

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

CRIMINAL APPEAL NO. 8 OF 2023

(Originating from Criminal Case No. 13/2022 of Kahama District Court)

MAGEMBE EMMANUELAPPELLANT

VERSUS

THE REPUBLIC..... RESPONDENT

JUDGMENT

Date of last order: 31st October, 2023

Date of Judgment: 8th November, 2023

MIRINDO, J.:

Around seven o'clock in the evening of 7th January 2022 when there was power cut and business closed, footsteps were heard at the top of a building that consists of a guest house and houses rental rooms for retailers at Manzese in Kahama District. A man collapsed from the roof and fell down where the salon was run. Retailers were informed and they rushed to the scene. When the salon was opened, a man was seen hiding behind the sofa. One carton of coffee Spirit containing 30 units was found at the roof of the building that belonged to a retailer who run a *pombe* shop in the same building. The man who was immediately recognised as Magembe s/o



Emmanuel, the appellant, was a former employee of another retailer who run another *pombe* shop in that building.

Emmanuel was charged before Kahama District Court with two counts. First, breaking into building and committing an offence contrary to section 296 (a) and (b) of the Penal Code [Cap 16 RE 2019]. Secondly, stealing one carton of coffee spirit containing 30 units the property of the named retailer contrary to sections 258 and 265 of the same Penal Code. He was acquitted of the count of stealing, convicted of the count of breaking into building and committing an offence and sentenced to five years imprisonment.

On appeal to this Court, Emmanuel complained essentially that his conviction was against the weight of evidence: his defences were ignored by the trial court; there was no proof that he broke the building, trial court relied on hearsay evidence. His other major complaint was that the sentence imposed upon him was excessive.

Emmanuel appeared in person at the hearing of the appeal and had nothing to add to his grounds of appeal apart from asking this Court to consider the grounds presented in his Petition of Appeal. The Respondent was represented by Ms Nyamnyanga Magoti, learned State Attorney. Ms Magoti argued that there was strong prosecution evidence to prove the charge of breaking into building and committing an offence especially because

Emmanuel was found hiding behind the sofa in the salon and did not deny being found at the scene of crime.

In a charge for breaking into building and committing an offence under section 296 of the Penal Code [Cap 16 RE 2022], the prosecution must prove that:

- (a) the accused broke and entered into any of the specified buildings, and
- (b) after entering the accused committed an offence.

In proving the charge, the prosecution called four witnesses three of whom were retailers at the building where the appellant was found. All the three retailers consistently testified not witnessing the appellant breaking and entering in the building. Consistent also in their testimony was that after being informed about the appellant's presence within the building, they rushed to the scene and saw the appellant hiding behind the sofa in the salon. While the evidence that the appellant was at the top of the roof was hearsay as none of them witnessed the fact, the three prosecution witnesses offered direct evidence that they saw the appellant hiding behind the sofa. There is no doubt that the appellant was found within the salon. The appellant conceded as much in his defence. His explanation was that he was there to attend some electric wires that were loose. The appellant was neither an electrician or had any instructions to be there. His presence in the salon was



quite suspicious. Given that the appellant was found within the salon at the time when the business was closed, unless the appellant explained how he got into the salon, it is to be inferred that the appellant broke and entered into the building. Thus, the first element of the offence was proved beyond reasonable doubt.

The accused who breaks and enters into a building must commit an offence inside the building. As already stated, the trial magistrate ruled that the appellant did not commit the offence of stealing while inside the salon. Could the charge of breaking into building and committing an offence against the appellant stand after the appellant had been acquitted of stealing? I think not. In **Masenu s/o Butili v R** (1967) HCD No 81, the accused broke into a garage door but did not enter into that building because he was frightened away. He was convicted of the offence of malicious damage to property.

Under section 305 of the Criminal Procedure Act [Cap 20 RE 2022], a person charged for any offence from section 294 to 298 of the Penal Code may be convicted of any offences under those provisions if the offence with which the accused was charged was not proved. I am satisfied that there is sufficient evidence to justify conviction for the offence of being found in a building with intent to commit an offence under section 298 (f) of the Penal Code [Cap 16 Re 2019] (being the version of the revised edition under which the appellant was charged).



I quash the conviction for the offence of breaking into building and committing an offence under section 296 of the Penal Code [Cap 16 RE 2019] and on its stead convict the appellant of the offence of being found in a building with intent to commit an offence under section 298 (f) of the Penal Code [Cap 16 Re 2019]. With regard to sentence, the sentence for the offence under section 296 attracted a maximum sentence of ten years imprisonment and the appellant was sentenced to five years in prison. In connection with the substituted offence, the maximum sentence for the first offender under section 298 is five years. Going by the record of the trial court, the appellant was a first offender. I therefore sentence the appellant to two years' imprisonment.

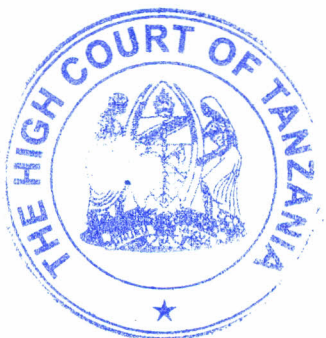
Except for the variation of the conviction and sentence, this appeal is dismissed.



F. M. MIRINDO
JUDGE
08/11/2023

Court: Delivered in chambers this 8th day of November, 2023 in the presence of the appellant in person and Mr Goodluck Saguya, learned State Attorney for the respondent. B/C Ms. Sumaiya Hussein-(RMA) present.

Right of appeal explained.



F. M. MIRINDO
JUDGE
08/11/2023