

TANZANIA / JUDGMENT

# augustino alberto kapako 2 others vs republic 2021 tzhc 9539 5 november 2021

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TZHCDECIDED  
5 November 2021

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IN THE HIGH COURT OF TANZANIA AT TABORA CONSOLIDATED DC CRIMINAL APPEAL NO. 6  
AND 2 OF 2020 (Originating from Criminal Case No. 170 of 2019 at Urambo District Court)

AUGUSTINO ALBERTO@ KAPAKO..... 1st APPELLANT FIKIRI

KABETH..... 2nd APPELLANT YAMUNGU HARUNI .....

3rd APPELLANT VERSUS REPUBLIC..... RESPONDENT

## JUDGMENT

Date of Last Order: 15/10/2021 Date of Delivery: 05/11/2021 AMOUR S. KHAMIS, J. In the District Court of Urambo, the appellants herein named Augustine Alberto @ Kapako, Fikiri Kabeth and Yamungu Haruni together with two others who are not part to this appeal were arraigned for two counts of breaking in the building with intent to commit an offence contrary to section 297 of the Penal Code, Cap 16 R.E 2002 and Stealing contrary to Section 258 and 265 of the Penal Code, Cap 16, R.E 2002. After a full trial, the appellants were found guilty on all counts. For the first count, they were sentenced to serve 14 years imprisonment and twelve (12) months imprisonment for second count. The sentence was ordered to run concurrently. 1 Aggrieved with both conviction and sentence passed by the trial Court, the appellants preferred separate appeals to this Court, namely: DC Criminal Appeal No. 6 of 2019, and DC Criminal Appeal No. 7 of 2020. Since the two appeals emanates from Criminal Case No. 170/2019, this Court ordered the two appeals to be consolidated. In the first appeal, Augustino Alberto @ Kapako, came up with three grounds of appeal to wit: -

1. That, the prosecution failed to prove the offences against the appellant beyond reasonable doubt
2. That the appellant was not positively identified at the scene by PW2
3. That, the conviction of the appellant was based on confession of co-accused which was not corroborated, In De. Criminal Appeal No. 7 of 2020, Fikiri Kabeth and Yamungu Haruni in a Joint Petition of Appeal, fronted a total of ten grounds of appeal. However, for reasons which will be apparent shortly, I take the liberty not to reproduce them. When the matter was called up for hearing, the appellants appeared in person whereas Mr. Deusdedith Rwegira, learned State Attorney appeared for the respondent. With permission of this Court, the

appellants opted to hear the respondent's submission first then re-joined later. 2 He submitted further that during trial, he requested to call the house owner but his prayer was turned down. On his part, the 3rd appellant (Yamungu Haruni) adopted the grounds of appeal to form part of his submission. He added that on 25/02/2019, the prosecution failed to call his landlord in whose house the stolen bicycles were found to testify on whether he was a resident therein or not. Further, the 3rd appellant challenged the prosecution side for their failure to tender in Court a certificate of seizure of the alleged stolen bicycles. Finally, he argued that, the prosecution failed to tender a receipt evidencing ownership of the stolen bicycles. Having read and considered the parties oral submissions and upon close examination of the record, I propose to resolve the grounds of appeal generally as they are intertwined. From the 8th ground of appeal as pleaded by the 2nd and 3rd appellants it is gleaned that cautioned statement allegedly made by the 1st appellant was made after the expiry of prescribed time contrary to Section 50 of the Criminal Procedure Act, Cap 20, R.E 2019. Moreover, the same cautioned statement was admitted in Court as a prosecution exhibit but it was not read out aloud immediately after its admission. 4 It is a legal requirement that, when documentary exhibits are admitted in Court the same must be read aloud so that the accused person may understand their contents. In Mathias Dosela @ Adriano Kasanga vs Republic, Criminal Appeal No. 212 of 2019 HC Mwanza [unreported] the Court emphasized that failure to read out documentary exhibits after their admission renders the evidence contained in that document improperly admitted and should be expunged from the record. In the circumstances, I find that Exhibit P3 was irregularly admitted and improperly relied upon by the trial Court and thus the same is hereby expunged from the record. Also, the appellant's concern was that the trial Court erred in law by failing to consider their defence in determination of the case. The record of the trial Court show that there were five witnesses on the prosecution side and six on the defence side. The defence evidence features at pages 31 to 44 of the typed proceedings but in her judgment, the trial Magistrate never considered it. In that regard, I differ with the learned State Attorney on his argument that the appellant's defence was considered. The trial magistrate drew the following conclusion in the impugned judgment: 5 "Therefor basing on the case cited hereinabove and considering the prosecution evidence this Court finds that all accused persons were mentioned but the prosecution evidence does not show how the accused person Joseph Haji @ Rasi and Hamisi Saleh were arrested and connected to the event, there for I find that the prosecution evidence against these accused persons is weak and I can't convict the accused persons only basing on their co-accused's confession (the 1st accused)" From the excerpt above, it is clear that the trial magistrate dealt with the prosecution evidence alone and arrived at a conclusion that the same sufficiently proved the case. As a result, she abandoned the defence case. It is a principle of law that failure to consider a defence case is fatal and the omission vitiates a conviction. In the case of Hussein Idd and Another vs Republic [1986] TLR 166, the Court of Appeal emphatically stated that. "it was a serious misdirection on the part of the trial Judge to deal with the prosecution evidence on its own and arrived at the conclusion that it was true and credible without considering the defence evidence" Likewise, in the appeal under my consideration, the

appellants were deprived of the right to have their defence properly considered. Upon expunging Exhibit P3 from the records, the remaining prosecution evidence is not sufficient to convict the appellants. 6 For the foregoing reasons, this appeal is meritorious and consequently allowed. The appellant's conviction is quashed, the 14 years imprisonment sentence is set aside with an order for immediate release from prison unless—lawfully held for other reason. s' 2MMfOUR^3. KHAMIS JUDGE 5/11/2021 ORDER: Judgment delivered in chambers in the presence of appellants in person and Mr. D. Rwegira, State Attorney for the respondent. 5/11/2021 7

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