

TANZANIA / JUDGMENT

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"i IN THE HIGH COURT OF TANZANIA AT DODOMA (APPELLATE JURISDICTION) . (DC)
CRIMINAL APPEAL NO 100 OF 2010 (ORIGINATING FROM KONDOA DISTRICT COURT AT
KONDOA ORIGINAL CRIMINAL CASE NO 146 OF 2009) MOHAMED ABDI
IGONGA APPELLANT VERSUS THE REPUBLIC
RESPONDENT 30/03/2011 & 02/05/2011.

JUDGMENT

KWARIKO, J. The facts of the case which led to this appeal can simply be recapitulated as follows: one HASSAN 5/0 ISSA SELEMANI @ MACHAKOSI (PW3) a businessman was living at the village of Bumbuta in Kondoa district and he owned a retail commodity shop. In the shop there was also a store where he kept various commodities for sale. This business building was not guarded and PW3 would just lock the same at the end of day's work. Thus in the early hours of 03/10/2009 when PW3 got to his shop to ,. start business he found a window to the store broken and upon inspection

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- I he found various commodities stolen. The stolen items included 33 cans of sunflower oil, 20 bags of cement, one bag of sardines (dagaa), 50 empty bags and five crates of coca cola soda all valued at Tshs 1,691,000/=. Upon the theft discovery PW3 reported the same to the Ward Executive Officer (WEO) who took upon the matter and fortunately PW3 got information from a Good Samaritan that the appellant herein and one HAMZA 5/0 HAMISI were selling his stolen properties. The WEO one SAID 5/0 KWARIKO (PW2) mobilized militiamen who arrested the appellant. Upon arrest the appellant who used to work for PW3 in collecting sunflower from other places admitted the breaking and theft allegations and mentioned HAMZA 5/0 HAMISI as his accomplice. Then PW2 informed the police at Kondoa police station who responded immediately to the scene. When the police came including NO E 2683 D/CORPORAL OMARY (PW4) the appellant further confessed the allegations before them and led the party to the place where they had kept some of the stolen property; this was the house where the said HAMZA 5/0 HAMISI lived with his family. However, HAMZA managed to escape before he was arrested and at his house only his mother and younger

brother ELIAS 5/0 HAMISI (PW1) were found. PW1 revealed that indeed his brother and appellant had awoken him in the early hours of that day at about 4.00 am and brought in the house eight cans of sunflower oil and one bag of sardines. He helped them to keep the items in his brother's room not knowing that it was stolen 2 '

- --1- ''-..... r property as his brother once dealt with sunflower business. That he had no key to that room hence the police in the presence of PW2 broke open the door where they found the property as earlier stated by PW1 and PW3 identified the same as his stolen property since there was a marker pen inscription of the name "MACHAKOSI" on the cans and bag. The appellant was taken to the police where he was interrogated by PW4 where he further confessed and thus his caution statement was written after all the legal requirements were complied. Thereafter the appellant was sent to court where he was charged in the first count with the offence of Store breaking c/ s 296 and in the second count with Stealing c/ s 265 both of the Penal Code Cap 16 Vol. 1 of the Laws, R.E.2002. It was alleged that on the 3rd day of October, 2009 at night hours at Bumbuta village in Kondoa district the appellant broke and entered into a store of one HASSAN S/0 ISSA @ MACHAKOSI with intention to commit theft where he stole the properties as aforementioned. The appellant had denied the charge hence his trial. During the appellant's trial his caution statement was tendered in court and admitted as exhibit P1 while the eight cans of sunflower oil and one bag of sardines were marked exhibit P1 collectively. 3 In his defence the appellant maintained his innocence but he admitted that he was the one who led the police to the house of HAMZA 5/0 HAMISI where the stolen property was found as the said HAMZA had earlier asked him to find customers to buy the commodities. He was thus a middleman and the one who was responsible for the theft was HAMZA. At the end of the trial the appellant was found guilty in both counts and was sentenced to ten (10) years imprisonment. Aggrieved with the decision of the trial court the appellant filed this appeal where he raised seven grounds of appeal which may conveniently be consolidated into five as follows: One; that he did not confess the allegations and the trial court erred to convict him on a repudiated confession. Two; that the caution statement was wrongly admitted since it was not corroborated by independent evidence. Three; that the police (PW4) ought to have taken him to the Justice of the Peace after he had confessed. Four; that the prosecution evidence was not watertight against him. Five; that it was an error that a search warrant was not tendered in court. During the hearing of this appeal the appellant did not add anything useful and he only adopted his grounds of appeal. On the other hand Ms. Chivanenda Luwongo appeared and argued the appeal on behalf of the respondent Republic where she resisted the appeal. As for the first ground of appeal this court agrees with Ms. Luwongo that although the appellant did not admit the allegations before the trial court but there is plenty of 4 .. evidence from the prosecution that he confessed to the allegations after his arrest before the WEO (PW2) and the police. The appellant led the police and local area leader (PW2) to the place where the stolen property had been stored. Thus, had he not been the perpetrator of the crime he wouldn't have known where the property had been kept. Further, the complaint that the trial court acted on a repudiated confession is an

afterthought because the record does not bear testimony of the same. It is in record that when the prosecution introduced the appellant's caution statement as evidence in court the appellant was given opportunity to comment where he did not object the same and it was accordingly admitted in evidence as exhibit P2. Thus, there is no any repudiation or anything of the like in respect of exhibit P2 hence this ground fails. Secondly, I agree with the learned State Attorney that the caution statement was rightly admitted in court and even without independent evidence it was sufficient to ground conviction. However, there was independent evidence from the prosecution by PW1 who saw the appellant and his brother HAMZA when they brought the stolen property in their house and stored the same in HAMZA's room; which property was sufficiently identified by PW3 as his property which was stolen in the night of that day. The appellant also admitted the allegations before the local area leader (PW2). Thus the doctrine of recent possession was proved in 5 ---, .. this case since the stolen property was recovered hardly a day after the theft had been committed. This ground also fails. In the third ground of appeal I find as rightly submitted by Ms. Luwongo that the appellant's confession given before PW4 was rightly proved in court as provided under section 27 (1) of the Evidence Act Cap. 6 Vol.1 of the Laws, R.E.2002 (the Act) which says; "confession voluntarily made to a police officer by a person accused of an offence may be proved as against that person." Thus the law does not say that if an accused confesses before a police officer he should necessarily be taken before the Justice of the Peace but the confession may be proved against the accused as it was done in this case. Also the confession before the Justice of the Peace by a person accused of an offence may be proved against him (see section 28 of the Act). This ground is also baseless. Fourthly, I share with the Republic that the evidence by the prosecution was watertight against the appellant as already been shown above. Since PW3 complained before PW2 that his store had been broken and properties were stolen; which properties were found in another man's house and sufficiently identified, a sketch plan of the scene could not be the best evidence to show that this incident really happened since PW3 6 could not have stolen his own property and took it to another man's house. Also, it is true that there was no eye witness during the breaking and stealing but even the appellant's defence shows that he was responsible for the crime. This is because at first he said that he learnt about the stolen property from HAMZA S/O HAMISI who had asked her to look for customers but in the same breath he said during cross-examination that he heard about the property in the street. Thus the available evidence proved the case against the appellant beyond doubts. This ground is thus rejected. Lastly, the appellant complained about the non production of a search warrant at this appellate stage where nobody is in the position to answer the same. Actually, PW4 would have been in a better position to answer about the search warrant. However, even in the absence of the search warrant the appellant's case was not prejudiced since the stolen property was recovered in the presence of the local area leader, the appellant and the relatives of the room's occupant who had escaped arrest. This ground is also non- meritous and it is rejected. The appellant was therefore rightly convicted as charged. As for the sentence I find two issues here. Firstly, since the appellant was charged and convicted of two counts which carry different terms of punishment, that is to say a maximum sentence of

seven years and ten years imprisonment respectively for the offence of Store Breaking and Stealing; the trial magistrate ought to have meted out the sentences for each 7

- I I ' offence and proceed to order the mode of execution of the same bearing in mind that the offences were committed in the same transaction. In this respect it is not known which of the two offences the ten (10) years imprisonment was meant to cater for. Whichever the case may have been this punishment was illegal as it contravened the provision of section 170
- (1) (a) of the Criminal Procedure Act, Cap 20 Vol.1 of the Laws, R.E.2002 (the Act) which says; ~ subordinate court may, in the cases in which such sentences are authorised by law, pass any of the following sentences- { a} imprisonment for a term not exceeding five years; save that where a court convicts a person of an offence specified in any of the Schedules to the Minimum Sentences Act *which it has jurisdiction to hear, it shall have the jurisdiction to pass the minimum sentence of imprisonment}" As the cited law speaks for itself the offences under which the appellant stood charged and convicted did not follow under the Minimum Sentences Act Cap 90 R.E.2002 hence the trial magistrate was bound by the cited provision of the law. For the interest of justice and expeditious disposal of cases I will not remit the case to the district court to rectify the error in sentencing. Instead, this court will invoke its revisionary powers 8

' .. - - - , J ~---- and sentence the appellant in accordance with the law as follows: the appellant being a first offender who cooperated with the police during the investigation of the case where the stolen property was recovered, had been in custody for nine months awaiting trial and who is in a way shouldering the blame alone after his accomplice had escaped, deserved leniency; he is therefore sentenced to eighteen (18) months imprisonment in each count under sections 296 and 265 of the Penal Code respectively. The sentences are ordered to run concurrently from the date of the appellant's conviction on 05/07/2010. Order accordingly. JUDGE 02/05/2011 Court: Right of Appeal fully e~gJained;,-, ,1 . . _ _ _ ~-T -r : , \ i _ _ _ , (M.A. A IKO) JUDGE 02/05/2011 AT DODOMA 02/05/2011 9 ----~-----,-,-----

- , t • L Appellant: Present. For Respondent: Ms Shio, State Attorney. C/c: Ms Komba. 11 10

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