

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(DODOMA DISTRICT REGISTRY)**

AT DODOMA

(DC) CRIMINAL APPEAL NO.93 OF 2022

(Originating from the District Court of Iramba at Kiomboi in Criminal Case No.73 of 2022)

SHANI S/O EMMANUEL@TIMBU.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

JUDGMENT

Date of last order: 31/5/2023

Date of judgment: 25/9/2023

KHALFAN, J.

The appellant, Shani s/o Emmanuel @ Timbu, and one Jonas s/o Gerson @ Kitundu were jointly charged with the offences of **Burglary** contrary to section 294 (1)(a) and **Theft** contrary to sections 258(1) and 265 both of the Penal Code, [Cap 16 R.E 2022] in the District Court of Iramba at Kiomboi (hereinafter referred to as the trial court). Jonas s/o Gerson @ Kitundu was alternatively charged with the offence of **unlawful possession of goods suspected to have been stolen** contrary to section 312(1)(b) of the Penal Code, [Cap 16 R.E 2022].

At the end of the trial, the trial court found the appellant guilty of the two offences as he was accordingly charged; whilst Jonas s/o Gerson @ Kitundu was found guilty of unlawful possession of goods suspected to



have been stolen. Jonas s/o Gerson @ Kitundu was sentenced to one year conditional discharge. The appellant was sentenced to serve seven (7) years imprisonment for each offence whereby the sentences shall run concurrently. The appellant was aggrieved by the conviction and sentence against him, hence the appeal in the court.

His petition of appeal comprises four (4) grounds of appeal in which he essentially argued that the prosecution case against him was not proved beyond reasonable doubt in the trial court.

When the appeal was heard in the court on the 31st day of May, 2023, the layman appellant prayed to adopt fully the grounds of appeal as they appear in the petition of appeal to form his submissions in support of the appeal in the court. The respondent Republic was represented by Ms. Magreth Bilal and Ms. Victoria Njau, both learned state attorneys who contested the appeal.

The respondent prayed to submit jointly on the 1st and 4th grounds of appeal, and also the 2nd and 3rd grounds of appeal. Regarding the 2nd and 3rd grounds of appeal, the respondent submitted that it is true that the appellant was not caught right-handed at the scene of crime and that he was not found in possession of the stolen properties.



However, the appellant himself voluntarily confessed to have been involved in breaking the claimant's house and stealing properties and that he took them to his uncle's place. That, the appellant himself directed the police to his uncle's place and after a search therein, they found a blue plastic drum which was ably identified by the claimant as her property. That, the said plastic drum was tendered and admitted in evidence as 'Exhibit P2' without objection from the appellant. That, further, the appellant did not in his defence, object that he did not send that plastic drum to his uncle, and his uncle who was the second accused did not, in his defence in the trial court, deny that fact. The respondent stated that these were the circumstances which led to the appellant's conviction and sentence thereof.

Concerning the 1st and 4th grounds of appeal, that the trial court failed to consider the weight of the defence case and that the prosecution case was not proved beyond reasonable doubt, the respondent submitted that the prosecution summoned witnesses who tendered exhibits hence they were able to prove their case beyond reasonable doubt as required in section 3(2) of the Evidence Act, [Cap 6 R.E 2022]. To buttress their submissions, the respondent referred the court to the case of **Tino s/o John Mahundi v. The Republic** (HC) Criminal Appeal No. 21 of 2020,



Mtwara Registry (unreported). The respondent prayed the court to dismiss the appeal because it lacked merit.

In rejoinder submissions, nothing was rejoined by the appellant.

That is all what was submitted by the parties in support of, and against the appeal in the court.

Briefly, the charge sheet bore the allegations that on the 26th of May, 2022 around night hours, the appellant and his co-accused broke, entered and stole different properties of the complainant, Mary Joseph (PW1). However, in the trial court, none of the prosecution witnesses (PW1 to PW5) did actually testify that it was the appellant and no one else committed the alleged offences.

The evidence on record by the prosecution (PW1, PW2) is to the effect that only one blue plastic drum ('Exhibit P2') was found at the home of Jonas Gerson, the appellant's co-accused despite the fact that the appellant was allegedly charged to have stolen three plastic water drums, two toilet sinks, two buckets, two pipes, three up-stairs, eight gallons of water, two spades, and one mattress all valued at TZS. 676,000/=; there was no any proof that the alleged stolen properties were at the complainant's (PW1) house on the night of the 26th of May, 2022.



The evidence of the hamlet chairman, Amoni Philemoni (PW2) did not establish that it was indeed the appellant who committed the alleged offence as charged. PW2, being the independent witness to the search, his evidence was that he witnessed one plastic drum being found from the house of Jonas Gerson, the appellant's co-accused who explained to the police officers that it was the appellant who gave him the plastic drum and hence committed the alleged offences. In his defence, the appellant did not deny to have given the plastic drum to his co-accused rather he claimed that the said plastic drum was his property. The prosecution (PW1) did not tender any evidence to establish that the 'Exhibit P2' was her property rather than only identifying the same to be hers.

The police officer, CPL F.8360 Manyonyi (PW3), testified that on the 4th of June, 2022 the appellant was brought into their office following their efforts. That, the appellant orally confessed (through 'Exhibit P1', the caution statement) to have stolen the properties of PW1 from her house whereby he later took them to his uncle, Jonas Gerson (his co-accused). That, PW3, assistant inspector Peterson Simon (PW5), the appellant, accompanied by other policemen, went to search the house of Jonas Gerson. That they had a search warrant and upon their arrival, they summoned the hamlet chairman (PW2) and another neighbour (one Lucas Nalogwa) who acted as independent witnesses to the search. That, they



found one blue plastic drum which PW1 identified as hers and claimed to be among the properties stolen from her house.

Another police officer, G.7673 DC Evaristi (PW4) testified *inter alia*, that on the morning of the 27th of May, 2022, he went to the scene of crime to inspect the doors of the house and that he found that the door locks were broken. The same allegations were also testified by the complainant (PW1) that she found that her house door was broken. Yet, the alleged broken padlock was not tendered in the trial court as a proof thereof. Neither was there a report, say sketch plan of the scene of crime, to confirm the broken door. In the absence of such evidence, the allegation of burglary against the appellant falls short of being proved beyond reasonable doubt in a court of law.

In defence, the appellant denied to have committed the offences of which he was charged. However, he admitted to have sold the blue plastic drum to Jonas Gerson claiming that the same was his property. He claimed that he was taken to the police station on the 3rd of June, 2022 whereby he was forced and tortured and then required to put his thumb print on the cautioned statement ('Exhibit P1') which was already recorded. That, the said cautioned statement ('Exhibit P1'), was not his confession rather recorded from one person called Makiya.



The prosecution case largely relied on the cautioned statement ('Exhibit P1'). But, according to the trial court's record of the proceedings, the appellant was arrested on the 4th day of June, 2022, that he recorded his cautioned statement on the 5th day of June, 2022 and that he was taken to the trial court on the 9th day of June, 2022. Taking into account that the appellant claimed to have been threatened and tortured to put his thumb print on the cautioned statement ('Exhibit P1'), the court is left doubtful on the voluntariness of the same. That, if at all the appellant confessed to have committed the offences of which he was charged, then why there was a delay in taking him before the district court? Such fact, supports the appellant's allegations that he was forced to sign the cautioned statement.

What is undisputed in this case is the fact that a blue plastic water drum was found in the home of Jonas Gerson which both the complainant (PW1) and the appellant's claim to be their property. The problem is in establishing proof beyond reasonable doubt that on the night of the 26th day of May, 2022, the appellant did break and steal PW1's property worth TZS. 676,000/= as complained by her. Bearing in mind that in criminal law, it is elementary that the prosecution must prove their case beyond reasonable doubt and that in case of doubts, the same be resolved in favour of the accused person, the court finds that the prosecution




evidence in the trial court was weak and insufficient to secure a safe conviction against the appellant.

The prosecution case in the trial court was not proved beyond reasonable doubt as so rightly stated by the appellant in his 4th ground of appeal. The appeal is therefore, allowed. The appellant's conviction and sentence of seven (7) imprisonment are hereby quashed and set aside respectively. The appellant shall be released forthwith from prison unless he is otherwise held for another lawful cause.

It is so ordered.

Dated at Dodoma this 25th day of September, 2023.




F. R. KHALFAN
JUDGE