

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

**(SONGEA DISTRICT REGISTRY)**

**AT SONGEA**

**DC. CRIMINAL APPEAL NO. 6 OF 2023**

*(Originating from Nyasa District Court in Criminal Case No. 30 of 2022)*

**ESSAU JANKEN KATAMBALA @ TANGU ..... APPELLANT**

**VERSUS**

**THE REPUBLIC ..... RESPONDENT**

**JUDGMENT**

Date of Last Order: 27/04/2023

Date of Judgment: 05/05/2023

**U. E. Madeha, J.**

It is worth considering that, before the District Court of Nyasa the above-named Appellant was charged with two counts. The first count was burglary contrary to section 294 (1) (a) and (2) of the *Penal Code* (Cap. 16 R. E. 2022) and the second count was stealing contrary to sections 258 (1) and 265 of the *Penal Code* (Cap. 16, R. E. 2022). After a full Trial the accused was convicted and sentence on both counts. He was sentenced to serve fifteen years imprisonment for the first count and seven years

imprisonment for the second count. The sentences were ordered to run concurrently. Aggrieved by both convictions and sentences given by the Trial Court, the Appellant has knocked the doors of this Court for appeal.

In albeit briefly, the prosecution case was to the effect that; the complainant one Janken Katambala (PW1), is the biological father of the Appellant. It seems to be true that, they were living in the same house at Tambachi area in Zambia Hamlet, Mbambabay Village within the District of Nyasa and Ruvuma Region. Principally, it was alleged that on the 8<sup>th</sup> day of December, 2022, at around 18:00 hours, the Appellant returned back at the complainant's (PW1) house. Upon his arrival he met PW1 who was accused of committing chaos by pouring bath water on the door, pouring such water on a small mattress which the complainant used to have a daytime nap outside his house.

To add to it, the Appellant stood on the door of his father's house and threatened anyone entering inside the house of the complainant and he insulted his sisters for being so proud. In that case, the complainant reported the matter to the Police Station. Before departing at his house, the complainant's (PW1) son (Appellant) collected the small mattress which the complainant used to have a daytime nap and thrown it to him. When

PW1 was returned back to his home from the Police Station, he entered into his room and discovered the padlock on the door is broken. He found the broken padlock and his mattress made Tanform (5x6 feet) was missing in his house. The Appellant was not found. He was nowhere to be seen.

According to PW2's testimonies; around 20:00 hours on 8<sup>th</sup> December, 2022 while he was preparing dinner with her mother the Appellant arrived at their house carrying a mattress (5x6 feet) which has a black and yellowish colour. In fact, they were told that the Appellant was selling the mattress for an amount of TZS. 50,000 and they told him that they had no money. Then the Appellant departed from their house with the mattress. The mattress purchase receipt was received during trial and admitted as an exhibit P1, the mattress itself was received as exhibit P2 and the certificate of seizure was received in evidence as exhibit P3. During trial, DW2 was charged for an offence of possession of goods suspected to be stolen or unlawfully acquired contrary to section 312 (1) (d) of the *Penal Code* (supra) and admitted to have purchased the mattress from the Appellant. He was convicted and committed to serve community service for a term of three years.

Notably, at the end of the trial the Appellant was convicted and sentenced on both counts. For the offence of burglary, he was ordered to serve fifteen years imprisonment and for the offence of stealing to serve seven years imprisonment. The sentences were ordered to run concurrently. In this appeal, the Appellant in his memorandum of appeal raised three grounds of complaint, which are as follows:

- 1. That the Trial Court erred in law to convict the Appellant while the prosecution failed to prove the offences he was charged beyond reasonable doubt as required by the law.*
- 2. That the Trial Court erred in law and in fact to convict the Appellant while the prosecution did not prove the case of burglary within the framework of section 294 (1) of the Penal Code (Cap. 16 R. E. 2002).*
- 3. That the Trial Court erred in law to convict and sentence the Appellant while none of the prosecution witnesses testified before the Court that he saw me breaking the house of the complainant which is a house of our family and I also live within the house.*
- 4. That the Trial Court erred in law and in fact to convict and sentence the Appellant the punitive sentences of fifteen years imprisonment for the first count and seven years imprisonment for the second count without taking into consideration mitigating factor that he was the first offender.*

5. *That the Trial Court erred in law to convict and sentence the Appellant while the prosecution did not bring any exhibits which proved that the house was broken.*
6. *That the Trial Court erred in law to convict and sentence the Appellant basin on fabricated evidence originating from family conflict since the complainant is the biological father of the Appellant.*
7. *That the Trial Court erred in law to convict and sentence the Appellant, not only punitive sentence of fifteen years for the first count of burglary but also illegal sentence because it is not provided under section 294 (1) (b) of the Penal Code (Cap. 16, R. E. 2002).*

At the hearing of this appeal the Appellant appeared in person whereas the Respondent was represented by the learned State Attorneys; Mr. Tarimo and Mr. Sarwart.

Arguing in support of his appeal the Appellant faulted the decision of the Trial Court that the sentence pronounced by the Trial Magistrate was not clear and prayed this Court to look the evidence, sentence and mitigating factors which were not considered. On the first count of burglary, the Appellant stated that the prosecution failed to prove its case beyond reasonable doubt as they failed to tender a broken padlock to prove the case of burglary.

On the contrary, Mr. Tarimo submitted that; on the first ground of appeal the prosecution did not prove the case beyond reasonable doubt. He further argued that it is the duty of the prosecution to prove the case beyond a reasonable doubt. He made reference to the decision of the Court of Appeal of Tanzania in the case of **Pascal Yoya @ Maganga v. Republic**, Criminal Appeal No. 248 of 2017, in which it was stated that it is the duty of the prosecution to prove the case beyond reasonable doubt. He added that looking on the proceedings of the Trial Court the prosecution brought four witnesses to prove the offences which the Appellant was charged with. Basically, the evidence shows that Appellant had broken the house of the complainant and steal the mattress.

As much as the second ground of appeal which states that the Appellant's conviction didn't meet the requirements of section 294 (1) of the *Penal Code* (supra), he submitted that, the prosecution side brought the victim as a witness, who told the Trial Court that on 8<sup>th</sup> December, 2022, when the Appellant came back at home insulted him and he made some chaos. Then the complainant (PW1) went to report the matter to the Police Station. When PW1 came back to his home, he found the Appellant has broken the house and the complainant's mattress was missing. He

further submitted that at around 20:00 hours, the accused was arrested. He added that the evidence proves that the Appellant sold the stolen mattress to DW2. As said earlier, he contended that the Appellant stole the mattress at around 12:00 hours that is when they discovered that the house was broken and the mattress had gone.

Mr. Tarimo further submitted that on the third ground of appeal, the Appellant was seen selling the stolen mattress, which is the property of PW1, thus the Appellant's conviction and sentence were proved beyond reasonable doubt.

On the fourth ground of appeal that the Trial Court did not consider the mitigating and aggravating factors, the learned State Attorney stated that the Trial Court considered both the mitigating and aggravating factors and correctly sentenced the Appellant to serve fifteen years imprisonment for the offence of burglary and seven years imprisonment for the offence of stealing. To add to it, he struggled further that considering the circumstances of the case the appellant was supposed to be sentenced to twenty years imprisonment.

In fact, with the foregoing submissions of the learned State's Attorney for the Republic/Respondent, in his rejoinder submission the Appellant reiterated what he has submitted in his submission in chief and asked for this Court to do justice to him as there was no evidence that he committed the offences he was charged.

Having gone through the petition of appeal, which encompasses seven grounds of appeal, I find that they boil down into two main issues namely; **one**, whether the prosecution side proved its case beyond reasonable doubt and; **two** whether the mitigating factors were considered.

As much as I am concerned, I will start with the first issue of whether the prosecution case was proved against the Appellant on both counts of burglary and theft. After going through the Trial Court's original records, I find the evidence given by the prosecution on the offence of burglary, does not prove that the Appellant broke and entered into the house of the complainant. The evidence clearly shows that being insulted by his son (DW1), PW1 who is the Appellant's father he directly and immediately went to report the matter to the Police Station. When he returned back home he found the mattress had been stolen by the Appellant.



Consequently, the testimony of other witnesses shows that when he stole the mattress, he went to sell it to DW2 and that's when he was arrested. On my view, I find the offence of burglary was not proved by the prosecution there is no evidence of breaking into the house of the complainant and committing the offence of theft.

At the same time, I warn myself that the Appellant used to live in the same house with his father. The door of the Appellant's father bedroom was broken. The prosecution testified that the Appellant was the one who broken the door since he was the one who insulted the complainant. This Court has to ask itself whether it is true that the door was broken by the Appellant.

Alternatively, the complainant was going to the Police Station because he was insulted by the Appellant. When he returned home things changed and it became the case of burglary and stealing the mattress. Surprisingly, something that this Court should be careful about is that even the allege broken lock was not taken to Court as an exhibit.

In contrast to this and due to the above findings, the case of burglary was not proved by the prosecution. Eventually, the findings of the State's

Attorney on the offence of burglary are distinguishable. To put it in a nutshell, the prosecution side failed to prove the offence of burglary against the Appellant.

On the other hand, on the offence of stealing, I think the evidence shows that the Appellant was found with a mattress which was stolen. It is true that, the Appellant failed to explain how he came into possession of the alleged stolen mattress. Therefore, I find the offence of stealing was proved beyond reasonable doubt.

On the second issue of whether mitigation factors were considered, I find among the Appellant's mitigating factor was sickness and he presented clinic card which was admitted as exhibit D1. Despite the sickness which the Appellant proved before the Trial Court, he was imprisoned to serve seven years for the offence of stealing. The learned State Attorney representing the Republic in his submission in this appeal was on the view that mitigating factors were considered and added that if the accused had known to be sick or had dependents, he would have stopped committing crime. Having gone through the submissions made by both parties, I am of the view that mitigation factors were not considered. See the case of

**Raphael Peter Mwita v. Republic**, Criminal Appeal No. 224 of 2016, in which the Court of Appeal had this to say:

*"Clearly, looking at the above quotation the trial Judge did not mention any antecedent or the mitigating factors which he said to have been considered. He tenderized that he considered them. As it was lightly put by both learned advocates this was not a proper consideration of the mitigating factors. In both antecedents and mitigating factors for example it was treated that the Appellant had no previous conviction or rather he was the first offender as was put by the learned defence counsel. This was in our view, among the important legal obligation to be considered by the trial Judge."*

Being guided by the above decision, I am of the view that in sentencing the accused person, it is clear that the Court has to consider mitigating and aggravating factors which describes the circumstances of the case and the accused's character. The Court is also required to depict how it applied those factors to impose sentence to the accused and not to give a generalized statement that it has considered the mitigating and aggravating factors. The Trial Court was bound to consider each mitigating factor. It is true that the Appellant has no criminal records, thus he was a first offender and he is sick and he tendered a clinic card as an exhibit

"CE1". Due to those factors, I find the mitigating factors were not considered and the sentence of seven years imprisonment imposed to the Appellant for the offence of stealing was excessive.

For the reasons stated above, this appeal is partly allowed. The Appellant is hereby acquitted for the first count and the sentence of fifteen years that was imposed against him on that offence is set aside. I substitute the sentence of seven years imprisonment imposed to the Appellant for the second count to a sentence of two years imprisonment from the date of conviction. It is ordered accordingly.

DATED and DELIVERED at **SONGEA** this 5<sup>th</sup> day of May, 2023.



  
**U. E. MADEHA**

**JUDGE**

**05/05/2023**

**COURT:** Judgment is read over in the presence of the Appellant and Mr. Tarimo (State Attorney) for the Respondent. Right of appeal explained.



  
**U. E. MADEHA**

**JUDGE**

**05/05/2023**