

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
AT SHINYANGA**

CRIMINAL APPEAL NO. 6 OF 2022

(Original Criminal Case No. 62/2019 from Bariadi District Court)

MADUKA S/O MASALA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGEMENT

12th August, 2022

A. MATUMA, J;

The appellant was charged and convicted of two offences Burglary contrary to section 294 (91) (a) and (2) of the Penal Code, and Stealing contrary to section 258 (1), (2) (a) and 265 of the same Code, Cap. 16 R.E. 2002.

He was alleged to have in cooperation with two others entered in the dwelling house of Eliud Mashauri Elias and stole one Television Flat screen make LG 55 inches on the night of 9th March, 2019.

The incident is reported to have been committed at Nyamikoma village within Busega District in Simiyu Region.

After a hearing of the prosecution case and the trial Court to have ruled that the appellant and his fellow had a case to answer, the appellant and another absconded and thus did not enter their defence.

Judgment in absentia was thus entered and a conviction entered whereas the appellant was sentenced to serve ten (10) years

On my party, I entirely agree with M/S Edith Tuka learned State Attorney that the prosecution case was not proved to the required standard. Starting with the Cautioned Statement exhibit P4, it is true that when PW3 prayed to tender it in evidence, the appellant in clear words repudiated it;

"I have objection as that statement was not written by me. It was written by PW3....Also if I have admitted the offence I was supposed to be taken to the Justice of the peace..."

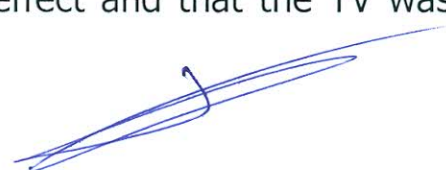
Under those words the appellant was repudiating to have the made statement at all.

In the circumstances, it was necessary to conduct an inquiry as it was held in the case of **Nyerere Nyague v. The Republic, Criminal Appeal no. 67 of 2010.**

The trial Court however did not do so, it proceeded to overrule the objection and admit the cautioned statement in evidence. That was wrong and as rightly submitted by Edith Tuka learned State Attorney, the statement is liable to be expunged as I hereby do.

In the absence of the Cautioned statement there is no any remaining evidence which links the appellant to the stolen TV because no body witnessed the stealing and the appellant was not found in possession of such TV.

The one who was found in possession of the same was the 3rd accused who justified the possession as an electronic technician who has business licence to that effect and that the TV was brought to him for maintenance.



imprisonment term for the first count and seven (7) years imprisonment term for the second count.

Upon his arrest and committal to prison to serve his sentence, the appellant has preferred this appeal mainly on the ground that the prosecution case was not proved beyond any reasonable doubts against him.

At the hearing of this appeal, the appellant appeared in person while the respondent was represented by M/S Edith Tuka learned State Attorney.

The learned State Attorney who started to address the Court at the option of the appellant supported the appeal. She argued that the prosecution evidence was not enough to warrant the conviction of the appellant.

She first attacked the validity of the cautioned statement which was admitted without an inquiry despite the clear record that the appellant repudiated it. She asked this Court to expunge such exhibit.

She also argued that the alleged stolen TV was found in possession of the third accused one Lazaro Gidion Mgimba but the said accused who did not deny to have been found with the TV, did not identify the appellant as the one who brought the TV to him. Instead, he named another person who was not arrested or charged.

The learned State Attorney also faulted the purported identification of the stolen property.

The Appellant had no more than joining hands with the learned State Attorney.

This accused did not identify and name the appellant as the one who brought the TV to him. He was clear that the one who brought the TV to him was not the appellant.

The appellant stand incriminated by suspicious of the victim PW, one Eliud Elias Mashauri who after the stealing he started phoning here and there and he was told that two short men were seen carrying the TV. With such information he suspected Maduka the appellant herein as he himself testified at page 19 of the proceedings;

"From the description I noted that it was Maduka. On 23/03/2019 I saw Maduka. I called police who arrested him."

These suspicions are the only incriminating facts against the appellant which in law do not stand. It is the law that suspicions however strong or however grave are not evidence to warrant any conviction. See among other cases; **Hakimu Mfaume v. Republic (1984) TLR 201.**

With the herein observations, I find that this appeal has been brought with sufficient cause, I accordingly allow it.

The conviction of the appellant in both counts are hereby quashed and the sentences thereof set aside.

I order his immediate release from custody unless held for some other lawful cause.




A. MATUMA
JUDGE
12/08/2022