

IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

CRIMINAL APPEAL NO. 29 OF 2021

(Originating from Newala District Court in Criminal Case No,53 of 2020)

ISMAIL HAMISI MDELYA..... APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of Last Order:27/4/2022

Date of Judgment: 13/07/2022

LALTAIKA, J.

ISMAIL s/o HAMISI MDELYA "the appellant" was arraigned in the District Court of Newala (the trial court) charged with on two counts: 1. Burglary contrary to section 294(1)(2) of the Penal Code Cap 16 RE 2019 "the Penal Code" and 2. Stealing contrary to section 258 and 265 of the Penal Code.

At the trial court, the charge was read over to the appellant and the particulars of the counts explained as required by law. When he was invited to plead, the appellant denied having committed any of the offences. Needless to say, a plea of not guilty was entered against the appellant.

Consequently, and the court was duty bound to conduct a full trial to allow the prosecution to prove the allegations leveled against the appellant beyond reasonable doubt as required by law.

At this juncture, a brief glimpse on the facts as can be gleaned from the trial court's records is considered imperative. It was the prosecution's case that on 30th May 2020, one ISMAIL s/o HAMISI MDELYA, (43 years old, by then, when he was arrested) resident of Luchingu a village located in Newala District, Mtwara, did break into the house of one RASHIDI KALIANI LEMU whereupon he stole a Television [set] make Zola 24 inches, and a battery make RITA both valued at TZS 550,000. It was the prosecution's case further that the incident happened in the night hours approximately 02:00 AM.

According to the records available, it was one Nasibu Fadhili Mawazo, (who later testified as PW2) 17 years old (by then) Form Four student who saw the appellant carrying a plastic bag. Moreover, PW2 allegedly heard a strange noise that sounded like someone pouring water into a bucket. PW2 (allegedly) raised an alarm waking up his uncle Rani Rashidi Lemu (PW4) a 31 years-old (by then) secondary school teacher who was sleeping in a room nearby. The two, allegedly, chased down the appellant and managed to arrest him. The duo claimed further that before they arrested the appellant, he dropped down a plastic bag, popularly known as "kiroba" and that upon opening it up, they found a TV set and a battery that allegedly belonged to Rashidi Kelyahi Lemu (PW1) owner of the house that had been broken into.

After arresting the appellant, PW2 and PW4 claimed, they took him along with the bag containing the TV and battery, to the house of PW1, the victim of the alleged crime. PW1 (allegedly) reported the arrest to one Hamza Ahmadi Bakari, (PW5) a 28 years old Village Executive Officer (VEO) for Mchangani Village who in turn took the appellant to Newala Police Station for further actions.

The lower court's records inform further that at the Newala Police Station, the appellant was received by E. 731 SGT Justus Bona Francis (PW6) who allegedly conducted physical search and found the appellant had hidden in his jacket 16 keys (15 of which suspected to be motorcycle keys) one key pad, one screw driver (commonly referred to as *bisibisi*) two shovels, one [piece of] scissors and one rope.

PW6 allegedly filled in a certificate of seizure which certificate the appellant refused to sign. One G. 8999 P/C Daudi Athumani Niga, then exhibit keeper at Nachingwea Police Station, was entrusted with all these exhibits [including the TV set and battery) upon signing the Police Form (PF) 51. He later testified as PW7. The trial lasted from 11/06/2020 when the accused was arraigned in court to 28/01/2021 when the judgement was delivered.

Having been convinced that the prosecution had proved its case beyond reasonable doubt as required by law, the learned trial Magistrate A.M. BUSHIRI convicted the appellant as charged and sentenced him to serve a jail term of five years' imprisonment for the first count and three years' imprisonment for the second count. The appellant is dissatisfied and

aggrieved by both conviction and sentence hence this appeal. He has lodged this appeal vide a petition of appeal comprising of six grounds which I take the liberty to paraphrase them as follows: -

1. *That, the prosecution side did not prove its case beyond reasonable doubt.*
2. *That, the trial court has failed properly to examine, evaluate and analyze evidence on record.*
3. *That the trial court erred in law and in fact by convicting and sentencing the appellant as it did, basing on unreliable evidence.*
4. *That, there is no watertight evidence of the appellant identification.*
5. *That, PW2 simply said there was solar light or simply light without any attempt to elaborate on the intensity of the light because solar panel/lamps produce light of different intensities.*
6. *That the manner in which the proceedings at the trial court were conducted, was irregular or/and improper.*

When this appeal was called for hearing on 27/4/2022, the appellant appeared in person, unrepresented while the respondent Republic was represented by Mr. Wilbroad Ndunguru, learned Senior State Attorney.

In his submission, the appellant, with a disclaimer that he was not learned in law, narrated, at some considerable length, the background of the matter. He submitted that it all began on 28/5/2020 at 8:30 in the night, when he was going to sell cooking oil to his customers at Mchangani village. On his way to the village, the appellant narrated, he met some people coming from

watching soccer on a public TV. They asked him what he was carrying to which he replied that he was carrying cooking oil and was taking [some of it] to a customer. The appellant was allegedly told that he was suspected to be a foreigner. He was arrested and ended up at Newala Police Station where he stayed for a long time. He allegedly demanded to be taken to court and on Monday 11/6/2020 he was arraigned in Newala District Court. A charge on Burglary and Stealing was read over to him as alluded to above.

It was the appellant's submission further that he had denied the charge and, he claimed, the police did not record any personal statement against him. The appellant narrated further that during trial, a total of seven prosecution witnesses were summoned. Four (4) out of the seven witnesses, the appellant claimed, were members of the same family; a father, son, grandson and an uncle.

It is the appellant's submission further that he cross examined the witnesses including PW1 who had claimed that he had bought the items out of his own pocket. The appellant asserted that PW1 gave contradictory figures on the prices of the TV and battery and he was unable to produce a receipt to prove ownership.

Finally, the appellant prayed that this court adopts his petition of appeal and the grounds therein as a part of his in-depth submission.

It was time for the respondent. In response, Mr. Wilbroad Ndunguru, learned Senior State Attorney submitted that he was in support of the conviction and sentence meted by the trial court against the appellant. The learned State Attorney alluded that he was going to merge the first, fourth

and fifth grounds of appeal in his submission as, he asserted, they were all centered on faulting the trial court on the proof of the case beyond reasonable doubt as well as identification.

The learned Senior State Attorney argued that on the first count of burglary which is contrary to section 294(1) and (2) of the Penal Code [Cap 16 R.E. 2019] the ingredients of the offence are one, there must be residential premises. Two, the house has to be broken into. Three, the event took place during the night. He stressed that the evidence shows that the incidence took place at 2:00 am.

Regarding the second count, Mr. Ndunguru argued that [in law] stealing is established where property capable of being stolen is taken away by an accused adding that in the legal jargon such a process is referred to as asportation.

Linking the above legal exposition to the present case, the learned Senior State Attorney argued that there was sufficient evidence to show that the appellant had broken into the house of one RASHIDI KALIANI LEMU, stole the items therein namely TV make Zola 24 inches as well as battery make RITA.

Mr. Ndunguru submitted that as per the grounds of appeal, he was inclined to determine if there were any chances of a mistaken identity. It is the learned Senior State Attorney's submission that there was no any mistaken identity. This is because, the learned counsel reasoned, since the appellant was chased down until he was caught, the manner in which he was apprehended did not provide room for any mix up of people. To bolster

his argument, Mr. Ndunguru referred this court to the case of **Nikas Desdery @Oisso vs Republic**, Criminal Appeal No.18 of 2013 at page 11 CAT-Arusha.

It is Mr. Ndunguru's submission that since the appellant was chased down and the items that he had stolen were returned to the homestead of the victim, the identification of items as to whether they belonged to the victim was no longer an issue. To that end, the learned Senior State Attorney concluded that the 1st, 4th and 5th grounds of appeal had no merit and prayed that they are dismissed.

Moving on to the 2nd and 3rd grounds of appeal, the learned Senior State Attorney opined that they were related as they both touched upon analysis of evidence and credibility of witnesses. It is Mr. Ndunguru's submission in relation to these grounds that there was no issue on reliability of the witnesses because PW2 and PW4 were eye witnesses. The learned Senior State Attorney stressed that even in their evidence, their testimony was not shaken because they were eye witnesses. Moreover, the learned Senior State Attorney contended, in his defence the appellant raised issues that were not related to the charge.

Citing examples from the proceedings of the trial court, Mr. Ndunguru submitted that although the charge was on 30/5/2020 the appellant's defence was centered on what happened on 28/6/2020. Mr. Ndunguru thinks these are days totally apart and that is why the court couldn't possibly consider the defence because it was not relevant.

It is Mr. Ndunguru's submission that the appellant did not assist the court in understanding his defence. The learned counsel is of the view that the trial court could suspect that the appellant wanted to raise the defence of alibi but still it was improperly raised.

It is Mr. Ndunguru's submission further that the trial court had analyzed the evidence and was convinced that the direct evidence of PW2 and PW4 were sufficient to warrant conviction. He prayed that the two grounds be equally dismissed.

On the last ground of appeal namely ground number six, Mr. Ndunguru reminded this court that the appellant had complained that the trial court's proceedings were marred with irregularities. It is Mr. Ndunguru's submission that he has gone through the proceedings and could not see any defect. To this end, it is the learned Senior State Attorney's prayer that all the grounds be dismissed and, consequently, the entire appeal likewise be dismissed with its entirety for lack of merit.

In a brief rejoinder, the appellant stressed that as per his grounds of appeal, he believed he had argued his appeal and prayed this court to set him free. He quickly pointed out that according to [the legal] procedure he was supposed to be taken to the police station with the stolen items right away.

Having dispassionately but keenly considered the grounds of appeal, record of the trial court and rival submissions by both parties the main issue for my consideration is whether the appeal has merit. To this end, I will move

straight to the first ground of appeal which I consider capable of disposing of the appeal in its entirety.

The appellant has raised a complaint that the prosecution case has not been proven beyond reasonable doubt as required by law. In dealing with this ground, in addition to weighing the revival submissions of either side, I have also taken the liberty to review the evidence adduced in the lower court. As the first appellate court, I am empowered to re-evaluate the entire evidence on the trial court record by reading and subjecting it to a critical analysis and where need arise reach to my own findings and conclusions of the facts. **See, D.R. Pandya v Republic (1957) EA 336.**

Having gone through the lower court records as alluded above, it does not take much thought to realize that indeed, the case has not been proven beyond reasonable doubt as required by law in spite of the zealous attempts by the learned Senior State Attorney to convince me otherwise.

It is trite law that the prosecution is not only obliged to prove that a crime has been committed but also that the accused person is the one who has committed it. In this case, the prosecution has proved neither of these. The manner in which the appellant was arrested by a 17-year-old secondary school student leaves a lot to be desired.

I beg to be excused for being overtly critical but having tirelessly gone through the records of the lower courts I find this one of the most poorly investigated and prosecuted cases that has come to my chamber so far. Apparently, the prosecution had asserted that the appellant (a 47-year-old man) while being chased down by a 17-year-old student in the night,

dropped down a bag containing a TV set and a battery. This does not sound convincing to me. Since the TV set was not described anywhere in the proceedings, nor was its condition before and after it was dropped down by the appellant (allegedly) on the run, I find it a fabricated story to say the very least.

I wish to state with the same emphasis that although the learned Senior State Attorney attempted to convince this court that the trial court had failed to grasp the appellant's defence, it is trite law in our jurisdiction that conviction in criminal cases must be based on the strength of the prosecution case and not the weakness of the defence see **Christian Kale and Rwekeza Benard v. Republic [1992] T.L.R. 302**

All said and done, I find this ground capable of disposing off the appeal on merit. To this end, I allow this appeal in its entirety. The conviction of the appellant is hereby quashed and the sentences of five years' imprisonment for the first count and three years' imprisonment for the second count of is set aside. The appellant is to be released forthwith from prison, unless otherwise lawfully held.

It is so ordered

E.I. LALTAIKA

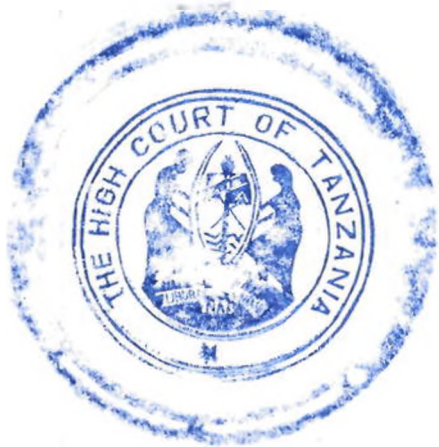


JUDGE

13/7/2022

Court:

This Judgment is delivered under my hand and the seal of this Court on this 27th day of June,2022 in the presence of the Mr. Wilbroad Ndunguru, the learned Senior State Attorney and appellant who has appeared unrepresented.



E.I. LALTAIKA

E.I. Laltaika
JUDGE

13/7/2022

Court

The right to appeal to the Court of Appeal of Tanzania fully explained



E.I. LALTAIKA

E.I. Laltaika
JUDGE

13/7/2022