

GHANA / JUDGMENT

REPUBLIC VRS AVEDOR (CC/167/23)

[2024] GHADC 301 (25 September 2024)

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JUDGMENT DELIVERED IN THE DISTRICT COURT, ADA ON WEDNESDAY, THE 25TH OF SEPTEMBER, 2024 BEFORE HER WORSHIP PAULINA KWAKYEWA ADWOA. SUIT NO: CC/167/23

THE REPUBLIC VS. MAXWELL AVEDOR 1ST ACCUSED
RAYMOND KUDAYAH.....2ND ACCUSED 1st Accused
person.....Present 2nd Accused
Person.....Present Detective Inspector Alexander Annang,
for the prosecution..... Present

JUDGMENT

The two accused persons herein, Maxwell Avedor and Raymond Kudayah were arraigned before this court on the 11th of May, 2023 and charged with four counts of offences of Conspiracy to steal; Causing unlawful damage, Unlawful Entry and Stealing, contrary to sections 23(1), 172(1) (b), 152 and 124(1) of the Criminal m offences Act, 1960, (Act 29) as amended. Both accused persons pleaded Not Guilty to both offences charged and so the case was set down for trial after all disclosures had been served on the accused persons. Page 1 of 11 The brief facts as presented to the court by the prosecution were that the complainants, one Kwao Maxwell, aged 19 and Israel Okutu, aged 21 are students of Ada Technical Institute resident at Atortorkope/ Ada whist the first accused, Maxwell Avedor, aged 26 and the second accused, Raymond Kudayah, aged 22 are farmers, resident at Adonokope/Ada. Complainants are day students of the above school and share the same room. On 08/05/23, at about 6.00am, the complainants locked their room and left for school. On their return at about 8.00am, the same day, they found the padlock to their room valued GHC50.00 broken. They entered and detected theft of the first complainant's bag, containing his clothing, value yet to be known, infinix Hot 4 smart phone valued GHc900.00, Infinix Hot 8 smart phone valued GHC1000.00, One Gas cylinder, valued GHC200.00, TECHNO mobile phone, valued GHC200; and the second complainant's electric iron, valued GHC50.00, one footwear valued GHC100.00, cooking oil, valued GHC50.00, Provisions (gari, milk and oat) valued GHC200.00 and a hair and body cream valued GHC70.00. Complainants made their personal enquiries and a witness in this case, who saw the accused persons carrying the aforementioned items away, disclosed their identity to the complainants. Report was made to police by the complainants and the accused persons were arrested and investigation statement obtained from

them. A search was conducted on the accused persons and a gas cylinder, cooking oil, hair cream and body cream were retrieved from the A1's room. The First complainant identified these items to the police as his. After investigations, the accused persons were charged with the offences and brought before this court. At the trial, the prosecution called five witnesses in support of their case. The First Prosecution Witness (PW1), whose full name he mentioned as Kwao Maxwell, a student of the Ada Technical Institute, informed the Court in his evidence in chief that, on the morning of the 8th of May, 2023, he and his roommate, the Second Prosecution Witness (PW2), also a student of the Ada Technical Institute, left their room at about 6: 00am to school to write their end of term examination. He returned home at about 10:00 am to find that the padlock to their door had been damaged and the door left opened. He entered the room and noticed that his properties, including school bag, personal effects Page 2 of 11 such as his Ghana card, a pair of trousers, infinix Hot 8 and smart phones; two Keypad techno phones, a charger and his cooking gas cylinder, a quantity of rice, frytol cooking oil and palm oil, and some other items in his bag had been taken away. According to him, some persons in the community told them that they saw the accused persons herein, carrying the items. He then reported the matter to the assembly member to the community who later advised them to lodge a complaint with the police which he did. After the complaint, the PW1 said he went to their home with a police officer where he identified some of his lost properties including a cylinder and frytol cooking oil. The PW1 also said that his own father in... led him to a certain man who he described as a phone repairer, who indicated to him that both accused persons herein had earlier gone to him with some phones and three (3) sim cards for the decoding. It was the case of PW1 that the said phone repairer father told him that he was unable to decode the phones and so gave them back to the accused persons but forgot to give two

- (2) of the sim cards to them. He later went to him with a police officer where one of the sim cards turned to be his. The Second Prosecution Witness (PW2) was one Okutu Israel. Also a student of Ada Technical Institute. He corroborated the evidence as stated by the PW1 and further stated that his properties, made up of shirts, knickers, foot ware, pomade and electric iron. Upon a search conducted by the police in the accused person's last place of abode, the PW2 said he identified some hair and body cream to be his. The Third Prosecution Witness (PW3) also identified himself as a student of the Ada Technical Institute. He informed the court that he was the one who informed the PW1 and PW2 that after they had complained about their lost properties that he saw the accused persons carrying some items and a bag on their backs from their area leaving towards their community –the Adonorkope-Ada. According to the PW3, he was about to enter the bush, close by his residence to ease himself when he saw the two accused persons coming from the bush towards his direction. He decided to hide himself from Page 3 of 11 them. It was his case that saw the accused persons holding some items and a bag on their back, going to their community-the Adonorkope township. The Fourth Prosecution Witness (PW4) happened to be the phone repairer that the persons allegedly gave some phones to be decoded for them. He mentioned his full name as Doku Emmanuel Kofi and informed the court in his evidence in chief that he was in his house sometime in May, 2023, when the first

accused person, Maxwell went to him with two (2) phones for him to decode for him. He attempted decoding them but that it was not successful, so he returned them to him –A1. Not long after that the PW4 said a student of the Ada Technical Institute went to him and reported to him about his missing phone. He then realized that he did not give one of the phones he had removed from the phones to him-the A1. So he gave it to the PW1 to crosscheck to see if it was his. It was his case that, the PW1, after crosschecking, the PW1 told him that the sim card belonged to him. The fifth prosecution witness, the investigator of this case, informed the court in his evidence in chief that this case was referred to him for investigations on the 8th May, 2023 after the report had been lodged at the station. He later visited the crime scene and found the room of the PW1 and PW2 ransacked with a padlock to their door damaged. The PW5 further Indicated to the court that, on the 9th of May, 2023, investigations led to the identity of the A1 and A2 at Adonorkope -Ada, the house in which the A1 lives. He conducted a search in the house and found a gas cylinder with an identification mark on it and which was immediately identified by the PW1. A further search revealed a body cream and hair lotion, both of which were identified by the A2 as his. He therefore retrieved all the items from the A1. The investigator also corroborated the evidence as adduced by the PW4 that the A1 took some phones and some sim cards to him for decoding which he- the PW4 could not decode and the fact that one of the sim cards, when crosschecked by inserting it in a different phone, corresponded with the numbers given to the police by the PW1. According to him, the PW4 could not decode the phones because the A1 was unable to Page 4 of 11 produce the google account of the phones. The Prosecution ended their case at this point. The 1st Accused Person, Avedor Maxwell, in opening his defence stated that the complaints herein- the PW1 and PW2 were accusing him falsely and that, he did not know anything about the offences charged. He said all he knew was that, on the day of his arrest, he had come back home from farm, eating, when the police went and arrested him. After my arrest the police searched my room. During the search, my old cylinder that I use, hair pomade and body cream were found. According to him, the complainant mentioned several items that they said were allegedly stolen which were not found in my room but I was sent to the police station and my statement taken. I insisted I knew nothing about it. I maintain that I do not know anything about the offence charged. The Second Accused person also did not have much to say save to insist he did not know anything about the offence charged. Both accused persons did not call any witness, so they ended their individual cases thereafter. The legal issues for determination at this point are: 1. whether or not the prosecution has been able to prove its case.

2. whether or not the accused persons are guilty of the offences charged. The fundamental principle underlining the rule of law as far as criminal law is concerned is that the burden of proof remains on the prosecution and the evidential burden shifts to the accused only after a prima facie case had been made against the accused person. In the case of Commissioner of Police V Isaac Antwi [1961] GLR 408 it was held per holding one (1) as follows: “The fundamental principles underlying the rule of law are that the burden of proof remains throughout on the prosecution and the evidential burden shifts to the accused only if at the

end of the case for the prosecution an explanation of circumstances Page 5 of 11 peculiarly within the knowledge of the accused is called for. The accused is not required to prove anything” Also, in the case of Gligah & Atiso v. The Republic [2010] SCGLR 870@879, Dotse JSC (As he then was) stated as follows: “in other words whenever an accused person is arraigned before any court in any criminal trial, it is the duty of the prosecution to prove the essential ingredients of the offence against the accused person beyond any reasonable doubt...” This is also provided for by Section 13(1) and (2) of the Evidence Act 1960 (NRCD 323). As earlier stated, the two accused persons are before this court on the offences of Conspiracy to steal; Causing unlawful damage, Unlawful Entry and Stealing, contrary to sections 23(1), 172(1) (b), 152 and 124(1) of the Criminal and other offences Act, 1960, (Act 29 Section 23(1) of Act 29 states that... In the English case of R v. Brisac (1803) 102 ER 792 at 795, the court had this to say concerning the offence of conspiracy: ‘conspiracy is a matter of inference deduced from certain criminal acts of the parties accused done in pursuance of an apparent criminal purpose in common between them’ Section 172(1) of the Criminal Offences Act, 1960 (Act 29) provides that:

- (1) A person who intentionally and unlawfully causes damage to property
 - (a) to a value not exceeding one million cedis or without a pecuniary value, commits a misdemeanor. In the case of Homenya v The Republic, the court held that the main ingredients to be proved by the prosecution in a charge of unlawful damage are intention and unlawful damage. Section 174 of Act 29 also explains unlawful damage as follows: Page 6 of 11
- (1) A person does an act or causes an event unlawfully, within the meaning of the provisions of this Act relating to unlawful damage, where that person is liable to a civil action or proceeding, or to a fine or any other punishment under an enactment,
 - (a) in respect of the doing of the act causing an event, or
 - (b) in respect of the consequences of the act or event, or
 - (c) in which that person would be so liable if that person caused the event directly by a personal act, or
 - (d) in which that person is liable to be restrained by injunction or any other proceeding from doing that act or causing that event. Again, section 152 of the Criminal Offences Act, 1960, (Act 29) states that: A person who unlawfully enters a building with the intention of committing a criminal offence in the building commits a second degree felony. Section 153 explains unlawful entry as follows: “A person unlawfully enters a building if that person enters otherwise than in the exercise of a lawful right or by the consent of any other person able to give consent for the purposes for which that person enters.” From above, the ingredients to be proven by the prosecution in a case of unlawful entry therefore are that: 1. 2. 3. a person enters a building; without a lawful right or consent of a person capable of giving consent; with intent of committing a crime. Section 125 of Act 29 defines stealing as

follows: Page 7 of 11 “A person steals who dishonestly appropriates a thing of which that person is not the owner.” Again, section 122(2) of Act 29 defines appropriation as follows: “An appropriation of a thing in any other case means any moving, taking, obtaining, carrying away, or dealing with a thing, with the intent that a person may be deprived of the benefit of the ownership of that thing, or of the benefit of the right or interest in the thing, or in its value or proceeds, or part of that thing.” Dishonest Appropriation is also defined in section 120 of Act 29/60 as follows: An appropriation of a thing is dishonest “(a) if it is made with the intent to defraud; or

- (b) if it is made by a person without claim of right, and with a knowledge or belief that the appropriation is without the consent of a person for whom that person is trustee or who is owner of the thing, or that the appropriation would, if known to the other person, be without the consent of the other person.” The above then gives the elements of stealing as stated in the case of *Lucien Vrs. The Republic* [1977] 1GLR as follows: “The only basic ingredients requiring proof in a charge of stealing were that: (i). the person charged must not be the owner of the thing stolen; (ii). he must have appropriated it and (iii). the appropriation must have been dishonest.” The prosecution would have to prove all the ingredients above in order to discharge the burden placed on them to prove their case beyond reasonable doubt against the accused person. Page 8 of 11 Whether or not the prosecution has been able to prove its case As stated above, the case for the prosecution is that the accused persons herein did agree to act together to cause and indeed caused unlawful damage to the PW1 and PW2’s door, entered their room without their consent and took various properties of theirs away. This was corroborated by almost all the prosecution witnesses, particularly the PW4, one Doku Emmanuel Kofi who did state in his evidence in chief to the court that the First accused person, Maxwell Avedor went to him with two (2) phones around the same time that the PW1 and PW2 complained of their lost properties, including the phones, for him to decode for him decoding them but that it was not successful and also the fact that one of the sim cards, which he inadvertently kept, happened to be the property of the PW1. Although both accused persons strongly denied knowledge of the lost properties. The three tier test for examining the defence of the accused as held by Ollenu JSC in the case of the case of *Lutterodt v Commissioner of Police* [1963]2 GLR, at 439, was discussed by the Supreme Court in the case of the *Republic v Francis Ike Uyanwune* [2013]58 GMJ 162, at 182- 183as follows: “where the determination of a case depends upon facts and the court forms the opinion that a prima facie case has been made, the court should proceed to examine the case for defence in three stages; 1. Firstly, it should consider whether the explanation of the defence is acceptable, if it is, that provides complete answer, then the court should acquit the defendant; 2. If the court should finds itself unable to accept or, if it should consider the explanation to be not true, it should then proceed to consider whether the explanation is nevertheless reasonably probable, if it should find it to be, the court should acquit the defendant; and 3.Finally quite apart from the defendant’s explanation or the defence taken by itself, the court should consider the defence such as it is together with the whole case, i.e. Page 9 of 11 prosecution and defence together,

and being satisfied of the guilt of the defendant beyond reasonable doubt before it should convict, if no, it should acquit.” Now, after a careful appraisal of the entire evidence as adduced before me by the prosecution as well as the defence, I find that the prosecution was unable to prove its case against the accused persons regarding counts 1,2 and 3 but I am not satisfied with the explanation offered by the accused persons in their attempt to cast doubt on the case of the prosecution with respect to count 4 since proof beyond reasonable doubt does not mean proof to the hilt. I therefore find the accused persons guilty of the offence of stealing and convict them accordingly. Consequently, the accused persons herein are hereby acquitted and discharged of the offences of conspiracy to steal, causing damage and Unlawful entry. They are however convicted of the offence of stealing because they were unable to convince the court that the properties found in their possession, especially the phones and the gas cylinder are for them as they alleged. Any plea in mitigation before sentence is passed: 1st Accused person: I am begging the court for mercy. I will not repeat this. 2nd Accused person: I am begging the court. By Court: is the accused person known? Prosecution: The A1 is known but the A2 is not known. By Court The accused persons have pleaded with the court to tamper justice with mercy. They would be given the opportunity to reform, but for deterrence sake, the accused persons are sentenced as follows: Page 10 of 11 The A1 is hereby sentenced to serve 36- months prison term In Hard Labour since he is known. The A2 on the other hand, should serve a period of 18- months prison term. SGD H/ W PAULINA KWAKYEWA ADWOA. Page 11 of 11

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