

TANZANIA / JUDGMENT

bilieli patrick vs republic 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MBEYA SUB - REGISTRY AT
MBEYA CRIMINAL APPEAL NO. 118 OF 2023 (Originating from the District Court of Chunya at
Chunya in Criminal Case No. 6 of 2022) BILIELI PATRICK.....
APPELLANT VERSUS THE REPUBLIC..... RESPONDENT

JUDGMENT

1st & 17th November, 2023 MPAZE, J.: On 20th January, 2023, the appellant was arraigned before the District Court of Chunya in Mbeya Region facing two counts, one; housebreaking, contrary to section 294 (1) (a) and (b) and two; stealing, contrary to sections 258 and 265 all of the Penal Code, Cap. 16 R.E 2022 Upon full trial, the appellant was convicted and sentenced to serve 5 years term of imprisonment for the first count and 3 years imprisonment for the second count, with the sentences ordered to run concurrently. 1 Aggrieved with both the conviction and sentence, the appellant preferred a petition of appeal consisting of a total of six (6) grounds of appeal that can be reduced into three (3) grounds, namely, that:

1. The trial court erred in law in convicting and sentencing the appellant without proof beyond reasonable doubt.
2. The trial court erred both in law and in fact in convicting the appellant without considering evidence of key witnesses and crucial exhibits that were not summoned and tendered in court respectively.
3. The trial court erred both in law and in fact in convicting and sentencing the appellant without considering his defence. The facts of the case that led to the appellant's conviction can be briefly deduced as follows; On 4th November 2021, Alinifia Chenelo Jonas (PW2) received a call from his wife, who informed him that the gate of their house had been broken and the engine of their tricycle stolen. PW2 promptly reported the incident to the police. Later, on 14th January 2022, he was called to appear at the police station to identify the stolen engine. PW2 positively identified the engine as the one stolen from his tricycle. According to Meshack Ngala (PW1), a motorcycle mechanic, on 11th February 2022, while at his garage, the appellant arrived with an engine and requested PW1 to fix it. On 12th February 2022, the appellant 2 collected the engine. However, during the process of taking

it, militiamen arrived, arrested them and took them to the police station. G. 4684 D/CPL Deogratias (PW3) interrogated the appellant, who confessed to stealing the said engine from Kibaoni Village. In his defence, the appellant refuted the allegations, asserting that he did not commit the offence. He stated that on the date PW1 claimed to have delivered the engine to him, the appellant was in prison. He had been serving a sentence since 19th January, 2022 having been convicted and sentenced for another offence. During the hearing, the appellant appeared in person while the Republic was represented by Ms. Imelda Aluko, Public Prosecutor. The appellant submitted generally that, the prosecution side failed to prove their case beyond reasonable doubt as he was neither arrested at the scene of crime nor found in possession of the stolen property. The appellant also contested the trial court's failure to take into account his defence. He highlighted that, on the date mentioned by PW1 when the engine was purportedly delivered to him for fixing and on the day of his arrest, he was confined in prison. Additionally, he raised doubts about the trial court's findings to convict him while the offence was not 3 proved, stressing that there was no evidence of him being found in possession of the stolen property. He further faulted the prosecution for not calling a key witness. In wholesome, the appellant prayed for this court to allow the appeal, quash the conviction and set aside the sentence imposed on him. Opposing the appeal, Ms. Aluko argued that the case was proven beyond a reasonable doubt, even though she conceded that the appellant was not found in possession of the stolen property. She promptly pointed out that the lack of the stolen property in the appellant's possession did not necessarily mean he did not commit the offence. Ms Aluko asserted that PW1 had adequately established that the stolen property (engine) had been sent to the appellant for fixing, thus proof was required within the legal standard. As regards the failure to call key witnesses, Ms Aluko argued that the witnesses who testified were key in proving the case and that there was no need to call other witnesses. On the complaint that the defence was not considered, Ms Aluko referred to page 9 of the typed proceedings that, when the appellant was cross-examined, he said concerning this offence he was as well arrested meaning that, he was not in prison. 4 Lastly, Ms. Auko prayed for the appeal to be dismissed, and the conviction and sentence of the trial court to be upheld. In rejoinder, the appellant had nothing useful to add, he insisted to be set free for this offence. This court carefully pondered on the submission of parties in disposing of this appeal. This court will be guided by the issue of whether the prosecution managed to prove their case beyond reasonable doubt. It is a cardinal principle of law in criminal justice that it is the duty of the prosecution to prove her case beyond reasonable doubt and that duty never shifts to the accused person. Reasonable doubt was defined in the case of *Magendo Paul & Another v. Republic*, [1993] T.L.R 220 where the Court of Appeal held on page 221 that: '(ii) If the evidence is so strong against an accused as to leave only a remote possibility in his favour, which can easily be dismissed, the case is proved beyond reasonable doubt.' The first count against the appellant was on "housebreaking" contrary to section 294 (1) (a) of the Penal Code that reads: '294. -(1) Any person who- 's

- (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit an offence therein; or
- (b) N/A
- (2) Where an offence under this section is committed in the night, it is burglary and the offender is liable to imprisonment for twenty years.' In house breaking, the prosecution must prove, one; there was breaking and entering into a dwelling house, two; the breaking was committed in the daytime and three; there was intent to commit an offence. The particulars on the first count read; 'On 4h November, 2021 at Lupa village within Chunya District and Mbeya Region, the appellant did break and entered into the house of Aiinifia Cheneio Johnas with intent to commit an offence of stealing.' Though the above particulars of the offence state that the appellant did break and enter in the house, the same particulars are silent as to the time that the breaking occurred. PW2 who is the alleged owner of the said house in his evidence, did not state at what time on 4th November, 2021 that his house was broken. Also, neither PW1 nor PW3 accounted for the time of the commission of the offence of housebreaking. 6 Additionally, PW2 testified that, it was his wife who informed him of the housebreaking and that the gate of their house was found broken. Notably, the aspect of time and how the gate was broken had not been accounted for. Apart from being informed by his wife, PW2 did not account as to whether upon arriving at home, he found his gate broken as informed by his wife. Such evidence requires a lot to be inquired from the prosecution in conformity with the charge. The above Notwithstanding goes in hand with the fact that anyone who desires a matter to be held in his favour, will undoubtedly be required to parade all key witnesses for the sake of proving his claims within the required standard in law. To this Court, the circumstances of this case deem it necessary for the mentioned wife of PW2 to have been summoned before the trial court to provide testimony and address the unanswered questions. The first premise is that, the choice of witnesses to be paraded in court to prove a certain matter lies with the party who wants the court to believe on such an assertion. In the same lineage, the position of the law has also been that failure to parade crucial witness invites an adverse inference to the prosecution as held by the Court of Appeal in *Azizi Abdallah v. Republic*, [1991] T.L.R 71 where the Court firmly held that: 7 '(iii) The general and well-known rule is that the prosecutor is under a prima facie duty to call those witnesses who, from their connection with the transaction in question, can testify on material facts. If such witnesses are within reach but are not called without sufficient reason being shown, the Court may draw an inference adverse to the prosecution.' This legal requirement was misapprehended by the prosecution side. It is also worth noting here that, while the charge stipulates the offence was housebreaking, time and breaking were not proven. Deduced from the above, the position of law is now settled that variances in the particulars of the offence and charge sheet that have not been amended render the charge unproven. In *Abel Masikiti vs Republic*, Criminal Appeal No. 24 of 2015, the Court of Appeal (Unreported), (Mbeya Registry), the Court had the following in account on pages 8 and 9: "If there is any variance or uncertainty in the dates, then the charge must be amended in terms of section 234 of the CPA. If this is not done, the preferred charge will

remain unproved and the accused shall be entitled to an acquittal.' 8 As indicated above, the evidence by PW1, PW2 and PW3 was not in connection with the charge sheet. The prosecution thus ought to have amended the charge that they did not. On that footing, it cannot safely be said that housebreaking was in law proved beyond reasonable doubt. The evidence that connected the appellant with the offence is that of PW1, who testified that, on 11th February, 2022, while he was at his garage, the appellant arrived with an engine to be fixed. On 12th February 2022, the appellant went to collect the said engine while taking it, they were arrested by some militiamen who took them to the police station. This evidence like that of PW2 does not prove the offence of housebreaking by any stretch of the imagination. In his defence, the appellant denied having committed the offence where he said that the dates mentioned by PW1 as the ones that he delivered the engine to PW1 and the date of his arrest he was in prison as a convict in Criminal Case No. 4 of 2022 at Chunya District Court. Upon revisiting the proceedings of the trial court, this court observed that the appellant was brought before the trial court on 20th January 2022 where bail conditions were set. The appellant informed the court that he could not be released on bail as he was a prisoner. The 9 records also reveal that, during the preliminary hearing when the facts were read and explained to the appellant, he denied the facts of being arrested. In light of this, the prosecution was duty bound to prove this fact. From the above state of things, this court agrees with the appellant that the prosecution side failed to prove their case beyond a reasonable doubt due to the reasons hereunder. First; the particulars of the offence failed to disclose the time for the commission of the offence to distinguish an offence of breaking and that of burglary for the particulars of the offence just portrayed mere housebreaking. Breaking alone without stating the time within which the breaking occurred does not necessarily mean housebreaking, for breaking can be committed either at night or daytime. So, time is so crucial and of essence in proving an offence of breaking. Second; both the particulars of the offence and the evidence presented by the prosecution witnesses failed to specify the time within which the offence was committed. Furthermore, the evidence concerning the breaking of the gate lacks clarity, casting reasonable doubt on the nature of the break-in. 10 Third, the trial court also failed to consider the defence of the appellant as raised and argued by the appellant. PW2 told the court that he received the engine from the appellant on 11th February, 2022 and on 12th February, 2022 they were arrested. If the trial court had considered the defence of the appellant would have not found him guilty. In this appeal, the appellant informed the court that he was convicted and sentenced in Criminal case No 4 of 2022 of the District Court of Chunya, the defence which he also made at the trial. This court upon taking judicial notice of the said Judgment of the trial court finds it truly that the appellant on 19th January, 2022 was convicted and sentenced to serve five (5) years imprisonment in the said criminal case. As the prosecution side was bound to prove the charge that the appellant was facing, from the above autopsy that this court has endeavoured to address, this court thus firmly holds that the evidence adduced and the charge that the appellant was facing are in variance. All said and done, this court allows the appeal. The convictions entered in favour of the charged offences of housebreaking and stealing are hereby quashed with the imposed li sentences set aside. The appellant is

ordered to be released forthwith unless otherwise held in another lawful cause. It is so ordered. Dated at Mbeya this 17th November, 2023. JUDGE Court: Judgment delivered in the presence of the appellant in person and Mr. Agustino Magesa learned state attorney this 17th day November, 2023. Right of Appeal fully explained. M.B. MPAZE JUDGE 17/11/2023 12

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