

- shillings, the court shall sentence such person to imprisonment for a term: riot -less than: five years. 1. As far as the first and second accused are concerned the offence of burglary for which they were convicted, sentenced to 4 years imprisonment ought to have attracted a minimum sentence of 5 years imprisonment since the property they obtained in the course of committing that offence was worth 55,000 shs. An appropriate order will be made at the end of this judgment. As regards the 3rd accused person he was found guilty of burglary and stealing and sentenced to concurrent terms of 4 years and 1 year respectively. Whereas the evidence on record showed that the first and second accused had been living in the house which was burgled and they readily admitted that there was no evidence to show that the accused also lived there. The fact that the evidence of Samwel Ithewa (PW1) showed that upon being arrested the first and second accused stated that they had stolen the goods and sold a motorcycle to the 3rd accused.
- to the 3rd accused. Tgere was also evidence from Godfrey Wimbo CPW, 1.
- On 7/8/87, the 3rd accused sold the mattress for 1 shs.2,500/- in the presence of many people one of whom was Joseph Soffer from province that the 3rd accused participated in the burglary and theft. the prosecution did not even prove that he had knowledge of actual offence that the mattress was stolen:
- Hfs conduct in selling the mattress in the presence of many people without hiding was certainly not that expected from a guilty person. The convictions against the 3rd accused were therefore, not supported by the evidence on the record and was conceded, by Mwai tereke, learned State Attorney, that the convictions should be quashed and the accused set free. As regards the fourth accused: On the only evidence against him, was that his house was searched and in it was found a jacket which appeared to have been tempered with in that a cassette tape had been pasted on it to hold a piece of cloth that was put on it. The learned trial magistrate reasoned out thus: 'It may be expected that the accused in a case like this, should not know that they were stolen property but at the time he was arrested, he came into knowledge that the speaker was a thief and that it may be required in the future as evidence. Grieco he decided to try to destroy the evidence. What I conclude is that the 4th accused's act only amounted to the destruction of evidence. The learned trial magistrate, all the evidence ...'

- < ' that was on record pointed to the fact that he had bought the speaker. - ., , • • I- • • • at Songea from th~ 1st and 2nd accused. ·but there was no effort· ori the-
 - . t • ' ~ . . ,
 - ' . - • • part of the pros·ecution to shc·w that he knew or ought to have knowri . . , -, j · . . -
· . l that it_ wa~ stol~ ~, ~ ~ f. d there• was no·· ?'V_i . ~once tq. ~how. that the: c~l:lo tape and piece of clothef~d been affixed on the speaker ry ~he 4th
 - . ·1, ~c; ' accused rather- ~n~\ . t': if the self confessed thieves - . i. e • .. , the _fi~i; it and second aqcusJ9, ~- _ , - . , . : "" I: ~ ~ . • - ~ ~ ' - · even wors, o Wh a t is · . l · s t. hat· even l · f i · . t had · bee. n
· provec. i. J . ' : - _ . .. • ~ , : / ' . . . ~ .. :: ; _ ; . . the 4th accused. who tempered with the speaker the learned trial ' . ' , , . . ' , , . . ' _ , magistrate c~uld ~ot ' iawfu' . liy substitute· a conviction for the offe: frc . : · , . ; ' 1 . : : ' , ... - ; : _ ' . · . : : _ , _ . . : . . : ' - t . of destroying. evidence because of the following reasons:
- (1) The offenc~ of destFoying evidence under. s. 109 of· the Penal Code is defined to require two important ,. ingre'dients to be proved ' . , ' J"
 - (a) < Knowledge that , the: thing ' destroyed iriay be re qui rod. in evidence in a judicial : Prote: e- ding. · (b). Wilful destruction with. intent to prevent use in evidence. In this case there was no evidence to show that the 4th accused. knew that the · speaker could · be requred . . ; _ in evidence o
 - (2) Though -the offence of destroying evidence is minor to both burglary and theft it is not cogm. ate, to any of the two. In other words it is not J)os· si ble < to arrive at the offence of destroying evidence by the process; . of .. 4--µlt: r- action from • ~he. ing~edients that constitute burglaty < I • the ft, \ , , , _ , . · : ° : • ~ ' ' : : ~r • In the result the sentence of 4 years imposed on the 1st and . > . . . , _ ~ . 2nd accused for the offence of bu, rglary is se~ , aside for being ilRg, · ~ ~ A . sentence of 5 years imprisonment' is substituted. The sentence_ of year imprisonment for the count . of th2ft remains undisturbed. · , . ie: n: tenn, s . . : . . to run · concurrently. Furthermore the con- yict: ion~ again~t the 3rd ace. used r1re · quashed and sentences sei · oside; He should be set free at once unless he is otherwise legally detained.,. Finally , _the convi('tittr. against the 4th accused is quashed 8nd \he sentence , of fine of 5,0~J shs~ imposed on him is set aside. The', : fi: e should be refunded to him,, , JUDGE' J 7th. June, 1990 Judgment Delivered in the presence of Mr. Na~j l S. ~te Attqr. ney. · ' , ' ~ L, J, i~UA 7f6/90

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