IN THE HIGH COURT OF TANZANIA

AT MBEYA

APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 116 OF 1980

(ORIGINAL CRIMINAL CASE NO. 97 OF 1977
OF THE DISTRICT COURT OF SUMBAWANGA DISTRICT
AT SUMBAWANGA).

NESTORY S/O KAWINGO ..... APPELLANT

versus

THE REPUBLIC ..... RESPONDENT

J U D G M E N T

SAMATTA, J., - This is an appeal from a decision of the district court of Sumbawanga district whereby the appellant was convicted of storebreaking, contrary to s. 296(1) of the Penal Code, and was sentenced to a term of three years' imprisonment.

Mr Teemba, counsel for the Republic, says that the lower court's decision is sound. I respectfully agree. There was no dispute at the trial over the fact that on the night of 27/28th November, 1976, the store of one Salvatory Msangawale was broken into and several bags of grain were stolen therefrom. According to PW3, Berta d/o Kilonga, on the following morning the appellant tried to sell to her some fingermillet which was in a gunny bag. The witness had no money. The appellant left the bag at her house, promising that he would collect it later. He did not keep his promise. Instead, he disappeared from the village. He was arrested after several months had passed.

The appellant denied having taken any part in the crime he was charged with. He claimed that on November 30, 1976, he left for a place called Kapozo; he went there in connection with some business. He called two witnesses, one Kawingo Mleli and one John Mwanalinze. The evidence of the two witnesses tended to lend

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weight to the prosecution case. Kawingo said, inter alia, that the appellant escaped from the village and that that event took place on November 29, 1976. The witness also testified to the effect that in November 1976 the appellant owned neither maize nor fingermillet. John Mwanalinga said, among other things: "After an allegation that accd. had stolen the fingermillet he escaped from the village."

The learned trial magistrate analysed the evidence before him, and at the end of that exercise he was satisfied that the prosecutor had proved his case. I think that finding was justified. According to his own witness, the appellant had no fingermillet in November 1976, and yet on November 28, 1976 he, the appellant, was in possession of some fingermillet which he tried to dispose of by selling it to Berta d/o Kilenga. This attempted sale occurred only a couple of hours after Salvatory Msangawale's fingermillet had been stolen. The appellant left the fingermillet at Berta Kilenga, promising to come and collect it later. He did not go back to the witness' house. The learned trial magistrate rejected the appellant's Kapozo story. Instead, he accepted the prosecution's story that the appellant had escaped from the village. I can see no reason or ground to fault that finding. The finding was partly based on the evidence of the appellant's own witnesses. Like the learned trial magistrate, I am of the view that the totality of the evidence demonstrated the appellant's guilt beyond reasonable doubt. I would dismiss the appeal against conviction.

The appeal against sentence can, I think, be disposed of in two sentences. The sentence the appellant has complained

against is the minimum sentence prescribed by law: see s. 4(a) of the Minimum Sentences Act, 1972. It cannot be reduced by any court of law.

Before parting with this case I desire to say one or two things. The learned trial magistrate appears to think that the words "arrest" and "seize" are synonymous. That is not correct. It is a wrong use of the word "arrest" to say, for example: "A police constable yesterday arrested a bundle of clothes." What the constable must have done is to seize the bundle. That is one thing. The second thing I wish to say is that the citation of s. 265 of the Penal Code to the charge which was laid at the appellant's door was superfluous. Section 296(1) of the Penal Code creates a composite offence and, therefore, the citation of that section is enough. I hope these two observations will be useful to the learned trial magistrate.

The appeal stands dismissed in its entirety.

B. A. SAMATTA

JUDGE.

Delivered this 14th day of November, 1980, in the presence of Mr Teemba, counsel for the Republic.

B. A. SAMATTA

JUDGE.