

TANZANIA / JUDGMENT

athumani mohamed mwambo vs the republic 2011 tzhc 2115 3 october 2011

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TZHCDECIDED
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IN THE HIGH COURT OF TANZANIA AT DODOMA (DC) CRIMINAL APPEAL NUMBER 108 OF 2010 (ORIGINAL CRIMINAL CASE NUMBER 110 OF 2010 OF THE DISTRICT COURT OF KONDAAATKONDOA) ATHUMANI MOHAMED @ MWAMBO-----
APPELLANT VERSUS THE REPUBLIC-----RESPONDENT

JUDGMENT

2007-2011 & 03-10-2011 S. S. MWANGESIJ.: On the 29th September 2010, the appellant herein started to serve an imprisonment sentence for a term of fourteen (14) years after being convicted of the offence of house breaking and stealing contrary to the provisions of section 294 (1) of the Penal Code Cap 16 Volume 1 of the Laws Revised Edition of 2002. It was alleged by the prosecution that, on the 09th day of June 2010 at or about 0700 hours at Bereko village within the District of Kondoa in the Region of Dodoma, the accused did break and enter into the house of one Davis Jackson and stole from therein one pair of sandals valued at TZs. 38,000/=, one bag make Fubu Jeans XCII valued at TZs. 7,000/=, one torch valued at TZs. 2,500/=, three batteries make Y valued at TZs. 7,500/=, one bed sheet valued at TZs. 7,000/=, one shirt valued at TZs. 9,000/=, thirteen CDs valued at TZs. 85,000/=, one underwear valued at TZs. 1,500/= and one remote valued at TZs. 20,000/=, all total valued at TZs. 151,250/= the properties of the said Davis Jackson. When the charge was read over to the accused, he did plead not guilty. In order to establish the guilt of the accused person, the prosecution did summon five witnesses. Thereafter, the accused was invited to enter his defence, a thing which he did do and never summoned any witness to back up his defence. The learned trial Resident Magistrate upon evaluating the evidence that was laid before him was of the view that the commission of the offence had been sufficiently established. To that effect, he did convict the accused and sentenced him to go to jail for a period of fourteen years (14). The findings of the trial Court as well as the sentence awarded did aggrieve the appellant who has decided to challenge it by this appeal. In his memorandum of appeal, the appellant has raised a number of grounds among which include, that the evidence that was tendered at the trial Court did not justify conviction as it did not sufficiently establish that he did steal the alleged items. The appellant has also complained that, the trial Magistrate did err to use his confession alleged to have been made at the Police Station, to found his conviction because, although he did not object to its being tendered as exhibit, he has argued that

during its being recorded from him by the Police Officer, the procedural legal requirements were not complied with as his legal rights were not sufficiently explained to him. In his grounds of appeal, the appellant has as well challenged the procedure that was applied to tender as exhibits the items that were alleged to have been recovered from his home because, the search that was conducted at his house did not adhere to the mandatory procedural requirements. And furthermore, those items were never adequately identified by the complainant as among his stolen ones because he never gave any peculiar marks that could differentiate them from other items of the like found in the street. r Lastly, the appellant has castigated the learned trial Resident Magistrate for not considering his defence evidence in determining the case against him. It has been his view that in so doing, his rights were denied and justice was never done to him. On those bases, he has requested this Court to quash the findings of the trial Court and set him at liberty. During the hearing of the appeal, the appellant who did appear in person to prosecute his appeal had nothing substantial to add to his grounds of appeal. He only requested this Court to closely consider his grounds of appeal as were based on very sound reasons. On the other hand, the respondent- Republic was represented by Mr. Nchimbi learned State Attorney. It was the position of the learned State Counsel that, he did support the conviction that was entered to the appellant by the trial Court. Responding to the grounds raised by the appellant, Mr. Nchimbi was of the view that, the evidence that was tendered at the trial Court to establish the commission of the offence by the appellant did sufficiently do so. As regards the confession of the appellant at the Police Station, it has been the argument of the learned State Attorney that, the same was correctly acted upon by the trial Magistrate because, its production as exhibit in Court by PW6 was never resisted by the appellant. Under such situation, there was no way under which the trial Magistrate could not have used it in founding conviction to the appellant. In support of this averment, the learned State Attorney did refer this Court to the decision of the Court of Appeal in the case of Paulo Maduka and Others Vs Republic Criminal Appeal No. 110 of 2007 (CAT) Dodoma Registry (unreported). Regarding the identification of the stolen properties, Mr. Nchimbi has been at one with the appellant that, indeed, those items that were tendered as exhibits were common commodities with no peculiar marks. As such, in order to differentiate them from other commodities found in the market, there ought to have been given clear marks. Such requirement was never discharged by the prosecution witnesses. All the same, the learned State Attorney was of the opinion that, such anomaly did not vitiate the proceedings. Furthermore, the appellant did not resist the contention that those items were not his. What was heard from him is the general denial that, those items were not recovered from his room a thing that was disproved by the evidence before the Court. With regard to the complaint by the appellant that the search that was conducted at his place of abode was done without adherence to the legal requirement, it has been the assertion of the learned State Attorney that, such complaint is unfounded. Much as the evidence that was tendered at the trial Court does unfold, all the required legal procedures were complied with. Mr. Nchimbi has been at one with the appellant on the ground that his defence evidence was not adequately analysed by the trial learned Magistrate. However, it has been his view that such failure did not occasion any injustice to the appellant. He has thus requested this Court being the first appellate Court to re-evaluate such evidence, and make its findings as it may consider fit under the provisions of section 388 of the Criminal Procedure Act, Cap 20 of the Laws

Revised Edition of 2002. And on the question of the sentence that was imposed to the appellant, the learned State Attorney's opinion is that, the same was illegal as it did not comply with the provisions of section 170 (2) of the Criminal Procedure Act, that requires sentences like the one imposed to the appellant by the trial Court, to be confirmed by the High Court. The failure by the trial Court to forward the case file at issue to this Court for confirmation of the sentence was improper. He has thus invited this Court to make the necessary orders as it may deem proper. On the bases of what has been submitted from both sides above, the question for this Court to resolve is as to whether the appeal by the appellant is founded on sound grounds. In founding conviction to the appellant, the trial Court did rely on the evidence of confession by the appellant and the recovery of items that were alleged to have been stolen from the complainant (PW1). As submitted by the learned State Attorney, the ground by the appellant to challenge such evidence now is untenable. This is from the fact that when the said statement of confession was being tendered in Court as exhibit, the appellant never objected and hence got admitted as exhibit P 4. The implication therefore, is that he accepted such statement as nothing but true. What he is trying to^now, is mere afterthought as per the holding in the case of Maduka (supra). It was as well held by the trial Magistrate that, the items that were recovered at the premises of the appellant, were, sufficiently identified by PW1 to be among his stolen ones. As such, he was the one who stole them from the premises where they had been kept. While it is true as averred by the appellant that, those items were not adequately identified by PW1 to be his for failing to give any peculiar marks to differentiate them from other items found in the open 6 market, the circumstances under which those items were recovered, and their being flatly denied by the appellant, did justify the trial Court to hold as it did. The said items were recovered in the course a search that was properly mounted at the premises of the appellant. Therein, there were recovered those items which the , , laimed to be his. On his part, the appellant did claim not to know anything concerning those items. Since there was nothing to controvert the contention by PW1 that those items were his, the only remaining inference is that the contention was true. And since those items had been found inside the premises of the appellant in the presence of witnesses, and there was no statement from the appellant as to how those items happened to be there, the only plausible inference is that he was concerned with them. t And with regard to the complaint by the appellant to the effect that his defence was never considered by the trial Court, this Court upon having gone through the defence which the appellant did give during the trial of his case, has failed to find any material fact that ought to have been closely analysed by the trial Court other than the mere fact that, the Court omitted to indicate so. The defence testimony by the appellant had nothing substantial to beset the intact evidence from the prosecution. In any case, such omission by the learned trial Magistrate was not fatal and did not occasion any injustice. To that end, the appeal by the appellant is found to lack merit and has to flop. 7 It has been the view of the learned State Attorney that, the sentence of imprisonment for a term of fourteen (14) years that was imposed by the learned trial Magistrate required the confirmation of the High Court in compliance with the requirement of section 170 (2) of the Criminal Procedure Act, Cap 20. Indeed that is the position of law and the failure by the trial Court to comply with was an irregularity that did blemish the proceedings. Furthermore, the said sentence was excessive. It is therefore set aside. In lieu thereof, it is hereby ordered that, the appellant will

have to serve a jail sentence for a period of three (3) years. Ultimately thus, the appeal fails save the alteration of the term of jail sentence. Order accordingly. /i (S. S. MWANGE5I) \$ JUDGE 03 - 10 - 2011 8

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