

TANZANIA / JUDGMENT

## 19980903 TZHC Dar es Salaam

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TZHCDECIDED  
3 September 1998

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IN THE HIGH COURT OF TANZANIA - AT DAR ES SALAAM CRIMINAL APPEAL NO. 62 OF 1997  
(Originating from Criminal Case No. 12~\97, ILALA DISTRICT COURT) MUHIDINI  
OMARY ..... APPELLANT~ VERSUS  
REPUBLIC ..... RESPONDENT J U D G E M E N T KALEGEYA. J.  
The Appell nt, Muhidin ary, before the Temeke District with Breakino~~nto a buildina and  
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- \ - 294(1) and 265 of the Penal Code. ~ nthe 1st Count. while in the alternative 2nd count he was charged with Neglect to prevent an offence c\s 383 of the Penal Code. He as convicted on 1st count "" and sentenced to 3 years imprisonment and.ordered to compensate the owner of the stolen property {Mpingo w609) shs. 5,000,000/= . Being not ready to stomach this he has appealed to this court. Briefly facts of this matter are as follows. Appellant was a watchman of Keko Mwanaa Seaview Import and Export Ltd. During the night of 12\2\97 some pieces of Mpingo wood were stolen from one of said Company's store situated in the premises which Appellant guarded. Those who reported to the scene following the blowing of a whistle by Appellant found his legs and hands tied. He was suspected of having colluded with the thieves hence his arraignment. On appeal before this court Appellant argued that the trial court erred, in convicting him.on insufficient evidence; in believing that ]556 pjeces of Mpingo wood had been stolen when 1 there is no evidence that that quantity was stored at the - relevant godown; in associating him with the thieves and in shifting the burden of proof to him thus entering conviction basing on the weakness of the defence and not the strength of ttie prosecution evidence. Miss Otal, State Attorney, who appeared for the Respondent\Republic didn't support the conviction due to what she called a lot of flows in the prosecution case. On careful scrutiny of the record and analysis of the same~ together with the submissions made, and having related the same to the law of the land I can only say that the conviction cannot be sustained. Firstly, just to put records clear, and for the benefit of the trial Magistrate, where an accused is charged on alternative counts, once a conviction is entered on one no finding should be made on the other. In this case he flouted this principle when he stated, " ..... in the 1st count .... he is convicted as charged. As for the 2nd count ·I find out that there is no evidence to prove that the accused had neglected to prevent the offence. I find him not guilty in that 2nd count and so he is acquitted". Now turning to the substance.of the appeal I am on all fours with the learned state Attorney that the

evidence on record, however~ suspicious, did not establish the accused's guilt beyond all reasonable doubts. The contradictions and uncertainty vivid in the evidence tendered can not support conviction. ~ The question of breaking into the store is itself left unclarified. PW1, the owner of the Company deposed that he • rushed to the scene in the early hours of 12\2\97 upon being runP- up by police - he stated, "In one of the stores 1666 pieces of Mpingo wood were stolen ..... they were worth 5,000,000/= .... the doors were intact. There was no breakina" (emphasis mine). PW4, an investigator however had a different story - "At the scene the door for the room where Mpingo tree (sic!) was being stored aot broken and 2000 nieces. worthy shs. 300.000/= were stolen". (Again, emphasis mine):, And yet still, the particulars of the offence in count one indicate different pieces totalling 2020 and not 2000 as stated by the investigator nor 1666 as indicated by the owner. In defence the Appellant deposed that upon return from attending a call of nature three people who were followed up by 2 others descended on him and he was tied with rope on his legs and hands; gagled up by stuffing a piece of his own cloth into his mouth; assaulted on his mouth which resulted into his tooth being knocked off; threatened not to shout and covered with one of his coats, upon which the bandits opened into the store and stole what he didn't know but that he later struggled, got out his whistle 1 which he blew to call upon other people's attention. Managing to get a whistle out of one's pocket when hands are tied is hard to believe but equally the prosecution do not really portlay in which situation he was found. PW3, a fellow watchman. taking guard just 30 paces away deposed to have rushed to the scene in response to whistle blowing and to have had a conversation with Appellant on how the incident happened! This • witness deposed to have left Appellant untouched when he went to telephone the police. PW2, a police officer who came to the scene 3 • accidentally, for he was just going back to his station from the ' Central Police Station, deposed in part as under, "On my way I passed through the godowns ..... some people were outside. I had to ask them. They told me that there was a watchman tied with ropes inside. I had to open the gate. I met the accused tied with ropes on the hands and was covered with a cloth on the face. There was a cloth in the mouth and a whistle in the mouth. •He was blowina the whistle. I untied the ropes and the clothes from the month". (emphasis mine) If the latter version is correct the Appellant's version can't be correct as well-how could he be gagled up with a cloth but at the sametime h 9 ve a whistle which he blew! How could he struggle to get a whistle from the pockets into his mouth and yet the cloth covering his face remain where it was placed by bandits! If his fellow, neighbour watchman came to the scene before PW2, how could Appellant manage to have the seemingly long conversation with him while gagled and with a whistle in the mouth! Again, is. it natural that this fellow watchman could leave him in that state: even if we assume for the sake of argument that they didn't want to disturb evidence, at least common sense would lead the first on the scene to remove the cloth from the face to ease breathing. Clearly, both the prosecution and defence versions are pregrant with uncertainties and doubts to be believed. However, the legal principle in our land regarding criminal cases is that the prosecution must prove the offence beyond all reasonable doubts, and a Court cannot found conviction basing on the weakness of the defence as is in this case. # In the finality, for reasons stated, the appeal is allowed. The conviction, sentence and

compesatory order are quashed and 4 .• I ! ' - - set aside. The Appellant to be set at liberty forthwith unless otherwise lawfully held~ (L. B. Kalegeya) JUDGE Delivered o~ ... ~ J0. 1.1. °f~.~ ..... . (L. B. Kalegeya) JUDGE 5

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