of one David Masauli Sylvanus with intent to commit an offence therein namely theft. On the second count it was alleged that on 19<sup>th</sup> day of August 2020

during day time at Bethlehemu street within Mbinga District in Ruvuma Region after breaking and entering a dwelling house of one David Masauli Sylivanus did steal therein one Television set make Aborder Flat screen 43 inch valued at Tshs. 650,000/= one mattress make Dodoma 8.5\*6 inch valued at Tshs. 215,000/= one mobile phone with black colour valued at Tshs. 25000/= all properties its total value was Tshs. 890,000/= the property of David Masauli Sylivanus. After a full trial the appellant was found guilty of the second count only. Consequently, he was sentenced to two years imprisonment and was ordered to pay compensation of T.shs. 900,000/= to the victim. Aggrieved by the conviction and sentence he has appealed to this court on the following grounds: -

- 1) That, the trial court erred in law and fact to convict the appellant without the case being proved beyond all reasonable doubt as required by law because there is no good evidence to prove who handled or put properties outside where they were taken by the accused person through the motorcycle.*
- 2) That the learned Honorable Magistrate erred in law and fact in basing the appellant conviction on the evidence which was not well adduced the witnesses due to inconsistency evidence of PW1 and Pw2 on the issue of door whether it was opened or broke by the appellant.*



*3) That the learned trial Magistrate erred in law and fact by denying the victim defense of alibi without giving the opportunity to prosecution side to prove the case beyond all reasonable doubt that the accused was at the scene of crime.*

*4) That the exhibit which was produced before the court of law was not current receipt of EFD machines rather than ordinary receipt which shows that this case was forgery one to incriminate the appellant with this offence.*

At the hearing of the appeal the appellant appeared in person whereas the Republic was represented by Mr. Emmanuel Barigila, State Attorney who supported the appeal.

The appellant has nothing to add to the grounds of appeal.

Mr. Barigila supported the appeal solely on the first ground that the case was not proved beyond a reasonable doubt since important witnesses, who were indicated by PW1 were not called. He submitted that PW1 at page 6 of the typed proceedings said that when he found that the door of his house was broken, the neighbors told him that a person in a motorcycle took the goods away but the said neighbors were not called to verify that.

He said that, there is doubt on the identification of the appellant. PW1 said that a worker in a bus which the accused was a passenger took a photograph of the accused and send it to the victim was not

called and the said photographs were not brought to court, hence this piece of evidence is doubtful.

Furthermore, he said that there was no evidence regarding accused's arrest. It is only shown that the accused is in court.

Lastly, he said that the evidence of PW1 and PW2 is contradictory. PW1, at page 7 of the proceedings said PW2 knew PW1's home while PW2 stated that he did not know if that house was PW1's home.

The issue to be determined is whether this appeal has merits.

Starting with the first ground that the prosecution side did not prove the case beyond a reasonable doubt; as rightly conceded by Mr. Barigila the case was not proved to the required standard. First, I have noted that the victim tendered receipts which show that he was the owner of the stolen properties, the receipts were admitted by the court as exhibit P1. After their admission the same was not read in court so as to help the appellant to know their contents and prepare his defence. In the case of **Mbagga Julius vs. Republic**, Criminal Appeal No. 131 of 2015, the Court of Appeal sitting at Mwanza (Unreported), it was held that failure to read out the documentary exhibits after its admission renders the said evidence contained in that documents, improperly admitted and should be expunged from the records. Therefore, since exhibit P1 was not read after its admission is expunged from the record.



Having expunged them from the record there is no evidence supporting that the stolen property belonged to the victim.

I subscribe to Mr. Barigila's submission that crucial witnesses were not called to testify, these are neighbors who saw the appellant taking the victim's properties. It is settled law, as stated in the case of **Aziz Abdallah vs Republic** (1991) TLR 71 that the court is entitled to make adverse inference against the prosecution if they fail to call an important witness who could have proved an important issue which is left unproved, if that witness was within reach and was not called without reason. The prosecution failed to call the victim's neighbors who could have probably proved these important facts. I thus find that failing to call the neighbours did negatively affect the prosecution's evidence.

Again, the worker who allegedly was in a bus in which the appellant was a passenger who photographed appellant was not called to testify. Equally, PW1's testimony that the appellant was in Makeo Bus is rendered to a hearsay evidence which is inadmissible in court, worse still the photographs which were taken were not tendered in court.

There is also a complaint that there is contradiction in evidence adduced by PW1 and PW2. I also agree with Mr. Barigila that the contradictions affects the prosecution's evidence negatively, they go to the root of the case. It is a trite law that where evidence is inconsistent

or where it is contradicted it cannot be relied upon. See the case of **Mohamed Said Matula vs. R** [1995] TLR 3 and **Awadhi Ramadhani Waziri vs R**, Criminal Appeal No. 303 of 2014 Court of Appeal at Mtwara (unreported). PW1 testified that PW2 knew his home while PW2 denied that fact. In the case of Mohamed Said Matula it was held thus: -

*"Where the testimonies by witness contain inconsistencies and contradictions, the court has a duty to address the inconsistencies and try to resolve them where possible else the court has to decide whether the inconsistencies are only minor or whether they go to the root of the matter. If they go to the root of the matter they have to benefit accused."*

Having discussed as I did, the first and second grounds of appeal are disposed of.

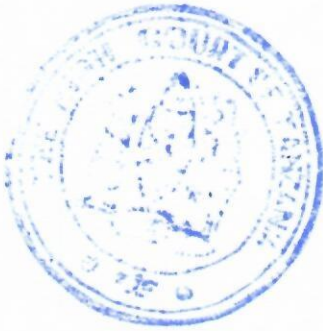
All in all, this suffices to dispose of the appeal.

That said and done, the appeal has merits and is hereby allowed. In the end I find that the case was not proved on the required standard. The conviction entered by the trial court against the appellant is quashed and the sentence is set aside. Consequently I order the appellant to be released forthwith unless there are other lawful reasons

for detaining him in prison, and the compensation order is hereby set aside accordingly.

It is so ordered.

Right of appeal explained.



  
**S.C. MOSHI**

**JUDGE**

**18/8/2021**